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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington, *et al*., on behalf of themselves and all similarly situated former America West Pilots,

Plaintiffs,

vs.

US Airline Pilots Ass'n, an unincorporated association,

Defendant,

———

US Airways, Inc.,

Intervenor.

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

US AIRWAYS, INC.'S REPLY BRIEF IN SUPPORT OF MOTION FOR LIMITED INTERVENTION UNDER RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE

US Airways, Inc. ("US Airways"), by and through its undersigned counsel, hereby files this reply in support of its motion to intervene (Doc. No. 128).

MEMORANDUM OF POINTS AND AUTHORITIES

In accordance with Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure, US Airways seeks to intervene in this lawsuit for the purposes of protecting its separate interests in:

(i) a prompt resolution of the merits of the West Pilots' claim against defendant US Airline Pilots Association ("USAPA") for breach of the duty of fair representation ("DFR"), including its interest in sustaining a determination of ripeness in further proceedings before this Court and (if applicable) the Court of Appeals; and

(ii) a prompt determination that the West Pilots have the right under the federal McCaskill-Bond statute to full and separate representation in the seniority-integration proceeding that will begin soon after the closing of US Airways' merger with American Airlines, Inc. ("American").

The requested intervention is necessary to protect US Airways' significant interest in achieving a seniority integration of the US Airways and American pilots in accordance with the schedule prescribed in the Memorandum of Understanding ("MOU").

Plaintiffs, seeking to represent a certified West Pilot class, support US Airways' request. (*See* Doc. No. 131.) USAPA, on the other hand, objects to the motion, although it does not claim that it would suffer any prejudice from US Airways' intervention. Rather, USAPA asserts that US Airways' "application is based to a significant degree on the hubristic notion that the Ninth Circuit's wayward decision in *Addington I* resulted from US Airways' lack of participation therein" and that "[t]here is also no need for it to be granted separate status as intervenors in this action as they propose to advance positions that they have already fully briefed, and that basically mirror those being advocated by plaintiffs." (US Airlines Pilots Association's Opposition To US Airways'

Motion For Leave To Intervene ("Opp.") (Doc. No. 144), at p. 1:5-7 & 1:10:13 (p. 4 of ECF filing).) USAPA is wrong on both counts.

First, USAPA's rhetoric regarding the Ninth Circuit's decision misses the point. It is clear that US Airways has a separate perspective and interest regarding the ripeness of the West Pilots' DFR claim against USAPA. US Airways, unlike the West Pilots, is a signatory to the MOU, and it has an interest in ensuring that the merged airline will be integrated promptly, fairly and lawfully pursuant to the terms of the MOU. That is the controlling point with regard to the pending motion to intervene. And, although not directly relevant here, it is also indisputable that US Airways' separate interests were not presented to the Ninth Circuit panel in *Addington I* because US Airways was not a party in that proceeding. US Airways believes that its absence very likely affected the outcome in that proceeding. *See also* May 14, 2013 Hearing Tr. at pp. 26:22-27:1 (The Court: "The Ninth Circuit was, I think in my view, . . . were not ready to make the decision because I don't think they really understood what the position of the corporation was . . . .").

Second, USAPA's contention that plaintiffs can adequately represent US Airways' separate interests is incorrect. The West Pilots' interest is to prevail on the merits of their claims against USAPA, whereas US Airways' interest lies in the prompt and final resolution of those claims. Moreover, US Airways has an independent and separate interest in the clarification of its own rights and obligations under the McCaskill-Bond statute. Because US Airways' interests are distinct from those of the West Pilots, its interests may not be adequately represented by the West Pilots within the meaning of Rule 24 and, therefore, US Airways' intervention to protect its interests is warranted.

ARGUMENT

I. US AIRWAYS HAS A SEPARATE INTEREST IN A PROMPT RESOLUTION OF THE MERITS OF THE DFR AND MCCASKILL-BOND CLAIMS AGAINST USAPA.

USAPA's contention that "intervention is unwarranted in that the positions US Airways advances are consistent with plaintiffs' positions and already before the Court" (Opp. at p. 1:21-22 (p. 4 of ECF filing)) is unsupported by the authority it cites.

The presumption that an existing party will adequately represent the interests of a proposed intervenor is triggered "when an applicant for intervention and an existing party have ***the same ultimate objective***," and the requirement (if any) to make a "compelling showing" of inadequate representation is triggered "[i]f the applicant's interest is ***identical*** to that of one of the present parties." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (emphasis added) (quoted in Opp. at p. 2:2-7 (p. 5 of ECF filing)). Here, US Airways and the West Pilots do not have the "same ultimate objective" and their interests are not "identical."

To the contrary, plaintiffs' ultimate objective is for the West Pilots to prevail on their DFR claim against USAPA, whereas US Airways' ultimate objective is that the DFR claim be resolved promptly and on the merits so that the US Airways/American pilot integration can be accomplished in accordance with the timeline in the MOU – without regard to whether it is USAPA or the West Pilots who prevail on the DFR claim. And, while it is true (as USAPA notes) that plaintiffs have so far prosecuted this lawsuit in a manner consistent with a desire for a prompt resolution on the merits, future events might cause the plaintiffs' litigation strategy to change, and, in such a circumstance, US Airways' interests might not be adequately protected by plaintiffs.[1] Because the interests of the plaintiffs/proposed West Pilot class and US Airways are not identical, US Airways need only make a "minimal" showing of potential inadequate representation to support its intervention, and it has done so here. *See Prete*, 438 F.3d at 956 ("The burden of showing inadequacy of representation is minimal and is satisfied if the applicant shows that representation of its interests 'may be' inadequate.") (citation and quotation marks omitted); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1207-1208 (5th Cir. 1994) (holding that intervenors' interest may not be adequately represented by governmental defendant even though their legal positions were consistent, because intervenors sought to

[1] For example, it is US Airways' understanding that the Court has set aside September 24-25 for the trial in this matter. US Airways has a separate interest in seeking limits on each side's presentation time at trial, so as to ensure the trial will be completed no later than September 25. There is no assurance that this interest will be adequately represented by the West Pilots.

protect their economic interests whereas government was obligated to represent the public interest).

II. US AIRWAYS HAS A LEGALLY PROTECTABLE INTEREST IN RESOLUTION OF ITS DISPUTE WITH USAPA REGARDING THE WEST PILOTS' ROLE IN THE MCCASKILL-BOND PROCESS, AND THAT INTEREST IS NOT ADEQUATELY REPRESENTED BY PLAINTIFFS.

The Court should reject USAPA's assertion that US Airways does not have "a 'legally protectable interest' [in] advocating for 'a prompt determination that the West Pilots have the right under the federal McCaskill-Bond statute to full and separate representation in the upcoming seniority-integration proceedings,'" because US Airways is "legally and contractually committed to recognize USAPA as the exclusive representative of US Airways pilots." (Opp. at p. 4:9-16 (p. 7 of ECF filing).) Again, USAPA's argument misses the point.

As USAPA notes, the MOU provides that US Airways shall comply with the Railway Labor Act by continuing "to recognize and treat with USAPA as the representative of the pilots employed by US Airways until another representative for the pilot craft or class is certified by the National Mediation Board." (*See* MOU ¶ 5; Plaintiffs' Evidentiary App. Part 3 (Doc. No. 14-3), at p. 368 (p. 57 of ECF filing).) But nothing US Airways has done is inconsistent with that obligation – certainly US Airways has no intent to "recognize and treat with" the West Pilots, and it has not done so. Instead, the issue in dispute involves the West Pilots' role under the applicable federal law, McCaskill-Bond, in negotiations and an arbitration ***between US Airways pilots and American pilots***. This has nothing to do with negotiations under the Railway Labor Act ***with US Airways***.

Indeed, USAPA fails to mention that the MOU expressly mandates the utilization of a "seniority integration process consistent with McCaskill-Bond," and describes the participants in that process as the "merger representatives" without limitation to the certified unions. (*See* MOU ¶¶ 7, 10(a) & 10(f); Plaintiffs' Evidentiary App. Part 3, at pp. 368-369 & 372-373 (pp. 57-58 & 61-62 of Doc. No. 14-3 ECF filing).) The MOU

also provides that "[t]he company(ies) will be parties to the arbitration, if any, in accordance with McCaskill-Bond." (*See* MOU ¶ 10(f).)

It is US Airways' position, as set forth in its Intervention Pleading and its prior submissions to the Court that, although it is required to remain neutral regarding the order of US Airways pilots and American pilots on the integrated seniority list, it has an obligation under McCaskill-Bond to provide for a "fair and equitable" seniority integration for its employee groups and that, under the unique circumstances of this case and the applicable precedents, its obligation under McCaskill-Bond requires it to ensure the West Pilots have full and separate representation in the seniority-integration process with American's pilots.[2] (*See* US Airways, Inc.'s Motion For Limited Intervention Under Rule 24 Of The Federal Rules Of Civil Procedure (Doc. No. 128), at p. 5:9-17 (p. 6 of ECF filing); US Airways, Inc.'s Intervention Pleading Pursuant To Rule 24 Of The Federal Rules Of Civil Procedure (Doc. No. 128-1), at ¶¶ 11-14; US Airways' Post-Hearing Supplemental Brief (Doc. No. 98), at pp. 1:4-7:8 (pp. 2-8 of ECF filing); US Airways' Response To Plaintiffs' And USAPA's Post-Hearing Supplemental Briefs (Doc. No. 110), at pp. 1:7-8:20 (pp. 2-9 of ECF filing). USAPA disagrees. (*See, e.g.*, Opp. at pp. 4:17-5:7 (pp. 7-8 of ECF filing).) It is the resolution of that legal dispute between US Airways and USAPA which US Airways seeks to achieve through its requested intervention. USAPA would, on the other hand, have the Court assume that USAPA's legal position is correct, and, based on that assumption, deny US Airways the right to litigate the validity of its legal position. That puts the cart before the horse.

USAPA also misses the mark in asserting that "US Airways proposes to intervene to advance positions that are, for all intents and purposes, the same as those advanced by plaintiffs on a record where it is clearly unnecessary for it to do so in that plaintiffs are

[2] Stated differently, US Airways is not neutral as to whether the West Pilots have their own "seat at the table" in the McCaskill-Bond process. Contrary to USAPA's suggestions (*see* Opp. at p. 5:8-18 (p. 8 of ECF filing)), that position is not inconsistent with US Airways' obligation to remain neutral as to the order in which pilots are placed on the integrated US Airways/American seniority list.

capable of making their own arguments." (Opp. at p. 5:11-14 (p. 8 of ECF filing).) US Airways has a significant interest in the determination of ***its*** rights and obligations under the McCaskill-Bond statute. Although in the absence of intervention US Airways would not be formally bound by this Court's judgment on the West Pilots' McCaskill-Bond declaratory-relief claim against USAPA,[3] the Court's decision (and rationale therefor) will constitute a precedent that has a direct and significant impact on US Airways. As the Ninth Circuit has noted: "Surely the doctrine of *stare decisis* will come into play . . . . In appropriate circumstances, therefore, *stare decisis* may supply the requisite practical impairment warranting intervention of right." *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981) (granting intervention to the United States Attorney General in class-action lawsuit filed by group of Filipinos who had been denied certificates of identity by the Northern Marianas Islands; Attorney General had a protectable interest in the litigation because the agency "who is charged with administration and enforcement of the laws relating to immigration and naturalization, has an interest in a case in which people seek to have it determined that they are persons who will be entitled to become United States citizens."); *Hines v. D'Artois*, 531 F.2d 726, 738 (5th Cir. 1976) (State Examiner for municipal fire and police civil service had right to intervene in employment discrimination action against police department, where plaintiffs challenged employment practices Examiner was required to administer and defend).[4]

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[3] Given that US Airways would not be bound by the Court's decision absent intervention, USAPA's opposition to intervention is odd. Regardless, the ability to avoid additional duplicative litigation is another reason to grant US Airways' motion for intervention. *See United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) ("By allowing parties with a ***practical*** interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues . . . .") (emphasis in original).

[4] USAPA's final argument regarding the alleged inadequacy of US Airways' Intervention Pleading (Doc. No. 128-1) (*see* Opp. at pp. 5:19-6:19 (pp. 8-9 of ECF filing)) is meritless. US Airways' Intervention Pleading does in fact set forth a claim for declaratory relief with respect to the McCaskill-Bond issue (*see* Doc. No. 128-1, at pp. 6:3-7:6 (pp. 7-8 of ECF filing)) – even though the authorities cited in US Airways' motion make clear that the assertion of a free-standing claim is not necessary for intervention. (*See* Doc. No. 128, at pp. 8:17-9:16 (pp. 9-10 of ECF filing)). Regardless, US Airways' Intervention Pleading indisputably provides adequate notice of its interests in intervention and its legal position in support of those interests, which is what is required by Rule 24(c). *See, e.g., In re Co. Petro Marketing Group, Inc.*, 11 B.R. 546,

CONCLUSION

For all the foregoing reasons, US Airways respectfully submits that its motion for intervention should be granted.

Dated: August 8, 2013

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549 (B.A.P. 9th Cir. 1981), *aff'd in relevant part by* 680 F.2d 566, 572-573 (9th Cir. 1982) (explaining that "[t]he motion and pleading requirements of [Rule 24] are intended to provide notice to the parties to a proceeding in which intervention is requested of the grounds for which it is sought," and holding that intervenor satisfied requirements of Rule 24 by "stat[ing] the bases upon which intervention was sought").

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2013, I caused to be electronically transmitted the attached US Airways, Inc.'s Reply Brief In Support Of Motion For Limited Intervention Under Rule 24 Of The Federal Rules Of Civil Procedure to the Clerk's office using the CM/ECF System for filing.

/s/Robert A. Siegel

Robert A. Siegel

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