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| DISTRICT COURT, DENVER COUNTY, COLORADO |  |  |
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| Court Address: Denver County Court  1437 Bannock St., Room 256 | F | ILING ID: F4524FD9B4430 ASE NUMBER: 2015CV31709 |
| Denver, CO 80202 |  |  |
| (720) 865-8301 |  |  |
| Plaintiffs: ROBERT ABRAMS and ABRAMS & |  |  |
| ASSOCIATES, LLC, a Colorado limited liability |  |  |
| company; |  |  |
| v. |  | **COURT USE ONLY** |
| Defendants: SHAWN BEESON |  |  |
| Attorneys for Plaintiffs: | |  |
|  | | Case Number: 2015CV31709 |
| Nathan Silver  Silver Law Firm, LLC 700 17th Street, Suite 650  Denver, Colorado 80202  Phone: (303) 328-8510  E-mail: [nathan@silverlawdenver.com](mailto:nathan@silverlawdenver.com) Atty. Reg. # 28836 | | Division: 275 |
| ABRAMS & ASSOCIATES, LLC  Robert Abrams, Atty Reg. #37950  Neil S. Sullenberger, Atty Reg. # 48698 700 17th St., Suite 650  Denver, CO 80202 | |  |
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| **PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION FOR ABSENTEE TESTIMONY PURSUANT TO C.R.C.P. 43** | | |

COMES NOW, Plaintiffs Robert Abrams and Abrams & Associates, LLC, by their attorneys at Silver Law Firm, LLC and Abrams & Associates, LLC, and hereby file their Response to Defendant’s Motion for Absentee Testimony, Pursuant to C.R.C.P. 43. In support thereof, Plaintiffs state and allege as follows:

# INTRODUCTION

1. Defendant seeks leave to present the trial testimony of one of his key witnesses, Alexander Osborn, via telephone. *See Plaintiff’s Motion for Absentee Testimony*. Plaintiffs object to such request for the reasons stated herein.

# LEGAL AUTHORITY

1. “A party may request that testimony be presented at a trial of hearing by a person absent from the courtroom by means of telephone or some other suitable and equivalent medium of communication. A request for absentee testimony shall be made by written motion or stipulation filed a*s soon as practicable after the need for absentee testimony becomes known*. The motion shall include: (A) The reason(s) for allowing such testimony; (B) A detailed description of all testimony which is proposed to be taken by telephone or other medium of communication; [and] (C) Copies of all documents or reports which will be used or referred to in such testimony.” C.R.C.P. 43(i)(1) (*emphasis added*).
2. “The court shall determine whether in the interest of justice absentee testimony may be allowed. The facts to be considered by the court in determining whether to permit absentee testimony shall include but not be limited to the following: (A) Whether there is a statutory right to absentee testimony; (B) The cost savings to the parties of having absentee testimony versus the cost of the witness appearing in person; (C) The availability of appropriate equipment at the court to permit the presentation of absentee testimony; (D) The availability of the witness to appear personally in court; (E) The relative importance of the issue or issues for which the witness is offered to testify; (F) If credibility of the witness is an issue; (G) Whether the case is to be tried to the court or to a jury; (H) Whether the presentation of absentee testimony would inhibit the ability to cross examine the witness; (I) The efforts of the requesting

parties to obtain the presence of the witness.” C.R.C.P. 43(i)(3).

1. CRE 804 provides the hearsay exceptions that apply when the declarant is unavailable. Within the definition of “unavailable” is when the declarant “is absent from the hearing and the proponent of a statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(3) or (4) his attendance or testimony) by process or other reasonable means.” C.R.E. 804(a)(5). When a declarant is unavailable, “[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination” is not excluded by the hearsay rule. C.R.E. 804(b)(1).

# ARGUMENT

1. **Defendant’s Motion should be denied for failure to meet the clear requirements of C.R.C.P. 43.**
2. As a threshold issue, Defendant’s Motion does not satisfy the C.R.C.P. 43 standards for absentee testimony. Defendant’s Motion notes only that Mr. Osborn “is scheduled to be in Germany” during trial. Such explanation does not meet the requirements as set forth in

C.R.C.P. 43(i)(1).

1. Further, Defendant fails to provide both “a *detailed* description of all testimony proposed to be taken by phone” and “copies of all documents or reports which will be used or referred to in such testimony” with his Motion. *See* C.R.C.P. 43(i)(1)(B)-(C).
2. Defendant provides only that Mr. Osborn will testify regarding “the incident he observed” and his witness statement to the Denver Police Department. Not only is “the incident” not a detailed description, but also the Police Statement surely will not encompass all of Mr.

Osborn’s testimony. Defendant’s only additional attachment is a transcript which he seeks to read into the record on the basis of his alternative request for relief, pursuant to C.R.E. 804, not in his primary request for absentee testimony.

1. As a threshold matter, the “incident” as reported to police and defendant’s exhibit to his motion of Mr. Osborn’s statement to the police is inadmissible evidence because the entire matter was dismissed against Mr. Abrams and the record was sealed. *Exhibit 1.* Further, Judge Vallejos, at a hearing on or about March 24, 2016 in this matter, ordered the entire file inadmissible because it was sealed.
2. C.R.C.P. 43(i) uses the term “shall” in its motion requirements. *Id.* “Use of the word ‘shall’ is presumed to connote a mandatory meaning.” *People v. Jackson,* 972 P.2d 698, 700 (Colo.App.1998) (citation omitted). Accordingly, Plaintiff’s Motion should be denied for its failure to comply with C.R.C.P. 43.
3. Further, Defendant makes no evidentiary showing, by affidavit, letter, or even email, concerning Mr. Osborn’s unavailability to testify at trial.

# Even if the Court permitted Defendant’s patently deficient Motion to survive its defects, the interests of justice support denial of Defendant’s Motion.

1. The additional C.R.C.P. 43 factors to be considered by the Court further support denial of Plaintiff’s Motion. *See* C.R.C.P. 43(i)(3)(A)-(I).
2. In determining whether to permit absentee testimony, a trial court shall consider a variety of factors, including “[t]he relative importance of the issue or issues for which the witness if offered to testify.” C.R.C.P. 43(i)(3)(E).
3. It is anticipated that Defendant’s counsel will elicit opinions from Mr. Osborn concerning Plaintiffs’ involvement in the alleged battery. As the Court is aware, this is a hotly contested issue in this case, where Plaintiffs believe Mr. Osborn was not even present for the

incident due to his allegations that Plaintiff Abrams was wearing a suit at the time of the incident when plaintiffs evidence proves he was in shorts and a t-shirt, so arguably he wasn’t even at the scene of the incident.

1. Accordingly, in relation to Defendants’ claim for battery, Mr. Osborn’s testimony is of great importance. In addition to the importance of Mr. Osborn’s anticipated testimony, another C.R.C.P. 43 factor to be considered is the credibility of the witness. *See* C.R.C.P. 43(i)(3)(F). It logically follows that the credibility and reliability (or lack thereof) of the information relied upon by Mr. Osborn is an issue. Specifically, Mr. Osborn is a critical witness in the matter, who is subject to impeachment in front of a jury. This cannot be done by telephone and would prejudice the plaintiffs.
2. Another C.R.C.P. 43 consideration is whether “the presentation of absentee testimony would inhibit the ability to cross examine the witness.” C.R.C.P. 43(i)(3)(H). Given Mr. Osborn’s inconsistent testimony and potential lack of credibility, it is critical that Plaintiffs be allowed a full and fair opportunity to vigorously cross examine Mr. Osborn. The due process rights afforded to civil litigants include the right to cross examination. *See Aspen Properties Co.*

*v. Preble*, 780 P.2d 57 (Colo. App. 1989).

1. Plaintiffs address the prior cross examination in greater detail below, but state that prior cross examination was not as thorough and likely did not cover the full scope of anticipated testimony because it was largely in defense of the false reporting claim that caused an assault charge, later dismissed, against Mr. Abrams. As such, cross examination of this witness at trial is different and critical.
2. Another factor weighing against permitting the absentee testimony of Mr. Osborn is the fact that this is a trial to the jury, as opposed to a court trial. *See* C.R.C.P. 43(i)(3)(G).

Permitting a witness to testify via telephone denies the jury the opportunity to observe a witness’ demeanor and manner of testifying, all of which is critical to the weight given to the witness’ testimony. This is especially true when Plaintiffs allege that Mr. Osborn may not have even witnessed the incident due to his inconsistent testimony. And, plaintiffs had no opportunity to develop out his biases towards lawyers in the matter, which plaintiffs suspect he has, which would support the allegations of his fabricated testimony.

1. Last, Plaintiff’s Motion does not identify what efforts were made to obtain the presence of Mr. Osborn at trial. *See* C.R.C.P. 43(i)(3)(I). For example, when was Mr. Osborn informed of the current trial date? When did Defendant (presumably through his counsel) contact Mr. Osborn regarding trial scheduling?
2. Assuming Defendant learned of Mr. Osborn’s plans shortly before filing the Motion, this means that efforts to schedule Mr. Osborn occurred shortly before trial.
3. The trial date has been vacated twice over Plaintiffs’ objections. Defendant, by motion, moved the court to vacate the original trial date and the November trial date. *See Defendant’s filing history.* This final trial date was set on or about October 17, 2016. Defendant’s counsel had ample time to notify Mr. Osborn of the trial date, well in advance of any work schedule conflicts, and simply failed to do so. Defendant’s counsel has repeatedly failed to participate and has been granted substantial leeway by the Court to Plaintiffs’ detriment.
4. Mr. Osborn is Defendant’s central witness in this matter. Defendant has an obligation to produce his witnesses, in person, to the jury, subject to cross examination, to prevent prejudice to Plaintiffs. He failed to do so, and his motion for telephone testimony and to read incomplete transcript portions into the record should be stricken.
5. “A request for absentee testimony shall be made by written motion or stipulation

filed a*s soon as practicable after the need for absentee testimony becomes known*.” C.R.C.P. 43(i)(1) (emphasis added). Plaintiffs request the Court to consider the amount of time Defendant’s counsel had to ensure Mr. Osborn’s attendance at trial, its lack of any explanation as to why this Motion was filed less than one month before trial, and its failure to affirmatively state that the Motion was filed as soon as practicable after the need for absentee testimony becomes known, pursuant to C.R.C.P. 43(i)(1).

1. The cost of Defendant’s lack of diligence should not be borne by Plaintiffs.

Permitting the testimony of an absentee witness under these circumstances is contrary to the interests of justice. *See* C.R.C.P. 43(i)(3).

# Defendant’s alternative request for admission of selected portions of prior testimony into the record is improper and impermissible under these facts and circumstances.

1. Defendant’s alternative request to admit portions of Mr. Osborn’s prior testimony at a protection order hearing into the record is also improper. The arguments against absentee

testimony raised in §§ I-II, *supra*, apply to Defendant’s alternative request and is incorporated herein.

1. First, it is unclear whether Mr. Osborn is unavailable, and no evidentiary support has been included in Defendant’s Motion to that effect.
2. Second, Defendant’s Motion does not include any statement regarding attempts to procure Mr. Osborn’s attendance, nor any evidentiary support that their attempts to serve process on Mr. Osborn have failed since October 17, 2016, pursuant to C.R.E. 804.
3. Third, Mr. Osborn’s testimony at the protection order hearing was limited in scope, as Plaintiffs had no motive to delve into Mr. Osborn’s account of the incident as it relates to Defendant’s claims and damages in this hearing against the Firm. Defendant claims and

Plaintiffs stipulate that Plaintiff Robert Abrams had an opportunity to cross examine Mr. Osborn. However, at the time of that hearing, Abrams & Associates, LLC (the “Firm”) was not a named party to those claims. It wasn’t until July 8, 2016 that the court granted opposing counsel’s motion to amend his complaint to join Abrams & Associates; accordingly, that plaintiff never inquired of Mr. Osborn, as it had no claims to defend. *See Defendant’s ICCES filing history.* The motive for the cross examination of Mr. Osborn at the protection order hearing only involved the assault. Neither plaintiff had the motive to inquire into perceived damages or causation thereof in the matter, because it was not relevant to the protection order hearing.

1. C.R.E. 804(b)(1) states that the hearsay exception applies only “if the party against whom the testimony is now offered … had an opportunity *and* similar motive to develop the testimony by direct, cross, or redirect examination.”
2. Initially, Plaintiffs direct the Court to the prior Court’s order filed April 28, 2016, wherein the Court found that the issues and elements discussed in the permanent restraining order hearing were “not identical” with the battery claim. The Court clearly reasoned, “While the parties are the same and, arguably, there was a ‘final judgment,’ Plaintiff did not have a ‘full and fair opportunity’ to litigate the ‘battery’ issue in the prior hearing. Rather, he litigated whether a ‘restraining order should be made permanent.’” *Exhibit 2, p. 3, final ¶.*
3. Plaintiff Abrams’ cross at the prior hearing was focused primarily on an assault from a self-defense posture. Plaintiff Abrams did not examine Mr. Osborn on his biases against attorneys and focused on a surface-level account of the incident. Plaintiffs intend to fully develop Mr. Osborn’s character, history, motives, biases and credibility in great detail at this trial, which Plaintiffs assert must be done in front of the jury to satisfy Plaintiffs’ due process rights and the interests of justice. Further, Abrams & Associates (the “Firm”) never had an opportunity to

examine Mr. Osborn for the reasons stated above. The Firm has questions as well to Mr. Osborn, regarding causation and damages, now that the Firm is a named party in this matter. These topics were not particularly relevant at the protection order hearing, which Plaintiff Abrams viewed more as a formality than a hearing in which he needed to elicit crucial testimony as it relates to this matter. As such, Plaintiff Abrams had no similar motive to examine Mr. Osborn in detail, and C.R.E. 804(b)(1) does not affect the inadmissibility of Mr. Osborn’s prior hearsay testimony.

1. Defendant now seeks to introduce prior testimony of a witness against both the Firm and Abrams, where at the prior hearing, the Firm had not yet been named and thus was not afforded the opportunity or motive to cross examine Mr. Osborn in protection of its interests.
2. For the above reasons, Defendant’s Motion for Absentee Testimony should be

denied.

WHEREFORE, Plaintiffs respectfully request this Court deny Defendant’s Motion for Absentee Testimony, deny Defendant’s alternative request to read prior portions of incomplete transcript testimony in this matter as barred by C.R.E. 804, and require Mr. Osborn’s courtroom presence, subject to cross examination, should Defendant intend to call him as a witness at trial.

RESPECTFULLY SUBMITTED this 20th dayof April, 2017.

ABRAMS & ASSOCIATES, LLC

*/s/ Neil S. Sullenberger*

Neil S. Sullenberger, Attorney at Law

*(Original signature on file at Abrams & Assoc., LLC, pursuant to C.R.C.P. 121 § 1-26)*

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this 20th day of April, 2017, via ICCES, served a true and correct and correct copy of the foregoing PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION FOR ABSENTEE TESTIMONY PURSUANT TO C.R.C.P. 43 upon:

Wadi Muhaisen Amanda Becker

Muhaisen & Muhaisen, LLC 1435 Larimer Street, Suite 203

Denver, Colorado 80202

*Attorney for Defendant*

*/s/ Michael A. Gubiotti*

Michael A. Gubiotti

*(Original signature on file at Abrams & Assoc. LLC pursuant to C.R.C.P. 121 § 1-26)*