IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGINA RAUB, ***Plaintiff,*** vs. **US AIRWAYS, INC., a Delaware Corporation, and UNITED STATES OF AMERICA,** ***Defendants.***	Civil Action No. 16-cv-01975-JD

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT US AIRWAY'S MOTION TO SANCTION PLAINTIFF'S COUNSEL

ALISA BRODKOWITZ, ESQUIRE, *Pro Hac Vice*
RACHEL M. LUKE, *Pro Hac Vice*
Friedman | Rubin
51 University Street, Suite 201
Seattle, WA 98101
alisa@friedmanrubin.com
rachel@friedmanrubin.com
(206) 501-4446

PATRICK FITZGERALD, ESQUIRE
Kline & Specter, P.C.
1525 Locust Street, Nineteenth Floor
Philadelphia, PA 19102
(215) 772-1000

Attorneys for Plaintiff

Dated: September 11, 2017

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I. INTRODUCTION

Plaintiff submits this Supplemental Memorandum in Opposition to Defendant's Motion to Sanction Plaintiff's Counsel after Defendant advised the Court via email that it is concerned with Ms. Brodkowitz' anticipated conduct in other cases involving US Airways. This supplement also follows Defendant's decision to effectively cancel the Court ordered mediation of this matter which was scheduled for September 11, 2017 in order to pursue its sanctions motion, which creates a settlement conflict of interest for Plaintiff's counsel. Plaintiff asks this Court deny Defendant's Motion on the grounds of waiver and improper motive.

II. STATEMENT OF RELEVANT FACTS

The following timeline is relevant:

2010- *Braun v. US Airways*- Ms. Brodkowitz files first of many cases against US Airways.[1] In the seven years since Ms. Brodkowitz has been litigating against US Airways, including current other US Airways litigation, neither it nor defense counsel has ever raised any ethical concerns until this litigation. During this time Ms. Brodkowitz proves herself to be a competent adversary, developing new Montreal Convention law against the airline in Arizona, *Greig v. US Airways Inc*., 28 F.Supp.3d 973 (2014).

April 29, 2014- US Airways Flight 815 injures Plaintiff Regina Raub.

May 6, 2014- Ms. Brodkowitz writes US Airways a letter of representation and request for preservation of evidence.[2]

June 2015- Ms. Brodkowitz obtains NTSB Flight 815 report describing FAA negligence.[3]

June 5 and 17, 2015- Ms. Brodkowitz contacts Flight 815 flight attendants via phone, advises of NTSB report on Flight 815 and sends report via email at their request. Defendant US Airways counsel contends it represented these flight attendants at least as of this pre-filing date.

[1] Exhibit 1 to Declaration of Alisa Brodkowitz, *Braun* complaint.
[2] Id. at Exhibit 2, Correspondence to US Airways dated May 6, 2014.
[3] Id. at Exhibit 3, NTSB Factual Report.

April 26, 2016- Plaintiff files Complaint against US Airways and FAA (USA).[4]

December 23, 2017-US Airways responds to USA Request for Production seeking Flight 815 weather dispatch records, advising that none exist.[5]

January 11, 2017- Plaintiff propounds RFP for all documents related to Flight 815. Notably, again no weather dispatch records produced. Defendant US Airways responded on February 10, 2017.[6]

April 18, 2017-Plaintiff asks for 30(b)(6) deposition on Flight 815 weather dispatch records.[7]

May 1, 2017- US Airways email advising it cannot produce such a deponent since "US Airways has no documents relating to ground dispatch communication for the subject flight."[8]

June 6, 20174 – US Airways is still working on the dispatch designee. [9]

June 9, 2017-Depositions of Flight Attendants from Flight 815, defense counsel demonstrates prior knowledge of their contact with Ms. Brodkowitz and he claims to represent them.[10]

- During depositions US Airways counsel asks only the two flight attendants contacted to describe their prior communications with Ms. Brodkowitz, and does not ask third flight attendant anything about communicating with Ms. Brodkowitz. Also comes prepared with June 5, 2015 email to Pavluk-Boyle to use as deposition Exhibit.

- Defense counsel claims to represent the flight attendants, he advises Ms. Brodkowitz that he will object on the grounds of attorney client privilege if Ms. Brodkowitz asks about any communications he may have had with the flight attendants, (such as whether he had ever advised them of their two year statute of limitations in which to sue the FAA).

June 13, 2017-Plaintiff asks for 30(b)(6) deposition on general topic of dispatch communications and record retention of such documents.[11]

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[4] See Docket, Document 1.
[5] Brodkowitz Decl., at Exhibit 4, Request for Production No. 8, dated December 23, 2016.
[6] Id. at Exhibit 5, Plaintiff's First Interrogatories and Requests for Production to US Airways and Answers and Responses thereto.
[7] Id. at Exhibit 6, email correspondence between Counsel dated April 18, 2017.
[8] Id. at Exhibit 7, email correspondence from S. Shapiro dated May 1, 2017.
[9] Id. at Exhibit 8, email correspondence between counsel.
[10] Id. at Exhibit 9, excerpts from Deposition of Donna Pavluk-Boyle, 62:24 – 72:5 and Deposition of Jeanette DeMarco, 39:21 – 45:7.
[11] Id. at Exhibit 10, email correspondence between Counsel dated June 13, 2017.

June 16, 2016- Close of fact discovery.

June 26, 2017-Plaintiff writes to US Airways, again asking for 30(b)(6) of dispatch communications and records retention.[12]

July 21, 2017-Plaintiff makes liability expert disclosures, hampered by lack of dispatch records.

July 25, 2017-Plaintiff files motion for Sanctions for Spoliation of weather dispatch documents asking for inference that airline knew of bad weather in advance of flight.[13]

July 28, 2017- Defendant US Airways files Motion for Sanctions against Ms. Brodkowitz, seeking to revoke her *pro hac vice* admission.[14]

August 10, 2017-Defendant US Airways suddenly produces 293 pages of weather dispatch documents for Flight 815. Plaintiff contends production of withheld weather documents constitutes discovery abuse, a violation of Fed. Rule Civ. Pro 37(c) and 26(g), entitling her to retake depositions of pilots and amend expert disclosures at defendant's expense.[15]

August 16, 2017-Defendant US Airways advises "finally able to locate an employee with knowledge of US Airways' Dispatch operations in 2014."[16]

August 16, 2017- Defendant US Airways and USA advise Court via letter that they will be admitting liability in this case and filing a stipulation of admitted liability with the Court.[17]

August 24, 2017- during Court telephonic conference with all counsel Plaintiff advises the Court she will withdraw her Motion for Sanctions because Defendants are admitting liability. Defendants advise Court they are no longer seeking Ms. Brodkowitz' notes of call with flight attendants, or to prevent the use of such notes at trial but still seeking revocation of her *pro hac vice.* [18]

September 6, 2017-US Airways' counsel advises Ms. Brodkowitz that it will not seek to sanction her if she settles Ms. Raub's case on September 11, 2017 at upcoming Court ordered mediation. Ms. Brodkowitz consults ethics counsel and advises Court via letter of

[12] Id. at Exhibit 11, email correspondence between Counsel.
[13] Docket at Document 48.
[14] Docket at Document 49.
[15] Exhibit 12 to Brodkowitz Declaration, email correspondence from S. Shapiro.
[16] Id. at Exhibit 13, email correspondence from S. Shapiro.
[17] Id. at Exhibit 14, letter from S. Riegel to Judge DuBois.
[18] Id. at Exhibit 15, Brodkowitz letter to Judge DuBois.

the conflict of interest. During telephonic Court conference of same day Defendant learns motion against Ms. Brodkowitz is interfering with settlement. [19]

September 7, 2017-US Airways counsel writes to Court, stating that it will not withdraw its motion for sanctions because Ms. Brodkowitz regularly litigates against the airline and anticipates that absent sanctions she will breach the rules of professional conduct in the future.

III. DISCUSSION

The above timeline demonstrates several important points. By admitting liability, Defendant US Airways has eradicated any effect at trial of any allegedly inappropriate contact. Defendant US Airways seeks to impose punishment for an alleged violation without the requisite fact gathering. The timeline also demonstrates that US Airways waited well-after it knew about the contact with the flight attendants to file its motion. By lying in wait, it waived its objections to the contact and showed that its motion was strategically, not ethically, motivated. Finally, the timeline shows a defendant threatening sanctions to obtain settlement, gain advantage, delay or harass opposing counsel, all of which amount to an improper use of the rules of ethics and such motions.

A. US Airways' Cross Motion for Sanctions Is Motivated By An Improper Purpose.

Waiver is a valid basis for the denial of a motion to disqualify. *Zimmerman v. Duggan*, 81 B.R. 296, 300 (E.D.Pa.1987). In determining whether the moving party has waived its right to object to the opposing party's counsel the court should consider the length of the delay in bringing a motion to disqualify and whether the delay and motion are strategic. *Com. Ins. Co. v. Graphix Hot Line, Inc.*, 808 F. Supp. 1200, 1208 (E.D. Pa. 1992). "We share the Court of Appeals' concern about 'tactical use of disqualification motions' to harass opposing counsel." *Id.*

[19] Id. at Exhibit 16, Shapiro email to Judge DuBois, dated September 7, 2017.

at 1208 quoting *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985).

In addition, timing of a motion as a cross motion is pertinent and is additional and compelling grounds for its denial. *Oi Tai Chan v. Soc'y of Shaolin Temple, Inc.*, 30 Misc. 3d 244, 261, 910 N.Y.S.2d 872, 886 (N.Y. Sup. Ct. 2010). In *Oi Tai Chan* Defendant's motion to disqualify was made only after Plaintiff filed her motion for discovery sanctions against defense counsel Mr. Jiang. As in this case, evidence suggested that Defendant would have known about any ethical conflict prior to that time. The Court denied the motion to disqualify reasoning that his cross motion for disqualification was not filed because of a genuine concern for upholding the Rules of Professional Conduct "but as a perceived stratagem, misusing an important ethical code setting forth professional standards as a chessboard maneuver to get a checkmate…" *Id* at 261.Defendant US Airways failed to bring their Motion for Sanctions against Ms. Brodkowitz until over a year after Plaintiff filed her complaint, waiving any such objection. Defense counsel knew prior to the depositions of the flight attendants about their contact with Ms. Brodkowitz, as evidenced by his conduct at their depositions. The airline is a sophisticated corporate litigant with its own internal counsel and defense counsel claims to represent these flight attendants. This suggests defense counsel would have known about the contact for many months prior to their depositions.

Defendant's motion for sanctions was a cross motion, filed three days after Ms. Brodkowitz filed her motion for sanctions against US Airways. US Airways was in a difficult position, it had to either admit liability or face difficult questions about withholding weather documents central to the Plaintiffs' liability case. Its cross motion was litigation by vilification. This Court has an obligation to prevent litigants from using motions to disqualify opposing counsel for tactical reasons. *Hamilton v. Merrill Lynch*, 645 F. Supp. 60, 61 (E.D. Pa. 1986);

Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F.Supp. 1200, 1204 (E.D. Pa. 1992); *Ferranti Int'l Plc. v. Clark,* 767 F. Supp. 670 (E.D. Pa. 1991).

A concern about disqualification being sought for such a tactical purpose is particularly likely to be voiced in a situation where the targeted attorney is capable and a formidable advocate, one who possesses unique knowledge of the subject matter, or has extensive experience with the case. *Commonwealth v. Cassidy*, 568 A.2d 693, 698 n.4 (Pa. Super. 1989) (seeking to disqualify the most competent lawyers is "not a novel idea"); *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222 (6th Cir. 1988) ("ability to deny one's opponent the services of capable counsel is a potent weapon"); *Hannan v. Watt*, 147 Ill. App. 3d 456, 497 N.E.2d 1307, 1311 (1986) (only four law firms in US qualified to represent pilots in airline merger cases, disqualification denied because of potentially it was being improperly used). These concerns are implicated here too, as Ms. Brodkowitz possesses unique skills as an aviation attorney with experience in the Montreal Convention and has extensive experience in this case.

Further improper use of the motion for sanctions arose when defense counsel advised Ms. Brodkowitz on September 5, 2017 that it would withdraw its motion for sanctions against her if she settled Ms. Raub's case at an upcoming mediation. This is the same as threatening sanctions if the case did not settle. It is inappropriate to threaten sanctions against opposing counsel to obtain a settlement. *Zubulake v. UBS Warburg LLC*, 2003 WL 21087136 (S.D.N.Y. 2003). A party to a civil litigation cannot threaten to instigate criminal charges solely to gain a strategic advantage. The logic of this rule applies with equal force to threats of regulatory enforcement. *Id* at 293. The use of threats of disciplinary action to influence civil litigation would compromise both the disciplinary system and the civil adjudicative process. *Illinois State Bar Association Advisory Op*. 87-07 (1988). Also see District of Columbia Rule 8.4(g) it is professional

misconduct for a lawyer to "[s]eek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter," and California Rule 5-100 a lawyer "shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute"; and see *In re Ruffalo*, 390 U.S. 544, 551 (1968), in describing the requirements of due process in lawyer disciplinary proceedings, the U.S. Supreme Court labeled disciplinary proceedings against lawyers "quasi criminal."

It is also possible that Defendant sought to deprive Ms. Raub of her chosen counsel at mediation, by creating a conflict of interest or that Defendant simply wanted to delay the mediation until after it received Plaintiff's rebuttal reports which are due on September 15, 2017. Another improper purpose behind Defendant US Airways' motion relates to Ms. Brodkowitz' ability to sue the airline in the various jurisdictions in which it avails itself nationwide.

In order to be admitted *pro hac vice*, various jurisdictions require counsel to attest that they have not been disciplined by any Court. (See for example, Dist. Of Connecticut Local Rule 83.1). Certainly Defendant US Airways/American Airlines has an interest in preventing Ms. Brodkowitz from being admitted in the various jurisdictions in which it avails itself as an international carrier of passengers for hire. The motion could have been brought simply to harass Ms. Brodkowitz. It has taken up her time and caused her to incur the expense of hiring ethics counsel to address the conflict of interest its actions created. (If this Court so invites her she is able to provide a compilation of her time spent and costs incurred in this regard). In any case Defendant's motion was not motivated by concerns about the ethics of the legal professional but instead an improper tactical device designed to obtain settlement or deprive a Plaintiff of a component opposing counsel.

A Pennsylvania state court in a factually similar case, held that a trial court ruling of disqualification based on an alleged violation of the Penn. Rule of Prof. Conduct 4.1 was

reversible error. It held that disqualification is only appropriate where it is needed to ensure that the parties receive the fair trial that due process requires and where facts support that a violation has occurred. *McCarthy v. Se. Pennsylvania Transp. Auth.*, 2001 PA Super 106, 772 A.2d 987 (Pa. Super. Ct. 2001). In *McCarthy* the attorney's alleged violation of Rule 4.2 had no effect on the conduct of the litigation since a motion *in limine* prevented introduction of the corporation's employee's statements at trial. The facts did not establish that employees whom the attorney spoke to were speaking agents or could otherwise impute liability to corporation.

The *McCarthy* Court held that the authority to sanction counsel for violations of the Rules of Professional Conduct is limited. *Reilly by Reilly v. SEPTA*, 507 Pa. 204, 489 A.2d 1291 (1985). "Perceived violations do not permit the trial courts or the intermediate appellate courts to alter the rules of law, evidentiary rules, presumptions or burdens of proof. More importantly, violations of those Codes are not a proper subject for consideration of the lower courts to impose punishment for attorney or judicial misconduct." *Id* at 1299.

In this case US Airways advised the Court that it is admitting liability and no longer seeks any notes of the conversations or to prevent the use of these notes at trial. Nor do the facts establish that the flight attendants were speaking agents or could have imputed liability to Defendant US Airways, in other words, the evidence does not support a finding of a violation of RPC 4.1 or 4.2. It is difficult to imagine what the flight attendants could have said to impute liability to US Airways given that they are not managers, were not flying the plane, and do not perform maintenance on seatbelts. Where the weight of the evidence suggests, as here, that the motion is not motivated by genuine ethical concern but to obtain an advantage, the motion may be properly denied. *Commonwealth Ins. Co* at 1209. Plaintiff asks that this Court deny Defendant's motion for sanctions on the grounds that its conduct belies an improper strategic motivation behind their motion.

IV. CONCLUSION

For all of these reasons, Ms. Raub asks the Court to deny US Airways' request for sanctions against Ms. Brodkowitz. No sanction is appropriate.

Respectfully submitted,

/s/ Alisa Brodkowitz
ALISA BRODKOWITZ, ESQUIRE, *Pro Hac Vice*
RACHEL M. LUKE, ESQUIRE, *Pro Hac Vice*
Friedman | Rubin
51 University, Ste. 201
Seattle, WA 98101
alisa@friedmanrubin.com
rachel@friedmanrubin.com
(206) 501-4446
(206) 623-0794 fax

PATRICK FITZGERALD, ESQUIRE
Kline & Specter, P.C.
1525 Locust Street, Nineteenth Floor
Philadelphia, PA 19102
(215) 772-1000

Attorneys for Plaintiff

Dated: September 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2017, I served a copy of the foregoing PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT US AIRWAY'S MOTION TO SANCTION PLAINTIFF'S COUNSEL on the following attorneys by the following indicated method(s):

Attorney for Defendant US AIRWAYS, INC.: J. Denny Shupe, Esq. Stephen J. Shapiro, Esq. Lee Schmeer, Esq. Schnader Harrison Segal & Lewis LLP 1600 Market Street, Suite 3600 Philadelphia, PA 19103 dshupe@schnader.com sshapiro@schnader.com lschmeer@schnader.com	Via Messenger Via Email Only [X] Via ECF Via U.S. Mail, First Class
Co-Counsel for Defendant USA: Steven J. Riegel, Esq. Department of Justice – T/AA P.O. Box 14271 Washington, D.C. 20044 steven.riegel@usdoj.gov	Via Messenger Via Email Only [X] Via ECF Via U.S. Mail, First Class

Dated this 11th day of September, 2017.

/s/Jessica Vick
Jessica Vick, Paralegal
Friedman | Rubin®
51 University Street, Suite 201
Seattle, WA 98101
jvick@friedmanrubin.com
Tel: (206)501-4446
Fax: (206)623-0794