

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

US AIRWAYS, INC.,

Plaintiff,

vs.

No. 07 CV 1235 MCA/LFG

EDWARD J. LOPEZ, JR., in his official
capacity as Superintendent of the New Mexico
Regulation and Licensing Department,

GARY TOMADA, in his official capacity as
Director, New Mexico Regulation and
Licensing Department, Alcohol & Gaming
Division.

Defendants.

**DEFENDANTS' ANSWER TO COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Defendants Edward J. Lopez, Jr. and Gary Tomada by and through their counsel
Freedman Boyd Hollander Goldberg & Ives, P.A. (Joseph Goldberg, John Boyd, Alexandra
Freedman Smith, Matthew L. Garcia) hereby answer Plaintiff US Airways, Inc. ("US Airways")
Complaint for Declaratory and Injunctive Relief ("Complaint") as follows:

1. As to paragraph 1 of the Complaint, the Defendants admit that US Airways, by its
Complaint, seeks to enjoin Defendants from applying appropriate New Mexico laws regulating
the provision of alcoholic beverages within the territorial jurisdiction of the State of New
Mexico. Defendants state that the averments in the last two sentences of paragraph 1 of the
Complaint do not allege facts but rather argue legal conclusions and therefore do not require
answer by the Defendants, but to the extent that such averments require answer, Defendants deny
the same. As to the remaining allegations of paragraph 1, Defendants deny them.

2. As to paragraph 2 of the Complaint, Defendants are without sufficient knowledge to admit or deny whether US Airways continues to serve alcoholic beverages on its flights to or from New Mexico airports and therefore denies those allegations. As to the remaining allegations contained in paragraph 2, Defendants deny them.

3. As to paragraph 3 of the Complaint, Defendants admit that the Twenty-First Amendment to the Constitution of the United States provides: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” Defendants deny that alcoholic beverages previously served on board US Airways aircraft flying within New Mexico airspace and/or on the ground at New Mexico airports are not being transported or imported for delivery or use within the State of New Mexico. As to all other averments in paragraph 3, Defendants state that they do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants, but to the extent that such averments require answer, Defendants deny them. Further, Defendants state affirmatively that neither federal law nor the Twenty-First Amendment pre-empt the State of New Mexico’s authority to regulate the distribution of alcoholic beverages within its territorial jurisdiction including the provision of alcoholic beverages on US Airways commercial aircraft flying within New Mexico’s territorial boundaries.

4. As to paragraph 4 of the Complaint, Defendants are without sufficient knowledge to admit or deny the averments of paragraph 4 and therefore deny the same.

5. As to paragraph 5 of the Complaint, Defendants admit that the New Mexico Regulations and Licensing Department (“RLD”) is an agency organized pursuant to N.M. Stat. § 60-3A-7 and exists under the laws of the State of New Mexico. As to the remaining allegations

of paragraph 5, Defendants deny them. Further, Defendants state affirmatively that Mr. Lopez has not been the superintendent of RLD since November 30, 2007.

6. The Defendants admit the allegations contained in paragraph 6.

7. The Defendants admit the allegations contained in paragraph 7.

8. As to paragraph 8 of the Complaint, Defendants deny that US Airways has been harmed but otherwise admit the remaining allegations contained in paragraph 8.

9. As to paragraph 9 of the Complaint, Defendants admit there are federal statutes and regulations governing some operations of commercial airlines but as to the remaining averments of paragraph 9, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

10. As to paragraph 10 of the Complaint, Defendants admit that the Federal Aviation Act was enacted in 1958. As to the remaining averments of paragraph 10, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

11. As to paragraph 11 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

12. As to paragraph 12 of the Complaint, Defendants admit that in 1978 Congress enacted the ADA. As to the remaining averments in paragraph 12, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

13. As to paragraph 13 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

14. As to the allegations of paragraph 14, the Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

15. As to the allegations of paragraph 15, the Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

16. As to the allegations of paragraph 16, the Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

17. As to paragraph 17 of the Complaint, Defendants admit that the FARS are enforced by the administrator of the FAA. As to the remaining averments in paragraph 17, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

18. As to the allegations of paragraph 18, the Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

19. The Defendants admit the allegations contained in paragraph 19.

20. As to paragraph 20 of the Complaint, Defendants deny that the RLD is headed by Mr. Lopez. As to the remaining allegations of paragraph 20, Defendants admit them.

21. The Defendants admit the allegations contained in paragraph 21.

22. The Defendants deny the allegations contained in paragraph 22.

23. As to Paragraph 23 of the Complaint, Defendants deny that New Mexico Liquor Control Act (“NMLCA”) was never intended to apply to service of alcoholic beverages by airlines. Defendants further state that the NMLCA expressly requires air carriers to obtain a license and post such license at the airport. NMSA 1978, § 60-6A-9(B). Defendants admit that in order to obtain a license under the NMLCA, applicants must, *inter alia*, undertake the procedures stated in paragraph 23.

24. As to paragraph 24 of the Complaint, Defendants deny that the “trainers” referred to in paragraph 24 are employees of the New Mexico Alcohol and Gaming Division. As to the remaining allegations of paragraph 24, Defendants admit them.

25. The Defendants admit the allegations contained in paragraph 25.

26. The Defendants admit the allegations contained in paragraph 26.

27. As to paragraph 27 of the Complaint, Defendants are without sufficient knowledge to admit or deny the allegations and therefore deny the same.

28. As to paragraph 28 of the Complaint, Defendants admit that US Airways provides alcoholic beverages to its customers within New Mexico’s territorial boundaries both while on the ground and in the air, including in New Mexico airspace. As to the remaining allegations of paragraph 28, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

29. As to paragraph 29 of the Complaint, Defendants admit that US Airways provides alcoholic beverages to its customers within New Mexico’s territorial boundaries both while on

the ground and in the air. As to the remaining allegations in paragraph 29, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

30. As to paragraph 30 of the Complaint, Defendants deny that all of US Airways major competitors that serve in New Mexico offer alcoholic beverages for sale in their cabins. Defendants state further, on information and belief, that some of US Airways' competitors do not provide liquor on flights into New Mexico because they have refused to obtain a license. As to the remaining allegations of paragraph 30, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

31. As to paragraph 31 of the Complaint, Defendants admit that on November 11, 2006, Dana Papst had flown from Phoenix, Arizona to Albuquerque on US Airways flight 206. As to the remaining allegations in paragraph 31, Defendants deny them.

32. The Defendants are without sufficient knowledge to admit or deny the allegations of paragraph 32 and therefore deny them

33. The Defendants admit the allegations contained in paragraph 33.

34. As to paragraph 34, Defendants deny that it was Mr. Tomada and AGD who served US Airways with a citation. The Defendants admit the remaining allegations in paragraph 34.

35. The Defendants admit the allegations contained in paragraph 35.

36. As to paragraph 36, Defendants admit that US Airways was required to stop serving alcoholic beverages to its customers on any flight departing from or arriving into the State of New Mexico while in New Mexico's territorial boundaries. Defendants deny that airspace over New Mexico is exclusive federal airspace. As to the remaining allegations in

paragraph 36, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

37. As to paragraph 37 of the Complaint, Defendants admit that on February 2, 2007, US Airways sent a letter to Defendant Lopez containing the statements quoted in the paragraph. Defendants deny the truth of the quoted statements. As to the remaining allegations in paragraph 37, Defendants admit them.

38. As to paragraph 38 of the Complaint, Defendants admit that air and rail carriers had, in the past, submitted an abbreviated application for a liquor license but deny that air and rail carriers presently are allowed to submit an abbreviated application. As to the remaining allegations in paragraph 38, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

39. As to paragraph 39 of the Complaint, Defendants admit that the New Mexico Regulation and Licensing Department requested that US Airways obtain a temporary license while its application for a permanent license was pending. As to the remaining allegations in paragraph 39, Defendants are without sufficient knowledge to admit or deny them therefore deny them.

40. The Defendants admit the allegations of paragraph 40.

41. As to paragraph 41 of the Complaint, Defendants admit that the New Mexico Regulation and Licensing Department issued US Airways a temporary license. As to the remaining allegations in paragraph 41, Defendants are without sufficient knowledge to admit them and therefore deny them.

42. The Defendants admit the allegations of paragraph 42.

43. As to paragraph 43, Defendants deny that “AGD had changed its rules” regarding the applications for public service licenses. As to the remaining allegations in paragraph 43, Defendants admit them.

44. The Defendants admit the allegations in paragraph 44.

45. The Defendants admit the allegations in paragraph 45.

46. As to paragraph 46 of the Complaint, Defendants admit that US Airways sent Mr. Lopez a letter relating to the schedules of its flight attendants which contained the language quoted in paragraph 46 of the Complaint. As to the truth or falsity of the representations made in that letter and quoted in paragraph 46, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

47. The Defendants admit the allegations in paragraph 47.

48. The Defendants admit the allegations in paragraph 48.

49. As to paragraph 49 of the Complaint, Defendants admit that US Airways offered to make the NewMAST materials available to its flight attendants. As to the remaining allegations in paragraph 49, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

50. The Defendants admit the allegations in paragraph 50.

51. As to paragraph 51 of the Complaint, Defendants deny that four of the deficiencies referred to in the complaint had been cured as the attempt to cure such deficiencies did not occur until after US Airways’ temporary license had expired. As to the remaining allegations in paragraph 51, Defendants admit them.

52. The Defendants admit the allegations in paragraph 52.

53. As to paragraph 53 of the Complaint, Defendants admit that on June 20, 2007, US Airways sent a letter to Defendant Lopez containing the statements quoted in the paragraph. As to the truth or falsity of the statements in that quoted paragraph, Defendants are without sufficient knowledge to admit or deny them and therefore deny them.

54. Other than the characterization “substantively”, Defendants admit the allegations in paragraph 54; but Defendants deny the characterization.

55. The Defendants admit the allegations in paragraph 55.

56. The Defendants admit the allegations in paragraph 56.

57. As to paragraph 57 of the Complaint, Defendants admit that on October 19, 2007, there was a meeting between US Airways and Defendants. As to the remaining allegations in paragraph 57, Defendants deny them.

58. The Defendants admit the allegations in paragraph 58. To the extent that US Airways suggests that the denial of its permanent liquor license was based exclusively on its sale of alcohol to an intoxicated passenger, the Defendants deny such allegations.

59. In answering the allegations in paragraphs 60 through 73, Defendants incorporate their answers in the preceding paragraphs as if set out herein.

60. As to paragraph 60 of the Complaint, Defendants admit that the federal government regulates certain aspects of commercial air travel. As to the remaining averments in paragraph 60, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, the Defendants deny them.

61. As to paragraph 61 of the Complaint, the Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

62. As to paragraph 62 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

63. As to paragraph 63 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

64. As to paragraph 64 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

65. As to paragraph 65 of the Complaint, Defendants admit that the New Mexico Liquor Control Act requires US Airways to acquire and maintain a license in order to dispense alcoholic beverages within the territorial boundaries of the State of New Mexico. Defendants deny that airspace over New Mexico is exclusive federal airspace. As to the remaining averments of paragraph 65, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

66. As to paragraph 66 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

67. As to paragraph 67 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

68. Defendants deny the allegations of paragraph 68 of the Complaint.

69. Defendants deny the allegations of paragraph 69 of the Complaint.

70. As to paragraph 70 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them. Defendants further state affirmatively that none of the actions of Defendants impermissibly impinged on any legally protected interests of US Airways under the Supremacy Clause of the Constitution of the United States nor under the Federal Aviation Act nor under the Airline Deregulation Act.

71. Defendants deny the allegations in paragraph 71 of the Complaint.

72. As to paragraph 72 of the Complaint, Defendants admit that US Airways seeks by its Complaint declaratory and injunctive relief, but otherwise state that the remaining averments of paragraph 72 do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

73. As to paragraph 73 of the Complaint, Defendants admit that US Airways seeks by its Complaint a permanent injunction, but otherwise state that the remaining averments of paragraph 73 do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

74. In response to paragraphs 75 – 87, Defendants incorporate by reference their responses in this Answer to paragraphs 1 through 73 of the Complaint.

75. As to paragraph 75, the Defendants state that the averments of paragraph 75 do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them. Defendants further state affirmatively that the Twenty-First Amendment to the Constitution of the United States assigns to the States, including the State of New Mexico the power to regulate the provision of alcoholic beverages on commercial airlines within their respective territorial boundaries.

76. As to paragraph 76 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

77. The Defendants deny the allegations in paragraph 77.

78. The Defendants deny the allegations in paragraph 78.

79. The Defendants deny the allegations in paragraph 79.

80. As to paragraph 80 of the Complaint, Defendants admit that New Mexico's Liquor Control Act requires US Airways to acquire and maintain a license to dispense alcoholic beverages on any flight departing from or arriving into an airport located within the territorial boundaries of the State of New Mexico. As to the remaining averments in paragraph 80, Defendants state that they do not allege facts but rather argue legal conclusions and therefore Defendants are not required to answer; but to the extent an answer is required, Defendants deny them.

81. As to paragraph 81 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

82. As to paragraph 82 of the Complaint, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; but to the extent an answer is required, Defendants deny them.

83. The Defendants deny the allegations in paragraph 83.

84. As to paragraph 84 of the Complaint, Defendants admit that the United States Constitution contains article VI, clause 2, as well as the Twenty-First Amendment but as to the remaining averments in paragraph 84, Defendants state that those averments do not allege facts but rather argue legal conclusions and therefore do not require answer by the Defendants; to the extent an answer is required, Defendants deny them. Defendants further state affirmatively that no conduct by Defendants impermissibly impinged on any interests of US Airways under the Supremacy Clause, the Twenty-First Amendment or any other federal law.

85. The Defendants deny the allegations in paragraph 85.

86. The Defendants deny the allegations in paragraph 86.

87. The Defendants deny the allegations in paragraph 87.

AFFIRMATIVE DEFENSE

The Twenty-First Amendment of the United States Constitution grants to the State of New Mexico, and the Defendants in their official capacities, the constitutional right to regulate “[t]he transportation or importation” of “intoxicating liquors” into New Mexico “for delivery or use therein.” U.S.C.A. Const. Amend. XXI. The regulation of the service of alcoholic beverages within the territorial jurisdiction of the State of New Mexico, both within its airspace and on the ground at the Albuquerque International Sunport, as well as other places within the State’s territorial jurisdiction, implicates the interests of the Twenty-First Amendment to the United States Constitution. Any intrusion on any federal interest by New Mexico’s licensing

regulation is minimal and justified. Therefore, the Defendants' conduct in regulating the service of alcohol in US Airways' airplanes within the territorial jurisdiction of the State of New Mexico is protected by the Twenty-First Amendment of the United States Constitution and prohibition of reasonable licensing regulation of the service alcoholic beverages on US Airways' airplanes within the territorial jurisdiction of the State of New Mexico will constitute an undue burden on interests protected by the Twenty-First Amendment to the United States Constitution.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I CERTIFY that on the _____ day of January, 2008, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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