

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA**

AHMED SHQEIRAT, MOHAMED	)	
IBRAHIM, DIDMAR FAJA, OMAR	)	
SHAHIN, MAHMOUD SULAIMAN, and	)	
MARWAN SADEDDIN,	)	Civil Action No.: 0:07-CV-01513
	)	(ADM) (AJB)
Plaintiffs,	)	
	)	
v.	)	
	)	
US AIRWAYS GROUP, INC.,	)	
US AIRWAYS, INC., JOHN DOES, and	)	
METROPOLITAN AIRPORTS	)	
COMMISSION,	)	
	)	
Defendants.	)	

**DEFENDANTS US AIRWAYS GROUP, INC. AND US AIRWAYS, INC.’S  
MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS US AIRWAYS  
GROUP, INC. AND US AIRWAYS, INC.’S MOTION FOR  
SUMMARY JUDGMENT**

COME NOW, Defendants US Airways Group, Inc. and US Airways, Inc.<sup>1</sup>  
(hereinafter referred to as “US Airways”), by counsel, and in accordance with Local Rule  
7.1(b), respectfully submit this Memorandum of Law in Support of Defendants  
US Airways Group, Inc. and US Airways, Inc.’s Motion for Summary Judgment, and  
state as follows:

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<sup>1</sup> It should be noted that Plaintiffs have incorrectly named US Airways, Inc. as a defendant in this matter. The flight upon which Plaintiffs were booked to travel on November 20, 2006 was operated by America West Airlines, not US Airways, Inc. However, US Airways Group, Inc. is the parent corporation of both US Airways, Inc. and America West. Thus, for ease of reference, and in order to avoid confusion, these various entities will be referenced as “US Airways.”

## **I. STATEMENT OF CASE**

This action arises in relation to US Airways' denial of transportation to Plaintiffs Ahmed Shqeirat, Mohamed Ibrahim, Didmar Faja, Omar Shahin, Mahmoud Sulaiman, and Marwan Sadeddin in November 2006 due to security concerns. Plaintiffs commenced this action by filing a Verified Complaint in this Court on March 12, 2007. Plaintiffs filed a First Amended Complaint on March 23, 2007 seeking declaratory and injunctive relief, and compensatory and punitive damages. In addition to US Airways, the First Amended Complaint also lists the Metropolitan Airports Commission and unidentified John Does as defendants.

The First Amended Complaint asserts fifteen counts against US Airways, including claims for false arrest, negligent and intentional infliction of emotional distress, defamation, failure to train, conspiracy to discriminate, negligence, and violation of 42 U.S.C. § 1981, 42 U.S.C. § 2000d, 42 U.S.C. § 1983, 49 U.S.C. § 41705, Minn. Stat. § 363A.11 subd. 1, Minn. Stat. § 363A.17, and the Constitution of the State of Minnesota.

For the reasons set forth below, US Airways respectfully requests that this Court grant its motion, and dismiss Plaintiffs' First Amended Complaint with prejudice.

## **II. STATEMENT OF UNCONTESTED FACTS**

### **A. Relevant Policies and Procedures**

1. US Airways InFlight Operations Manual describes Flight Attendant procedures for balancing security concerns with non-discrimination. This document requires flight attendants to report any unusual or strange passenger behavior to the

captain immediately. The document also clearly advises that US Airways will not refuse transportation to any customer except those whose conduct or condition threatens the safety of other passengers/crewmembers. Flight attendants do not have authority to deny boarding to any passenger. Lastly, the document advises flight attendants to use the “But/For” test to determine the justification for their actions when dealing with potential security concerns posed by passengers. Pursuant to this procedure, a flight attendant must ask himself/herself “...but for this person’s perceived race, ethnic heritage or religious orientation, would I have subjected this individual to additional safety or security scrutiny?” If the answer to this question is no, then the security concerns are not justifiable. (US Airways InFlight Operations Manual, §§ 8.6, 8.7, hereinafter referred to as Exhibit 1).

**B. Purchase of US Airways Tickets**

1. On October 29, 2006, Plaintiff Shahin purchased five tickets for round trip air travel on US Airways from Phoenix International Airport (“PHX”) in Phoenix, Arizona to Minnesota-St. Paul International Airport (“MSP”) in Minneapolis, Minnesota. The passengers for whom the five tickets were purchased were Plaintiff Omar Shahin, Plaintiff Mahmoud Sulaiman, Plaintiff Didmar Faja, Plaintiff Marwan Sadeddin, and Plaintiff Ahmed Shqeirat. (Plaintiff Shahin’s Passenger Name Record (“PNR”), hereinafter referred to as Exhibit 2; Plaintiff Sulaiman’s PNR, hereinafter

referred to as Exhibit 3; Plaintiffs Faja and Sadeddin's PNR, hereinafter referred to as Exhibit 4; Plaintiff Shqeirat's PNR, hereinafter referred to as Exhibit 5).

2. Plaintiff Shahin's ticket specified air travel on US Airways Flight 353 from PHX to MSP on November 16, 2006, and return air travel on US Airways Flight 300 from MSP to PHX on November 20, 2006. (Exhibit 2).

3. Plaintiffs Sulaiman, Faja, Sadeddin, and Shqeirat's tickets specified air travel on US Airways Flight 57 from PHX to MSP on November 18, 2006, and return air travel on US Airways Flight 300 from MSP to PHX on November 20, 2006. (Exhibit 3; Exhibit 4; Exhibit 5).

4. On November 9, 2006, Plaintiff Shahin purchased one additional ticket for round trip air travel on US Airways from PHX to MSP. The passenger for whom the ticket was purchased was Plaintiff Mohamed Ibrahim. Plaintiff Ibrahim's ticket specified air travel on US Airways Flight 57 from PHX to MSP on November 18, 2006, and return air travel on US Airways Flight 300 from MSP to PHX on November 20, 2006. Plaintiff Ibrahim's origination and ultimate return city was Bakersfield, California. (Plaintiff Ibrahim's PNR, hereinafter referred to as Exhibit 6). Tickets for all six passengers were purchased for coach class travel. (Exhibit 2, Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 6).

**C. Travel From PHX to MSP**

1. Plaintiff Shahin was automatically upgraded to First Class for his flight from PHX to MSP due to his status as a Gold Elite member of the US Airways Dividend

Miles (frequent flyer) Program. On November 16, 2006, Plaintiff Shahin traveled on Flight 353 from PHX to MSP. (Exhibit 2).

2. On November 18, 2006, Plaintiffs Shqeirat and Ibrahim traveled together on Flight 57 from PHX to MSP. (Exhibit 5; Exhibit 6).

3. On November 18, 2006, Plaintiff Sulaiman arrived at US Airways' PHX ticket counter at 9:37 AM Mountain Standard Time ("MST"). Plaintiff Sulaiman arrived too late to meet the minimum cut-off time for Flight 57, which was scheduled to depart at 9:50 AM MST. US Airways offered him a later flight at no charge. Plaintiff Sulaiman accepted this offer, and was rebooked on Flight 351 from PHX to MSP. (Exhibit 3).

4. On November 18, 2006, Plaintiffs Faja and Sadeddin arrived at US Airways PHX ticket counter at 9:39 AM MST. Plaintiffs Faja and Sadeddin arrived too late to meet the minimum cut-off time for Flight 57, which was scheduled to depart at 9:50 AM MST. US Airways offered them a later flight at no charge. Plaintiffs asked to speak to a supervisor. The supervisor explained the check-in cut-off to Plaintiffs and offered the next available flight. Plaintiffs Faja and Sadeddin eventually accepted this proposal. (Exhibit 4).

5. On November 18, 2006, Plaintiffs Faja, Sadeddin, and Sulaiman traveled together on US Airways Flight 351 from PHX to MSP. (Exhibit 3, Exhibit 4).

**D. Denial of Transportation on US Airways Flight 300**

1. On November 20, 2006, at 3:15 PM Central Standard Time (“CST”), Plaintiff Shahin checked in for Flight 300 at the US Airways ticket counter at MSP, and was assigned seat 1D. Prior to check-in, Plaintiff Shahin had automatically upgraded to First Class based on his status as a Gold Elite member of the US Airways Dividend Miles Program. (Exhibit 2).

2. On November 20, 2006, at 3:16 PM CST, Plaintiff Sulaiman checked in for Flight 300 at the US Airways ticket counter at MSP. Plaintiff Sulaiman was assigned seat 9D. (Exhibit 3).

3. On November 20, 2006, at 3:15 PM CST, Plaintiff Shqeirat checked in for Flight 300 at US Airways Kiosk #2 at MSP. Plaintiff Shqeirat did not select a seat. Plaintiff Shqeirat was assigned seat 25E. (Exhibit 5).

4. On November 20, 2006, at 3:21 PM CST, Plaintiffs Faja and Sadeddin checked in for Flight 300 at US Airways Kiosk #2 at MSP. They did not select seats. Plaintiffs Faja and Sadeddin were assigned seats 25F and 4D respectively.<sup>2</sup> (Exhibit 4).

5. On November 20, 2006, at 3:30 PM CST, Plaintiff Ibrahim checked in for Flights 300 and 2779, the latter a downline connecting flight to Bakersfield, at US Airways Kiosk #2 at MSP. He did not select a seat. Plaintiff Ibrahim was assigned seat 21D. (Exhibit 6).

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<sup>2</sup> Although Plaintiff Sadeddin was assigned seat 4D, after boarding, he switched seats with the passenger seated in 9D, and thus, was seated next to Plaintiff Sulaiman.

6. At approximately 5:10 PM CST on November 20, 2006, a passenger on Flight 300, who was sitting in seat 26D, passed a handwritten note to US Airways Flight Attendant Terri Boatner. The note stated:

6 suspicious Arabic men on plane, spaced out in their seats. All were together, saying “.....Allah.....Allah,” cursing US involvement w/ Saddam before flight - 1 in front exit row, another in first row 1st class, another in 8D, another in 22D, two in 25 E&F.

(Declaration of Flight Attendant Terri Boatner, hereinafter referred to as Exhibit 7; Handwritten Note from Passenger seated in 26D, hereinafter referred to as Exhibit 8).

7. Upon reading the passenger’s note, Flight Attendant Boatner shared the note with Flight Attendant Suzanne Messer and Flight Attendant Kevin Kelly so that they would be aware of the situation. (Exhibit 7; Declaration of Flight Attendant Suzanne Messer, hereinafter referred to as Exhibit 9; Declaration of Flight Attendant Kevin Kelly, hereinafter referred to as Exhibit 10).

8. US Airways procedures require flight attendants to “report any unusual or strange passenger behavior immediately to the captain via the interphone.” (Exhibit 1). In accordance with this policy, Flight Attendant Boatner took the note to Captain John Wood, who was located in the cockpit. (Exhibit 7; Declaration of Captain John Wood, hereinafter referred to as Exhibit 11; Declaration of First Officer Glenn Blumenstein, hereinafter referred to as Exhibit 12).

9. After the note was delivered to the cockpit, Flight Attendant Kelly reported to Captain Wood that Plaintiffs Shahin and Sadeddin had requested seatbelt extenders.<sup>3</sup> Flight Attendant Kelly had complied with the request and provided the seatbelt extenders, even though, in Kelly's opinion, only one of the Plaintiffs seemed to be roughly of a size that was appropriate for a seatbelt extender. (Exhibit 10; Exhibit 11; Exhibit 12).

10. Flight Attendant Kelly also reported to Captain Wood that Plaintiff Shahin, who was seated in First Class, had walked back to the coach section of the aircraft twice during the delay to speak with the other Plaintiffs. (Exhibit 10; Exhibit 11).

11. After the Captain received this information, he discussed his concerns with US Airways Ground Security Coordinator ("GSC") and MSP Shift Manager Rob Davis, who had arrived on the aircraft. Mr. Davis then called US Airways Phoenix-based Systems Operations Control ("SOC").<sup>1</sup> (Exhibit 11; Exhibit 12; Declaration of Rob Davis, hereinafter referred to as Exhibit 13).

12. In response to the call from Mr. Davis, the System Customer Service Manager ("SCSM") on duty at SOC, Danielle Manning, located in PHX, attempted to retrieve the Plaintiffs' PNRs from the airline's computer reservations system using the seat numbers provided in the handwritten note. When Ms. Manning retrieved the PNRs

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<sup>3</sup> A seatbelt extender is a fabric strap with a metal buckle at the end. Generally, oversized individuals use this device during air travel if they cannot comfortably fasten the standard aircraft seatbelt. This device can potentially be used as a weapon.

<sup>1</sup> The SOC is the operational "nerve center" of US Airways. Its functions relate to dispatch, aircraft routing maintenance planning and Systems Customer Service Managers.

for the passengers sitting in seats 25E and 25F, Plaintiffs Shqeirat and Faja, she learned that they had originally also been traveling with the passenger in seat 4D, Plaintiff Sadeddin. (Declaration of Danielle Manning, hereinafter referred to as Exhibit 14).

13. Because Plaintiffs Faja and Sadeddin had arrived late for their flight to Minneapolis on November 18, 2006, their PNR had been separated from Plaintiff Shqeirat's PNR when they were rebooked on a later flight. As a result, the initial screen of Plaintiffs Faja and Sadeddin's PNR for the return flight, Flight 300, seemed to show only the return leg, and not the outbound flight taken by the Plaintiffs on November 18, 2006. Thus, it appeared to Ms. Manning that these three passengers were traveling on one-way tickets. Ms. Manning advised Mr. Davis and Captain Wood of the results of her review of the Plaintiffs' PNRs. (Exhibit 4; Exhibit 11; Exhibit 13; Exhibit 14).

14. Based on discussions with and information provided by Flight 300 crewmembers, US Airways SCSM Danielle Manning, and the passenger mentioned above, Captain Wood made the decision to deny transportation on Flight 300. Specifically, the Captain's decision to deny transportation to Plaintiffs was based on consideration of the following concerns: (1) the passenger in seat 26D's note regarding Plaintiffs' anti-US comments and seating arrangement; (2) Flight Attendant Kelly's observations regarding the seatbelt extender requests from two of the Plaintiffs, when only one seemed to need one, and Plaintiff Shahin's movement through the cabin during the delay; and (3) information from the PNRs reportedly indicating that three of the

Plaintiffs were traveling on one-way tickets. (Exhibit 11, Exhibit 12, Exhibit 13, Exhibit 14).

15. After the Captain made the decision to deny transportation, station personnel at MSP contacted law enforcement to assist with the situation. In response, two officers from the Minneapolis Airport Police, and one Federal Air Marshal boarded the aircraft and spoke with the original complaining passenger seated in seat 26D. The officers subsequently informed GSC Rob Davis that they had concluded that the complaining passenger was credible. (Exhibit 13; Declaration of Penny Breedlove, hereinafter referred to as Exhibit 15; Minnesota Airport Police Report, hereinafter referred to as Exhibit 16).

16. After law enforcement officers spoke with the passenger in seat 26D, they left the aircraft briefly. Thereafter, additional law enforcement personnel arrived. From this point forward, all relevant actions were performed by law enforcement personnel, not by US Airways. (Exhibit 16).

17. After the Plaintiffs were removed from Flight 300, Mr. Davis initiated the refund process for the Plaintiffs' tickets. Additionally, since Plaintiffs were denied transportation due to security concerns, Mr. Davis, in consultation with SCSM Danielle Manning in SOC, manually included a note on the Plaintiffs' PNRs indicating that they should not be rebooked without clearance from US Airways Aviation Security. (Exhibit 13; Exhibit 14).

**E. Requests for Rebooking**

1. Although Mr. Davis had provided his contact information to law enforcement personnel, no one from any of the federal and local law enforcement agencies involved in questioning the Plaintiffs contacted Mr. Davis or any other US Airways employee at MSP to advise them that the six Plaintiffs had been cleared to travel. (Exhibit 13). Also, no law enforcement official contacted any US Airways employee at the company's offices in Phoenix, Arizona to advise that the Plaintiffs had been cleared to travel. (Declaration of Steve Fitzpatrick, US Airways Corporate Security Regional Manager for MSP, hereinafter referred to as Exhibit 17).

2. Thus, throughout the time period during which Plaintiffs attempted to rebook tickets via US Airways telephone reservations number, their PNRs continued to reflect Mr. Davis' note that they should not be rebooked without clearance from US Airways Aviation Security. US Airways corporate personnel did not determine that law enforcement had cleared the Plaintiffs to travel until the morning of November 21, 2006, at which point, rebooking was immediately offered. (Exhibit 18, Exhibit 19, Exhibit 20, Exhibit 21).

3. At approximately 10:56 PM CST on November 20, 2006, Plaintiff Shqeirat called the public US Airways telephone reservations number to request rebooking. In an attempt to rebook the Plaintiffs, Reservations Customer Service Department ("CSD") agent Jennifer Johnson, who is located in Reno, Nevada, used the PNR locator number provided by Plaintiff Shqeirat to retrieve his PNR. After she retrieved the PNR, she

noticed that his ticket had been refunded. She also saw Mr. Davis' note regarding rebooking the Plaintiffs. Thus, she informed Mr. Shqeirat that his ticket had been refunded, and that he could not be rebooked without clearance from US Airways security. (Declaration of Jennifer Johnson, hereinafter referred to as Exhibit 18).

4. Mr. Shqeirat then passed the telephone to Plaintiff Shahin, who reiterated the request for rebooking. As she had stated to Mr. Shqeirat, Ms. Johnson informed Mr. Shahin that he could not be rebooked without clearance from US Airways security. (Exhibit 18).

5. Mr. Shahin told Ms. Johnson that there was an FBI agent present with him who could verify that he had been cleared to travel by law enforcement. In response, Ms. Johnson informed Mr. Shahin that she had no means of verifying this individual's identity or information, and further, that this is an issue which law enforcement should address with US Airways security or US Airways MSP station personnel. (Exhibit 18).

6. After her conversation with Mr. Shqeirat and Mr. Shahin, Ms. Johnson contacted US Airways MSP Shift Manager Rob Davis and informed him that these individuals had requested rebooking. Mr. Davis told Ms. Johnson that he had not received any notification from law enforcement or US Airways security that these individuals had been cleared to travel. (Exhibit 13, Exhibit 18).

7. At approximately 11:59 PM CST on November 20, 2006, an individual

identifying himself as Federal Air Marshal Dale Ouse<sup>2</sup> called the public US Airways telephone reservations number and requested rebooking for the six Plaintiffs. He did not contact Rob Davis or other decision-makers at MSP, nor did he contact US Airways Corporate Security or other decision-makers at corporate headquarters in Phoenix. (Declaration of Javier Gonzalez, hereinafter referred to as Exhibit 19).

8. In response to the request, Reservations CSD agent Javier Gonzalez, who is located in Phoenix, Arizona, contacted US Airways Phoenix-based SOC to request permission for the rebooking. However, due to the late hour, the individuals who had been involved in the original evaluation and determination to deny transportation were not available. Moreover, Mr. Gonzalez was advised that SOC had not received any information indicating that these individuals had been cleared by law enforcement to travel. Thus, he was told that, since SOC did not have any means to verify Mr. Ouse's identity, rebooking could not be authorized. SOC directed Mr. Gonzalez to inform Mr. Ouse to contact US Airways Corporate Security on this issue. Mr. Gonzalez relayed this information to Mr. Ouse. (Exhibit 19).

9. At approximately 6:00 AM CST on November 21, 2006, Plaintiff Shahin called the public US Airways telephone reservations number, and again requested rebooking. (Declaration of Jeloma McDonald, hereinafter referred to as Exhibit 20).

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<sup>2</sup> Although the caller identified himself as Federal Air Marshal Dale Ouse, the police report relating to this incident indicates that Mr. Ouse is an FBI agent who interviewed Plaintiffs Sadeddin and Shahin after they were deplaned. (Exhibit 16).

10. In response to the request, US Airways Reservations agent Jeloma McDonald reviewed Plaintiff Shahin's PNR and saw Mr. Davis' note regarding rebooking the Plaintiffs. Thus, she advised Mr. Shahin that he could not be rebooked without security clearance. In response, Mr. Shahin stated that the FBI had contacted US Airways, and he had been cleared to travel. (Exhibit 20).

11. In an attempt to verify this information, Ms. McDonald contacted US Airways MSP Station Manager Penny Breedlove. Ms. Breedlove contacted US Airways SOC, and was advised by SCSM Danielle Manning that US Airways had not received any notification from law enforcement that these individuals had been cleared to travel, and thus, rebooking could not be authorized. Ms. Breedlove informed Ms. McDonald of this determination. Ms. McDonald relayed this information to Mr. Shahin. (Exhibit 14, Exhibit 15, Exhibit 20).

12. At approximately 9:50 AM CST on November 21, 2006, the six Plaintiffs, accompanied by news and media personnel, approached the US Airways ticket counter at MSP, and asked to purchase six tickets to PHX. In response, US Airways MSP Station Manager Penny Breedlove, relying on the information previously provided that US Airways had still not received notification from law enforcement that the Plaintiffs had been cleared to travel, informed the Plaintiffs that they could not be rebooked, and should make arrangements for alternative travel. (Exhibit 15).

13. At approximately 10:40 AM CST, which was 8:40 AM MST at US Airways headquarters in Phoenix, upon learning of the situation involving the Plaintiffs, a

conference call of relevant decision-makers at US Airways corporate headquarters was conducted to analyze the situation. During this conference call, US Airways corporate personnel determined for the first time that the six Plaintiffs had been cleared to travel by law enforcement. (Declaration of David Seymour, US Airways Vice President of Operations, Control and Planning, hereinafter referred to as Exhibit 21).

14. At approximately 10:50 AM CST, the US Airways Customer Relations Department attempted to rebook all six Plaintiffs. US Airways Customer Relations Director Henri Dawes called Plaintiff Shahin on his cell phone to offer rebooking. However, by this time, the Plaintiffs had already purchased tickets on Northwest Airlines for a flight scheduled to depart MSP at 11:45 AM CST. (Declaration of Henri Dawes, hereinafter referred to as Exhibit 22).

15. At approximately 12:45 PM MST, the six Plaintiffs arrived at PHX on Northwest Airlines. Ms. Dawes met the six Plaintiffs upon their arrival at PHX and apologized for the inconvenience. She then relayed US Airways' offer to pay for Plaintiffs' Northwest tickets and any hotel expenses for November 20, 2006. Plaintiff Shahin declined. Ms. Dawes also provided her direct contact information and agreed to schedule a meeting for further discussion. (Exhibit 22).

### **III. LEGAL ARGUMENT**

#### **A. SUMMARY JUDGMENT STANDARD**

Rule 56 of the Federal Rules of Civil Procedure provides that a defending party may move, at any time, for summary judgment in that party's favor "as to all or any part"

of the claims against that party. Fed. R. Civ. P. 56 (2007). Summary judgment is appropriate if the movants have shown that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. Griffin v. Pinkerton's, Inc., 173 F.3d 661, 664 (8th Cir. 1999). Summary judgment is proper if the nonmoving party has failed to make a sufficient showing on an essential element of his/her case with respect to which he/she has the burden of proof. Hammond v. Northland Counseling Ctr., Inc., 218 F.3d 886, 891 (8th Cir. 2000). A party seeking to avoid having summary judgment entered against it must set forth specific facts showing that there is a genuine material issue that requires trial. Roxas v. Presentation College, 90 F.3d 310, 315 (8th Cir. 1996).

The court's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. In reviewing the record, the court must view all facts in the light most favorable to the nonmoving party. "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." KIRT v. Fashion Bug #3253, Inc., No. C 05-4142, 2007 U.S. Dist. LEXIS 22694, at \*9-10 (N.D. Iowa March 28, 2007). Only factual disputes that might affect the outcome of the suit will preclude summary judgment. Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391, 396 (S.D.N.Y. 2004).

**B. US AIRWAYS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE IT ACTED WITHIN ITS STATUTORY DISCRETION WHEN IT REFUSED TO TRANSPORT PLAINTIFFS DUE TO SAFETY CONCERNS**

The Federal Aviation Act, 49 U.S.C. § 44902, addresses air carrier refusal to transport passengers and property. This statute provides:

(b) Permissive refusal: Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier *may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.*

49 U.S.C. § 44902(b)(2007). Courts applying this provision have held that such a refusal cannot give rise to a claim for damages under either federal or state law unless the carrier's decision was arbitrary and capricious. See Williams v. Trans World Airlines, 509 F.2d 942, 948 (2d Cir. 1975); see also Cordero v. CIA Mexicana De Aviacion, S.A., 681 F.2d 669 (9th Cir. 1982); Dasrath v. Continental Airlines, Inc., 467 F. Supp. 2d 431, 444 (D. N.J. 2006); Al-Qudhai'een v. America West Airlines, Inc., 267 F. Supp. 2d 841, 846 (S.D. Ohio 2003); Schaeffer v. Cavallero, 54 F. Supp.2d 350, 351 (S.D.N.Y. 1999); Rubin v. United Air Lines, Inc., 117 Cal. Rptr. 2d 109, 119-120 (Cal. Ct. App. 2002).

The Second Circuit Court of Appeals, while applying the former version of this statute, 49 U.S.C. App. § 1511, set forth the following test to determine the propriety of an airline's refusal to transport:

The test.....rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

Williams v. Trans World Airlines, 509 F.2d 942, 948 (2d Cir. 1975) cited in Cordero, 681 F.2d at 672; Dasrath, 467 F. Supp. 2d at 443; Al-Qudhai'een, 267 F. Supp. 2d at 846; Christel v. American Airlines, Inc., 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002).

Pursuant to this test, an airline's decision should be judged on the basis of the facts as known to the airline at the time, and without regard to hindsight. Williams, 509 F.2d at 948. Assessment of a carrier's decision must take into account all the circumstances surrounding the decision. This includes facts known at the time, the time constraints under which the decision is made, and the general security climate in which the events unfold. Section 44902 does not permit a carrier to be held liable where it is merely negligent in deciding that a passenger might be "inimical to safety." Dasrath, 467 F. Supp. 2d at 444; see also Adamsons v. American Airlines, Inc., 444 N.E.2d 21 (N.Y. 1982) ("We do not believe that Congress, in enacting the Federal Aviation Act, intended to test the airline's discretion to deny passage to certain persons by standards of negligence."). The carrier's discretion is protected "if exercised in good faith and for a rational reason." Dasrath, 467 F. Supp. 2d at 444 citing Adamsons v. American Airlines, Inc., 444 N.E.2d 21, 24 (N.Y. 1982).

Section 44902 gives airline personnel broad discretion to remove passengers for safety reasons. Dasrath, 467 F. Supp. 2d at 443 (noting that the standard for assessing an airline's decision to refuse transportation is "lenient"). Decisions applying § 44902 confirm that the statute protects any decision that is not arbitrary and capricious. See Williams v. Trans World Airlines, 509 F.2d 942 (2d 1975) (discrimination action

dismissed because Court concluded airline's decision to refuse transportation based upon FBI's assertion that plaintiff was an armed fugitive was reasonable, even though a search revealed no weapons); Sedigh v. Delta Airlines, Inc., 850 F. Supp. 197 (E.D.N.Y. 1994) (action dismissed after Court concluded Captain's decision to remove plaintiff, who appeared nervous, apparently smoked in the lavatory, and was reported as stating "kill the Jews," was reasonable, *even though it was later determined that plaintiff did not make that statement*); Zervigon v. Piedmont Aviation, Inc., 558 F. Supp. 1305 (S.D.N.Y. 1983) (discrimination action dismissed based on Court's determination that Captain's decision to remove plaintiffs after one member of group assaulted a flight attendant, and plaintiffs made statements which Captain and passengers believed indicated flight would be hijacked, was justified); Rubin v. United Air Lines, Inc., 117 Cal. Rptr. 2d 109 (Cal. Ct. App. 2002) (action dismissed after Court determined airline's removal of plaintiff, who made an unauthorized attempt to enter first class and refused to follow flight attendant's directions, was reasonable); but see Bayaa v. United Airlines, Inc., 249 F. Supp. 2d 1198, 1205 (C.D. CA 2002) (airline's duty under § 44902 does not grant it a license to discriminate on the basis of race or national origin); Alshrafi v. American Airlines, Inc., 321 F. Supp. 2d 150 (D. Mass. 2004) (a decision based on race would be arbitrary and capricious); Dasrath, 467 F. Supp. at 434 (same).

Additionally, it should be noted that, pursuant to Federal regulations, the pilot in command of an aircraft has complete control over and responsibility for the overall safety of the aircraft, its crew and passengers, without limitation. 14 C.F.R. § 121.537(d)

(2007). Moreover, an aircraft captain is entitled, without further inquiry, to rely upon a flight attendant's representations that a conflict with a passenger might distract the flight attendant from performing his/her safety-related duties. Christel, 222 F. Supp. 2d at 340. The captain does not have an obligation to leave the cockpit and investigate the truthfulness of a flight attendant's statements. See id.

Al-Qudhai'een v. America West Airlines, Inc., 267 F. Supp. 2d 841 (S.D. Ohio 2003) presents an example of a refusal to transport situation in which the airline received § 44902 immunity. The Al-Qudhai'een Court dismissed plaintiffs' action against America West, which was based on removal from a flight, because it determined that the airline was entitled to immunity under 49 U.S.C. § 44902(b). In this case, the record revealed that the Captain's decision to deny transportation was based on reports that plaintiffs had failed to follow crew member instructions, changed seats without permission, entered first class without permission, walked towards the cockpit and pulled the door handle, appeared irritated when informed that the flight would stop in Columbus, Ohio, and asked questions regarding whether the current aircraft would be the same aircraft that would proceed on to Washington, D.C. Id. at 847. Taking into account all of the circumstances known to the Captain at the time he made his decision, and the fact that he was entitled to rely on information provided by the crew despite any exaggerations or false representations, the Court held that the Captain's decision was not

arbitrary or capricious. Therefore, the Court granted America West immunity pursuant to § 44902(b), and dismissed the action.<sup>4</sup> Id.

In the present case, similar to the situation in Al'Qudhai'een, the record of uncontested facts establishes that the decision of the Captain of Flight 300 to deny transportation to Plaintiffs was based on a multitude of independent facts reported to him by crewmembers, passengers, and other US Airways personnel, and thus, was not arbitrary or capricious. Moreover, the situation arose minutes before the flight was scheduled to takeoff, and ultimately caused a delay. Considering the time constraints within which the Captain was operating, he rationally and reasonably evaluated the information provided to him, and determined that denial of transportation was necessary to ensure the safety of the flight. The Captain's decision was not based on Plaintiffs' race, religion, ancestry or national origin, nor is there any evidence to support such an assertion. [Statement of Undisputed Facts, hereinafter "SUF," D.6, D.8-D.14].

Shortly before scheduled departure, the Captain was informed of the passenger in 26D's handwritten note discussing Plaintiffs' anti-US comments and spread out seating arrangement, and Flight Attendant Kelly's observations regarding the seatbelt extender requests from two of the Plaintiffs, when only one seemed to need one, and Plaintiff Shahin's movement through the cabin during the delay. [SUF D.8-D.10]. After he received this information, the Captain discussed the situation with the US Airways

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<sup>4</sup> The Court granted summary judgment on plaintiffs' Federal claims, and declined to exercise supplemental jurisdiction over the state law claims. Plaintiffs' state law claims were dismissed without prejudice.

Ground Security Coordinator, who then contacted US Airways SOC. SOC advised the Captain that information from Plaintiffs' PNRs indicated that three of the Plaintiffs were traveling on one-way tickets. Considering all of this information, to ensure the safety of the flight, the Captain decided to deny transportation to Plaintiffs. [SUF D.11-D.14].

The fact that the information obtained from Plaintiffs' PNRs indicating that they were traveling on one-way tickets was ultimately determined to be inaccurate is not relevant when evaluating the reasonableness of the Captain's decision. The Captain's decision must be evaluated based on the information he had available to him at the time he denied transportation, and his beliefs regarding the accuracy of that information. In such situations, due to the enhanced security requirements imposed in the aftermath of the September 11, 2001 terrorist attacks, airline personnel must closely examine any irregular or unusual behavior. A failure to do so could have catastrophic ramifications.

Once the Plaintiffs were removed from Flight 300, all relevant actions thereafter were taken by law enforcement personnel, not US Airways. [SUF D.16]. US Airways refusal to immediately rebook Plaintiffs was a consequence of the removal from Flight 300, and was in no way related to their race, religion, ancestry, or national origin. Because Plaintiffs were removed from Flight 300 due to security concerns, their PNRs were modified and indicated that they could not be rebooked without clearance from US Airways Aviation Security. [SUF D.17]. Thus, each US Airways employee that subsequently attempted to rebook Plaintiffs was alerted by the notations on the PNRs. [SUF E.2].

Lastly, it should be noted that, although US Airways personnel provided law enforcement with their contact information, no law enforcement personnel contacted US Airways at MSP or US Airways corporate headquarters to inform them that Plaintiffs had been cleared to travel. This fact is highlighted by the various conversations between Plaintiffs and US Airways personnel regarding Plaintiffs' request for rebooking. When Plaintiffs first called to request rebooking, Reservations CSD agent Jennifer Johnson advised them that law enforcement should discuss this issue with US Airways security or US Airways MSP Station personnel. Subsequently, when Dale Ouse spoke with US Airways Reservations CSD agent Javier Gonzalez, he was specifically advised to contact US Airways Corporate Security on this issue.<sup>5</sup> [SUF E.5, E.8]. Notably, after US Airways corporate decision-makers determined that Plaintiffs had been cleared to travel, just prior to their meeting at 8:40 AM MST on November 21, 2006, they immediately contacted Plaintiffs in order to rebook them. However, at that point, Plaintiffs had already booked a flight on Northwest Airlines. [SUF E.13 – E.14].

The record of uncontested facts clearly establishes that security concerns were the sole basis for the Captain's decision to deny transportation, and the subsequent refusals to rebook Plaintiffs until the following day. The Captain's decision was reasonable in light of the time constraints under which he was operating, the various independent reports he received regarding Plaintiffs' behavior and travel arrangements, and the heightened

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<sup>5</sup> Mr. Ouse eventually contacted US Airways Corporate Security on November 22, 2006.

security climate within which all airlines operate since 9/11. This decision was not arbitrary or capricious, and was within the Captain's discretion to make.

In fact, based on what he knew at the time, it was the only reasonable and rational decision to be made. For this reason, US Airways respectfully requests that this Court grant it immunity pursuant to 49 U.S.C. § 44902, and dismiss Plaintiffs' First Amended Complaint with prejudice.

**C. PLAINTIFFS' STATE LAW CLAIMS ARE PREEMPTED BY THE AIRLINE DEREGULATION ACT**

Even if this Court does not grant US Airways immunity pursuant to 49 U.S.C. § 44902, Plaintiffs' state law claims should be dismissed because they are preempted by the Airline Deregulation Act ("ADA") of 1978.

Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in a statute's language or implicitly contained in its structure and purpose. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992).

In 1978, the Federal Aviation Act was amended by the ADA, which provides in part:

[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)(2007). The purpose of the ADA was to prevent states from undoing federal deregulation with regulation of their own. Morales, 504 U.S. at 379.

The Supreme Court first analyzed this express preemption provision in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992). In Morales, the Supreme Court held that the statutory words “relating to” express a broad preemptive purpose. Thus, the Court declared that state enforcement actions having a “connection with or reference to” airline rates, routes, or services are preempted under 49 U.S.C. App. 1305(a)(1).<sup>6</sup> Morales, 504 U.S. at 383-84. The Court further held that laws of general applicability, even those consistent with federal law, are preempted if they have the “forbidden significant effect” on rates, routes, or services. Id. at 386. Pursuant to this interpretation, the Court ultimately declared the general consumer protection regulations at issue in the case preempted pursuant to the ADA. Id. at 391.

The Morales Court did note that “some state actions may affect [airline services] in too tenuous, remote, or peripheral a manner” to have a preemptive effect. However, the Court did not consider the matter before it a borderline scenario, and thus expressed no views regarding where it would be appropriate to draw the line. Id. at 390-91.

The Supreme Court next addressed the ADA preemption provision in American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995). In American Airlines, Inc., the Court interpreted the “enact or enforce any law” language in the ADA preemption provision. The plaintiffs in this case asserted claims based on the Illinois Consumer Fraud Act and

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<sup>6</sup> 49 U.S.C. App. 1305(a)(1) was recodified at 49 U.S.C. 41713(b)(1) with revised language. Congress intended the revision to make no substantive changes. American Airlines, Inc. v. Wolens, 513 U.S. 219, 223 (1995) citing Pub. L. 103-272, § 1(a), 108 Stat. 745.

breach of contract in relation to the defendant airline's frequent flyer program. Initially, the Court determined that plaintiffs' claims related to air carrier "rates," such as "mileage credits for free tickets and upgrades," and "services," **such as "access to flights and class-of-service upgrades..."** Id. at 226. The Court then held that the ADA's preemption clause does not shelter airlines from suits that do not allege violation of state-imposed obligations. Thus, the Court preempted plaintiffs' Illinois Consumer Fraud Act claims, but preserved the breach of contract claim because that related to the airline's breach of its own self-imposed undertakings. Id. at 228-29. Lastly, the Court noted that, in light of the ADA's deregulatory purpose, "States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier."

The Supreme Court has not addressed the ADA preemption provision since American Airlines, Inc.; however, many courts that have considered the issue since that decision have concluded that the term "services" in § 41713(b)(1) should be interpreted broadly, and held that it includes air carrier boarding procedures and transportation services. Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1257-59 (11th Cir. 2003) (holding that the term "services" includes the physical transportation of passengers and incidents of that transportation); Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998) (holding that boarding procedures are a service rendered by airlines); Travel All Over the World, Inc. v. The Kingdom of Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996) (adopting Fifth Circuit's definition of "services," which includes boarding procedures

and transportation); Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336-37 (5th Cir. 1995) (“Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.”); but see Charas v. TWA, 160 F.2d 1259 (9th 1998) (holding that the term “services” encompasses “the prices, schedules, origins and destinations of the point-to-point transportation of passengers and cargo, or mail” but does not include the provision of in-flight beverages, the handling of baggage, and similar amenities); Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186 (3d 1998) (expressly agreeing with Ninth Circuit’s narrow interpretation of “services”). Notably, a broad interpretation of “services” is supported by the Supreme Court’s decision in American Airlines, Inc., which identified “access to flights” as an air carrier service. American Airlines, Inc., 513 U.S. at 226.

Moreover, although the Eighth Circuit Court of Appeals has not directly addressed the scope of the term “services,” it has interpreted the phrase “a price, route, or service of an air carrier” in § 41713(b)(1) broadly. In Botz v. Omni Air International, 286 F.3d 488, 494 (8th Cir. 2002), the Court noted that Congress did not choose to restrict the scope of the word list “price, route, or service” by using qualifying words or phrases that would have made the three terms more definite and focused. Thus, the Court held that the ADA preemption provision’s plain language indicates that it has a broad preemptive effect on state law claims involving air carrier prices, routes, or services. Id.

The Botz Court ultimately declared the plaintiff's claims under the Minnesota Whistleblower statute preempted. In support of this determination, the Court noted that the plaintiff's claims involved an application of state law that purports to regulate the same segment of the air carrier industry as an integrated and comprehensive provision of the ADA, the Whistleblower Protection Program ("WPP"). The Court stated that, the fact that the WPP provides a comprehensive scheme for protecting the precise sort of air safety-related conduct involved in the plaintiff's case is evidence of Congress' clear and manifest intent to preempt whistleblower claims related to air safety. Botz, 286 F.3d at 498.

Lastly, the U.S. District Court for the District of Minnesota examined the ADA preemption provision in Alasady v. Northwest Airlines Corp., No. 02-3669, 2003 U.S. Dist. LEXIS 3841, at \*1 (D. Minn. March 3, 2003), a case which involved discrimination claims arising from a refusal to transport the plaintiffs, which the airline claimed was based on safety concerns. In Alasady, the Court adopted the Fifth Circuit's broad definition of the term "services," which includes actions such as boarding procedures. However, the Court narrowly described boarding procedures as "the procedures used to move passengers from the terminal onto the plane in an orderly fashion," which it determined is an "integral part of a customer's air travel experience." Thus, the Court concluded that boarding procedures are relevant to competition in the airline industry, and therefore, a "service" within the meaning of § 41713(b)(1). Id. at \*24.

However, the Court in Alasady refused to preempt the plaintiffs' state tort claims on the grounds that Congress did not intend for the ADA preemption provision to embrace safety issues, but rather was aimed at economic regulation. Therefore, the Court held that preemption of state laws ensuring equal access to public accommodations does not further the purposes of the ADA to foster "maximum reliance on competitive market forces." Id. at \*28-32. Thus, although the Court adopted the broad definition of "services" set forth by the Fifth Circuit in Hodges, the Court's limited definition of boarding procedures and determination that § 41713(b)(1) only applies to economic regulation resulted in an extremely narrow application, which is inconsistent with precedent establishing the broad preemptive effect of this provision.

In the present matter, Plaintiffs have asserted state tort claims for false arrest, intentional and negligent infliction of emotional distress, defamation, negligence, conspiracy to discriminate, and violation of Minn. Stat. § 363A.11 subd. 1, Minn. Stat. § 363A.17, and the Constitution of Minnesota. [First Am. Compl. pp. 22-23, 24-27, 28-36]. These claims directly relate to and arise from US Airways' denial of transportation to Plaintiffs due to safety concerns, an action within the airline's discretion pursuant to 49 U.S.C. § 44902. [First Am. Compl. pp. 22-23, 24-27, 28-36; SUF D.14]. Boarding procedures, and the decision whether or not to transport an individual, directly relate to an air carrier's provision of transportation, which is arguably an air carrier "service" under a narrow or broad interpretation of the term. Moreover, this assertion is supported

by the Supreme Court's identification of "access to flights" as an air carrier service in American Airlines, Inc.

Air carrier denial of transportation is federally regulated under the Federal Aviation Act, which grants air carriers' discretion to remove passengers they determine may be "inimical to safety." Case law interpreting this provision has established standards to evaluate the actions of an airline, and determined that such refusal to transport decisions will be upheld so long as they are not "arbitrary and capricious." Permitting Plaintiffs' state law tort claims to continue would result in state regulation of US Airways' ability to deny transportation services. Subjecting air carriers such as US Airways to extensive state regulations, guidelines, and standards relating to denial of transportation decisions would defeat the deregulatory purpose of the ADA, and result in state regulation of an area in which Congress chose to grant air carriers substantial discretion pursuant § 44902. Notably, Congress retained § 44902 when it deregulated the airline industry in 1978.

As noted in the Eighth Circuit's decision in Botz, Congress did not restrict the scope of the terms "price, route, or service" in the statute. Thus, the Botz Court held that § 41713 has a "broad preemptive effect" on state law claims involving air carrier prices, routes, or services. Preemption of Plaintiffs' state law tort claims would be consistent with the Eighth Circuit's broad interpretation of the ADA provision. If Congress had intended to limit the preemptive effect of § 41713(b)(1) to economic regulation, as

suggested by the Court in Alasady, it could have included limiting language in the statute; however, significantly, it did not.

Notably, numerous courts have preempted state law tort claims arising from refusals to transport pursuant to § 41713(b)(1). See Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998) (preempted plaintiff's tort claims arising from airline boarding practices because the claims related to airline's services); O'Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir. 1989) (preempted plaintiff's state law tort claims arising from a refusal to transport based on ADA express preemption provision); Elnajjar v. Northwest Airlines, Inc., Nos. H-04-680 & H-04-681, 2005 U.S. Dist. LEXIS 36792, at \*1 (S.D. Tex. August 15, 2005) (preempted plaintiff's state tort claims for intentional infliction of emotional distress, invasion of privacy, and defamation arising from a refusal to transport because boarding procedures are an airline service); Williams v. Midwest Airlines, Inc., 321 F. Supp. 2d 993 (E.D. Wis. 2004) (preempted plaintiff's state law tort claims arising from a refusal to transport because the claims related to airline services); Huggar v. Northwest Airlines, Inc., No. 98-C-594, 1999 U.S. Dist. LEXIS 1026, at \*1 (N.D. Ill. January 26, 1999) (preempting plaintiff's state law tort claims because decision to refuse transportation directly related to airline's services); Von Anhalt v. Delta Air Lines, Inc., 735 F. Supp. 1030 (S.D. Fla. 1990) (preempted plaintiff's state law tort claims arising from a refusal to transport based on the ADA preemption provision).

Plaintiffs state law tort claims are based on US Airways' boarding procedures and decision to deny transportation, which directly relate to an air carrier's transportation

services. [First Am. Compl. pp. 22-23, 24-27, 28-36; SUF D.14]. Thus, enforcement of Plaintiffs' claims would result in state regulation of an air carrier's service, in violation of the ADA. Moreover, enforcement would result in the imposition of state standards in air carrier denial of transportation decisions, a subject matter already federally regulated pursuant 49 U.S.C. § 44902.

For these reasons, US Airways respectfully requests that this Court dismiss Plaintiff's state law tort claims based on 49 U.S.C. § 41713(b)(1) preemption.

#### **IV. CONCLUSION**

For the foregoing reasons, US Airways respectfully requests that this Court grant its Motion for Summary Judgment, and dismiss Plaintiffs' First Amended Complaint with prejudice.

Dated: May 29, 2007

By: s/ Michael C. Lindberg  
Michael C. Lindberg, Esq. (MN Bar # 63307)  
JOHNSON & LINDBERG, P.A.  
7900 International Drive, Suite 960  
Minneapolis, MN 55425-1582  
(952) 851-0700  
(952) 851-0900 facsimile

Dane B. Jaques, Esq. (MN Bar # 191280)  
(USDC Minn. Pending)  
DOMBROFF & GILMORE, P.C.  
1676 International Drive, Penthouse  
McLean, Virginia 22102  
(703) 336-8800  
(703) 336-8750 facsimile

Counsel for Defendants US Airways Group, Inc. and  
US Airways, Inc.