IN THE
SUPREME COURT OF CALIFORNIA

SEABRIGHT INSURANCE COMPANY,
ANTHONY VERDON LUJAN
Plaintiffs and Appellants
v.
US AIRWAYS, INC.
(erroneously sued herein as America West Airlines)
Defendant and Respondent

After a Decision by the Court of Appeal,
First Appellate District, Division Four

Supreme Court Case No.: S182508
First Appellate District Case No.: A123726
San Francisco Superior Court, No.: 458707

US AIRWAYS, INC.'S
REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

DISCUSSION 2

A. Hooker's Analysis of Retained Control And Affirmative Contribution Is Required Before Analyzing The Nature Of A Passive Hirer's Duty To Injured Workers 2

B. US Airways Did Not "Retain Control" Of Aubry's Worksite At San Francisco International Airport 4

C. There Is No Evidence Of Causation 7

D. Appellants' Continued Reliance On *Padilla* Is Mistaken 10

E. Appellants Essentially Ask This Court To Create A New "Test" Of Nondelegability 11

F. US Airways Follows The Correct Method Of Determining Whether A Regulatory Duty Exists 14

G. Appellants' Objections To The Request For Judicial Notice Already Were Rejected 16

H. Public Policy Mandates A Full Reversal 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Barclay v. Lange
(2005) 129 Cal.App.4th 281 ..... 10, 16

Camargo v. Tjaarda Dairy
(2001) 25 Cal.4th 1235 14

Elsner v. Uveges
(2004) 34 Cal.App.4th 915 ..... 12, 13, 15

Estate v. Griswold
(2001) 24 Cal.4th 904 12

Evard v. Southern California Edison
(2007) 153 Cal.App.4th 137 ..... 10, 11, 12, 13

Friends of Lagoon Valley v. City of Vacaville
(2007) 154 Cal.App.4th 807 12

Green v. Soule
(1904) 145 Cal. 96 2

Hard v. Hollywood Turf Club
(1952) 112 Cal.App.2d 263 ..... 12, 13

Hooker v. Dept. of Transportation
(2002) 27 Cal.4th 198 ..... 1-4, *passim*

Kinsman v. Unocal Corporation
(2005) 37 Cal.4th 659 ..... 6, 13, 14

Leslie G. v. Perry & Associates
(1996) 43 Cal.App.4th 472 8

Maloney v. Rath
(1968) 69 Cal.2d 442 11

McDonald v. Shell Oil Co.
(1955) 44 Cal.2d 785 2

Padilla v. Pomona College
(2008) 166 Cal.App.4th 661 ..... 10, 11

Park v. Burlington Northern Santa Fe Railway Co.
(2003) 108 Cal.App.4th 595 16

Phelps v. Stostad
(1997) 16 Cal.4th 23 12

Privette v. Superior Court
(1993) 5 Cal.4th 689 ..... 3, 4, 12, 17

Ratcliff v. Vanir
(2001) 88 Cal.App.4th 595 7

Seabright Insurance Company, et al. v. US Airways, Inc., et al.
(2010) 183 Cal.App.4th 219 5

Thompson v. Jess
(1999) 1999 Utah 22, 979 P.2d 322 3

Statutes

Labor Code § 6303 ..... 14, 15

Regulations

8 C.C.R. 336.1 14

8 C.C.R. 1502 11

8 C.C.R. 1735 ..... 10, 11

8 C.C.R. 3202 ..... 14, 15

8 C.C.R. 3203 6

8 C.C.R. 3339 15

8 C.C.R. 4002 ..... 14, 15

Other Authorities

Prosser & Keeton, *Torts* (5th ed. 1984) § 41, p. 269 8

INTRODUCTION

The overarching theme of Appellants' brief appears to be that whenever there is an alleged regulatory breach, *ipso facto* there is a basis for liability under *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198. To follow Appellants' argument, the alleged breach of a safety regulation (allegedly an actionable "omission" under *Hooker*'s footnote 3) equals strict liability to a passive hirer, even without a causal link between the alleged breach and the plaintiff's injury. That is not the law.

The primary and most significant inquiry in which the Court of Appeal should have engaged remains the two-part test established by this Court in *Hooker*. Under the *Hooker* analysis, there is no evidence that US Airways, Inc. (US Airways) retained control over Anthony Verdon's work or worksite, and that it exercised that alleged control so as to affirmatively contribute to Verdon's injuries.

Here, the Court of Appeal put the cart before the horse by incorrectly deciding the regulatory "nondelegable duty" issue before even considering evidence showing the airline's lack of control over Verdon's worksite and the complete absence of any affirmative conduct causally related to Verdon's injury. This Court should

reverse the underlying appellate decision, and in the process clarify the meaning of *Hooker*'s reference to actionable "omissions" in the context of the retained control/affirmative contribution analysis.

DISCUSSION

A. *Hooker*'s Analysis Of Retained Control And Affirmative Contribution Is Required *Before* Analyzing The Nature Of A Passive Hirer's Duty To Injured Workers

Contrary to Appellants' argument, US Airways does not contend that a "three prong test" should supplant the fundamental analysis under *Hooker*.[1] Rather, the opening brief clearly asserts that, where an injured employee seeks tort remedies beyond that afforded by workers' compensation, the court *first* must analyze whether the defendant retained control over the worksite so as to affirmatively contribute to the plaintiff's injury. (*Hooker,* 27 Cal.4th at p. 213, citing *Green v. Soule* (1904) 145 Cal. 96, 99; *accord, McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788.)

Appellants' insistence that they only assert claims for direct negligence against US Airways is exactly the point. The *Hooker* test

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[1] *See,* Appellants' Joint Answer Brief On The Merits (Joint Answer), at p. 4, para. 2.

is the method by which courts identify whether there are actual indicia of direct negligence for which an injured employee may seek tort compensation in addition to his or her workers' compensation benefits. In turn, and as stated in the opening brief, the term "omission" as used in *Hooker*'s footnote 3 explicitly refers to active conduct such as a "promise broken or an induced reliance." (See discussion of the "active participation standard" relied upon by *Hooker,* 27 Cal.4th at p. 207, citing *Thompson v. Jess* (1999) 1999 Utah 22, 979 P.2d 322, 326-328.) Without these well-reasoned parameters of analysis, the Court of Appeal is ignoring the limitations on liability afforded by *Privette v. Superior Court* (1993) 5 Cal.4th 689, in disregard of the essential legal underpinnings for this Court's decision in *Hooker*.

Appellants' suggestion that the alleged breach of a nondelegable regulatory duty, without more, is indicative of direct negligence also is without merit. This Court has held unequivocally that such liability is essentially vicarious, a form of liability foreclosed by *Privette.* (*Privette v. Superior Court,* 5 Cal.4th at p. 700.) Thus, in order to properly analyze whether direct liability exists where a

regulatory breach is alleged, applying the *Hooker* two-part test is paramount.

B. US Airways Did Not "Retain Control" Of Aubry's Worksite At San Francisco International Airport

Appellants restate verbatim their arguments made to the Court of Appeal, asserting that Aubry's 1996 maintenance agreement shows the airline "retained control" over the worksite at San Francisco International Airport (SFO). This very contract, however, said no such thing. Rather, it expressly required Aubry to name US Airways (as successor to America West) as an additional insured on Aubry's workers' compensation and general liability insurance policies.[2] This is strong evidence that US Airways relied on Aubry to monitor the conveyor's safety and repair as necessary, while the airline paid to ensure that it had no exposure for injury to Aubry employees. If the 1996 contract is to somehow be considered as evidence of the airline's retained control, the Court of Appeal should have considered the *entire* contract rather than a select sentence or two.[3] Ignoring the contract's insurance requirement was critical error.

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[2] *See*, Vol. 1, CT, 94.

[3] The Court should properly consider the testimony of Aubry

The mere fact that US Airways employees occasionally needed to clear bag jams from the conveyors does not establish that the airline retained control over the safety of its entire conveyor system at SFO. (*Seabright Insurance Company, et al. v. US Airways, Inc., et al.* (2010) 183 Cal.App.4th 219, at fn. 4.) Aubry was hired as an experienced millwright company to work on the conveyor belt system because US Airways did not have the staff or expertise to do so itself. US Airways did not train Aubry's employees, Aubry did.[4] US Airways did not supervise Aubry's workers, Aubry did.[5] US Airways did not control the method or means of work, Aubry did.[6] And as

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employees and US Airway employees regarding the nature and scope of Aubry's actual duties at the time of the incident. Such testimony examined in context with the relatively archaic agreement, constitutes more reliable, credible evidence of Aubry's responsibilities. Aubry employees worked on US Airways' conveyor belts five to eight hours *daily* at the time of the incident. *See,* deposition testimony of Aubry employee Marco Moniz, Vol. 1, CT, 142 (35:19-36:21); 147-148 (57:21-25; 58:12-59:16); *see also*, testimony of Aubry supervisor Noel Varela, Vol. 1, CT, 181 (22:6-24:16).

[4] Vol. 1, CT, 137-138; 143 (40:3-41:1); 144 (43:22-45:25); 145 (46:1-49:25); 146 (50:1-53:1); 165-173.

[5] *See,* testimony of Anthony Verdon at Vol. 1, CT, 248-250 (21:16-29:15); 251(31:2-10); 253-254 (51:7-57:10); 255-257 (69:13-76:1); *see also,* testimony of Aubry Supervisor Noel Varela at Vol. 1, CT, 177-180 (1:1-20:16).

[6] Vol. 1, CT, 142 (34:16-36:21); 147 (57:21-25); 148 (58:12-59:16);

noted in the opening brief, Aubry hired its own independent safety contractor to draft Aubry's Safety Practice and Procedure Manual per California Code of Regulations Section 3203, as part of Aubry's Injury Illness and Prevention Program applicable only to its employees.[7] Aubry never notified US Airways that a guard was required, and that condition was open and obvious only to Aubry.[8]

Appellants also err in contending that the airline owed Aubry's employees a nondelegable duty of care by virtue of the Space and Use Permit between US Airways and the City and County of San Francisco.[9] The Permit inured only to the benefit of the contracting

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178 (10:18-20); 183 (36:7-37:25); 184 (38:1-40:4).

[7] Vol. 3, CT, 392 at para. 4, 596-605, 607-622.

[8] *Kinsman v. Unocal Corporation* (2005) 37 Cal.4th 659 is instructive. There, in the context of an allegedly dangerous condition of property, this Court held that a passive hirer is not liable unless it knew or had reason to know of the condition, and failed to alert the contractor or intentionally concealed the condition. This holding is informative because even where a duty to maintain safe premises arguably runs with the land, the analysis still requires retained control and the exercise of that control so as to affirmatively contribute to the plaintiff's injuries. There must be additional, direct negligence on the part of a hirer before liability will attach.

[9] *See,* Declaration of Dan Ravina, Property Specialist II in the Aviation Management Department of San Francisco International Airport, Vol. 1, CT, 39-86; *see also*, Declaration of Stephen Duxbury, Administrator for Occupational Health and Safety, US Airways, Vol.

parties, which did not include Aubry. (*Ratcliff v. Vanir* (2001) 88 Cal.App.4th 595.) US Airways complied with its duty *to the City* to ensure that the conveyor belts were in safe and functional operating condition by hiring specialty millwright contractor Aubry for that purpose.

From the moment Aubry started work at its "place of employment" at SFO, it had a responsibility to its own employees to ensure that the Title 8 regulations were adhered to within the worksite. The only "promise broken" was Aubry's implicit assurance to US Airways that any work done on the subject of the contract, *i.e.*, the conveyor belt system, was to be done in accordance with the governing law and regulations.[10]

C. There Is No Evidence Of Causation

Appellants contend that the Court of Appeal properly found that alleged violations of certain regulations by themselves provided a

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1, CT, 88-94.

[10] *See,* requirements for compliance by Aubry employees set forth in the opening pages of Aubry's Safety Practice and Procedure Manual. Vol. 1, CT, 394-396.

triable issue of fact on causation.[11] But in so holding, the Court of Appeal failed to apply the substantial evidence standard, which requires more than "speculation or conjecture ... or ... probabilities ... evenly balanced" or the court must rule in the defendant's favor on summary judgment. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 484 ("[A]n expert's uncorroborated speculation is insufficient to establish causation."); Prosser & Keeton, *Torts* (5th ed. 1984) § 41, p. 269.)

Appellants argue that the reasonable inference from the evidence is that Verdon's arm was "sucked into" the conveyor belt. This contention is entirely without basis in fact. There is no evidence that Verdon's hand, arm, foot, or any other body part was "sucked" into the conveyor.[12] This is because Verdon disavowed contemporaneous incident reports, replacing them with boilerplate statements from co-workers and Verdon's own declaration that he had

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[11] Appellants even claim that, where a *delegable* duty exists, the hirer is still liable because, at most, the injured worker's conduct (or that of his/her employer) simply goes to comparative negligence. Joint Answer at p. 10, fn. 4.

[12] Joint Answer at p. 13, para. 2.

no idea how his hand became caught in the conveyor belt system.[13] Appellants tried to bolster their "causation" case by bringing in an expert, Matthew T. Wilson, to opine on the working conditions he observed nearly three years after Verdon's accident. Wilson's opinion on causation was stricken by the trial court. (RT, 14:17-24.) In the trial court's words,

> He can testify that the conditions are unsafe, he can testify about that, but he cannot tell us how the accident happened. That [is] beyond anybody's ability without some information about what did happen, which – and to the extent there was information, it's been withdrawn. (RT, 14:20-24.)

The trial court got it right; the Court of Appeal did not. Based on the complete absence of any showing of causation, or any evidence of affirmative conduct that caused Verdon's injury, US Airways is entitled to summary judgment, and the Court of Appeal's decision should be reversed.

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[13] Vol. 3, CT, 657-659 (Verdon); 668-670 (Varela); 677-679 (Moniz).

D. Appellants' Continued Reliance On *Padilla* Is Mistaken

The error inherent in the *Evard/Barclay* "strand" of opinions on regulatory "omissions" is exemplified by *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 668-673. Although *Padilla* came to the right conclusion about the nondelegability of the regulation at issue, *Padilla's* reliance on the vague test of "the nature of the regulation" was little more than an uncritical restating of *Evard*:

> ...[T]he regulation at issue in *Evard* pertained to the condition of the landowner's property, and required the owner to maintain protective railing on the billboard at all times. This ongoing duty required the guardrails to be in place regardless of whether work was being done on the billboard. The regulation, in other words, imposed a permanent obligation on the owner with respect to the condition of the property; no one but the landowner was in a position to ensure that condition. Here, Regulation 1735(a) pertained solely to the preparation of the worksite when specific work was being done, that is at a time when contractors were necessarily present. Therefore, there is no basis in Regulation 1735(a) to conclude the duties could not be delegated. (*Padilla,* 166 Cal.App.4th at p. 672, relying on *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146-147.)

The regulatory "analysis" adopted by *Padilla* and *Evard* has no substance, because it did not consider the actual terms of the regulation at issue.[14]

Under a proper analysis of the regulation, the *Padilla* court would have reached the same correct conclusion, but by the proper path. The language of Section 1735 does not identify a specific category of employer to which the regulation applies. Under Title 8, Section 1502, "Construction Safety Orders" (which include Section 1735) apply "whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts." Had *Padilla*'s regulatory analysis employed the correct framework, perhaps later Courts of Appeal would not have been so confused.

E. Appellants Essentially Ask This Court To Create A New "Test" Of Nondelegability

Appellants do not address any of the opening brief's points regarding *Hooker*'s application where the breach of nondelegable duty

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[14] It also is possible that the Court of Appeal was equally misled by cases regarding an allegedly nondelegable duty toward innocent third-party bystanders. (*See, e.g., Maloney v. Rath* (1968) 69 Cal.2d 442.)

is alleged. Instead, Appellants maintain that US Airways had a "continuing obligation" to comply with the applicable Title 8 regulations simply because the regulations existed before Aubry was hired to maintain and repair the conveyor belt system. Neither the Court of Appeal nor Appellants cited any authority, other than *Evard*, for the argument that nondelegable duties are established by virtue of a timeline. In contrast, US Airways relies on longstanding authority establishing how to analyze a statute or regulation. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 920; *Estate of Griswold* (2001) 25 Cal.4th 904, 910; *Phelps v. Stostad* (1997) 16 Cal.4th 23, 32; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 826.)

It also bears reiteration that, even before *Privette*, the majority of courts considering liability for injuries on multi-employer work sites found that safety regulations are considered *delegable* to contractors. As *Hard v. Hollywood Turf Club* (1952) 112 Cal.App.2d 263, 269 colorfully put it,

> ...[T]he aim of safety and insurance statutes is not to hinder or do harm to employers. Taking them by and large, those laws serve the best interest of management and of society as a whole by preserving the manpower of industry and by maintaining the established economy. The Legislature could not reasonably have intended to

> operate a hardship upon employers by making one contractor liable for the neglects of another. If as the generalissimo of a construction job, the general contractor leaves holes in the floor or grease upon it whereby any invitee might suffer injury, of course he would be liable. But where he has agreed by subcontract with an *experienced and reputable* painter to paint the ceilings and walls of the building under repair and the reputable painter negligently constructs an inferior scaffold that cannot support his workmen, it is nothing short of oppression to require the general contractor to pay the total amount of damages suffered by the injured workman as the result of the painter's negligence and thereby relieve the subcontractor of all charges he might have been obliged to pay on account of the accident. [Emphasis added.]

Hooker followed the same principles, and they apply with equal force to Appellants' claims here. (*See also, Elsner v. Uveges* (2004) 34 Cal.4th 915 [safety regulations were never intended to expand common law liability].) With the exception of *Evard*, there is no precedent for Appellants' claim that the Title 8 regulations contain language creating a nondelegable duty on a passive hirer like US Airways. In fact, this Court has previously commented that the policy reasons associated with the nondelegable duty doctrine do not apply where workers' compensation insurance is available, and that "the policy in favor of delegation of responsibility and assignment of liability is so strong in this context that we have not allowed it to be

circumvented on a negligent hiring theory." (*Kinsman v. Unocal Corporation* (2005) 37 Cal.4th at p. 671, referring to *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235.) US Airways respectfully submits that no policy reasons exist to hold otherwise in this case, either.

F. US Airways Follows The Correct Method Of Determining Whether A Regulatory Duty Exists

Appellants argue that the legislative history of Section 4002 sheds no light on the issue of whether the regulations are nondelegable because the drafters did not consider the issue. US Airways respectfully submits, however, that the drafters' exclusion of this inquiry shows the delegable nature of the regulations when considered within the appropriate regulatory framework. Section 3202 of the Title 8 regulations apply to "all employments defined by Labor Code Section 6303." Section 336.1 of California Code of Regulations allows the Department of Safety and Health to cite all employers who fall within the regulatory definition of an "exposing," "creating," "controlling," or "correcting" employer. These are clear textual indicators that nondelegability was not addressed by the drafters because inserting the doctrine into the regulatory framework

would conflict with the overall purpose of creating an incentive for *all* employers on a given worksite to use their best efforts to enforce safety regulations, thereby reducing work injuries and the burden on the workers' compensation system.[15]

Similarly, Sections 3339 and 4002 of the California Code of Regulations do not explicitly apply *only* to landowners or other passive occupiers of property who hire specialty contractors to maintain that property. Rather, the "Scope of Application" found at Section 3202 of Title 8 expressly states that the regulations apply to "all employments" defined by Labor Code Section 6303. Therefore, the notion of nondelegability simply does not apply where the regulation on its face applies with equal force to every employer on

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[15] Again, this Court should not lose sight of its well-founded holding in *Elsner v. Uveges* (2004) 34 Cal.4th 915, that safety regulations were never intended to expand common law liability. Yet, this is apparently what Appellants would have this Court do. If Appellants have their way, employers will be forced to shoulder the burden of becoming their own specialty contractors regardless of the nature of their business, wholly increasing the risk of on-the-job injuries to employees trying to perform work for which they have neither the training nor the expertise to do safely.

the job. Appellants' arguments to the contrary should be rejected, and the Court of Appeal's decision reversed.[16]

G. Appellants' Objections To The Request For Judicial Notice Already Were Rejected

Appellants spend a significant portion of their brief objecting to Respondent's request for judicial notice, particularly the safety sections from Aubry's own website. These arguments should be disregarded, as this Court already has rejected them.

Appellants attempted to file objections to the request for judicial notice 15 days after the deadline to do so, at which point the Court apparently rejected the filing and deemed those objections waived. Respondents submit that it is inappropriate for Appellants to

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[16] Many Courts of Appeal have been confused about how to handle claims that safety regulations are nondelegable in a multi-employer context. The courts' confusion over this issue perhaps stems from a misnomer regarding the term "nondelegable." As pointed out in the opening brief, the concept of a nondelegable duty arose at common law to protect innocent bystanders injured by some aspect of a work of improvement. Too often the courts have applied the "nondelegable" label to an obligation that arises based on the express terms of a regulation and its statutory framework, which in turn determines to whom the duty applies. This Court's recognition of this point would go a long way toward clarifying the law. (*See, e.g., Barclay v. Lange* (2005) 129 Cal.App.4th 281, and *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595.)

use their answer brief on the merits to restate those objections to the Court.

In any case, Appellants' brief does not argue that Aubry's website is inaccurate or misrepresents the scope and nature of the millwright's services regarding maintenance and repair of conveyor belt systems. Therefore, US Airways submits that the Court should reject Appellants' plea to disregard evidence from Aubry's own website.

H. Public Policy Mandates A Full Reversal

As a result of the Court of Appeal's decision, any business with operations that require expertise in specialized areas beyond the expertise of the company's own staff will have no choice but to accommodate what is essentially an unlimited risk of strict liability for on-the-job injuries of independent contractors' employees, regardless of the level of control exercised at the job site. This result flies in the face of the Legislature's intent in drafting the workers' compensation scheme, and destroys the protections afforded to passive hirers by *Privette* and its progeny.

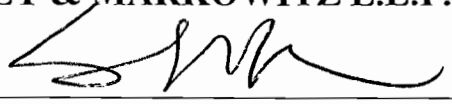
Without a clarification of the law, entities that appropriately are protected from claims for additional tort recovery will lose the protections of *Privette*, and their exposure to claims for reimbursement of benefits paid by workers' compensation insurers seeking to find a loophole for that purpose will skyrocket. Such a result was never intended by the Legislature or this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeal. In so doing, this Court can clarify the meaning of the term "omission" in footnote 3 of the *Hooker* decision as referring to an induced reliance or a promise broken. This will establish the appropriate parameters for nondelegable duty analysis in the context of a claim for additional tort remedies for on-the-job injuries sustained by an employee of a hired contractor against a passive hirer such as US Airways.

Respectfully submitted,

KENNEY & MARKOWITZ L.L.P.

By: 

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CERTIFICATE OF WORD COUNT

Case No. S182508

I, Elizabeth D. Rhodes, an attorney with Kenney & Markowitz, counsel herein for Defendant/Respondent US Airways, Inc. (Respondent), hereby certify on behalf of Respondent, that the length of its Opening Brief On The Merits is 2,914 words, relying on the word count of the computer program used to prepare the brief.

Dated: January 10, 2011

ELIZABETH D. RHODES
State Bar No. 218480

Case Title: *Seabright Insurance Company v. US Airways, et al.*
Court: California Supreme Court
Case No. S182508
Court: Court of Appeal of the State of California
First Appellate District
Case No. A123726
Court: San Francisco Superior Court
Case No. CGC-06-458707

PROOF OF SERVICE
[C.C.P.§2008, F.R.C.P. Rule 5]

I, the undersigned, state:

I am a citizen of the United States. My business address is 255 California Street, Suite 1300, San Francisco, California 94111. I am employed in the City and County of San Francisco. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing documents described as follows:

REPLY BRIEF ON THE MERITS OF US AIRWAYS, INC.

on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed and served as follows:

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Court of Appeal **First Appellate District** **Division Four** 350 McAllister Street San Francisco, CA 94102 **(1 copy– Via US Mail)**	**Case No. A123726**

Peter J. Busch, Sup. Judge **Superior Court of California** County of San Francisco 400 McAllister Street San Francisco, CA 94102 **(1 Copy Via U.S. Mail)**	**Case No. CGC-06-458707**
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[X] BY PERSONAL SERVICE – Following ordinary business practices, I caused to be served, by hand delivery, such envelope(s) by hand this date to the offices of the addressee(s).

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date in San Francisco, California.

Dated: January 10, 2011	
	JANIE CROWLEY