US Airways, Inc.
KAREN GILLEN, State Bar No. 018008
karen.gillen@usairways.com
111 West Rio Salado Parkway
Tempe, AZ 85281
Telephone: (480) 693-0800
Facsimile: (480) 693-5932

O'Melveny & Myers LLP
ROBERT A. SIEGEL (*pro hac vice*)
CHRIS A. HOLLINGER (*pro hac vice*)
rsiegel@omm.com
chollinger@omm.com
400 South Hope Street
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for Defendant
US Airways, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki; Michael J. Soha; Rodney Albert Brackin; and George Maliga, on behalf of themselves and all similarly situated former America West Pilots,

Plaintiffs,

vs.

US Airline Pilots Ass'n, an unincorporated association; and US Airways, Inc., a Delaware corporation,

Defendants.

Case No. 2:13-cv-00471-ROS

DEFENDANT US AIRWAYS, INC.'S RESPONSE TO PLAINTIFFS' AND USAPA'S POST-HEARING SUPPLEMENTAL BRIEFS

Defendant US Airways, Inc. ("US Airways"), by and through its undersigned counsel, hereby submits this Response to Plaintiffs' Trial Memorandum on the Participation of West Pilots in the McCaskill-Bond Process ("Plaintiffs' McCaskill-Bond Brief") (Doc. No. 97), Plaintiffs' Trial Memorandum on Remedy ("Plaintiffs' Remedy Brief") (Doc. No. 96), and defendant US Airline Pilots Association's Supplemental Brief as Directed by the Court at May 14, 2013 Hearing ("USAPA Brief") (Doc. No. 95).[1]

I. THE WEST PILOTS' SEPARATE SENIORITY INTERESTS ENTITLE THEM TO THEIR OWN REPRESENTATION IN THE MCCASKILL-BOND PROCEEDINGS.

A. CAB Decisions Applying Sections 3 and 13 Of The *Allegheny-Mohawk* LPPs Are Persuasive Authority When Interpreting McCaskill-Bond.

The McCaskill-Bond Amendment expressly incorporates Sections 3 and 13 of the *Allegheny-Mohawk* LPPs and specifically cites the CAB's decision by name. *See* 49 U.S.C. § 42112(a) ("sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger (as published at 59 C.A.B. 45) shall apply to the integration of covered employees of the covered air carriers."). Sections 3 and 13 of the LPPs, respectively, mandated seniority-integration negotiations with "the representatives of the employees affected," and, failing agreement, arbitration that was final and binding on the "parties," but neither the text of McCaskill-Bond itself nor the LPPs define those terms or specifically address whether affected employees with divergent seniority interests could be separately represented in the seniority-integration process. The CAB's decisions, however, do provide guidance and represent a body of administrative interpretations of Sections 3 and 13 that were known and fixed at the time Congress enacted McCaskill-Bond. In the absence of more specific guidance in the text of McCaskill-Bond or the LPPs, it is appropriate to infer that Congress intended for those provisions of the LPPs to be implemented in a manner

[1] AMR Corporation and American Airlines, Inc. have filed a motion for intervention, which is pending before the Court. (*See* Doc. No. 56.) They have authorized US Airways to represent that they concur in the views expressed in this Response.

consistent with the CAB's prior decisions thereunder. *Cf. Huffman v. Commissioner*, 978 F.2d 1139, 1145 (9th Cir. 1992) ("Words with a fixed legal or judicially settled meaning, where the context so requires, must be presumed to have been used in that sense"); *United States v. Consolidated Productions, Inc.*, 326 F. Supp. 603, 605 (C.D. Cal. 1971) ("[W]here Congress uses a term of art in a statute there is a presumption that it retains its traditional meaning absent some contrary expression of congressional intent, either explicit or implied from the history and purposes of the statute.") (*citing Morissette v. United States*, 342 U.S. 246, 250 (1952)).

USAPA, however, argues that "[i]t is the text of the statute, and not inferences drawn by resort to decisions of the CAB, that determines the rights of employees under the statute," citing the Seventh Circuit's decision in *Committee of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. Int'l Bhd. of Teamsters*, 662 F.3d 954, 957 (7th Cir. 2011). (*See* USAPA Brief, at p. 7:2-4 (p. 8 of ECF filing).) But the court simply interpreted a different portion of McCaskill-Bond that expressly defined what sort of "covered transaction" was intended to be covered by the Amendment, held that the statutory definition applied to the facts of the case, and, in so doing, reversed the lower court's decision applying CAB decisions that were inconsistent with the text of the statute. *Committee of Concerned Midwest Flight Attendants*, 662 F.3d at 957-958. Here, by contrast, there is no language in McCaskill-Bond (or the LPPs) that defines "the representatives of the employees affected" or the "parties," or that specifically explains how those provisions should be applied with respect to the question of who may participate in the seniority-integration proceedings, and it is therefore appropriate to consult the CAB's decisions.[2]

[2] Plaintiffs, who agree that they have the right to full participation in the McCaskill-Bond process, claim that "the fact that McCaskill-Bond adopts LPP §§ 3 & 13 does not mean that Congress intends federal courts to apply the LPPs now exactly as they were applied when the industry was regulated by the CAB." (*See* Plaintiffs' McCaskill-Bond Brief, at p. 5:3-9.) In support, plaintiffs cite *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 & n.15 (1989), where the Court observed that "Congress' silence is just that – silence." At issue in *Reid* was whether Congress had intended the Copyright Act of 1976 to incorporate a body of case law developed under the Copyright Act of 1909 which addressed copyright ownership of employee

B. CAB Decisions Support Separate Representation In The McCaskill-Bond Process For Employee Subgroups With Separate Seniority Interests Such As The West Pilots.

The practice under Sections 3 and 13 of the *Allegheny-Mohawk* and similar LPPs supports separate participation for employee subgroups with separate seniority interests in appropriate circumstances at least where, as here, the subgroup's participation is addressed before the seniority-integration process begins. This includes situations where the employee subgroup comprises less than a complete pre-merger bargaining unit (or "craft or class") and, post-merger, the subgroup is represented by a union for collective-bargaining purposes under the Railway Labor Act ("RLA"). *See, e.g. American-Trans Caribbean Merger*, 57 C.A.B. 581, 586 n.10 (1971) (concluding that "there may be a certain divergence of interest between the active and furloughed pilots of both [pre-merger carriers, who were both unionized], and accordingly we would expect that all such groups of pilots or flight engineers would be entitled to have separate or additional representation in the event they so desire") (attached to Second Declaration of Chris A. Hollinger filed concurrently herewith); *United-Capital Merger Case*, 40 C.A.B. 903, 907 (1964) (concluding that, where subgroup of flight crew employees had "been offered to participate as a party in the [seniority-integration] arbitration" and where they did in fact participate, the seniority-integration procedures had been fair); *National Airlines Acquisition, Arbitration Award*, 97 C.A.B. 570, 571 (1982) (denying petition of individual former National employees to over-turn a seniority list arbitration where those employees had been represented in that arbitration by a committee specifically formed to oppose a seniority arrangement agreed to by their former union and the post-merger/incumbent

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work product, where the text of the 1976 statute was both silent with respect to the prior body of case law and contrary to the test for copyright ownership set out in the prior cases. The Court rejected the petitioners' argument that, by this "silence" in the 1976 statute, Congress had intended to incorporate the prior body of case law. *Reid*, 490 U.S. at 748-749. Here, however, Congress was not "silent" – McCaskill-Bond refers to a specific CAB decision by name and citation – and the prior body of CAB decisional law informs the definition of LPP terms that are not expressly defined in the statute, as opposed to the situation in *Reid* where the prior body of case law was contrary to the text and structure of the later-enacted statute.

union and post-merger carrier; the arbitrator ruled that the seniority arrangement complied with Section 3 of the LPPs); *National Airlines Acquisition, Arbitration*, 95 C.A.B. 584, 594-595 (1982) (concluding that procedures were "fair and equitable" where subgroup of union members on furlough had been accorded separate participation in seniority arbitration, even though they were also represented in that arbitration by their union's Master Executive Council).

Three of the decisions cited by USAPA involved post-hoc attempts by employee subgroups to overturn already-negotiated or already-arbitrated integrated seniority lists on the ground that the seniority lists, which had already been finalized through the *Allegheny-Mohawk* processes, were not fair and equitable.[3] Thus, while those decisions contain broad language in dictum about a union's role in the seniority-integration process, they did not hold that employee subgroups with unique seniority interests were not appropriate participants in seniority-integration proceedings where, as here, the subgroup's participation is addressed before the process begins.[4] In fact, one of the decisions cited by USAPA, *National Airlines Acquisition, Arbitration*, 95 C.A.B. at 594-595, is a case in which the CAB, in concluding that the seniority-integration process had been fair and equitable, expressly relied on the fact that the dissatisfied employee subgroup had

[3] *See* USAPA Brief, at p. 2:10-11 (p. 3 of ECF filing) (citing *National Airlines Acquisition*, 94 C.A.B. 433, and noting that it involved petition by employee subgroup to "undo the seniority integration agreement reached between Pan Am and the IBT"); *National Airlines Acquisition*, 95 C.A.B. at 594 (cited in USAPA Brief, at p. 3:16-26 (p. 4 of ECF filing); USAPA Brief, at p. 4:3-4 (p. 5 of ECF filing) (citing *Allegheny-Mohawk Merger Case*, and noting that it involved "a former Mohawk pilot challenging the seniority integration award that resulted from the internal merger policy of ALPA").

[4] Because the CAB's LPP's reflected a strong policy preference for negotiation between affected parties followed by arbitration (if necessary) before an experienced labor arbitrator, *see, e.g., Delta-C&S Seniority List*, 29 C.A.B. 1347, 1350 (1959), once a union, exclusively, had negotiated or arbitrated an integrated seniority list, it is not surprising the CAB was extremely reluctant to disturb it. *See, e.g., National Airlines Acquisition*, 94 C.A.B. at 436 ("Where this has been done [i.e., negotiations between the carrier and union under the Railway Labor Act to create an integrated seniority list], it would be with the greatest reluctance that the [CAB] would inject itself into the contractual relationships between the carrier and the employee group, and only on a showing of bad faith, or deliberate attempt to subvert the [CAB's] order, or other compelling circumstances.").

participated in the arbitration – which is exactly the opposite of what USAPA is seeking here.

A fourth decision cited by USAPA, *National Airlines Acquisition*, 84 C.A.B. 408 (1979) (attached to Second Declaration of Chris A. Hollinger filed concurrently herewith), involved a request by a group of furloughed pilots to have "separate arbitration rights under the LPPs if the Group concludes, after the completion of the seniority list integration, that its interests have not been adequately represented by the unions charged with its representation." *Id.* at 476. The CAB declined to grant the employee subgroup (the "Janus Group") the right to compel arbitration under Section 13 if they were unhappy with the result of negotiations among the unions. *Id.* The unions subsequently agreed to a negotiation procedure to reach an integrated seniority proposal, culminating in a final and binding arbitration, and the Janus Group appeared separately in this arbitration to advance their interests. *See National Airlines Acquisition, Arbitration*, 95 C.A.B. 584, 594-595 (1982). After the arbitration had been completed, the CAB rejected the Janus Group's attempt to challenge the results of the arbitration, finding that, by their participation in the arbitration, "they fully participated in integrating seniority within the meaning of the LPPs." *Id.* at 594. The CAB's treatment of the Janus Group therefore supports, rather than denies, participation by employee subgroups with separate seniority interests while reinforcing the unremarkable proposition that once an issue has been subject to "final and binding" arbitration, it is generally not subject to further exacting review. While the CAB's decision contains broad language in dictum about the role of unions in the seniority-integration process and expresses concerns about "interfer[ing] with the established representation format" and "setting up a third force" through a "grant of independent arbitration rights" to an employee subgroup, 84 C.A.B. at 476-477, in that case separate participation of the subgroup was in fact thought to be appropriate by the CAB and did in fact occur.[5]

[5] In any event, the CAB's stated concerns in its Janus Group decision about disrupting collective-bargaining representation patterns through the grant of separate "party" status to

USAPA, finally, asserts that the CAB "only granted party status to an interest group that represented *all* of the craft or class of one of the merging carriers and only where the craft or class would otherwise be unrepresented in collective bargaining following the merger." (USAPA's Brief, at p. 5:25-27 (p. 6 of ECF filing) (emphasis in original).) This assertion is contradicted by the CAB decisions cited above (*see* pp. 3:3-4:3, *supra*). In particular, in *American-Trans Caribbean Merger*, 57 C.A.B. 581 (1971), the CAB's order provided that "all groups of pilots or flight engineers who desire to do so shall be entitled to participate in [the seniority list] arbitration proceeding and shall be entitled to representation of their own choosing," *id.* at 586, and that "there may be a certain divergence of interest between the active and furloughed pilots of both American and TCA, and accordingly we would expect that all such groups of pilots or flight engineers would be entitled to have separate or additional representation in the event they so desire." *Id.* at 586 n.10. The CAB's decision, thus, did not limit separate representation to a subgroup corresponding to an entire pre-merger craft or class, but instead recognized that furloughed and active pilots/flight engineers from each of the pre-merger carriers could have separate representatives of their own choosing; moreover, these employees were union-represented both pre- and post-merger. Similarly, in *Braniff-*

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employee subgroups in the Section 3 and 13 process are not applicable to the circumstances of this case. First, the limited collective-bargaining negotiations between US Airways and American, on the one hand, and USAPA and the APA, on the other hand, regarding implementation of the integrated seniority list have already been completed; the remaining negotiations will solely involve groups of pilots, and cannot affect USAPA's role as the exclusive representative in collective-bargaining negotiations with US Airways. (US Airways, Inc.'s Response to Plaintiffs' Motion for Preliminary Injunction (Doc. 49), pp. 5-8 (pp. 6-9 of the ECF filing).) Second, given the relative numbers of US Airways and American pilots (roughly 4,000 compared to 10,000), and given the specific timetable in the MOU for the APA's invocation of the National Mediation Board's procedures to certify one union to represent all of the pilots after the merger, it is a certainty that, by the time the McCaskill-Bond arbitration begins, the APA will be certified to represent all post-merger pilots of the combined airlines and USAPA will no longer be the RLA collective-bargaining representative for any US Airways pilots. (*See* US Airline Pilots Association's Opposition To Plaintiffs' Motion For Preliminary Injunction (Doc. No. 48), pp. 5-6 (pp. 6-7 of the ECF filing) (noting that the APA represents approximately 10,000 pilots while USAPA represents approximately 4,000 pilots); MOU ¶¶ 10(a), 27 & Attachment C, Appendix Of Evidence In Support Of Motion For A Preliminary Injunction ("Plaintiffs' Evidentiary App.") Part 3 (Doc No. 14-3), at pp. 368-382 (pp. 57-71 of the ECF filing) (setting out timeline).)

Mid-Continent Merger Case, 17 C.A.B. 19 (1953), even though both employee groups were represented by the Air Line Dispatcher's Association pre- and post-merger, the CAB accorded separate "party" status to a group formed by the pre-merger Braniff employees to challenge a date-of-hire integrated seniority list adopted by the union. *See id.* at 20.[6]

C. Without Regard To The CAB Decisions, McCaskill-Bond's Requirement For A Fair And Equitable Seniority Integration Compels Separate Representation For Employee Subgroups With Seniority Interests Such As The West Pilots.

As discussed above, there are CAB decisions that provide support for separate participation for employee subgroups with separate seniority interests in negotiations and arbitrations under the LPPs, and Congress intended these decisions to inform the meaning of the McCaskill-Bond amendment. If the Court were to conclude that the CAB decisions do not provide definitive guidance, however, the statutory requirement remains – pursuant to Section 3 and 13 of the *Allegheny-Mohawk* LPPs, as incorporated by McCaskill-Bond, there must be an "integration of seniority lists in a ***fair and equitable manner*** [through participation by] representatives of the employees affected." *Allegheny-Mohawk*, 59 C.A.B at 45.

In the instant case, as the Court is aware, the East Pilots and the West Pilots continue to operate under two separate seniority lists due to a dispute over pilot seniority integration following the US Airways-America West merger and no integrated seniority list has been implemented. Because integration of the "West" seniority list and the "East" seniority list will effectively have to occur in order to achieve a single seniority list for all US Airways and American pilots following the, the East pilots and West pilots constitute distinct seniority interest groups. Given that USAPA is constitutionally committed to date-of-hire seniority and to oppose the Nicolau Award, a position which the West Pilots

[6] USAPA's assertion is based on a footnote from the CAB's decision in *National Airlines Acquisition*, 94 C.A.B. 433, 437 n.5. As explained herein, that footnote is inaccurate in its description of the *Braniff-Mid-Continent Merger Case* and the *American-Trans Caribbean Merger Case*.

believe is diametrically opposed to their interests, separate representation for the West Pilots is essential to a "fair and equitable" process of seniority integration because, as the CAB recognized, absent such representation, one employee group could "dictate the seniority rights of [the other group]." *Braniff-Mid Continent Merger Case*, 17 C.A.B. at 21.

USAPA's arguments to the contrary are unavailing. There is no language in the McCaskill-Bond amendment foreclosing the participation of any groups in the seniority-integration process other than those determined to be "representatives" by the NMB for collective-bargaining purposes. Although the statute defines "covered employee" as "a member of a craft or class that is subject to the Railway Labor Act," it merely provides that seniority integration must occur according to the LPPs and the LPPs are similarly silent on the issue of who can serve as an employee representative. *See* 49 U.S.C. § 42112. Moreover, the CAB expressly stated, on at least one occasion, that it did not equate "representative" for the purposes of seniority integration under the LPPs with a certified bargaining representative under the RLA. *See Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19, 21-22 (1953) ("we are unable to interpret the word 'representative' . . . to import the meaning of that term under the [RLA]"). In any event, the designation of a separate subgroup of West Pilots could not undermine USAPA's current status under the RLA because the McCaskill-Bond process will address only the resolution of seniority among groups of pilots, and not collective-bargaining negotiations with a carrier.[7]

[7] The West Pilots are not required to vindicate or protect their federal rights under the McCaskill-Bond statute through their currently-certified collective-bargaining representative any more than they are required to protect their other employment-related federal rights through their union. *Cf. Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc.*, 540 F.2d 864, 866 (7th Cir. 1976) (stating that because "Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation . . . individual union members may elect not to have the union represent them.").

II. STIPULATION TO RELEVANT FACTS REGARDING WHETHER OR NOT THERE HAS BEEN A BREACH OF THE DUTY OF FAIR REPRESENTATION.

As noted in its initial post-hearing brief, US Airways believes that it would be appropriate for plaintiffs and USAPA to reach a stipulation of relevant facts regarding whether or not USAPA has breached its duty of fair representation. The relevant facts, as opposed to their legal significance or how they are characterized by the parties, are essentially undisputed and can be proved through documentary evidence. Witness credibility is not at issue, and there is no need for an evidentiary hearing. The same is true with respect to the cause of action in plaintiffs' Complaint asserted against US Airways.

III. APPROPRIATE REMEDY FOR A BREACH OF THE DUTY OF FAIR REPRESENTATION.

As set forth in prior briefing, neither plaintiffs' Complaint nor their motion for preliminary injunction provides any basis whatsoever for entering an injunction against US Airways. (US Airways, Inc.'s Response To Plaintiffs' Motion For Preliminary Injunction (Doc. No. 49), pp. 2-3 (pp. 3-4 of the ECF filing); US Airways, Inc.'s Reply In Support Of Motion To Dismiss (Doc. No. 54).) The same is true with respect to Plaintiffs' Remedy Brief.

Accordingly, with respect to plaintiffs' proposed first alternative remedy, the reference to US Airways in the language of plaintiffs' proposed mandatory injunction should be deleted (*see* Plaintiffs' Remedy Brief, at p. 2:16), and, with respect to plaintiffs' "additional remedy," an award of attorneys' fees and costs (if any) can only be entered against USAPA and not US Airways.

Plaintiffs' proposed second alternative remedy is final and binding arbitration between the East Pilots and West Pilots to determine which US Airways seniority list will be used in the McCaskill-Bond seniority-integration process with American. (See Plaintiffs' Remedy Brief, at pp. 2:20-6:2.) Whether or not plaintiffs' arbitration proposal is an appropriate remedy for a breach of DFR, US Airways believes that such an arbitration is an acceptable process so long as it results in a prompt and final adjudication

of the merits of the seniority dispute and does not delay or otherwise interfere with the McCaskill-Bond seniority-integration process described in Paragraph 10 of the MOU. Two aspects of plaintiffs' proposed arbitration terms – the provision for payment by the carriers, without qualification, of both sides' attorneys' fees, costs and other arbitration-related expenses, and the provision requiring implementation of the East/West integrated seniority list by no later than February 8, 2014 – are inconsistent with and/or unauthorized by the MOU and thus would require this Court to rewrite the parties' agreement. (*See id.* at p. 4:4-6 (¶ 2) and p. 4:14-16 (¶ 5).) US Airways submits that, if the Court were to order an arbitration process as alternatively requested by plaintiffs, it would be appropriate to order the parties to promptly meet-and-confer regarding an arbitration protocol and report back to the Court.

Finally, plaintiffs state elsewhere that, to the extent McCaskill-Bond applies to seniority integration between the East and West pilots, "it puts the onus on US Airways to ensure that the West Pilots are fairly integrated with the East Pilots." (Plaintiffs' McCaskill-Bond Brief (Doc. No. 97), at p. 4:6-13.) Insofar as plaintiffs are suggesting that any such obligation provides a basis for this Court to enter a remedy against US Airways, they are mistaken. While US Airways agrees that, under the LPPs, a carrier has an obligation to ensure that the integrated seniority list that is ultimately implemented was negotiated/arbitrated in a fair and equitable manner, this obligation is procedural. *See American-Trans Caribbean Merger*, 57 C.A.B. 581, 583 (1971) ("our order imposes on American the obligation to adopt such procedures as will provide the maximum fairness to all concerned under the circumstances"). Procedural fairness is satisfied in this case by Paragraph 10 of the MOU, which mandates a process consistent with the McCaskill-Bond Amendment. The LPPs, however, impose no obligation on a carrier to evaluate the substantive fairness of the final ordering of employees on an integrated seniority list. Rather, where an integrated list has been reached through a fair and equitable process, the carrier's adoption of such a list is not subject to challenge absent "a showing of bad faith,

or deliberate attempt to subvert the Board's order, or other compelling circumstances." *Delta C&S Seniority List*, 29 C.A.B. 1347, 1349 (1959).

Dated: May 24, 2013.

O'Melveny & Myers LLP

By: /s/Robert A. Siegel
Robert A. Siegel (*pro hac vice*)
Chris A. Hollinger (*pro hac vice*)
400 South Hope Street, Suite 1500
Los Angeles, California 90071-2899

US Airways, Inc.
Karen Gillen, State Bar No. 018008
111 W. Rio Salado Parkway
Tempe, AZ 85281

Attorneys for Defendant US Airways, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, I caused to be electronically transmitted the attached Defendant US Airways, Inc.'s Response to Plaintiffs' and USAPA's Post-Hearing Supplemental Briefs.

/s/Robert A. Siegel

Robert A. Siegel

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