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

US AIRWAYS, INC., Plaintiff, vs. 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.	)	No. **COMPLAINT**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff US Airways brings this complaint to enjoin New Mexico state officials from enforcing laws that purport to govern US Airways' alcoholic beverage service on flights departing from or arriving into New Mexico. These laws, if allowed to stand, threaten to enmesh the Nation's airlines in a crazyquilt of regulation in which each state is allowed to preside over a unique jurisdictional patch of its own making. Beginning in January 2007, Defendants have imposed on US Airways an array of liquor licensing requirements that are manifestly unadaptable to airlines and the interstate transportation they provide. These requirements ostensibly apply to all alcoholic beverage service offered to all passengers on all US Airways flights taking off from or landing at all New Mexico airports — despite the fact that every single one of those flights (1) either originates or terminates *outside* New Mexico; and (2) travels *en route* through United States airspace, a domain of exclusive federal sovereignty. For reasons

described below, the laws in question are preempted as applied to US Airways by federal statutes and regulations, including the Airline Deregulation Act of 1978, 49 U.S.C. § 41701, *et seq.* (1978) ("the ADA"), and the Federal Aviation Act of 1958 ("1958 Act"). The application of these laws to US Airways thus violates the Supremacy Clause and, as further described below, also violates the Twenty-First Amendment to the United States Constitution.

2. As a direct and unavoidable result of Defendants' unlawful assertion of regulatory authority and intrusion into the federal government's exclusive jurisdiction in this field, US Airways has been forced to stop serving alcoholic beverages on every one of its flights to or from New Mexico airports. Defendants' actions have therefore injured and are continuing to injure US Airways and the flying public by subjecting them to New Mexico-specific regulatory requirements that are contrary to federal law. Absent relief from this Court, US Airways and the flying public will continue to suffer such injury.

3. Defendants' actions violate two provisions of the United States Constitution.

a. *Preemption under the Supremacy Clause*: Beginning with the Federal Aviation Act of 1958, Congress has stated that "[t]he United States of America… possess[es] and exercis[es] complete and exclusive national sovereignty in the airspace of the United States." Pub. L. 85-726, § 1108(a), 72 Stat. 731, 798-99, 49 U.S.C. App. § 1508(a) (1959). Congress re-confirmed this exclusive federal authority in the federal Airline Deregulation Act of 1978 ("ADA"), *see* Pub. L. 95-504, 92 Stat. 1705 (1978), before amending the language to its current form, *see* Pub. L. 103-272, § 1(e), 108 Stat. 1101, 49 U.S.C. § 40103(a)(1) ("The United States Government has exclusive sovereignty of airspace of the United States."). The ADA also expressly grants the U.S. Department of Transportation ("DOT") exclusive authority to regulate all aspects of airline safety and service by expressly barring the States, including the State of New Mexico, from "enact[ing]

or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier…." 49 U.S.C. § 41713(b)(1). Pursuant to its plenary and exclusive regulatory authority under the ADA, the DOT has promulgated comprehensive regulations that govern virtually every aspect of airline safety and service aboard federally licensed aircraft, including crewmember requirements, training materials and training programs, and—of special note here—the provision and service of food and beverages, including alcoholic beverages. *See* 14 C.F.R. § 121.1 *et seq*. Accordingly, Defendants' attempts to regulate the activity of US Airways in federal airspace through the Liquor Control Act is expressly preempted by federal law; intrudes on a field of regulation committed by Congress exclusively to the federal government alone; is inconsistent with the uniform, national scheme for airline regulation; and interferes with or stands as an obstacle to the full objectives and purposes of federal legislation and regulation in this field. Because federal law is "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Const. art. VI, cl. 2, Defendants' actions in violation of the ADA and preempted and nullified by the Constitution's Supremacy Clause. *See* Count I below.

b. *Violation of the Twenty-First Amendment*: The Twenty-First Amendment to the United States Constitution strictly circumscribes the authority of States to control the sale and service of alcoholic beverages, by providing that a State may regulate only the "transportation or importation" of alcoholic beverages into that State "for delivery or use therein." U.S. Const. amend. XXI. Because alcoholic beverages served aboard a federally-licensed aircraft are not being transported or imported "for delivery or use" within a State, but rather are intended for consumption that

occurs within the "exclusive [federal] sovereignty of airspace of the United States," 49 U.S.C. § 40103(a), the Twenty-First Amendment precludes States from regulating any aspect of the onboard sale, service, or consumption of alcoholic beverages. As a result, Defendants' application of the Liquor Control Act's licensing provisions to US Airways also violates the Twenty-First Amendment. *See* Count II below.

PARTIES, JURISDICTION AND VENUE

4. Plaintiff US Airways, Inc. is an interstate airline carrier certified by the Federal Aviation Administration ("FAA") of the United States Department of Transportation ("DOT"). On September 27, 2005, US Airways Group, Inc., the parent company of US Airways, consummated a merger transaction with America West Holdings Corporation, the parent company of America West Airlines, Inc. ("America West"). At the time of the merger, America West was an airline carrier certified by the FAA, as it had been since 1981, and it continued in that capacity until September 26, 2007. Between the date of the merger transaction and September 26, 2007, America West did business as US Airways. On September 26, 2007, America West surrendered its FAA operating certificate, and since that date all airline operations have been conducted under US Airways' FAA operating certificate. (Hereinafter, US Airways, Inc. and America West will be referred to jointly as "US Airways.") US Airways is one of our Nation's largest airlines operating more than 3,600 daily passenger flights to 230 destinations within the United States and 32 other countries.

5. Defendant Edward J. Lopez, Jr. is the Superintendent of the New Mexico Regulation and Licensing Department, an agency organized pursuant to N.M. Stat. § 60-3A-7 and existing under the laws of the State of New Mexico. Mr. Lopez is a defendant in this action solely in his official capacity.

6. Defendant Gary Tomada is the Director of the Alcohol & Gaming Division of the New Mexico Regulation and Licensing Department. Mr. Tomada is made a defendant in this action solely in his official capacity.

7. This action for declaratory and injunctive relief under the United States Constitution and 42 U.S.C. § 1983 challenges the application and enforcement of a state law that is preempted by federal law and violates the Twenty-First Amendment. This Court has jurisdiction to consider the claims and grant the relief sought in this action under 28 U.S.C. §§ 1331 (federal question), 1343(a)(3) (constitutional rights), and 2201 (declaratory judgment).

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), because all of the Defendants reside in this District, because the acts giving rise to Plaintiff's claims occurred within this District, and because Plaintiff does business in this District, has suffered harm in this District, and will continue to suffer harm in this District as a result of Defendants' actions until relief is granted.

LEGAL AND REGULATORY BACKGROUND

A. Federal Statutes and Regulations Governing Air Carriers

9. The operation of commercial airlines, including those operated by US Airways, is governed by a comprehensive system of federal statutes and regulations.

10. Since 1958, commercial airlines have been governed and regulated by the Federal Aviation Act of 1958, 49 U.S.C. App. § 1301, *et seq.*, which gave the Federal Aviation Administration broad authority over the use of navigable airspace. The 1958 Act also gave the Civil Aeronautics Board (the "CAB") broad authority to regulate interstate airfares and other aspects of airline service. The 1958 Act made clear that Congress intended to create a single, uniform set of federal rules to govern interstate aviation. In enacting the 1958 Act, Congress understood that "the Federal Government bears virtually complete responsibility for the

promotion and supervision of [the aviation] industry" because "it is the only [one of the transportation industries] whose operations are conducted almost wholly within the Federal jurisdiction and are subject to little or no regulation by States or local authorities." S. Rep. No. 1811, 85th Cong., 2nd Sess. 5 (1958). Congress therefore tasked the FAA and the CAB with the responsibility of providing regulatory oversight for the commercial aviation industry.

11. As a result of the Airline Deregulation Act (the "ADA"), Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.), States are *expressly* precluded from enforcing any law relating to prices, routes, or services of any air carrier, including US Airways. Instead, the ADA grants the federal government, acting through the DOT, an express, plenary, and exclusive authority to regulate these critical dimensions of commercial airline operations.

12. Congress enacted the ADA in 1978 because, among other reasons, it had determined that the airline industry should be subject to competitive market forces. To ensure that individual States would not interfere with these market forces or with comprehensive federal oversight of the airline industry, Congress included in the ADA a notably broad express preemption clause providing that "No state … shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier …." 49 U.S.C. App. § 1305(a)(1) (1978).

13. When Congress reenacted Title 49 of the U.S. Code in 1994, it revised this express preemption clause to read that "[a] State … may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier…." 49 U.S.C. § 41713(b)(1) (1994). It is well-settled that Congress did not intend for these minor 1994 wording changes to effect a substantive change in the law. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995) (citing Pub. L. 103-272, § 1(a), 108 Stat. 745).

14. Pursuant to the 1958 Act and the ADA, the Federal Aviation Administration ("FAA"), a division of the DOT, comprehensively governs the operations of air carriers, including crewmember requirements, operating manuals, training programs and materials, on-board procedures, and in-flight requirements. Relevantly, the FAA's comprehensive regulations (the "Federal Aviation Regulations" or "FARs") provide that no airline can use a flight attendant aboard one of its flights unless the person has completed a federally-mandated training program. 14 C.F.R. §§ 121.404, 121.433. The FARs provide that airline training programs must be approved by the Administrator of the FAA, *id.* § 121.405, and must contain specific federally-mandated elements, including special instruction on "passenger handling." *Id.* §§ 121.415, 121.421, 121.427. The FARs require airlines to produce and submit detailed operating manuals to both airline staff and the FAA, *id.* §§ 121.131–121.141, and specifically provide that such manuals must "[i]nclude instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety [and consistent] with any applicable Federal regulation." *Id.* § 121.135.

15. The FARs contain specific requirements regarding the service of alcoholic beverages aboard federally licensed aircraft. In particular, the FARs provide that:

> (a) No person may drink any alcoholic beverage aboard an aircraft unless the certificate holder operating the aircraft has served that beverage to him.
>
> (b) No certificate holder may serve any alcoholic beverage to any person aboard any of its aircraft who—(1) Appears to be intoxicated; (2) Is escorting a person or being escorted in accordance with 49 CFR 1544.221; or (3) Has a deadly or dangerous weapon accessible to him while aboard the aircraft in accordance with 49 CFR 1544.219, 1544.221, or 1544.223.
>
> (c) No certificate holder may allow any person to board any of its aircraft if that person appears to be intoxicated.
>
> (d) Each certificate holder shall, within five days after the

> incident, report to the Administrator the refusal of any person to comply with paragraph (a) of this section, or of any disturbance caused by a person who appears to be intoxicated aboard any of its aircraft.

14 C.F.R. § 121.575.

16. Given the broad scope of preemption under the 1958 Act and the ADA, as well as the FAA's comprehensive regulatory authority in this field, the DOT has expressly interpreted the ADA and the FAA's implementing FARs to preempt any State law or regulatory action relating to "in-flight amenities," 14 C.F.R. § 399.110 (2002), including regulations relating to "charges for headsets, excess baggage, and alcoholic beverages." Preemption in Air Transportation, 68 Fed Reg. 43882 (July 24, 2003).

17. The FARs are enforced by the Administrator of the FAA. The Administrator has broad investigative and enforcement powers, including the power to hold evidentiary hearings, impose civil penalties of up to $50,000 per violation, and seize aircraft involved in regulatory violations. *See* 49 U.S.C. § 46101, *et seq.*; 14 C.F.R. Part 13.

18. Because the 1958 Act and the ADA establish exclusive federal domain of federal airspace, any state laws which would seek to regulate air carriers' activities within that space are preempted, both expressly and impliedly, because such regulations create a conflict with federal exclusive authority and stand as an obstacle to the full achievement of the federal purposes in exercising such exclusive authority.

B. The New Mexico Liquor Control Act

19. New Mexico regulates the sale, service and public consumption of alcoholic beverages within its borders through a statutory and regulatory scheme known generally as the Liquor Control Act. *See* N.M. Stat. §§ 60-3A-1, *et seq.*

20. The Liquor Control Act is enforced by a number of different State officials. The licensing provisions of the Liquor Control Act fall under the authority of the New Mexico

Regulation and Licensing Department (the "RLD") and its Alcohol and Gaming Division (the "AGD"). *Id.* § 60-3A-7. The RLD is headed by a Superintendent, currently Defendant Lopez, and the head of the AGD is a Director, currently Defendant Tomada. The non-regulatory aspects of the Liquor Control Act, including investigations and enforcement activities, are administered by New Mexico's Department of Public Safety. *Id.* § 60-3A-6.

21. The Liquor Control Act requires any retailer, wholesaler, or distributor of alcoholic beverages within the State, as well as any restaurant or club within the State that wishes to serve alcoholic beverages, to obtain a license. *Id.* §§ 60-6A-1 to 60-6A-5. The Act also purports to require "[e]very person selling alcoholic beverages to travelers on trains or airplanes within the state [to] secure a public service license …." *Id.* § 60-6A-9(A). Once an air carrier obtains such a license, the license must be "posted … on the premises at each airport where alcoholic beverages are stored and issued to airplanes." *Id.* § 60-6A-9(B).

22. Although the Liquor Control Act sets forth lengthy procedures for obtaining a license, Defendants have never previously asserted that the Act requires federally licensed interstate airlines to obtain full-fledged licenses under §§ 60-6A-1 to 60-6A-5 for their on-board alcoholic beverage service. Instead, at all times prior to the present controversy, Defendants and their predecessors permitted interstate airline carriers operating flights to or from airports located in New Mexico to avoid the operation of the State's full licensing requirement by submitting a single-page application. This abbreviated application does not entail anything resembling the detailed submissions required of other applicants.

23. The New Mexico Liquor Control Act's full-fledged licensing requirements obviously were never intended to apply to airline alcohol beverage service. In order to obtain a license under the Liquor Control Act, for example, applicants generally must submit, *inter alia*, "a description, including floor plans, … that shows the proposed licensed premises for which the license application is submitted." *Id.* §§ 60-6B-2(A)(1), (2), (4). Applicants also must "obtain

approval for the issuance from the governing body of the local option district in which the proposed licensed premises are to be located …." *Id.* § 60-6B-2(A)(8).

24. The Liquor Control Act also imposes requirements relating to the training of employees engaged in the sale of alcoholic beverages. To that end, the statute prohibits any person from being "employed as a server on a licensed premises unless that person obtains" training under N.M. Stat. § 60-6E-1, *et seq.*, and requires that "[e]very licensee shall maintain on the licensed premises copies of the server permits of … each server then employed by the licensee …." *Id.* § 60-6E-6(A). The Director of the AGD must pre-approve any training program, and approved programs must cover at least six mandated subjects, including "state laws concerning liquor licensure." *Id.* § 60-6E-5. Among other things, Defendants currently mandate that all alcohol server training programs use a customized, New Mexico-specific set of so-called "NewMAST Training Materials," and employ specific trainers pre-selected by AGD.

25. Upon submission of the application package and the completion of a background check, the ALD may issue a temporary license for 90 days. *Id.* § 60-6B-2(C). The Director of the ALD may extend the temporary license for an additional ninety days if more time is needed to evaluate the application. *Id.*

26. No application may be approved until at least two public hearings are held—one by the RLD within 30 days of receiving the application, *id.* § 60-6B-2(F), and one by the "appropriate governing body" of the location for which the license is sought, *id.* § 60-6B-4(C). In addition, the RLD may not issue the license until notice of the application is "posted conspicuously … on the outside of the front wall or front entrance of the immediate premises for which the license is sought or … at the front entrance of the immediate premises for which the license is sought …." *Id.* § 60-6B-2(M)-(N).

FACTUAL BACKGROUND

A. US Airways Operations To and From New Mexico

27. US Airways has been continuously operating flights to and from the Albuquerque International Sunport Airport ("ABQ") in New Mexico, since 1983, and US Airways' predecessor airlines have served ABQ at various times even before 1983. Today, US Airways operates an average of approximately ten daily flights which arrive in or depart from ABQ. US Airways operates no intra-state New Mexico flights; all of its New Mexico flights depart from, or arrive at, a destination outside the State of New Mexico. Until the events giving rise to this action, US Airways typically offered alcoholic beverages to passengers aboard flights originating at the Albuquerque International Sunport ("departures") or destined to arrive at the Albuquerque International Sunport ("arrivals"). US Airways does not purchase or store alcoholic beverages in New Mexico, or sell or distribute alcoholic beverages in New Mexico other than on-board its aircraft.

28. With respect to departures, the overwhelming majority of US Airways' beverage service, including its alcoholic beverage service, occurs in the air, enroute to the aircraft's eventual destination. On most flights, departing First Class passengers are offered beverages, including alcoholic beverages, during the brief interval between the time they board and take-off; in those cases, US Airways would provide First Class passengers with such beverages on a complimentary basis. On rare occasions, US Airways may have also offered alcoholic beverages to other passengers before take-off, as when severe inclement weather or other operational delays resulted in passengers being required to remain on the aircraft for extended periods prior to take-off.

29. With respect to arrivals, and perhaps without exception, US Airways' beverage service, including its alcoholic beverage service, was limited to on-board service either in the air enroute or, occasionally, on the ground in the departure city. As of the filing of this complaint

US Airways is not aware of any alcoholic beverage service having been offered after a landing at ABQ.

30. United Airlines, Delta Air Lines, Continental Airlines and American Airlines, which compete with US Airways for New Mexico passenger traffic, provide First Class service that similarly includes complimentary beverage service, including alcoholic beverage service, to its First Class passengers. In addition, all of US Airways' major competitors that serve New Mexico offer alcoholic beverages for sale in their coach cabins.

B. The Papst Incident and Aftermath

31. The events leading to New Mexico's unprecedented effort to apply the Liquor Control Act against US Airways began on the night of November 11, 2006, following a tragic accident involving a US Airways passenger named Dana Papst. Earlier that day, Mr. Papst had flown from Phoenix, Arizona to Albuquerque on US Airways Flight 206.

32. According to reports, while airborne, Mr. Papst purchased and consumed two "mini-bottles" of liquor. After landing in Albuquerque, Mr. Papst spent approximately 80 minutes at ABQ, perhaps consuming alcohol provided by persons or entities other than US Airways. He then got into his car and began driving home. Approximately 20 miles north of the airport on Interstate 25, Mr. Papst stopped at a convenience store in Bernalillo and purchased a six-pack of beer. Over the course of the next 50 miles, Mr. Papst consumed at least three of those beers. Finally, some three hours after the conclusion of his flight from Phoenix to New Mexico, Mr. Papst caused an accident while driving the wrong way on I-25. Six people, including Mr. Papst, died in the crash.

33. The FAA responded by conducting an investigation of the Papst incident, including an examination of whether Mr. Papst had been intoxicated at the time he was served alcohol on Flight 206 and whether US Airways had violated federal regulations by serving him. On December 28, 2006, the FAA concluded that US Airways had not violated 14 C.F.R.

§ 121.575(b)(1) by serving Mr. Papst. The FAA accordingly declined to take any action against US Airways or the individual flight attendants who had served Mr. Papst, while working on Flight 206. *See* 12/28/06 Letter from R. Van Keuren to T. Lulkovich (attached as Exhibit 1).

34. On January 29, 2007, Defendant Tomada and the AGD served US Airways with a citation (the "First Citation") asserting that US Airways had served alcohol to an intoxicated person (Dana Papst), and a Cease-and-Desist Order purporting to direct US Airways to "immediately refrain from selling, serving and otherwise dispensing, storing or possessing alcoholic beverages of any kind in the State of New Mexico until it fully complies with all provisions" of the Liquor Control Act, including "securing a public service license…." *See* First Citation (attached as Exhibit 2).

35. The following day, Defendant Lopez announced that RLD was "interpreting [the Order] to apply to all US Airways flights scheduled to arrive in or depart from New Mexico." He further asserted that US Airways "should not be selling alcohol while in New Mexico airspace." *See* Holmes, "N.M. Closes Bar on US Airways Flights," AP Online (Jan. 30, 2007) (attached as Exhibit 3).

36. As a direct and unavoidable consequence of the Order, US Airways was effectively forced to stop serving alcoholic beverages on any flight departing from or arriving into the State of New Mexico; if it continued such service, it would have been placing itself and its flight attendants in unreasonable legal jeopardy notwithstanding that New Mexico lacks authority to issue the Order. That meant US Airways could not serve alcohol to passengers aboard flights passing through the exclusive federal sovereignty of United States airspace on the way to or from other States.

37. On February 2, 2007, US Airways informed Defendant Lopez of its position that it is "not … required to apply for or hold a state liquor license of any kind because the New Mexico Liquor Control Act is preempted by the Airline Deregulation Act of 1978." *See*

2/2/2007 Letter from M. Minerva to E. Lopez, Jr. (attached as Exhibit 4). Without waiving that argument or its rights, US Airways nevertheless submitted an application to obtain a public service license and a certification advising Defendants that it had suspended all sales, service, and dispensing of alcoholic beverages aboard its flights to or from New Mexico. *See* US Airways Initial Application (attached as Exhibit 5).

38. In both form and content, the Initial Application was identical to those historically submitted by other airlines to obtain the pubic service license. Upon information and belief, not all interstate air and rail carriers held a New Mexico license; but those that did held only a New Mexico public service license obtained by submission of the same one-page form submitted by US Airways.

39. Defendants nonetheless informed US Airways that it would not grant the public service license based on the one-page application. Defendants instead informed US Airways that it should submit additional documents, consistent with N.M. Stat. § 60-6B-2C, so that it could obtain a temporary 90-day license while its permanent application was pending. *See* 3/2/07 Letter from M. Campbell to B. Schwartz (attached as Exhibit 6). On March 2, 2007, "with full reservation of rights [and] in a good faith effort to resolve the licensure issue promptly," US Airways submitted the additional materials necessary to obtain the temporary license that would allow it to resume serving alcohol on its flights to and from New Mexico. *Id.*

40. As a condition precedent to granting US Airways a temporary license, Defendant Lopez directed US Airways to review the NewMAST materials and send him US Airways' FAA-approved training materials for flight attendants. In a March 7, 2007 letter, US Airways informed Defendant Lopez that it was "committed to *examine* whether material elements [of] the Department's 'dispensers' training materials can be incorporated into the Company's FAA-supervised training requirements without undue burden or interference." *See* 3/7/07 Letter from M. Campbell to E. Lopez, Jr. (attached as Exhibit 7) (emphasis added).

41. On March 14, 2007, Defendants issued US Airways a Temporary Public Service License, No. 7721, with a June 14, 2007 expiration date. *See* Temporary License No. 7721 (attached as Exhibit 8) (the "Temporary License"). US Airways immediately resumed service of alcoholic beverages on its flights arriving in or departing from New Mexico.

42. On May 22, 2007, US Airways was served with a Citation (the "Second Citation") alleging that it had served alcohol to an intoxicated person who later had been arrested for driving under the influence of alcohol. *See* Second Citation (attached as Exhibit 9).

43. The same day, the AGD held a hearing to determine whether US Airways had submitted a complete application and therefore was entitled to preliminary approval for a permanent license. The hearing officer, Ms. Jackie Gallegos, informed US Airways that the AGD had changed its rules, and would no longer be accepting the one-page form for an airline public service license. Ms. Gallegos explained that she had "been directed by the superintendent's office to start issuing and reviewing licenses for public service in the same manner that we do for all liquor licenses…." *See* 5/22/2007 Hearing Transcript (attached as Exhibit 10), at 1. Thus, US Airways would be required to comply with the requirements set forth in N.M. Stat. § 60-6B-2, including the server training procedures specified in N.M. Stat. §60-6-1 *et seq.*, and would need to submit additional documents in order to obtain approval. *Id.* at 1-11. That same day, Ms. Gallegos sent US Airways a letter detailing the documents that needed to be submitted. *See* 5/22/07 Letter from J. Gallegos to M. Campbell (attached as Exhibit 11).

44. On June 11, 2007, a full hearing was held on US Airways' application before Defendants Lopez and Tomada and Ms. Gallegos. At the hearing, US Airways tendered into the record all documents Mr. Gallegos had requested at the May 22 hearing. The hearing panel nonetheless informed US Airways that it would be required to submit additional documents that had not previously been requested. *See* 6/11/07 Hearing Transcript (attached as Exhibit 12), at 4-6.

45. Defendants then inquired whether US Airways had taken steps to implement the NewMAST materials into its training program. Counsel for US Airways responded that US Airways had fully complied with its prior commitment to consider doing so, and had in fact gone further by actually incorporating portions of the NewMAST material into its own company materials. *Id*. at 11-13. Defendant Lopez then suggested that US Airways adopt special training requirements for its employees servicing New Mexico routes: "[G]iven what the State has gone through, it seems to me it might have been a good idea to give those US Airways employees in New Mexico an indication of what we feel they should be doing when they are serving alcohol to passengers in the State." *Id*. at 15.

46. Counsel for US Airways responded that Defendant Lopez's proposal for New Mexico-specific training could not be implemented because there were no employees either based in New Mexico or dedicated to flights that serve New Mexico:

> [N]one of our employees [that] serve alcohol, report to work in New Mexico. They report, they work in Phoenix or Las Vegas or they can work in other cities around the country. A flight attendant may wake up one day thinking that he or she is going to fly from Phoenix to Seattle to Phoenix to El Paso and back to Phoenix, and may end up that day flying to Albuquerque. A flight attendant may wake up one morning thinking he or she is not going to work at all and may end up flying to Albuquerque. We do not have flight attendants who are dedicated to flying certain markets. It's a combination of a seniority bid and operational necessity system that produces a work schedule for a flight attendant. The flight attendants are the employees who serve alcohol onboard the flights and none of them are based in the State of New Mexico.

Id. at 16.

47. Defendant Lopez responded that he "would encourage [US Airways] to go the extra mile on your service in New Mexico as an interim mechanism while you develop your final training for I guess this coming September." *Id*.

48. Counsel for US Airways sought clarification as to what US Airways had to do in

order to secure renewal of its temporary license and approval of its the permanent license. Defendants did not respond. *Id*. at 16-17.

49. Faced with the looming expiration of its temporary license, on June 12, 2007, US Airways offered to make the NewMAST materials available to all its flight attendants.

50. On June 13, 2007, US Airways provided Defendants with the additional document requested at the June 11 hearing, *see* 6/13/07 Letter from M. Campbell to J. Gallegos (attached as Exhibit 13), and a letter memorializing its offer from the day prior to distribute the NewMAST materials. Later that day, the AGD's office delivered to Counsel for US Airways a decision denying US Airways' request for a permanent license.

51. The Decision (attached as Exhibit 14) identified five alleged deficiencies in US Airways' application. Decision at 1-2. Four of these deficiencies had been cured by US Airways' June 13 submission; the fifth indicated that US Airways would be required to obtain a disposition of the Second Citation. *Id*. at 1. The Decision also denied US Airways' alternate request to extend its temporary license for another 90-day period, on grounds that Plaintiff continued to utilize its own FAA-approved training programs for flight attendants and had not implemented the state's NewMAST Training Program. *Id*. at 2-3.

52. US Airways filed a Request for Reconsideration, *see* 6/13/07 Letter from M. Minerva to G. Tomada (attached as Exhibit 15), which was immediately denied, *see* 6/15/07 Letter from E. Lopez to M. Campbell (attached as Exhibit 16).

53. On June 20, 2007, US Airways sent a letter to Defendant Lopez inquiring whether the parties could resolve their impasse without resort to litigation:

> We are uncertain, given the absence of any identifiable complaint you have with our current training materials, coupled with our voluntary disbursement of the NewMAST training materials, what else the Department expects of the Company with respect to securing a temporary Public Service License. And we are perplexed, accordingly, by the statement in your June 15 letter that

> the Department is 'carefully reviewing developments.' Moreover, we do not understand why the Department believes that it, presumably along with all 49 other states, can independently dictate the content of an airline's flight attendant training program, which according to federal law is subject to approval by the Federal Aviation Administration. *See* 14 C.F.R. § 121.401(a)(1) (all crewmember training must be approved by the FAA); and 14 C.F.R. § 121.421 (requirements for flight attendant training). To the extent the Department believes it has this authority, we strenuously disagree. Despite our legal position on this issue, we have been willing to address the Department's concerns. It appears our efforts have been to no avail, but for reasons that have not been explained to us.

See 6/20/07 Letter from M. Campbell to G. Tomada (attached as Exhibit 17).

54. Defendants did not respond substantively to the June 20 letter. Instead, a state prosecutor sent a three-paragraph letter in which he claimed that US Airways had misinterpreted the procedures under the Liquor Control Act. *See* 6/26/07 Letter from B. Schwartz to M. Campbell (attached as Exhibit 18).

55. On August 30, 2007, Defendants proposed an "informal[]" resolution of the Second Citation, giving US Airways the option of accepting a $1000.00 fine and a one-day suspension of liquor sales on a Saturday, or electing to request a formal hearing. *See* 8/30/07 Letter from D. Lopez to America West Airlines (attached as Exhibit 19).

56. On September 19, 2007, US Airways responded, reaffirming that it had not served alcohol on its New Mexico flights since the expiration of its temporary license, and stating that it had communicated with Defendants to bring about an "amicable resolution of this controversy." *See* 9/19/07 Letter from M. Campbell to D. Lopez (attached as Exhibit 20).

57. On October 19, 2007, US Airways met with Defendants in a good-faith effort to resolve the controversy without resulting to litigation. Defendants, however, were not willing either to negotiate with US Airways or to provide US Airways with any procedure by which it could challenge Defendants' authority.

58. There was no further communication between the parties until November 15, 2007, when Defendants issued an Order that "disapproved" US Airways' application for a public service license. *See* 11/15/07 Order (attached as Exhibit 21). In support of this Order, Defendants stated that "US Airways sold, served, or otherwise dispensed alcoholic beverages to passenger Dana Papst, *in New Mexico*." *Id.* (emphasis added). Defendants also purported to base the disapproval on "affidavits from two Department employees that on November 6, 2007, while on board US Airways flight 196 … they observed flight attendants sell a visibly intoxicated male passenger two miniature bottles of alcohol…." *Id.* The flight in question, though, was from Phoenix, Arizona, to San Diego, California, *id.*, and at no point even *entered* New Mexico.

COUNT ONE

For Declaratory and Injunctive Relief Under The Supremacy Clause of The United States Constitution: The Federal Aviation Act of 1958, the Airline Deregulation Act and Associated Federal FARs

59. US Airways repeats and re-alleges Paragraphs 1 through 57 of this Complaint as though fully set forth herein.

60. As set forth above, the airline industry is comprehensively governed by federal statute and regulation. Virtually all matters related to airline training, safety and other procedures—including but not limited to crewmember requirements, operating manuals, training programs and materials, on-board procedures, and in-flight protocols, including on-board procedures and in-flight protocols related to the provision, service, and dispensing of alcoholic beverages—are subject to federal law, federal oversight, and federal enforcement.

61. The federal government's comprehensive oversight in this field has resulted in the establishment of uniform national regulations governing the operations of interstate air carriers like US Airways, and thereby permits US Airways to maintain consistent, federally approved

standards for staff training and food and beverage service.

62. In order to maintain national uniformity in this field, the Federal Aviation Act of 1958 and the ADA provide that "[t]he United States Government has exclusive sovereignty of airspace of the United States," 49 U.S.C. App. § 1508(a) (1976); 49 U.S.C. § 40103.

63. In order to maintain national uniformity, the ADA expressly prohibits the States, including the State of New Mexico, from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier…." 49 U.S.C. § 41713(b)(1).

64. The DOT has interpreted FAA regulations to expressly preempt any State law or regulatory action relating to "in-flight amenities," 4 C.F.R. § 399.110 (2002), including regulations relating to "charges for headsets, excess baggage, and alcoholic beverages." Preemption in Air Transportation, 68 Fed Reg. 43882 (July 24, 2003).

65. As applied by Defendants in this case, New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq*., nonetheless purports to require US Airways to acquire and maintain a State-issued license in order 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, including flights originating in, or that are scheduled to arrive at airports located in, other States, and flights that are in transit through the exclusive federal sovereignty of airspace of the United States.

66. As applied by Defendants in this case, New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq*., also purports to require US Airways to adopt training procedures and employ training manuals that are not required by federal law and have not been reviewed and approved by the federal government as a condition precedent to obtaining 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, including flights originating in, or that are

scheduled to arrive at airports located in, other States, and flights that are in transit through the exclusive federal sovereignty of airspace of the United States.

67. As applied by Defendants in this case, New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq.*, also purports to empower the State of New Mexico to issue citations and enforce sanctions against US Airways and its flight attendants for federally authorized conduct aboard a federally licensed aircraft that is in transit to or from another state, within the exclusive sovereignty of United States airspace, or both.

68. With these actions, the State of New Mexico has enacted and Defendants have attempted to enforce State laws that are "related to" a "service of an air carrier." As such, Defendants actions are expressly preempted by federal law.

69. Moreover, because Defendants' actions intrude upon a field of regulation exclusively occupied by the federal government, conflict with federal law (both the 1958 Act and the ADA) and regulation, and stand as an obstacle to achieving the full objectives and purposes of Congress and the DOT in establishing a nationally uniform program for the regulation of aviation safety and service provided by air carriers, including comprehensive federal regulation of virtually all matters related to airline training, safety and other procedures, Defendants' actions are also impliedly preempted and preempted by federal government's occupation of this regulatory field.

70. The United States Constitution makes federal law and regulations "the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. US Airways has legally protected interests under the Supremacy Clause, the Federal Aviation Act of 1958, the Airline Deregulation Act, and other federal laws, including 42 U.S.C. § 1983, in the full enforcement of federal law against Defendants' actions in this case.

71. Defendants' actions have injured, are injuring, and, absent relief from this Court,

will continue to injure US Airways and its customers.

72. To redress Defendants' violations of federal law and interference with US Airways' rights, and pursuant to 28 U.S.C. §§ 1331, 1343, 2201, the Supremacy Clause of the United States Constitution, and other provisions of law, including 42 U.S.C. §§ 1983 and 1988, US Airways thus requests a declaration that Defendants' attempts to enforce New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq.*, are preempted, invalid, and unlawful.

73. To restrain Defendants' continued efforts to violate federal law and interfere with US Airways' rights, and under the authority of *Ex Parte Young*, 209 U.S. 123 (1908), and other applicable doctrines and provisions of federal law, including 42 U.S.C. §§ 1983 and 1988, US Airways further requests permanent injunctive relief restraining Defendants from continuing to attempt to enforce New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq.*, against US Airways.

COUNT TWO

For Declaratory and Injunctive Relief Under The Supremacy Clause of The United States Constitution: Twenty-First Amendment

74. US Airways repeats and re-alleges Paragraphs 1 through 73 of this Complaint as though fully set forth herein.

75. The Twenty-First Amendment strictly precludes States, including the State of New Mexico, from regulating alcoholic beverages except where the regulation pertains to "[t]he transportation or importation" of such beverages into a State "for delivery or use therein." U.S. Const. amend. XXI.

76. States therefore lack authority to regulate the transportation of alcoholic beverages through the State unless those beverages enter the internal commerce of the State. Similarly, States are precluded from regulating the delivery or use of alcohol in areas of federal jurisdiction, even if that federal enclave otherwise is located within the State's territorial borders.

See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 334, 331-35 (1964); *Carter v. Virginia*, 321 U.S. 131, 136-38 (1944); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938).

77. Alcoholic beverages carried aboard US Airways' airplanes for onboard service to US Airways passengers on flights originating from or arriving at an airport located within the State of New Mexico are not transported or imported into the State of New Mexico for "delivery or use therein" within the meaning of the Twenty-First Amendment. Instead, those beverages are intended for use in the course of interstate air transportation that has or will occur within the exclusive federal jurisdiction of United States airspace.

78. Consistent with the limitations of the Twenty-First Amendment, the Constitution generally prohibits any state from attempting to impose or enforce regulations outside of its jurisdiction. Alcoholic beverages that are carried and served aboard US Airways flights do not enter the State of New Mexico's internal stream of commerce and are consumed either in transit to another sovereign state, or within the exclusive sovereignty of United States airspace, or both.

79. As a result, States, including the State of New Mexico, lack any authority to regulate the carriage, consumption, service, dispensing, or delivery of alcoholic beverages, or the manner thereof, aboard a federally licensed airplane that is in transit to or from another sovereign state, within the exclusive sovereignty of United States airspace, or both.

80. As applied by Defendants, however, New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq*., purports to require US Airways to acquire and maintain a license in order 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, including flights that are in transit to or from another state, or within the exclusive sovereignty of United States airspace, or both.

81. As applied by Defendants in this case, New Mexico's Liquor Control Act, N.M.

Stat. §§ 60-3A-1, *et seq*., also purports to require US Airways to adopt training procedures and employ training manuals relating to the carriage, consumption, service, dispensing or delivery of alcoholic beverages, or the manner thereof, aboard a federally licensed airplane that is in transit to or from another state, within the exclusive sovereignty of United States airspace, or both.

82. As applied by Defendants in this case, New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq*., also purports to empower the State of New Mexico to issue citations and enforce sanctions against US Airways based on its carriage, consumption, service, dispensing, or delivery of alcoholic beverages, or the manner thereof, aboard a federally licensed airplane within the exclusive federal sovereignty of United States airspace.

83. With these actions, the State of New Mexico has enacted and Defendants have attempted to enforce State laws that attempt to regulate alcoholic beverages that are not being transported or imported into the State of New Mexico "for use therein."

84. The United States Constitution makes federal law, including the Twenty-First Amendment, "the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. US Airways has legally protected interests under the Supremacy Clause, the Twenty-First Amendment, and other federal laws, including 42 U.S.C. § 1983, in the full enforcement of federal law against Defendants' actions in this case.

85. Defendants' actions have injured, are injuring, and, absent relief from this Court, will continue to injure US Airways and its customers.

86. To redress Defendants' violations of federal law and interference with US Airways' rights, and pursuant to 28 U.S.C. §§ 1331, 1343, 2201, the Supremacy Clause of the United States Constitution, the Twenty-First Amendment, and other provisions of law, including 42 U.S.C. §§ 1983 and 1988, US Airways is entitled to and hereby requests a declaration that Defendants' attempts to enforce New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et*

seq., are invalid and unlawful.

87. To restrain Defendants' continued efforts to violate federal law and interfere with US Airways' rights, and under the authority of *Ex Parte Young*, 209 U.S. 123 (1908), and all other applicable sources of federal law, including 42 U.S.C. §§ 1983 and 1988, US Airways is entitled to, and hereby requests, permanent injunctive relief restraining Defendants from continuing to attempt to enforce New Mexico's Liquor Control Act, N.M. Stat. §§ 60-3A-1, *et seq*., against US Airways.

PRAYER FOR RELIEF

WHEREFORE, US Airways seeks the following relief:

1. A declaratory judgment pursuant to 22 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure that the Liquor Control Act, N.M. Stat. § 60-6A-1, *et seq.*, as applied by Defendants to US Airways, violates federal law in the manner alleged above;

2. A permanent injunction, pursuant to *Ex Parte Young*, Rule 65 of the Federal Rules of Civil Procedure, and all other applicable sources of law, enjoining Defendants from applying or enforcing, or attempting to apply or enforce, the Liquor Control Act to US Airways;

3. An award of reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and other provisions of federal law;

4. Such other relief under federal law that may be considered appropriate under the circumstances, including other fees and costs of this action to the extent allowed by federal law.

Dated: December 7, 2007

Respectfully Submitted,

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