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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S REPLY IN OPPOSITION TO PLAINTIFFS RESPONSE (MIS-TITLED REPLY) IN SUPPORT OF PLAINTIFFS MOTION TO COMPEL USAPA OFFICERS TO APPEAR FOR TRIAL**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert., A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

To correct misstatements of the record, and to prevent unfair prejudice on the eve of trial, Defendants file this brief in opposition to Plaintiff's "reply" brief (Doc. # 399) in support of their motion to compel USAPA officers to attend trial.

The shrill rhetoric, misstatements of fact and baseless allegations contained in Plaintiffs' latest filing (Doc. # 399) serve only to mask the lack of legal authority for the proposition that the Court's "inherent powers" can override the Federal Rules of Civil Procedure.

Plaintiffs openly acknowledge that "the [Federal] Rules [of Civil Procedure] do not provide subpoena power for the Court to compel USAPA Officers to appear for trial." (Doc. # 399 at 1:21-23). Despite this acknowledgement, Plaintiffs invite this Court to re-write the Federal Rules of Civil Procedure by invoking its "inherent powers" to attempt override Rule 45 and compel a witness to attend trial who is not a party, who resides outside of the Court's subpoena jurisdiction and who was not been properly served with a trial subpoena.[1]

(As a threshold matter, Plaintiffs simply misrepresent the record when they claim that Defendants agreed to accept service of subpoenas on April 14th. The full email exchange is already in the record at Doc. # 372 and 372-2. In particular, Defendants expressly stated in email that they would accept trial subpoenas "provided, of course, travel and witness fees accompany them – and only for current officers of USAPA. **Of the witness on your trial list, that would include President Mike Cleary, and VP**

[1] Mr. Bradford filed a motion to quash the invalid subpoena that Plaintiffs attempted to serve on him. This motion is currently pending before this Court.

Randy Mowery." Doc. 373-2 page 3 [emphasis added]).

The "inherent powers" provided by Rule 16 cannot be expanded in this nature because "too broad an interpretation of the federal courts' inherent power to regulate their procedure . . . encourages judicial high-handedness." *In Re Atlantic Pipe Corp*., 304 F.3d 135, 144 (1st Cir. 2002).

> [A] district court, in devising means to control cases before it, may not exercise its inherent authority in a manner inconsistent with rule or statute. … such power should be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure. This means that where the rules rectly mandate a specific procedure to the exclusion of others, inherent authority is proscribed.

G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F. 2d 648, 652 (7th Cir. 1989) (citations omitted); *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc*., 2 F. 3d 1397, 1409 (5th Cir. 1993) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Accordingly, an argument for the existence of such a power must be grounded on more than mere judicial convenience."). In order to ensure that any exercise by this Court of its "inherent power" is exercised with "restraint and discretion" and "in harmony with the Federal Rules of Civil Procedure," those rules, as related to compulsion of trial witnesses, must be properly examined – something the Plaintiffs have chosen to ignore altogether.

1. **Recent Case Law Demonstrates A Narrowing Of A District Court's Territorial Subpoena Powers And Invocation Of The Court's "Inherent Power" To Override Rule 45 In This Instance Would be Error.**

Recent federal court case law has rejected interpretation of Rule 45 that would have

the effect of expanding a district court's territorial subpoena power over parties.[2] *Mazloum v. Dist. Of Columbia Metro. Police Dept*., 248 F.R.D. 725, 728 (D.D.C. 2008); *Lyman v. St. Jude Medical S.C., Inc*., 580 F. Supp. 2d 719 (E.D. Wis. 2008). "Additionally, a handful of courts besides the ones in *Mazloum* and *Lyman* have recognized that Rule 45(b)(2)'s cross-reference of 45(c)(3)(A) serves only as a limitation of the court's subpoena power, and not an expansion of it." *Chao v. Tyson Foods, Inc*., 255 F.R.D. 556, 558-559 (N.D. Ala. 2009) (*citing Johnson v. Big Lots Stores, Inc*., 251 F.R.D. 213, 218 (E.D. La. 2008); *Johnson v. Land O' Lakes, Inc*. 181 F.R.D. 388, 397 (N.D. Iowa 1998); *Jamsports Entertainment, LLC v. Paradama Productions, Inc*., 2005 U.S. Dist. LEXIS 59 at *1 (N.D. Ill. Jan. 3. 2005)).

Plaintiffs point to only one case where the court invoked its "inherent power" to compel attendance of a witness at trial. (*See* Doc. # 399 at 3 (*citing Clark v. Wilkin*, 2008 U.S. Dist. LEXIS 18419 (D. Utah Mar. 10, 2008)). First, that case is factually distinguishable in that the individual who was compelled to attend trial was a named defendant. Mr. Bradford is neither a named defendant nor even a party, yet Plaintiffs ask the Court to command USAPA to produce a witness that it has no legal right to compel.[3] Additionally, contrary to the recent trend set forth herein, the *Clark* court adopted an overly expansive territorial interpretation of Rule 45(b)(2). *Clark*, 2008 U.S. Dist.

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[2] In fact, prior to vacating its Order, this Court too recognized this recent trend. (Doc. # 393) (*citing Johnson v. Big Lots Stores, Inc*., 251 F.R.D. 213, 218-219 (E.D. La. 2008); *Dolezal v. Fritch*, 2009 U.S. Dist. LEXIS 26238 (D. Ariz. Mar. 23, 2009)).

[3] As already briefed by USAPA, Mr. Bradford is no longer a USAPA officer. (Doc. # 371 at 4). Additionally, Plaintiffs have attempted to sue Mr. Bradford as an individual in

LEXIS at *7-8. ("Because Wilkin is a party to the action, Rule 45(b)(2) does not protect him from being served with a trial subpoena even though he lives outside the district and further than 100 miles from this Court."). This expansive interpretation does not comport with the language of Rule 45. *Chao*, 255 F.R.D. at 559. ("to reach the conclusion that Rule 45(c)(3)(ii) authorized nationwide service through its inclusion in Rule 45(b)(2) would require the court to turn a clause intended as a limiting clause on its head and ignore the territorial restrictions on where a trial subpoena may properly be served.").

The more appropriate reference is found in *Mazloum*, where the court analyzed the territorial constraints of Rule 45 as related to a "nominal defendant" that had been granted summary judgment. 248 F.R.D. at 726. In that case, the court recognized the importance of the witness in question to the case and the "strong preference" for his live testimony at trial, but determined that it could not invoke its inherent powers in a manner that would undermine Rule 45. In making this determination, the court discussed the modern narrow territorial interpretation of Rule 45 and specifically distanced itself from *Clark* – the sole decision cited by Plaintiffs.

> At least one other federal court has suggested that "the court's inherent power enables the court to order" that a party witness appear at trial notwithstanding the fact that the witness resided outside of the 100-mile radious authorized by Rule 45(b)(2). *See Clark*, 2008 U.S. Dist. LEXIS 18419 at *2. **This Court, however, is not inclined to exercise its inherent power in a manner that would conflict with the structure and terms of the Federal Rules of Civil Procedure**.

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their state court litigation, but that case has since been dismissed by this Court. (*See* Doc. # 118).

Mazloum, 248 F.R.D. at 728, n.4 (emphasis added). The *Mazloum* decision offers sound guidance in this instance because it comports with the modern territorial interpretation of Rule 45, and follows the well settled principle that while "a court may have inherent power to do that which is not specifically provided for in the Rules, it may not do that which the Rules plainly forbid." *Natural Gas Pipeline*, 2 F.3d at 1407.

2. The Federal Rules Contemplate The Limited Geographic Subpoena Power Of The Court By Allowing The Use Of Depositions At Trial

Partially because a court has limited subpoena power, the Federal Rules allow a party to use deposition testimony at trial in lieu of live testimony. *See* Fed. R. Civ. P. 32. In fact, Rule 32(a)(3) specifically provides that "[a]n adverse party may use for *any purpose* the deposition of a party or anyone *who, when deposed, was the party's officer*, director managing agent or designee under Rule 30(b)(6). . ." *Id*. (emphasis added). This provision specifically allows an adverse party to offer the deposition of a party or its officers (including former officer in this instance) – none of which can be compelled to appear at trial if they reside beyond the geographical scope of the Court's subpoena power as Mr. Bradford does.[4]

This rule would be rendered mere surplusage if courts could simply invoke their inherent power to compel parties and their officers (including former officers) to attend trial regardless of the geographical subpoena limitations set forth in the Federal Rules. Moreover, Rule 32(a)(3) is separate and in addition to the more general Rule 32(a)(4), which applies to all unavailable witnesses. Thus, the specific allowance for the use of the

[4] As the Court noted in the Pretrial Conference (Aprl. 22, 2009, at Tr. 67:18).

deposition of a party, a party's officers, and its 30(b)(6) witnesses implicitly supports the limitations on a court's subpoena power. *Mazloum*, 248 F.R.D. at 728.

3. Conclusion

Rule 45 provides the regulatory framework for compelling the attendance of a witness at trial. Plaintiffs are the masters of their own lawsuit, and as such decided to bring suit in this venue *and* to rely on an adverse witness who resides outside of this Court's subpoena power to support their case in chief. Plaintiffs now realize that by following the Federal Rules of Civil Procedure, they cannot legally compel this witness to testify at trial, and they are not satisfied with utilizing the procedures contained in Rule 32 to present testimony via deposition. Therefore, Plaintiffs ask this Court to help them from themselves by ignoring the Federal Rules of Civil Procedure and ordering USAPA to produce a witness that it has no legal authority over, and to impose sanctions on USAPA if that individual does not appear. Such a request has no basis in law and should be denied.

Respectfully Submitted,

Dated: April 27, 2009

By: ***/s/ Lucas K. Middlebrook***

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- Defendant USAPA'S Reply In Opposition To Plaintiffs Response (Mis-Titled Reply) In Support Of Plaintiffs Motion To Compel USAPA Officers To Appear For Trial
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

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Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On April 27, 2009, by:

/s/ Nicholas Paul Granath, Esq.