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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON, *et al.*,
11 Plaintiffs,
12 vs.
13 US AIRLINE PILOTS ASSN., *et al.*,
14 Defendants.

CASE NOS.
2:08-CV-1633-PHX-NVW
2:08-CV-1728-PHX-NVW
(Consolidated)

**PLAINTIFFS' MOTION TO ESTABLISH
FOUNDATION FOR FOURTEEN (14)
TRIAL EXHIBITS**

15 Don ADDINGTON, *et al.*,
16 Plaintiffs,
17 vs.
18 Steven H. BRADFORD, *et al.*,
19 Defendants.

20 Plaintiffs file this Motion seeking an Order establishing foundation for
21 fourteen (14) trial exhibits listed in the table attached as Exhibit A and
22 addressed below and in the Jacob Declaration filed concurrently.

23 **A. Trial Exhibit 14.**

24 Although Defendant has claimed trial exhibit 14 is subject to attorney-
25 client privilege, it refuses to stipulate to foundation. This document was
26 used as exhibit CM-4 when two USAPA officers were deposed. Mark King,
27 USAPA Secretary-Treasurer, claimed this document was subject to
28 attorney-client privilege. (Andrew Jacob, *Declaration*, ¶¶ 1-3 (Apr. 29,

1 2009).) On March 19, 2009, Mr. Bradford admitted at his deposition that he
2 was the author. (*Id.* at ¶¶ 4-6.) Finally, in Defendant’s Combined Motion in
3 Limine at 28:14-16 (doc. 316), it avowed that this document “is a report of a
4 meeting with USAPA President Bradford and other union representatives.”

5 “Authentication is a condition precedent to admissibility, and this
6 condition is satisfied by evidence sufficient to support a finding that the
7 matter in question is what its proponent claims.” *Orr v. Bank of America,*
8 *NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (quotation marks omitted).
9 “Once the trial judge determines that there is prima facie evidence of
10 genuineness, the evidence is admitted, and the trier of fact makes its own
11 determination of the evidence's authenticity and weight.” *Id.* at n.6.
12 “Authentication can ... be accomplished through judicial admissions such as
13 stipulations, pleadings, and production of items in response to subpoena or
14 other discovery request.” 31 Wright & Gold, *Fed. Prac. & Proc. Evid.* § 7105.

15 Here, we have three judicial admissions. USAPA’s officers testified to
16 foundation under oath and its attorney avowed that trial exhibit 14 was
17 authored by Mr. Bradford. This exhibit would be offered to show the
18 communication referenced therein. The Court, therefore, should find that
19 foundation is established for trial exhibit 14.

20 **B. Trial Exhibits 15, 45 and 57.**

21 Trial exhibit 15 is an article entitled “US Airways 2006 and 2007 Pilot
22 Recalls,” published by the US Airways MEC in the periodical “US
23 Airwaves.” This exhibit is found on the ALPA website. (Jacob, *Decl.* at ¶ 7.)
24 Trial exhibit 45 is an announcement by the Philadelphia Domicile of USAPA
25 posted on the USAPA web site. (*Id.* at ¶ 8) Trial exhibit 57 is posted on the
26 ALPA web site. (*Id.* at ¶ 9.) All would be offered to show that such
27 documents are, in fact, on those websites.
28

1 To authenticate material obtained from a website, the party proffering
2 the evidence must produce “some statement or affidavit from someone with
3 knowledge [of the website] ... for example [a] web master or someone else
4 with personal knowledge would be sufficient.” *In re Homestore.com, Inc.*
5 *Sec.Litig.*, 347 F.Supp.2d 769, 782 (C.D. Cal. 2004); *see also Stewart v.*
6 *Wachowski*, 574 F.Supp.2d 1074, 1091 (C.D. Cal. 2005) (suggesting personal
7 knowledge that material was on a web site would be sufficient
8 authentication).

9 The Jacob Declaration establishes personal knowledge that trial
10 exhibits 15, 45 and 57 are found on the declarants’ websites. This personal
11 knowledge is sufficient to allow the jury to determine authenticity and
12 weight. The Court, therefore, should find that foundation is established for
13 trial exhibits 15, 45 and 57.

14 **C. Trial Exhibits 28, 31, 49, 61, 329, 336, 382, and 461.**

15 Exhibits 28, 31, 49, 61, 329, 336, 382, 461 were all produced by USAPA
16 and show a USAPA Bates number in the lower left hand corner. Regardless
17 that these were produced by USAPA, it refuses to stipulate to foundation.

18 In the Ninth Circuit, if a party produces a document subject to a
19 discovery request, it is deemed to have been authenticated for use against
20 the producing party under the doctrine of judicial admissions. *Maljack*
21 *Prods. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir.
22 1996). *Orr v. Bank of America*, 285 F.3d 764, 777 (9th Cir. 2002),
23 establishes that a document can only be deemed authenticated against the
24 producing party. “[T]here must be some evidence on the record indicating
25 that the documents in question were actually produced by an opposing party
26 in order to allow authentication-by-production.” *Barefield v. Bd. of*
27 *Trustees*, 500 F. Supp. 2d 1244, 1258 (E.D. Cal. 2007).

28

1 Because trial exhibits 28, 31, 49, 61, 329, 336, 382, and 461 were
2 produced by USAPA and would be used against USAPA, they fall within the
3 authentication-by-production rule. The Court, therefore, should find that
4 foundation is established for trial exhibits 28, 31, 49, 61, 329, 336, 382, and
5 461.

6 **D. Trial Exhibit 97.**

7 Trial exhibit 97 is a printout of an earlier version of the USAPA FAQ
8 webpage. (Jacob, *Decl.* at ¶ 10.) This exhibit was obtained from the website
9 “Internet Archive.” One court explained this website as follows:

10 Admittedly, the Internet Archive does not fit neatly into any of the
11 non-exhaustive examples listed in Rule 901; the Internet Archive
12 is a relatively new source for archiving websites. Nevertheless,
13 Plaintiff has presented no evidence that the Internet Archive is
14 unreliable or biased. And Plaintiff has neither denied that the
15 exhibit represents the contents of its website on the dates in
16 question, nor come forward with its own evidence challenging the
17 veracity of the exhibit. Under these circumstances, the Court is of
18 the opinion that Ms. Davis' affidavit is sufficient to satisfy Rule
19 901's threshold requirement for admissibility. Plaintiff is free to
20 raise its concerns regarding reliability with the jury.

21 *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 WL 2367740,
22 *6 (N.D.Ill. 2004). “[T]he Internet Archive receives data from third parties
23 who compile the data by using software programs known as crawlers that
24 surf the Web and automatically store copies of website files at certain points
25 in time as they existed at that point in time.” *Masters v. UHS of Delaware,*
26 *Inc.*, 2008 WL 5600714, *2 (E.D. Mo. Oct. 21, 2008). Personal knowledge
27 that material was found on Internet Archive is sufficient to establish
28 foundation that the material was found on the web site on the date
indicated in the archive. *Id.*

The Jacob Declaration establishes personal knowledge that trial exhibit
97 is stored on Internet Archive as an October 2007 USAPA webpage. This
is sufficient to allow the jury to make its own determination of authenticity

1 and weight. The Court, therefore, should find that foundation is established
2 for trial exhibit 97.

3 **E. Conclusion**

4 For reasons explained above, the Court should find that foundation is
5 established for the exhibits addressed herein.

6 Dated this _29th day of April, 2009
7 POLSINELLI SHUGHART PC

8 By: /s/
9 Andrew S. Jacob
10 Security Title Plaza
11 3636 N. Central Ave., Suite 1200
12 Phoenix, AZ 85012

13 CERTIFICATE OF SERVICE

14 I hereby certify that on April 29, 2009, I electronically transmitted the
15 foregoing document to the U.S. District Court Clerk's Office by using the
16 CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

17 s/
18 Andrew S. Jacob

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Exhibit A to Plaintiffs' Motion to Establish Foundation

Ex. #	Bates #	Code	Description	Author
14	ADD 0909	1	June 9, 2007, "Conversation With Attorney" (06/09/07)	Bradford
15	ADD 1906	2	US Airways 2006 and 2007 Pilot Recalls	East MEC
28	USAPA 0313	3	Criticism of Stephan (03/12/08)	USAPA
31	USAPA 1609	3	"Merger Philosophy"	USAPA
36	USAPA 2354	3	"Beware of Strangers!"	USAPA
45	ADD 4739	2	"PHL Domicile Updates" (03/10/09)	USAPA
49	USAPA 23510	3	Constitution	USAPA
57	ADD 4833	2	"What Every Pilot Needs to Know" (05/2006)	ALPA
61	USAPA 25963	3	"Agreement and Plan of Merger" (05/19/05)	
97	ADD 4913	4	"Frequently Asked Questions" (10/28/07)	USAPA
329	USAPA 2509	3	"US Airways Seniority Integration"	USAPA
336	USAPA 2662	3	"Merger Committee update" (06/12/08)	USAPA
382	USAPA 13780	3	"Agenda Item"	USAPA
461	USAPA 23734	3	Letter (05/12/08)	Davison

Codes:

1: Foundation established by judicial admissions.

2: Available at ALPA website

<http://74.125.95.132/search?q=cache:51xB60hUnykJ:https://crewroom.alpa.org/aaa/DesktopModules/ViewDocument.aspx%3FDocumentID%3D40311+%22US+Airwaves%22+alpa+2007&cd=6&hl=en&ct=clnk&gl=us>

Available on USAPA website at

http://1.usairlinepilots.org/members-only/PHL_updates.htm

Available at ALPA website at

http://www.alpa.org/DesktopModules/ALPA_Documents/ALPA_DocumentsView.aspx?itemid=3282&ModuleId=3052&TabId=256

3: Authentication-by-production. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002).

4: Available at internet archive of USAPA website at

<http://web.archive.org/web/20071028172930/usairlinepilots.org/faq.htm>