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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; 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,

Defendant.

US Airways, Inc.

Intervenor.

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

INTERVENOR US AIRWAYS, INC.'S MOTION TO CORRECT COURT'S JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(A) AND TO MODIFY COURT'S ORDER PURSUANT TO RULES 52(B) AND 59(E)

Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, Intervenor US Airways, Inc. ("US Airways") requests the Court to correct the judgment entered in this action on January 10, 2014 (Doc. No. 299) to conform to the technical requirements of Rule 23(c)(3) by describing the class to be bound by the judgment. And, pursuant to Rules 52(b) and 59(e), US Airways requests that the Court modify its January 10, 2014 Order (Doc. No. 298) to remove Footnote 15 so that the Order cannot be construed to prohibit the Allied Pilots Association ("APA") – after it has been certified as the single collective bargaining representative for all of the US Airways/American pilots – from creating and delegating authority to separate merger committees to represent the disparate seniority interests of the pre-merger US Airways and pre-merger American pilots.

INTRODUCTION

On January 10, 2014, the Court entered a "Judgment In A Civil Case" in this matter (the "Judgment"). (*See* Doc. No. 299.) Although the Court had previously certified a class in this case pursuant to Federal Rule of Civil Procedure 23(b)(1) (*see* Doc. No. 194 at 4:24), and the case was maintained as a class action throughout, the Judgment does not describe the class that is bound thereby as required by Rule 23(c)(3) of the Federal Rules of Civil Procedure. Accordingly, pursuant to Rule 60(a), US Airways moves the Court to correct the Judgment in order to conform to the technical requirements of Rule 23(c)(3).

Contemporaneous with the entry of the Judgment, the Court issued an Order explaining the rationale for its post-trial decision (the "Order"). (*See* Doc. No. 298.) Pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, US Airways seeks a limited modification of the Court's Order – in particular, the deletion of Footnote 15, which addresses circumstances ***after*** the APA is certified as the single collective bargaining representative for all of the US Airways/American pilots. US Airways makes this request so that the Order cannot be construed to prohibit the APA from creating and delegating authority to separate merger committees to represent the disparate seniority interests of the pre-merger US Airways and pre-merger American

pilots in formulating an integrated seniority list (including, if necessary, through arbitration). The creation of such merger committees by APA would be consistent with normal practice in the airline industry under the McCaskill-Bond statute and duty of fair representation principles, and would also be consistent with the process APA has proposed to use in the US Airways/American seniority integration if and when it is certified as the single collective bargaining representative for all of the pilots.

ARGUMENT

I. THE JUDGMENT SHOULD BE MODIFIED TO IDENTIFY THE CLASS BOUND THEREBY

A. The Judgment Is Not In Conformance With The Requirements Of Rule 23(c)(3).

Federal Rule of Civil Procedure 23(c)(3) provides that the judgment in a class action must, "for any class certified under Rule 23(b)(1) . . . , include and describe those whom the court finds to be class members." Fed. R. Civ. P. 23(c)(3)(A); *see also Harmsen v. Smith*, 693 F.2d 932, 942 (9th Cir. 1982) (remanding to district court to enter judgment in accordance with Rule 23(c)(3) for a class certified under Rule 23(b)(3)). The Rules Advisory Committee Notes for Rule 23(c)(3) explain that "[t]he judgment in a class action maintained as such to the end will embrace the class," and the judgment in a Rule 23(b)(1) class action should "'describe[]' the members of the class." Adv. Comm. Note, 39 F.R.D. 69, 105 (Feb. 28, 1966) (quoting Fed. R. Civ. P. 23(c)(3)(A)).

Here, the Judgment does not comply with Rule 23(c)(3), because it does not "include and describe those whom the court finds to be class members." Fed. R. Civ. P. 23(c)(3)(A). Indeed, although the Court certified a class pursuant to Rule 23(b)(1)(A) (*see* Doc. No. 194 at 3:4-12), and maintained this case as a class action through the entry of the Judgment, there is nothing on the face of the Judgment indicating that this case is a class action. (*See* Doc. No. 299.)

The exact requirements for a judgment to conform with Rule 23(c)(3) are not entirely clear.[1] At a minimum, however, the Judgment in this case should describe the class by the class definition in the Court's September 18, 2013 Order (Doc. No. 194), which granted Plaintiffs' Motion For Class Certification. *See* Fed. R. Civ. P. 23(c)(3) & 23(c)(3)(A); Adv. Comm. Note, 39 F.R.D. at 105. That definition is: "All pilots who are on the America West seniority list currently incorporated into the West Pilot's collective bargaining agreement." (Doc. No. 194 at 3:10-12.)

The Judgment in this case should be corrected to conform to Rule 23(c)(3) in order to ensure that it has the binding effect on the class that the Court intended. *See, e.g.*, Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1789 (3d ed. 2010) ("The obvious implication of Rule 23(c)(3) is that anyone ***properly listed in the judgment*** should be bound by it absent some special reason for not doing so.") (emphasis added).

B. Rule 60(a) Permits Correction Of The Judgment.

Judgments that do not conform to the technical requirements of Rule 23(c)(3) can be corrected pursuant to Federal Rule of Civil Procedure 60(a). Rule 60(a) provides that "[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). Rule 60(a) further provides that "[t]he court may do so on motion or on its own, with or without notice." *Id.* Relief under Rule 60(a) is appropriate when the requested correction is necessary to implement the result intended by the Court. *Kokomo Tube Co. v. Dayton Equip. Servs. Co.*, 123 F.3d 616, 623 (7th Cir. 1997), *overruled on other grounds by McCarter v. Ret. Plan for the Dist. Managers of the Am. Family Ins. Grp.*, 540 F.3d 649, 650 (7th Cir. 2008).

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[1] Rule 23(c)(3)(A) states that a judgment in a class action must, "for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members." The case law has not adequately clarified what it means to "include and describe," although the Advisory Committee Notes indicate that the judgment must "'describe[]' the members of the class, but need not specify the individual members." Adv. Comm. Note, 39 F.R.D at 105.

Where, as here, a judgment in a case that has been maintained as a class action does not conform to the requirements of Rule 23(c)(3), Rule 60(a) can be used to correct the oversight. *Vaughter v. E. Air Lines, Inc.*, 817 F.2d 685, 689 (11th Cir. 1987) ("[W]here the parties have operated under the understanding that a suit is being maintained as a class action, the failure of the district court to designate in the judgment the class thereby bound may be deemed an oversight or omission subject to correction pursuant to Rule 60(a)."); *Newman v. Prior*, 518 F.2d 97, 101 (4th Cir. 1975) (remanding case to district court to amend judgment pursuant to Rule 60(a), where judgment did not conform to Rule 23(c)(3)), *overruled on other grounds by Newcome v. Esrey*, 862 F.2d 1099 (4th Cir. 1988); *see also Young v. Katz*, 447 F.2d 431, 435 (5th Cir. 1971) (describing judgment's nonconformance with Rule 23(c)(3) as an "inadvertence," and remanding case "for the correction of the[se] omissions"); Wright & Miller, *supra*, § 1789 (noting that failure to comply with Rule 23(c)(3) at the time the judgment is entered "is not a fatal error . . . and the case can be remanded to remedy the defect").

The Court's intent here was clear – to have its judgment bind the West Pilots class. (*See, e.g.*, Doc. No. 298 at 6:9-11 ("In March 2013, shortly after the MOU was ratified but before the merger was completed, a group of West Pilots, on behalf of themselves and others similarly situated, filed the present suit alleging various claims against USAPA.").) Accordingly, the Judgment should be corrected pursuant to Rule 60(a) to conform to the technical requirements for class-action judgments.

II. THE COURT SHOULD EXERCISE ITS DISCRETION TO MODIFY ITS ORDER BY DELETION OF FOOTNOTE 15, SO THAT THE ORDER CANNOT BE CONSTRUED TO PROHIBIT THE APA – ONCE IT IS THE SINGLE COLLECTIVE BARGAINING REPRESENTATIVE – FROM CREATING MERGER COMMITTEES TO REPRESENT THE SENIORITY INTERESTS OF PRE-MERGER US AIRWAYS AND PRE-MERGER AMERICAN PILOTS IN NEGOTIATIONS AND ARBITRATION.

Rule 52(b) of the Federal Rules of Civil Procedure permits a court to amend its decision following a bench trial. *See Peak Invs., LLC v. Harter Indus., Inc.*, No. CIV-00-0289-PHX-SMM, 2002 WL 32830436, at *1 (D. Ariz. June 26, 2002). The rule provides:

"[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly."[2] "The decision to amend findings or judgment is left to the sound discretion of the trial judge." *Peak Invs., LLC*, 2002 WL 32830436, at *1. Here, US Airways is not asking the Court to change its ruling that the West Pilots do not have the right to separate participation in the McCaskill-Bond seniority-integration process in light of USAPA's current status as the certified collective bargaining representative for all US Airways (East and West) pilots. Rather, US Airways is asking the Court only to modify its Order, through the deletion of Footnote 15, so that the Order cannot be construed to prohibit the APA – once it becomes the single certified collective bargaining representative for all pre-merger US Airways and pre-merger American pilots – from creating and delegating authority to merger committees to represent the disparate seniority interests of pre-merger US Airways and pre-merger American pilots.

In Footnote 15 of the Order, the Court stated: "The MOU contemplates the need for arbitration but also requires the post-merger carrier remain neutral. Under the Court's reading of McCaskill-Bond, there will be no need for arbitration because, based on explicit language in the MOU, prior to the arbitration, there will have been an election and there will be only one certified representative for all pilots. Simply put, with the carrier having promised neutrality, there will not be two parties to go to arbitration." (Doc. No. 298, footnote 15 at 21:23-27.) This statement, however, does not contemplate the procedure that is regularly used in airline industry mergers under the McCaskill-Bond statute – a procedure that APA itself has proposed to utilize in connection with the US Airways/American seniority integration.

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[2] Although the text of Rule 52(b) refers to "findings," the rule has been cited as a basis to modify a court's legal conclusions in addition to its factual findings. *See, e.g., Peak Invs., LLC*. In any event, Rule 59(e), which authorizes "[a] motion to alter or amend a judgment," also provides a basis for this Court's consideration of the modification requested by US Airways. *See, e.g., Ramirez v. Medtronic, Inc.*, No. CV-13-00512-PHX-GMS, 2013 WL 4446913, at *23-25 (D. Ariz. Oct. 24, 2013); *U.S. Fidelity & Guar. Co. v. Lee Investments LLC,* No. CV-F-99-5583, 2009 WL 3162236, at *3-5 (E.D. Cal. Sept. 29, 2009).

In airline mergers subsequent to the enactment of McCaskill-Bond in December 2007, when there is a single Railway Labor Act collective bargaining representative for all of the employees in a post-merger work group, the surviving union has created and delegated authority to "merger representatives" or "merger committees" to advocate in negotiations and arbitration for the separate seniority interests of the employees from each of the pre-merger carriers. *See, e.g., In The Matter Of The Seniority Integration Arbitration Between The Pilots Of Northwest Airlines, Inc. And The Pilots Of Delta Air Lines, Inc.* (Dec. 8, 2008) (pre-merger Northwest and pre-merger Delta pilots were both represented by same union; arbitration was conducted between "Delta Pilots Merger Representatives" and "Northwest Pilots Merger Representatives") (attached as Ex. A to Declaration Of Robert A. Siegel ("Siegel Decl."), filed concurrently herewith); *In The Matter Of The Seniority Integration Arbitration Between The Pilots Of Continental Airlines And The Pilots Of United Air Lines* (Sept. 3, 2013) (same; arbitration was conducted between "Continental Pilot Merger Committee" and "United Pilot Merger Committee") (attached as Siegel Decl. Ex. B); *cf. In The Matter Of The Seniority List Integration Arbitration Under Allegheny-Mohawk Labor Protective Provisions . . . Among And Between The Pilots Of Republic Airline/Chautauqua Airlines/Shuttle America, et al.* (Feb. 19, 2011) at 6 (seniority-integration negotiation and arbitration process was conducted between four Seniority Merger Committees, created by the four different unions that were collective bargaining representatives for the pilots employed by the four pre-transaction carriers; Seniority Merger Committees agreed in advance that "[t]he Organization, if any, designated by the [National Mediation Board] as the duly designated representative of the combined craft or class of Flight Deck Crew Members for the single transportation system shall continue the Merger Committees in existence and delegate to the Merger Committees authority solely for the purpose of adjusting any dispute or disputes that might arise as to the interpretation or application of the [seniority-integration] award . . . .") (attached as Siegel Decl. Ex. C).

Thus, the limitation of participation rights under McCaskill-Bond to certified collective bargaining representatives does not foreclose arbitration between merger committees that have been created by the single, surviving union.[3] And such arbitrations occur even when the post-merger carrier takes no position as to how the employees should be ordered on the integrated seniority list. *See* Ex. A (post-merger carrier did not participate in seniority-integration arbitration between pre-merger Delta and Northwest pilots); Ex. B (same, as to arbitration between pre-merger United and Continental pilots); Ex. C at 28 (carrier participated in arbitration, but "[t]he Company does not have a position on the methodology that should be adopted by the Arbitrator in integrating the four seniority lists at issue in a 'fair and equitable' manner – i.e. the order in which pilots should be placed on the merged list.").[4]

Accordingly, it does not follow from US Airways' contractual obligation under the MOU to "remain neutral regarding the order in which pilots are placed on the integrated seniority list" (MOU ¶ 10(d)), and from the MOU's framework under which "prior to the arbitration, there will have been an election and there will be only one certified

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[3] Indeed, the text of the MOU allows for such a procedure. *See* MOU ¶ 10(f) ("The company(ies) shall provide information requested by the ***merger representatives*** for use in the arbitration . . . ."); ¶ 7 ("New American Airlines and US Airways shall reimburse the ***merger representatives*** involved in the seniority integration process in an aggregate not to exceed $4 million.") (all emphasis added).

[4] Similarly, Civil Aeronautics Board decisions also recognized the authority of the post-merger collective bargaining representative to agree to a seniority-integration process whereby there was some form of separate representation for pre-merger employee subgroups, including at arbitration. *See, e.g., National Arbitration, Unions' Arbitration Petitions*, 97 C.A.B. 565, 569 (1982) (recognizing ability of decertified pre-merger union to represent pre-merger employee group in seniority arbitration where post-merger certified union "fully acquiesce[d]" in pre-merger union's "participation in the seniority dispute."); *National Airlines Acquisition Arbitration Award*, 97 C.A.B. 570, 570-575 (1982) (affirming propriety of arbitration between post-merger certified bargaining representative, post-merger airline, and group formed to represent subgroup of pre-merger employees, to which post-merger union and airline had consented); *United Capital Merger Case*, 40 C.A.B. 903, 906 (1964) (affirming propriety of post-merger certified bargaining representative's intra-union procedures to establish integrated seniority list, including establishing merger committees to represent each group of pre-merger employees, and noting that it was not "improper for [the post-merger airline] to assume a posture of neutrality in the intra-union controversy or for [the airline] to enter into an agreement with [the union] accepting the integration list which had been arrived at as a result of the [union's] arbitration proceedings.").

representative for all pilots" (Doc. No. 298, footnote 15 at 21:25-26), that "there will not be two parties to go to arbitration." (*Id*. at 21:26-27.)[5] And APA does not contemplate such a result – to the contrary, in accordance with MOU Paragraph 10(f), it proposed a Seniority Integration Protocol Agreement for the US Airways/American seniority integration which would mandate as follows:

> "Effective on and after the date that the NMB determines the representation of the combined pilot craft and class at New American, the Organization, if any, designated by the NMB as the duly designated representative of the combined craft and class (the "Organization") shall designate such Merger Committees as are required to represent, for seniority integration purposes, the pilots on the pre-merger seniority lists in the combined craft and class. ***Consistent with the MOU, this Protocol Agreement, the duty of fair representation, and the Organization's other legal obligations, the Organization shall delegate to such Merger Committees authority to act for and on behalf of the pilots on their respective pre-merger seniority lists for purposes of concluding an integrated pilot seniority list.***"

(APA SIC [Seniority Integration Committee] Proposal, dated January 17, 2014, ¶ 2(b) at pp. 3-4 (emphasis added) (attached as Siegel Decl. Ex. D).) The APA's Proposal specifies further that if an integrated seniority list is not reached through negotiations, the Merger Committees shall proceed to arbitration. (*See id*. ¶¶ 7-16 at pp. 7-13.)

If the US Airways/American pilots seniority-integration process is not completed before the National Mediation Board certifies the APA as the single collective bargaining representative for all of the post-merger (US Airways and American) pilots, the Court's Order instructs that US Airways/American and the APA will both be responsible for ensuring that the pilot seniority lists are integrated in a lawful manner and in accordance with a lawful procedure. (*See* Order, Footnote 11 at 15:23-28, & 20:4-17.) In order to avoid potential confusion, to provide maximum flexibility to resolve the seniority-

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[5] Indeed, in order to avoid a repeat of the kind of scenario that led to the enactment of McCaskill-Bond in the first place, US Airways submits that the statute should be interpreted to ***require*** the surviving post-merger union to provide for arbitration between merger representatives/committees where the pre-merger employee groups were represented by different unions. *See, generally,* Order at 17:20-24 (noting that McCaskill-Bond "was sponsored by two senators who believed the American Airlines and Trans World Airlines ('TWA') merger had been unfair to the TWA employees. As explained in a press release from one of the sponsors, the statute was meant to 'ensure workers in the future don't suffer the same fate as the TWA workers.'") (citation omitted).

integration dispute in a manner consistent with McCaskill-Bond and the APA's "duty of fair representation to all employees" (Order at 20:7), including by means of an arbitration between merger committees, and to reduce the possibility of future legal challenges to the integrated seniority list that ultimately is generated,[6] US Airways respectfully requests that the Court delete Footnote 15 in its Order – a footnote which is not essential to the Court's holding regarding the status of the West Pilots in the McCaskill-Bond process.

CONCLUSION

For the foregoing reasons, US Airways respectfully requests that the Court grant its motion to correct the Court's Judgment pursuant to Rule 60(a) and to modify the Court's Order pursuant to Rules 52(b) and 59(e).

Dated: February 7, 2014

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[6] The Court previously granted US Airways' Motion to Intervene. (*See* Doc. No. 194.) In its subsequent Intervention Pleading, US Airways set forth its interest in the avoidance of "delay or disruption to the process of integrating US Airways and American pilots following the merger – a process that is central to the airline's realization of the operational and financial benefits from a combined pilot workforce." (Doc. No. 197 at ¶ 15.)

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2014, I caused to be electronically transmitted the attached Motion To Correct Court's Judgment Pursuant To Federal Rule Of Civil Procedure 60(a) And To Modify Court's Order Pursuant To Rules 52(b) And 59(e) to the Clerk's office using the CM/ECF System for filing and transmittal.

/s/ Robert A. Siegel
Robert A. Siegel

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