IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LEROY "BUD" BENSEL, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 02-2917 (JEI)
	)	
ALLIED PILOTS ASSOCIATION, ET AL.	)	
	)	
	)	
Defendants.	)	

REPLY MEMORANDUM
OF DEFENDANT AIR LINE PILOTS ASSOCIATION
IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

We show in Point I *infra* that Plaintiffs have failed to state a duty of fair representation (DFR) violation under the applicable standard. In Point II.A. below, we discuss the ten alleged instances of fraud on which Plaintiffs rest their case. Not one of their claims of misrepresentations and material omissions would establish a DFR breach if proved. Nor would Plaintiffs' allegations of departures from ALPA policies, which we review in Point II.B. *infra.*

We correct some of Plaintiffs' mischaracterizations of the record in Point II.C. These are only samples of Plaintiffs' indifference to the facts; many more instances of exaggeration, misrepresentation and other inappropriate advocacy appear throughout their opposition.

We review the numerous ways in which Plaintiffs claim that ALPA might have improved the TWA pilots' bargaining position in Point II.D. below. In their examination of the 2001 negotiations, Plaintiffs engage in the kind of *post hoc* rationalization that the law expressly prohibits. Many of these schemes were not mentioned at the time or in the Complaint, such as strike threats, bankruptcy rejection claims, public relations campaigns, picketing by other pilot groups and AFL-CIO actions – and for good reason, as they are merely desperation plays crafted in hindsight. Others were evaluated and rejected for sound reasons. For example, Roland Wilder's suggested litigation was declined because it was the judgment of ALPA's Legal Department, after a thorough review, that he was proposing a frivolous lawsuit that would produce no leverage and might generate retaliation that would render it counterproductive. At every step of the process, however, the critical bargaining decisions – when to meet, who should participate for the ALPA negotiating team, what to propose and counter-propose – were made by the elected representatives of the TWA pilots, including Named Plaintiffs Sally Young, Howard Hollander and Bob Pastore, who served as members and chairman of the TWA MEC.

As we show in Point III, the factual predicate for Plaintiffs' contentions is also faulty. Their declarations are unreliable and do not satisfy the requirements of Fed. R. Civ. P. 56(e).

I. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW.

More significant than what is in Plaintiffs' opposition is what is absent from it. Plaintiffs do not contend that ALPA acted in an "arbitrary" or "discriminatory" manner. Rather, they limit their claim to ALPA's supposed interest in becoming the American pilots' bargaining agent, arguing that this led one arm of ALPA to "direct" another – composed of Plaintiffs/officers and members of the TWA MEC – to accept a job-saving agreement. Plaintiffs essentially claim to have been bamboozled by the misrepresentations and material omissions of attorneys and other professionals, and through departures from ALPA's stated policies, into reaching an agreement that they acknowledged at the time provided many advantages for the TWA pilots. Att. 23: Holtzman Decl. Ex. 5.[1] They also claim that after the pivotal TWA MEC decision on April 2, 2001, representatives of ALPA acted in bad faith when they denied TWA MEC requests for specific actions.

Plaintiffs have thus abandoned the "arbitrary" and "discriminatory" prongs of the DFR, pinning their hopes instead on establishing that ALPA acted in "bad faith" as to the TWA pilots' seniority integration. *See Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 67 (1991). A DFR violation based on bad faith requires "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore,* 375 U.S. 335, 348 (1964). Plaintiffs' opposition identifies no admissible evidence that would state a DFR violation under this well-established standard.

Plaintiffs admit that judicial review in the DFR context should normally be "highly

[1] "Att. _" references are to Attachments 1-98, attached to our opening brief, and to documents filed with this brief. "ALPA Sanct. Br. Att. _" references are to documents filed with our opposition to Plaintiffs' motion for sanctions. We refer to exhibits from Plaintiffs' opposition submission and to their motion for sanctions as "Pl. Ex. _" and "Pl. Sanct. Ex. _," respectively.

deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *O'Neill,* 499 U.S. at 78. Pl. Br. 4. But they say that deference should not be accorded if a union "acts with an improper intent, purpose or motive." *Id.* at 7. That is not the law, however. As the court explained in *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1532 (7th Cir. 1992), "Slapping the label 'bad faith' or 'discrimination' on a classification that is rationally related to a legitimate objective does not alter the analysis." Even in the face of such allegations, the analysis of a union's conduct under the DFR is "analogized . . . to that of a legislature, subject to the most deferential judicial review." *Id.* (citing *O'Neill,* 499 U.S. at 78). Federal courts have long held, accordingly, that "'mere disagreements over tactics and strategy' will not support a claim for breach of the duty of fair representation." *Morales v. P.F. Labs., Inc.*, No. Civ. A. 00-150, 2000 WL 33678049, at *2 (D.N.J. Aug. 3, 2000) (quoting *De Fillippes v. Star Ledger,* 872 F. Supp. 138, 141 (D.N.J. 1994)).[2]

Moreover, Plaintiffs have no evidence to support their claims of bad faith. Here, ALPA's actions vis-à-vis the TWA pilots and the advice of the attorneys and other professionals at the April 2 TWA MEC meeting fell well within permissible bounds. Indeed, the TWA MEC chose the best of the available options at that meeting (although, in light of the "wide latitude" that courts allow union negotiators, it is not necessary for the Court to find that this was the best option, only that it was within the broad range of reasonableness, in order to grant summary

[2] Plaintiffs unduly rely on *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1471 (10th Cir. 1993). Pl. Br. 6-7. In *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1357-59 (10th Cir. 1994), the Tenth Circuit narrowed *Aguinaga* to its facts, describing it as a decision about a union that "clandestinely entered into a side agreement with the employer to reopen a closed plant as a nonunion operation and that waived all rights and claims that the employees would have against the employer." By contrast, Plaintiffs' extensive discovery has revealed no evidence of bad faith.

judgment in ALPA's favor). *O'Neill*, 499 U.S. at 78.[3]

Plaintiffs rest their "bad faith" theory on the premise that ALPA sacrificed the interests of the TWA pilots during 2001 because it was allegedly seeking to acquire the bargaining rights for the American pilots. That premise has two flaws. First, the undisputed evidence shows that it is false. As we explained in our opening brief at 32-33, the card campaign initiated by Mark Hunnibell and John Clark was not an ALPA effort, and ALPA was not seeking to merge with APA. Second, the premise makes no sense. If ALPA had represented the American pilots, that actually would have advanced the TWA pilots' interests, because the American pilots would then have been subject to ALPA's internal seniority integration procedures. ALPA's Summ. J. Br. 33. It is probably for that reason that Plaintiffs allege in the Complaint that ALPA violated the DFR by failing to seek representation of the combined American-TWA group in an NMB proceeding. Compl. ¶ 107(c). And it is probably for that reason, also, that APA responded to the independent Hunnibell/Clark campaign by advising the American pilots not to sign one of the Hunnibell/Clark cards and to "consider revoking it" if they had already signed one. *Id.*; Att. 39 at P03624.

Furthermore, as the court explained in *Spellacy v. Air Line Pilots Ass'n*, 156 F.3d 120, 126 (2d Cir. 1998), establishing improper union conduct "is only the first step in proving a fair representation claim. Plaintiffs must then demonstrate a causal connection between the union's wrongful conduct and their injuries." *Accord Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir. 1977); *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1472-73 (9th

[3] Plaintiffs seek to avoid summary judgment by speculating about ALPA's "state of mind," Pl. Br. 5, but they have failed to adduce a scintilla of admissible evidence to support their conjectures about the intentions of ALPA's representatives. Fed. R. Civ. P. 56(e) requires more than "some metaphysical doubt" about the material facts in order to defeat summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Cir. 1992); *Self v. Drivers, Local Union No. 61*, 620 F.2d 439, 443-44 (4th Cir. 1980). Plaintiffs complain that they (acting as the TWA MEC) were forced to waive their contractual Labor Protective Provisions (LPPs), and that, in turn, allowed APA to impose an unfavorable seniority integration upon them. But as we explained in our opening brief at 11-15, absent the agreement to waive the LPPs, one of two events would have occurred: either American would have abandoned the transaction, leaving TWA to liquidate, or the bankruptcy court would have granted TWA's Section 1113 motion and authorized rejection of the LPPs, along with the entire collective bargaining agreement (CBA). So even if Plaintiffs' claims about being forced or hoodwinked or ordered to waive their LPPs were true, there would be no causal connection between those events and their claims of harm.

In any event, there can be no doubt that the outcome of the negotiations brought enormous benefit to the TWA pilots by securing their employment with a successful major airline as their own carrier teetered on the brink of failure. The evidence demonstrates that this alone motivated the decisions and advice of those advising the MEC. As we show below, Plaintiffs have repeatedly mischaracterized the record in attempting to bring their case within the orbit of DFR law. The deposition testimony and documentary evidence undermine Plaintiffs' claims that ALPA sought during 2001 to enroll the American pilots in ALPA.[4]

II. PLAINTIFFS HAVE FAILED TO ESTABLISH ANY VIABLE CLAIMS WITH ADMISSIBLE EVIDENCE.

A. The TWA MEC Was Not Misled About the Need to Waive Its LPPs.

Plaintiffs complain that when some of the Named Plaintiffs acted as the TWA MEC, they

[4] Plaintiffs often respond to points in our opening brief by saying that the facts to which we refer do not appear in ALPA's statement of material facts. But many of the facts on which Plaintiffs rely are immaterial, and we address them only because they are related to Plaintiffs' arguments. A statement of material facts need not include every fact used to refute every frivolous argument raised in opposition to a motion for summary judgment.

were misled as to the need to waive the CBA's LPPs at its meeting on April 1-2, 2001, citing five asserted misrepresentations and five allegedly material omissions that they contend constitute grounds for permitting them to evade the consequences of their own decision to waive the LPPs. We demonstrated the flaws in many of these contentions in our opening brief at 11-24 and will incorporate those explanations by reference rather than reiterating them herein. As a matter of law, Plaintiffs' asserted misrepresentations and material omissions do not amount to a DFR violation, separately or cumulatively. Collectively, Plaintiffs' claims constitute improper historical revisionism "over tactics and strategy," *Morales,* at *2. The irony here is that it is some of the Plaintiffs themselves, in their roles as members and chairman of the TWA MEC, who made the tactical and strategic choices that they now lament.

1. Attempting to Stall

As shown in our opening brief at 19-21, there is no merit in Plaintiffs' revisionist theory (Pl. Br. 21) that stalling the Section 1113 hearing might have provided some benefit to the TWA pilots. The TWA MEC's Negotiating Committee, comprised of TWA pilots, had sought in a series of meetings in March 2001 to negotiate the best possible package of agreements for the TWA pilot group pursuant to the MEC's directions. Att. 6: Holtzman 57-58. The Negotiating Committee presented management's offer to the MEC as soon as the offer arrived and urged its acceptance because it concluded that management "would not give anything further." *Id.* One point of absolute management inflexibility was the unavailability of a process agreement for seniority integration requiring arbitration, which "was a topic of conversation at every session." *Id.* With the beneficial provisions of the package of agreements at stake – indeed, with the entire acquisition of assets and the TWA pilots' jobs themselves in peril – the MEC and its Negotiating Committee decided to accept the deal TWA and American had proposed.

Thus, the best possible deal for the TWA pilots was on the table on April 2. *Id.* at 57; Att. 114: Rosen 23-25. Plaintiffs have not identified what possible gain they might have achieved by delaying. As noted in our opening brief at 19-20, American refused to assume conflicting obligations, APA would not agree to arbitrate, and management's offer expired at the start of the Section 1113 hearing (with no assurance that it would be available later).

Even if we assume *arguendo* that the TWA MEC and its Negotiating Committee could with hindsight identify some advantage in delay, the Court would be left with "mere disagreements over tactics and strategy," which provide no basis for sustaining a DFR violation. *Morales*, 2000 WL 33678049, at *2. Right or wrong, the decision was clearly rational "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *O'Neill,* 499 U.S. at 78. That is the end of the inquiry. *Rakestraw,* 981 F.2d at 1534 ("[A] decision to make the best of a poor position does not vitiate a choice.").

2. The Consequences of Section 1113 "Rejection"

We demonstrated in our opening brief, at 21-22, that TWA had asked the bankruptcy court to "reject" the TWA pilots' CBA, and that the court's granting that relief would have nullified the CBA and thereby exposed the TWA pilots to serious consequences. Plaintiffs nonetheless complain that one ALPA staffer's comments on this point "greatly exaggerated" these risks. Pl. Br. 22. There is no evidence that his views were other than a good faith evaluation of the situation. Yet, again, it is unnecessary for the Court to resolve the substantive issue debated by Plaintiffs, as this, too, is but a "mere disagreement over tactics and strategy," which does not justify a DFR violation finding. It was clearly rational for this adviser to provide his view of "the facts and the legal climate that confronted the negotiators at the time the decision was made," and for the TWA MEC to elect to avoid the potential consequences.

3. American's Reasonable Best Efforts Promise

Plaintiffs claim that ALPA portrayed the reasonable best efforts letter of agreement as an important protection for the TWA pilots while knowing the letter was useless. Pl. Br. 23. But Arbitrator Richard Bloch rejected that interpretation of the agreement, in response to arguments by Company counsel: (Att. 43 at 4-5):

> At the outset, the Board rejects the Company's assertions both that the commitment in general was so vague as to resist enforcement and that its obligation was limited to merely kicking off the facilitation process. Underlying American's written commitment in this case is a significant and identifiable obligation of good faith. "Best efforts" is a connotatively meaningful expression of fair dealing. ALPA had the right to expect the Company not only to attempt to implement the machinery that would bring the two competing unions together, but also to support the process generally both by taking steps that would help it and refraining from others that would hurt it.

American made a meaningful and enforceable commitment, as Arbitrator Bloch found.

4. TWA's Chances of Winning Its Section 1113 Motion

According to Richard Seltzer, a leading expert on Section 1113, the odds of ALPA defeating TWA's Section 1113 motion were slim to none. Att. 17: Seltzer 105-06. Plaintiffs offer no evidence that Seltzer's explanation at the April 2 MEC meeting was anything except his honest opinion of the likelihood of success on the pending motion.

Seltzer explained his reasoning as follows: the bankruptcy judge's perspective was that the transaction would save thousands of jobs, that "[t]here were retiree benefits that were going to be assumed," that "[t]here was a contract, without the seniority provisions that ALPA wanted, but . . . which appeared to be favorable and which ALPA had reached agreement on the other aspects of the contract." Att. 115: Seltzer 114. And in Seltzer's view, the bankruptcy judge, who "was most interested in . . . preventing a liquidation, that he believed . . . was going to take place, . . . was not going to risk that in order to provide ALPA with what it wanted on the one

remaining issue," seniority integration. *Id.* at 115.

Plaintiffs contend that two ALPA staff attorneys had previously predicted that TWA would lose its Section 1113 motion, but that assertion, even if it were true, proves nothing of relevance to ALPA's fulfillment of its DFR. Whatever opinions those attorneys had earlier expressed, the TWA MEC made its decision on April 2 after listening to the analysis of one of the nation's leading experts.

Similarly, Plaintiffs say that Seltzer's opposition to the motion "made compelling arguments why the motion should be denied," but their evaluation of the legal arguments is not at odds with Seltzer's testimony. Pl. Br. 23. His prediction of TWA's likelihood of success responds to a different question and there is thus no inconsistency and no misrepresentation. Even though ALPA made good faith arguments, grounded in the facts and the law, the lawyer who drafted the opposition explained to the MEC that the bankruptcy judge assigned to the case would focus first and foremost on preserving the benefits TWA and its employees would receive from the consummation of the corporate transaction.

5. American's Stated Intention to Abandon the Transaction

As we explained in our opening brief at 13-15, 20, key American executives had made it plain that the carrier would abandon its purchase of TWA's assets unless the LPPs were removed from the TWA CBAs. In retrospect, Plaintiffs suggest a more hard-nosed approach might have achieved a better seniority agreement. Pl. Br. 24-25. This argument presents a classic example of a "disagreement over tactics and strategy," and provides no basis for finding a DFR violation. *Morales*, 2000 WL 33678049, at *2. It was clearly rational to recommend avoiding the draconian consequences of a mistaken reading of American's sincerity, such as the immediate loss of all 2300 TWA pilot jobs, "in light of both the facts and the legal climate that confronted

the negotiators at the time the decision was made." *O'Neill,* 499 U.S. at 78.

6. The Terms of the Transition Agreement

Plaintiffs contend that ALPA failed to tell the TWA MEC about major provisions of the Transition Agreement, including the waiver of future collective bargaining with TWA LLC. Pl. Br. 26-27. The MEC received management's offer on March 31, 2001, and had the "opportunity in the quiet of the MEC office in St. Louis to consider what had been negotiated." Att. 104: Holtzman 102. The MEC reviewed the entire proposal with Holtzman at the outset of the MEC meeting, and thus learned about this provision before approving it. *Id.* at 100-02. Indeed, in letters to their constituents on April 3 and 10, 2001, Named Plaintiffs and TWA MEC members Young and Hollander identified as a key element of the Transition Agreement the very provision about which they now claim ignorance: "TWA-LLC can implement changes to work rules with 21 days' notice. Such changes will transition the work rules to those in effect at AA." Att. 121: Letter from Steve Rautenberg and Young to Council 3 pilots (Apr. 3, 2001); Att. 122: Letter from Ted Case, Hollander and David Singer to Council 2 pilots (Apr. 10, 2001).

As Plaintiffs understood at the time, this provision gave the carrier the ability to shift the TWA pilots to the benefits and work rules under which the American pilots already worked, not to make any changes it wished. Nor was the inclusion of this provision in the agreement "gratuitous," as Plaintiffs claim. Pl. Br. 27. No rational airline would bargain for an interim contract, including a waiver of the LPPs, and then permit ALPA to bargain over the same issues during the brief period preceding the application of the APA-American CBA to the TWA pilots.[5]

[5] Airline labor negotiations have often proceeded under exigent circumstances in recent years, imposing tough choices on unions. For instance, in *Cooper v. TWA Airlines, LLC,* 274 F. Supp. 2d 231 (E.D.N.Y. 2003), the court upheld a concessionary contract that was still being finalized while workers were voting on it. *See also Marcoux v. Am. Airlines, Inc.*, No. 04 CV 1376, 2008 WL 2828599, at *24 (E.D.N.Y. July 22, 2008), discussed *infra* at 16.

Plaintiffs are also wrong in arguing, "The TWA pilots did not need a Transition Agreement to remain employed" because the Asset Purchase Agreement imposed an obligation on American to offer them employment. Pl. Br. 26. The corporate agreement specifically disavowed any intent to bestow third party beneficiary status on non-parties, so the Transition Agreement was necessary to secure the ability to enforce American's promise. Att. 123: Asset Purchase Agreement Between American Airlines, Inc. and Trans World Airlines, Inc. § 13.8 (Jan. 9, 2001); *Dravo Corp. v. Robert B Kerris, Inc.*, 655 F.2d 503, 510 (3d Cir. 1981).

Plaintiffs further misstate the record by claiming, "ALPA also gratuitously waived thirteen other protections." Pl. Br. 27. The record contains nothing about what these items were. Some of the provisions not carried forward included the pilots' right to TWA stock and a seat on the TWA Board of Directors; the acquisition rendered them valueless.

7. The Supposed Right to Strike

As we explained in our opening brief at 22-23, and contrary to Plaintiffs' contention, Pl. Br. 27-28, the threat of a strike was not a useful weapon for the TWA pilots in April 2001. As Seltzer asked rhetorically, "[W]hat would be the point of striking against a company that was probably going to liquidate anyway[?]" Att. 17: Seltzer 112. The notion that it was "bad faith" to recommend against this self-defeating exercise exemplifies the extent to which Plaintiffs are grasping at straws to hang on to this litigation.

8. Bankruptcy Rejection Claims

Although not mentioned in the Complaint or in discovery, Plaintiffs now argue that the TWA MEC was disadvantaged by the absence of any specific advice on April 2 of the possible recovery of rejection damages if TWA prevailed on its Section 1113 motion. Pl. Br. 28. The law is unclear, however, as to whether the rejection of a labor agreement pursuant to Section

1113 gives rise to a claim for contract rejection damages. *S. Labor Union, Local 188 v. Blue Diamond Coal Co. (In re Blue Diamond Coal Co.)*, 160 B.R. 574, 576-77 (E.D. Tenn. 1993); John J. Gallagher *et al.*, *An Unhappy Crossroads: The Interplay of Bankruptcy and Airline Labor Law*, 1 ALI-ABA Airline and Railroad Labor and Employment Law 825, 860-61 (2008).

Also, even if we assume for the sake of argument that such damages might have been available, there was no value to the threat of recovering damages in the event that the bankruptcy court were to approve TWA's Section 1113 motion, nor to any money that TWA pilots might have received from their pre-petition, unsecured claims, because TWA's unsecured creditors received no recovery in the carrier's bankruptcy. Att. 102: Glanzer 53-54.

9. The Supposed Conflict of Interests of Seltzer's Law Firm

Plaintiffs question whether the MEC knew that Seltzer's law firm was counsel to the union that represented American's flight attendants. Pl. Br. 28. There is no dispute, however, that Seltzer advised Holtzman of this fact and that Holtzman in turn informed MEC Vice Chairman Scott Schwartz and MEC Secretary-Treasurer Bob Stow. Pl. Ex. 6: Holtzman 131.

Furthermore, the other union was not a party to the bankruptcy proceedings in which Seltzer participated and he therefore had no conflict of interest. N.Y. Rules of Prof'l Conduct R. 1.7(a)(1) (prohibited conflict of interest "involve[s] the lawyer in representing differing interests."). In any event, even if Plaintiffs could establish such a conflict – which they have not – ALPA's engagement of such a lawyer reasonably and in good faith could not form the basis for a DFR violation. For ALPA's DFR responsibility is not triggered by any conceivable complaint Plaintiffs' fertile imaginations could concoct as to legal services their representatives received.

10. Babbitt's Recommendations to the TWA MEC

Plaintiffs contend that ALPA failed to tell the TWA MEC that Randy Babbitt

recommended petitioning the U.S. Department of Transportation (DOT) to condition its final approval of the asset purchase on a fair and equitable integration of TWA and American employees, and developing a "bottom line" seniority integration proposal, to be passed to APA with a threat of litigation. Pl. Br. 29. As we noted in our opening brief at 23-24, however, there was no reason to petition DOT because agency officials had already rejected that request at a meeting on March 27, 2001. Att. 19: Warner 65-68. And Babbitt suggested the tactic of a "bottom line" proposal to the TWA MEC at its meeting on April 1, 2001. Pl. Ex. 18: Warner 111. Plaintiffs' contention to the contrary arises from their misreading of Clay Warner's deposition testimony. *Id.*; Plaintiffs' Statement of Additional Material Facts ¶ 124.

Accordingly, none of Plaintiffs' alleged misrepresentations and material omissions provides the foundation for a finding that ALPA violated its DFR. This aspect of Plaintiffs' claim lies at the heart of their Complaint, but there are no facts that they could prove that would support a judgment in their favor on this theory.

B. There Is No Merit in Plaintiffs' Claim that ALPA Violated Its Policies.

Plaintiffs claim that ALPA failed to follow three of its policies, and that such action constitutes a *per se* DFR violation. However, the record shows that ALPA did not violate any of its policies. And even if it had, federal labor law would not require a finding that ALPA's DFR was violated in such circumstances.

1. ALPA Followed Its Policies

a. Negotiations

Plaintiffs contend that ALPA violated its policy because Woerth "had no involvement" in the negotiations leading up to the TWA MEC's April 2 approval of the package of agreements that its Negotiating Committee had worked out with TWA and American. Pl. Br. 18. Plaintiffs

misread both the record and Section 40.6.A.2.a. of ALPA's Administrative Manual, which provides for "[c]oordination directly through the President's office" during concessionary negotiations. Pl. Ex. 75 at 40-22. This provision does not say that the President must personally participate in the negotiations, *id.*, and there is no evidence that Woerth's office failed to "coordinate" the services provided to the TWA MEC. Pl. Ex. 2: Woerth 150-52. Moreover, Plaintiffs do not allege that they requested more input or personal involvement from Woerth.

b. Membership Ratification

Plaintiffs also contend that ALPA denied an alleged TWA MEC request for membership ratification of the TWA LLC-ALPA Transition Agreement, and that ALPA policy required the TWA pilots to ratify the Transition Agreement since it was a "first contract." Pl. Br. 19. The ALPA Constitution and By-Laws do not refer to "first contracts," *see* Pl. Ex. 96, and Plaintiffs mischaracterize the Transition Agreement as the "first contract" for the TWA pilots, whose ALPA CBAs went back, through various corporate reorganizations, more than fifty years. Att. 23: Holtzman Decl. ¶¶ 2-3. The ALPA Constitution, Art. XXVIII, Sec. 2(a)(2), provides that membership ratification is at "the option of the MEC." Pl. Ex. 96. ALPA interpreted its Constitution as requiring membership ratification only if the MEC adopted a resolution invoking that option.[6] Neither the minutes of the April 2 meeting nor any other document reflect that the MEC asked for membership ratification or that anyone at the meeting refused it. Att. 124: TWA MEC Special Meeting Minutes (Apr. 2, 2001). As David Holtzman explained, membership ratification is "the MEC's decision," and "the MEC, by ratifying the agreement, . . . used the

[6] Courts "typically defer to a union's interpretation of its own Constitution and will not override that interpretation unless it is 'patently unreasonable.'" *Executive Bd. of Transp. Workers Union of Phila., Local 234 v. Transp. Workers Union of Am., AFL-CIO*, 338 F.3d 166, 170 (3d Cir. 2003) (dissolving preliminary injunction because union's interpretation of its constitution was entitled to deference).

MEC ratification [alternative] to ratify the agreement. To do it otherwise would have required . . . different language and a resolution." Pl. Ex. 6: Holtzman 174-75.

C. Unwritten Policy

Plaintiffs further allege that ALPA violated an unwritten policy, "Independence Plus," by "ordering" the TWA MEC to accept the package of agreements that its Negotiating Committee achieved. Pl. Br. 19. Plaintiffs attempt to leverage ALPA's general operating practices into a rule, and argue that the violation of that "rule" is a DFR breach. Moreover, Plaintiffs seek to blur the distinction between an advisor commenting that "you have only one choice" and a superior "ordering" a subordinate to take an action. *Id.* at 17. No one at the April 2001 TWA MEC meeting had the authority under the ALPA Constitution and By-Laws to "order" the MEC to approve the proposed agreements, nor to refuse to conduct a membership ratification referendum, if the MEC had so resolved.

Plaintiffs' contention misconstrues how ALPA works. ALPA's professional staff and advisors and its national officers do not "order" MECs how to conduct their negotiations. Att. 114: Rosen 19; Att. 119: Woerth 248-50, 263. Each MEC has "extraordinary autonomy," and decides "every key question," as the TWA MEC did here. Att. 119: Woerth 250. No record of any "order" to the MEC exists because the MEC reached its own decision as to how best to protect the interests of the TWA pilots.

2. A Union's Deviation from Its Policies Does Not Constitute a *Per Se* DFR Violation.

Contrary to Plaintiffs' contention, Pl. Br. 18, a union does not automatically breach its DFR because it departs from its stated policies. While strictly "[a]dhering to [its internal] policy [may] insulate[ ] the union [against a DFR claim], . . . it does not follow that deviation exposes

the union to liability." *Rakestraw*, 981 F.2d at 1533.[7]

For example, in *Jones v. Pepsi Cola Bottling Co.*, 822 F. Supp. 396, 402-03 (E.D. Mich. 1993), the court dismissed a DFR complaint alleging that a union entered into a plant closing agreement without ratification even though its bylaws required ratification of CBAs. *Accord Baker v. Newspaper & Graphic Commc'ns Union, Local 6*, 628 F.2d 156, 166-67 (D.C. Cir. 1980) (summary judgment for union, which, by entering agreement with employer, "transgress[ed]" inter-union agreement and arguably its constitution; employer's threat of further job losses absent agreement posed a "no-win situation" for union, which "chose an equitable solution in keeping with the [DFR] standard"); *Famulare v. United Transp. Union Int'l*, 639 F. Supp. 965, 968-69 (S.D.N.Y. 1986) (summary judgment for union, which, faced with threatened transfer of work, acted reasonably in interpreting union constitution to permit entry into an agreement it deemed necessary "to protect the interests of the membership and the [union]").

Similarly, in *Marcoux v. Am. Airlines, Inc.*, No. 04 CV 1376, 2008 WL 2828599, at *24 (E.D.N.Y. July 22, 2008), the union's constitution required balloting for thirty days and the distribution of the proposed changes to the contract before voting, but the court granted summary judgment, even though these requirements were not observed, because "no reasonable jury could find these actions 'arbitrary, discriminatory, or in bad faith.'" Here, as in *Marcoux* and the other

[7] Plaintiffs misplace their reliance on *Nellis v. Air Line Pilots Ass'n*, 815 F. Supp. 1522 (E.D. Va. 1993), *aff'd* 15 F.3d 50 (4th Cir. 1994); *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213, 216 (9th Cir. 1989); and *Olsonoski v. Air Line Pilots Ass'n*, No. C-92-4491, 1994 WL 284993 (N.D. Cal. June 15, 1994). None holds that a union automatically breaches its DFR if it fails to follow its policies. In *Nellis*, 815 F. Supp. at 1540, the court granted summary judgment in ALPA's favor because there was no evidence that ALPA departed from its policy and it made clear that it was not ruling as Plaintiffs contend: "ALPA could only be found to have *impermissibly* discriminated against the plaintiffs if, in acting against the minority's interests, it violated the terms of a duly ratified union policy." In *Bernard*, 873 F.2d at 216, and *Olsonoski*, 1994 WL 284993, at *6, the courts merely ruled that ALPA's failure to follow its merger policy supported the conclusion that ALPA breached its DFR, not that a *per se* violation occurred.

cases cited above, summary judgment dismissing the complaint is appropriate because there is no basis for finding that ALPA's supposed departures from its policies were in bad faith, nor that they caused the harm of which Plaintiffs complain. *Humphrey v. Moore,* 375 U.S. at 350-51 (DFR plaintiffs must show "that the result would have been different had the matter been differently presented"); *Spellacy v. Air Line Pilots Ass'n,* 156 F.3d 120, 126 (2d Cir. 1998) (DFR plaintiffs must "demonstrate a causal connection between the union's wrongful conduct and their injuries").

C. Plaintiffs Repeatedly Mischaracterize the Record.

Plaintiffs also mischaracterize the record over and over again, in ways too numerous to recount here. Most of the factual issues they attempt to create are immaterial, but a few examples are necessary to give the Court a sense of the scope of the distortions underlying Plaintiffs' effort to oppose summary judgment.

1. ALPA Data Given to APA's ALPA Exploratory Committee

In an effort to bolster their conspiracy theories, Plaintiffs state that "ALPA shared information with [APA]." Pl. Br. 8. But the information at issue was public material, including "documents, for example, that describe services we provide to our members or activities that we've [been] involved in." Att. 8: Johnson I:123-24; Att. 125: APA's ALPA Exploratory Comm. Rep. to APA BOD (Jan. 29, 2001). ALPA was "involved at this time in a merger effort with Continental, there were a lot of materials that . . . we had that were off the shelf that if [they] felt that it was helpful that we . . . could provide it to [them]." Att. 8: Johnson I:124. Moreover, as Plaintiffs concede, even that exchange of public material ceased in early January, soon after American's acquisition of TWA was announced.

2. Termination of ALPA-APA Merger Discussions

In our opening brief at 28, we showed that any interest in an APA-ALPA merger in 2000 promptly evaporated when American announced its acquisition of TWA's assets. *See also* Att. 21: Woerth 61, 65-67; Att. 106: Johnson I:25. ALPA discontinued work with APA's ALPA Exploratory Committee because "with the announcement of the TWA merger we knew that any further progress with APA was a dead issue." Att. 8: Johnson I:116. As Clark put it, the Exploratory Committee report "landed with a thud because of the acquisition of the TWA assets . . . that was announced on January 9th." Att. 101: Clark 81.

Plaintiffs assert that ALPA "falsely assured" the TWA pilots that merger discussions with APA had ended in January 2001. Pl. Br. 8. They contend that the minutes of the ALPA Executive Council meeting on January 23, 2001 show that Woerth admitted that American organizing was "continuing." Woerth explained, however, that the reference in the Executive Council's minutes was to his report on "continuing" organizing at Continental and FedEx, and not at American. The minutes say:

> The Pilot Unity campaign, also directed by the October 2000 BOD, and which resulted in approval of the proposed ALPA/IACP Merger Agreement, is continuing and Captain Woerth updated the Council on the efforts at American Airlines and Federal Express.

Pl. Ex. 39 at ALPA 039774. Woerth explained that he had "reported [to the ALPA Executive Council] that I went to the APA board and reported that as that was all that happened." Att. 21: Woerth 60-61. Referring to the minutes, Woerth testified, "I reported in this thing that I was there and any characterizing I made with American Airlines was once the merger is announced there was no chance to organize American." *Id.*

Similarly, Plaintiffs misrepresent the minutes from the ALPA Executive Council in April 2001 as stating that "in early April 2001, ALPA 'expanded' its organizing efforts at American." Pl. Br. 9. As with the January minutes, the reference in the April minutes is to the Pilot Unity

program in general, not to any activity with APA. Woerth recounted his April report to the ALPA Executive Council:

> I'm sure we felt that of the four unions mentioned in the unity resolution it's natural to address all of them in any follow-up review . . . . You can't just leave them out. . . . The word expanded refers to the group of four. The only expansion was at Continental and FedEx. Maybe a[] little bit at [Air] Canada. There was no expansion of APA.

Att. 21: Woerth 62-64.

Plaintiffs rely on Jalmer Johnson's letter of January 25, 2001, in which he made a perfunctory offer to reimburse APA for expenses for distributing information about ALPA to APA members. Pl. Br. 8; Pl. Ex. 40. Johnson's letter was *pro forma*:

> Recognizing that the board had not decided the opposite, that they weren't going to pursue it, I looked at this as being a procedural letter that we've done with other groups as they've considered it. But as I explained earlier, based on discussions I had with him and discussions I had with others, we didn't expect anything coming out of this meeting or any merger coming forth. So I look at this [as] being nothing more than procedural correspondence.

Att. 106: Johnson I:125. No ALPA reimbursement was requested or paid.

Plaintiffs further claim that Woerth's reference to the American-TWA merger as a "little thing" during an August 2002 address at the APA DFW domicile shows that the APA merger talks were "only suspended" after the announcement of American's purchase of TWA's assets. Pl. Br. 14. Woerth's comment was clearly facetious.

3. Rindfleisch's Duties and Actions

In describing Ron Rindfleisch as ALPA's "chief organizer," Pl. Br. 8, Plaintiffs continue their ongoing effort to overstate his role. *See* ALPA's Summ. J. Br. 30-31. One of his duties was organizing, but he was not a management employee, was several layers from the top of the hierarchy, had no staff or budget, and did not make policy. Att. 14: Rindfleisch I:11-12, 19, 47.

Plaintiffs claim that Rindfleisch "encouraged" Hunnibell and Clark by his email on

December 21, 2001, commenting that ALPA would reimburse them for their expenses. Pl. Br. 14 n.4. But Rindfleisch "did not have the authority to . . . commit the financial resources of the Association." Att. 8: Johnson I:45.[8] And his unauthorized email did not "encourage" them as their effort was over when he sent it. Pl. Exs. 62, 67. Only about a dozen of the cards they collected were signed after mid-September 2001. Pl. Sanct. Ex. 37. They understood by then that ALPA, APA and the American pilot group were not interested in their card campaign; Rindfleisch in particular had made clear to them that card campaigns were "not the way that [ALPA] wanted to do business." Att. 7: Hunnibell 81-82.

Plaintiffs say that three of the candidates for APA office in May 2001 "were actually running on pro-ALPA tickets" and that "ALPA corresponded with these candidates regarding their campaigns." Pl. Br. 10. Plaintiffs misrepresent the facts. ALPA had nothing to do with these candidates' campaigns. Rindfleisch received an email from Terry McCullough passing along a link to the candidates' websites, but McCullough was not a candidate and had no role in any of these campaigns or in the Hunnibell/Clark card campaign. Att. 11: McCullough 23, 40, 51. Contrary to Plaintiffs' assertion, Rindfleisch learned of the distribution of authorization cards after-the-fact, and provided no input into any of the internal APA campaigns. Att. 112: Rindfleisch II:93-95; Att. 105: Hunnibell 74; Att. 101: Clark 82 ("There was no consultation

[8] Plaintiffs falsely claim that Rindfleisch secured approval to pay these expenses. Pl. Br. 12-13. First of all, Plaintiffs shade the truth in claiming that he "forwarded" the reimbursement request "to Woerth and fifteen other ALPA executives and officials." *Id.* at 12. The email he distributed had only a passing reference to the prior request, buried in a lengthy review of other subjects. Pl. Ex. 58. Nor did Rindfleisch "request[] and obtain[] approval from ALPA Legal and ALPA Finance." Pl. Br. 13. He sent a draft of his December 21 email to Warner and Kevin Barnhurst, but he did not do so asking for approval of the expenses. Pl. Ex. 64. Warner did not have the authority to approve the reimbursement of expenses, as Rindfleisch knew, and Warner and Barnhurst edited the email only for clarity. Att.15: Rindfleisch II:222; Att. 118: Warner 231-33. A few days later, Rindfleisch brought the request to Johnson, who instructed him to take the receipts to Barnhurst and tell him "to hold them and put them in a file." Att. 9: Johnson II:12.

with ALPA about that whatsoever.").

Nor did Rindfleisch's duties include performing any services for the TWA pilots. Att. 14: Rindfleisch I:222-23. He had no role in the TWA pilots' negotiations and neither did any of the American pilots who sent him emails. Plaintiffs also state without benefit of evidence that Rindfleisch "had almost daily contact" with Clark and Hunnibell. Clark was emphatic: "Never happened that way." Att. 101: Clark 81; Att. 105: Hunnibell 91(testifying that contact averaged once a month).

4. The Advice of the Various TWA MEC Advisors

Plaintiffs repeatedly mischaracterize what happened at the April 2 meeting. They allege that all of the advisors at the meeting told the MEC it "had no choice but to waive" the LPPs and that ALPA "ordered" it to do so. Pl. Br. 17, 19. However, as discussed above in Point II.B.1., MECs have "extraordinary autonomy" and decide "every key question" concerning their CBA negotiations – no one issued any "orders" and the MEC would have had no obligation to follow them in any event. Att. 21: Woerth 250. The attorneys and other professionals advising the MEC did what was asked: They provided advice on the available options and gave their views on their areas of special expertise.

Notably, Wilder recommended suing in federal district court to enjoin the acquisition. Att. 20: Wilder 61-64; Pl. Ex. 78. He hypothesized that the tactic would buy a few days to negotiate a better agreement on seniority integration procedures. Att. 20: Wilder 61-64. The MEC decided not to pursue the litigation. *Id.*

Warner tried to list "alternatives, follow[] paths, summariz[e] the advice that they were getting from their other advisors, and point[] out the results of the various alternatives." Pl. Ex. 18: Warner 21. He "emphasized . . . the consequences of the waiver" (*id.* at 47-48):

> that they would have employment with American, first with TWA-LLC and then with American under the terms and conditions that had been negotiated for LLC and then under American's green book. But that they would not have a seniority integration that they were happy with.

Babbitt outlined for the MEC "what I thought was a binary choice." Att. 1: Babbitt 123-24. He explained (*id.*), "The binary choice that I saw was one of two things; you're either going to accept the best deal that they have offered you or your alternative choice is to reject it."

Glanzer advised the TWA MEC "that it was a highly risky proposition to conclude that American would not walk away from the transaction if" the LPPs "were not waived," and that

> TWA's position, financial position, was precarious and it was burning through an enormous amount of cash; that the American transaction, I viewed as the only likely -- the only potential merger candidate at that juncture; that in the absence of American funding the bankruptcy, the company was out of money; and that it was my impression, from the -- discussions I participated in with American's management in the Unsecured Creditors' Committee context, that there was not a unanimity amongst American's officers with respect to the wisdom of proceeding with the transaction, and . . . that American, if they had thought about it, could probably have obtained the assets that they were interested in without necessarily going through this transaction.

Att. 4: Glanzer 58-59.

Based on his experience and analysis of the case and the judge, Seltzer counseled the MEC that the bankruptcy court would grant TWA's Section 1113 motion. Att. 17: Seltzer 104-06; Att. 115: Seltzer 113-16. He also told them that "when a contract is rejected, there is not a contract in effect, and that the question of what, if anything, was binding on the purchaser" – "what the terms and conditions would be at the purchaser" – was "completely uncertain," a "black hole." Att. 17: Seltzer at 106-08, 117-18; Att. 115: Seltzer 116. Seltzer further informed the MEC that Wilder's strategy to enjoin the asset purchase by filing an injunction action was inconsistent with the law and misleading. Att. 17 at 118-23. Seltzer expressed the view that the district court would either enjoin Wilder's proposed lawsuit or remand it to the bankruptcy court.

Id. at 122-23. And if the district court remanded it, Seltzer said he did not believe that the bankruptcy court would adjourn the Section 1113 hearing. *Id.*

5. ALPA's Preparation for the Section 1113 Hearing

Plaintiffs draw outlandish inferences from their false assertion that ALPA ignored the need to prepare for the Section 1113 hearing. Pl. Br. 19 n.9. In Section 1113 cases, Seltzer explained, "[y]ou're litigating something which usually is changing from day to day as you get close to the hearing," "[s]o a lot of 1113 witness prep . . . tends to take place immediately before the hearing, so you can focus on whe[re] the negotiations are [at] that point." Att. 115: Seltzer 94. If the hearing on TWA's Section 1113 motion had taken place, Seltzer planned to call TWA MEC Vice Chairman Schwartz. *Id.* "[B]y the time of the hearing, . . . the likely outstanding issue would be the seniority issue," and Seltzer's choice was Schwartz as "the best person to talk about why this issue was important, and what the pilots' position at that point was, and if they hadn't agreed at that point, why they hadn't agreed." *Id.* Schwartz "had already testified in the bankruptcy proceeding," and Seltzer could have prepared him the day before the hearing if necessary. *Id.* In fact, Seltzer observed, "It would not [have] ma[d]e a lot of sense to prep him on the positions of the parties a week ahead of time." *Id.*

6. Hunnibell and Clark's Visit to ALPA Headquarters

Plaintiffs say that "the principal American pilot organizers were invited to ALPA headquarters to meet with ALPA officials" on July 23, 2001, and that ALPA concealed this "fact" from the TWA pilots. Pl. Br. 12. The record does not support these contentions.

Clark speculated that he and Hunnibell "*probably* took a cab over to [ALPA's] D.C. office" on July 23, 2001, Att. 101: Clark 121 (emphasis added), but there is no receipt for this cab ride among those they sent to Rindfleisch. Att. 34 at ALPA 024612. Clark's recollections

were vague, moreover, and he could not recall who was present or whether ALPA invited them to the facility or he and Hunnibell invited themselves. Att. 101: Clark 121-22.

Hunnibell testified that he and Clark met with ALPA personnel only twice in the Washington, D.C., area. Att. 105: Hunnibell 63. In July 2001, as he recalled, they stayed in downtown Washington, but they did not visit ALPA headquarters. *Id.* at 58, 60, 63. Hunnibell remembered that on another occasion he and Clark "stayed at . . . the Marriott, right next door to [ALPA] headquarters out in Herndon," but that was later, in "May or perhaps June 2003." *Id.* at 63, 77. Corroborating Hunnibell's testimony, no one from ALPA recalled Hunnibell and Clark visiting ALPA headquarters in 2001 or 2002. Att. 12: Mugerditchian 138-40; Att. 113: Rindfleisch II:61; Att. 21: Woerth 311-12. Paul Rice succeeded to Mugerditchian's position in 2003; thus, further supporting Hunnibell's recollection is Rindfleisch's testimony that he and Rice met Hunnibell and Clark at the Herndon Marriott, and that they toured ALPA's Herndon facility the next day. Att. 112: Rindfleisch I:124-25.

7. Clark's Supposedly "Lavish" Meal

Plaintiffs erroneously assert that Clark "got treated to a lavish meal" on December 5, 2001. Pl. Br. 13. Clark testified at his deposition that he flew from Los Angeles to Las Vegas "that morning, and . . . was probably back home by 2:00" the same day. Att. 101: Clark 166. He said he had lunch with Woerth and Mugerditchian and returned afterwards. *Id.* at 164. Woerth and Mugerditchian testified the same. Att. 21: Woerth 307 (lunch consisted of "a coke and a ham sandwich"); Att. 108: Mugerditchian 151 (meeting with Clark lasted only ten or twenty minutes). Clark's parking receipt at LAX shows he entered on 12/5/01 at 10:21 and departed the same day at 17:22. Pl. Ex. 63 at ALPA 024611. John Feldvary inadvertently named Clark on his expense report at both lunch and dinner, but his declaration explains that Clark was only at

lunch and that Feldvary mistakenly listed him at dinner. Att. 126: Feldvary Decl. ¶¶ 2-3. The tab for lunch was $65 for five people, hardly a "lavish" meal.

D. Plaintiffs' Post-April 2 Theories Are Likewise Fatally Flawed.

Plaintiffs mischaracterize the events after the TWA MEC agreed to management's offer, as we discussed in our opening brief at 33-41. A few of their errors are further described below.

1. Woerth's Appearance at the APA Board Meeting on April 5, 2001

Plaintiffs speculate that Woerth wanted the TWA MEC's scope waiver in hand when he appeared at an APA meeting on April 5, 2001.[9] Pl. Br. 22. It is undisputed, however, that APA invited Woerth at the last minute, and that he was only able to stop by the meeting because he was already in Texas. Att. 21: Woerth 237, 240-41. And it is undisputed that Woerth did not tell any of the attorneys or others at the April 2 MEC meeting what advice to give or when the TWA MEC should act on management's proposal. Att. 116: Tumblin 94-96; Att. 17: Seltzer 140-41; Att. 21: Woerth 222.

2. Wilder's Litigation Theories

Plaintiffs argue that ALPA erred in rejecting Wilder's second litigation theory, Pl. Br. 31-32, but ALPA's Legal Department thoroughly evaluated it and concluded that it was frivolous and would produce no leverage. ALPA Br. 36. Plaintiffs also argue that ALPA should have authorized Wilder's proposed injunction lawsuit, Pl. Br. 33-34, but that proposal became moot when American agreed to arbitrate ALPA's reasonable best efforts grievance on an expedited schedule. ALPA Br. 37.

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[9] Plaintiffs erroneously claim that Woerth told APA that the *TWA MEC* needed to "get real" in the seniority negotiations, Pl. Br. 9, even though Woerth testified that he said that *APA* needed to "get real." Att. 21: Woerth 247. Plaintiffs rely on an American pilot's electronic bulletin board posting contradicting Woerth's testimony (Pl. SOAF ¶ 162), but the author of the message disavowed any recollection of the alleged statement at his deposition. Att. 111: Reifsnyder 7-10. Not a shred of admissible evidence conflicts with Woerth's testimony as to what he told APA.

3. The Number of Authorization Cards

Plaintiffs misrepresent the record in order to manufacture a dispute as to the number of authorization cards collected by Hunnibell and Clark. They claim that ALPA's "30(b)(6) witness testified there were 2,300." Pl. Br. 13 n.3. As Plaintiffs well know, however, the witness corrected himself on this point: "I confused the number of TWA pilots with the numbers of cards. . . . I think there were . . . in excess of 1,000 cards that I was told about. . . . [T]hat's roughly the numbers that we are talking about. So I just wanted to correct my mistake and my reference to 2300." Att. 114: Rosen 166. An analysis of the two spreadsheets from Clark shows exactly the same 1549 signers on both spreadsheets. ALPA Sanct. Br. Att. 12: McCarthy Supplemental Decl. ¶¶ 4-5.

4. The TWA MEC's Major Contingency Fund Requests

Plaintiffs claim that ALPA violated its DFR when the Executive Council denied the TWA MEC's requests for additional money beyond its operating budget to finance unspecified litigation. Pl. Br. 32-33. This claim is absurd on its face – there is no DFR requirement to accede to every request for funding without regard to the union's budget and financial policies. The TWA MEC had operating deficits in excess of $4 million for the 1997-2001 period, Att. 127: TWA MEC MCF Request (Jan. 16, 2002) at ALPA 020552; Att. 100: Case 133, and had received Major Contingency Fund (MCF) grants every year from 1988 to 2000, a "world record." Att. 119: Woerth 174, 303. Pastore verbally asked the Executive Council to tap into the MCF, yet again, to retain an additional attorney in July 2001, Pl. Br. 33, Pastore Decl. ¶12, but he did not have a TWA MEC resolution requesting the funding, as required by ALPA policy, and in any event the basis for the request would have fallen outside ALPA's policy for accessing the MCF. Att. 106: Johnson I:59-62, 81-82. The Executive Council nonetheless "reaffirm[ed] the

pledge of the May 2001 Executive Board to provide the full moral support of the Association, along with the necessary funding . . . to enable the TWA MEC to properly represent the TWA pilots." Att. 128: ALPA Executive Council Resolution AI #35 (July 24-25, 2001). In 2001, consistent with these resolutions, the TWA MEC received more than a million dollars in loans, transfers and grants from the Operating Contingency Fund (OCF), Att. 100: Case 133.

There was also a January 2002 request for more than $3 million from the MCF (Att. 127), this one supported by a TWA MEC resolution. The Executive Council also denied this request because the TWA MEC still had adequate funding for its ongoing activities and this request, too, fell outside of the MCF's scope, as it was likewise premised on undefined litigation. Att. 129: ALPA Executive Council Resolution AI #22 (Jan. 15-17, 2002). And in the January 2002 resolution disposing of the TWA MEC's request, the Executive Council agreed to continue to give more OCF money to the MEC if its existing budget proved insufficient for matters including member communications, pilot unity initiatives, MEC meetings, and contract negotiations. *Id.* at 3.

Significantly, the vote to deny the MCF requests on the Executive Council, on which the TWA pilots had a representative, was unanimous. Att. 110: Rachford 88. And even now, Plaintiffs cannot claim that it mattered from which fund their financial support came, or that the MCF money they requested would have improved their seniority standing at American.[10]

5. The Bond Bill

[10] Plaintiffs attribute remarks to Woerth and another Executive Council member that they contend are evidence that the MCF requests were denied in bad faith. Pl. Br. 32-33. Woerth's alleged comment was "no, and hell no." Pl. Ex. 1: Rachford 43. Woerth apparently had strong feelings about the TWA MEC's overspending and the substantial resources it had taken advantage of. Att. 119: Woerth 174, 303. Moreover, profanity is commonly heard at union meetings, and does not constitute a proper foundation for a DFR violation. *See Cooper,* 274 F. Supp. 2d at 244-45 ("stray remarks" are "extremely weak evidence, if evidence at all, of either bad faith or discriminatory animus" when made "during an emotionally charged labor meeting").

Plaintiffs claim that ALPA violated its DFR because it did not succeed in securing the enactment of S. 1479, 107th Cong. (2001) (Att. 86), which was aimed at requiring the arbitration of the integration of employee seniority lists for the American-TWA merger. Pl. Br. 35. Plaintiffs apparently contend that the bill would have been enacted if ALPA had pushed harder for it, Pl. Br. 35, but that theory conflicts with what the TWA MEC said in 2001 and with the evidence developed in discovery. In an Information System Update on Dec. 19, 2001 (Att. 87), TWA MEC Communications Chairman Glenn Stieneke conveyed the TWA MEC's "gratitude" to ALPA's Government Affairs Department "for their support and guidance in pushing this proposed legislation forward" and his belief that the "TWA pilot lobbyists and ALPA Government Affairs have made a definite impression on both Houses of Congress."

Indeed, the record shows that this view was justified. On October 3, 2001, Woerth wrote Sen. Christopher Bond that ALPA "strong[ly] support[ed]" the bill. Att. 88. Woerth also talked with Rep. Richard Gephardt about it and "place[d] a few calls to senators." Att. 21: Woerth 279. ALPA's Government Affairs Department also "went out and pursued it and . . . lobbied . . . within Congress to try and get the Bond Amendment passed." Att. 16: Rosen 100. Paul Hallisay, ALPA's Director of Government Affairs, and his associates Brendan Kenny and Jerry Baker, "talked to many people" about the measure, including senators. Att. 21: Woerth 278, 292. ALPA's Legal Department offered suggestions "about how to fix the legislation," after learning of defects that would have prevented it from achieving what the TWA pilots wanted it to do. Att. 117: Wagner 105-06.

Woerth and Hallisay advised the TWA MEC that the necessary language should be quietly added as a rider to the Senate's version of an appropriations bill, which would then hopefully pass the Senate and slip quickly through the House-Senate Conference Committee.

Att. 119: Woerth 281-83. They explained to the TWA MEC that this "stealth strategy" was the most likely approach to secure the enactment of these provisions because APA and American opposed them. *Id.* at 283-84. The proposed legislation was never likely to pass because Republicans controlled the Congress and the White House and there was little interest in "special interest legislation" for a particular group of airline employees following the September 11 attacks and the resulting devastation throughout the airline industry. Att. 16: Rosen 104-07. The bill did pass the Senate as an amendment to the 2002 Defense Appropriations Bill. Att. 119: Woerth 279, 292-93, 297. However, the TWA MEC had publicly trumpeted the endeavor, contrary to the advice of Woerth and Hallisay, thereby sparking intense lobbying by opponents of the bill, who obtained its removal in the Conference Committee. *Id.* at 294-97.[11]

In any event, there are many reasons why any particular bill does not become law, and the claimed lack of support by ALPA could not have been the cause of Congress's failure to enact the Bond bill. Accordingly, Plaintiffs cannot demonstrate the "causal connection" between ALPA's alleged conduct and their injuries that is necessary to state a DFR claim. *Humphrey v. Moore*, 375 U.S. at 350-51; *Spellacy v. Air Line Pilots Ass'n*, 156 F.3d at 126.

6. Litigation over the Validity of Supplement CC

Plaintiffs criticize ALPA for failing to defend Named Plaintiff Bud Bensel in APA's lawsuit against him. Pl. Br. 35. However, the Third Circuit upheld APA's claim in that lawsuit that Supplement CC was a valid agreement. ALPA Br. 39-40. ALPA funding would not have altered that result.

7. Picketing by Other ALPA Members

Plaintiffs suggest that ALPA violated its DFR because it did not take any action to

[11] Plaintiff Arthur cited hearsay comments by unnamed persons attributing opposition to the bill to ALPA, but he offered no admissible evidence to support his claims. Pl. Ex. 24: Arthur 45-51.

organize picketing by pilots from other airlines. Pl. Br. 36. Plaintiffs never requested such action and it is not a part of their Complaint or the parties' discovery. Plaintiffs do not say whom ALPA would have picketed or what that would have accomplished. Thus, the alleged misconduct could not possibly support a DFR finding as a matter of law.

8. Public Relations Campaign

Plaintiffs also say that ALPA breached its DFR because it failed to undertake any public relations campaign in support of the TWA pilots. Pl. Br. 37. They omit mention of the fact that ALPA approved the TWA MEC's hiring of a public relations firm in January 2001 and that the MEC utilized the firm's services as it saw fit throughout its seniority battle. Pl. Ex. 39: ALPA Executive Council Meeting Minutes (Jan. 23-25, 2001) at ALPA 039815-16. The failure to launch a public relations campaign could not, in any event, form the basis for a DFR violation.

9. The Consolidation of the TWA MEC into a Single Domicile

Plaintiffs complain that the TWA MEC was reduced to one local council in order to manipulate the MEC into approving Supplement CC. Pl. Br. 37-38. But the ALPA Constitution required a single domicile for the TWA MEC when TWA LCC closed its Los Angeles and New York pilot domiciles and based all TWA pilots in St. Louis as of November 2001. Att. 130: ALPA Constitution & By-Laws, Art. III, § 10.A.; Att. 108: Mugerditchian 173-74. And in any event, the TWA MEC and ALPA never approved Supplement CC, so the alleged "manipulation" had no effect.[12]

10. The TWA MEC Meeting on November 7, 2001

[12] Plaintiffs allege that Warner "threatened" Young that TWA pilots might sue her if she blocked the vote on the seniority agreement by absenting herself from the meeting in order to deprive the meeting of a quorum. Pl. Br. 38; Pl. Ex. 18: Warner 179; Att. 120: Young 126-28. The quorum issue never made a difference, however, because Pastore ruled that the motion to approve Supplement CC failed for lack of a second. Att. 120: Young 128.

As further evidence of the supposed conspiracy to manipulate the MEC into approving Supplement CC, Plaintiffs argue that Woerth called the TWA MEC meeting on November 7, 2001. Pl. Br. 38. But the official meeting notice confirms that Pastore called the meeting: "In accordance with Article IV, Section 3.D(1) of the ALPA Constitution and By-Laws, Chairman Robert Pastore hereby calls a special meeting of the TWA Master Executive Council to commence at 10:00 a.m. (CST) on November 7, 2001." Att. 131: TWA MEC Special Meeting Notice (Nov. 6, 2001).

III. PLAINTIFFS' DECLARATIONS FAIL TO MEET THE REQUIREMENTS OF FED. R. CIV. P. 56(e).

A declarant "must ordinarily set forth facts, rather than opinions or conclusions." *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985). A declaration "that is 'essentially conclusory and lacking in specific facts' is inadequate." *Id.* (quoting *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 789-90 (3d Cir. 1978)). Also, "prior depositions are more reliable than [declarations]" and "a party may not create a material issue of fact to defeat summary judgment by filing [a declaration] disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 251, 253 (3d Cir. 2007).

In order to evade the facts, and contrary to the dictates of Fed. R. Civ. P. 56(e), Plaintiffs offer several additional declarations that offer legal conclusions, make factual assertions about which the declarant is not competent to testify, and contradict earlier deposition testimony. These declarations should be ignored.

In Young's declaration, for instance, she states in ¶ 15: "The Transition Agreement with newly formed TWA, LLC was a first contract." Hollander says the same in ¶ 25 of his declaration. Plaintiffs rely upon these assertions as the premise for their argument that the

Transition Agreement was subject to membership ratification. Pl. Br. 18-19. However, as discussed in Point II.B.1. *supra*, whether a union's constitution requires membership ratification is a question of interpretation, to be determined by the union's governing bodies; the ALPA Constitution and By-Laws do not expressly refer to "first contracts;" and, the Transition Agreement was not a "first contract" for the TWA pilots in ALPA's view, in any event.

Moreover, Hollander's declaration asserts at ¶ 26 that, "at the April 2 meeting, the TWA MEC requested that the whole matter of waiving scope and entering into a contract with TWA LLC be subject to membership ratification. ALPA denied that request." But the TWA MEC certainly knew how to adopt a resolution calling for membership ratification if it wanted to, and the absence of any documentary support for Hollander's assertion conflicts with his version of the events. Hollander's declaration seeks to evade the fact that the TWA MEC took no action to invoke its membership ratification option on April 2, and instead approved the agreement that its Negotiating Committee had brought to it for its consideration. Pl. Ex. 6: Holtzman 174-75.

Contrary to Hollander's deposition testimony, at 160, on which Plaintiffs rely, ALPA did not "bully" Wilder "into acquiescence" on April 2. Pl. Br. 30. Wilder has provided an affidavit and supporting documentation proving that he spent almost an hour on April 1 explaining to the MEC his proposal to sue American to bar the consummation of its acquisition of TWA's assets, and that he went to a meeting for another client that evening and was not present on April 2. Att. 27: Wilder Aff. ¶¶ 2-3 & Ex. A. at 97. In their letter to the TWA Council 2 pilots explaining the MEC's April 2 decision, at 2, Hollander, Singer and Case noted that Wilder disagreed with the other advisors and that his "dissenting opinion was singularly focused over the legal strategy, court filings, and course of action leading up to the 1113 deadline." Att. 122.

Hollander's declaration also represents a significant departure from his testimony at his

deposition, in which he, like the other Named Plaintiffs, could recall little, if any, of the April 2 discussions. For instance, Hollander now claims that at the April 2 meeting, "Warner told the MEC his initial advice had been 'premature' and that he had to 'defer' to the other ALPA attorneys present." Hollander Decl. ¶ 18. However, Hollander was asked at his deposition, "You don't remember whether Mr. Warner said anything at all at that meeting?" Pl. Ex. 23: Hollander 74-75. His response then was: "I can't remember . . . if he spoke or not, no." *Id.*

Similarly, Hollander now asserts that Seltzer and Tumblin "told the MEC their chances of prevailing on the Section 1113 motion were poor." Hollander Decl. ¶ 5. At his deposition, however, this was the exchange about Seltzer: "Q: Do you remember Richard Seltzer speaking at that meeting?" "A: I remember him being present. I do not remember conversations from Richard Seltzer or any individual." Pl. Ex. 23: Hollander 76. He added, "I remember no specific person engaging in any specific statement." *Id.* As to Tumblin, Hollander stated, "I don't recall specific Steve Tumblin advice at that particular meeting." Att. 103: Hollander 163.

Hollander has likewise recovered from amnesia as to Babbitt's statements at the April 2 meeting, as well as what Babbitt did not say. The deposition testimony was: "Q: Now, were there specific misrepresentations that you attributed to Randy Babbitt at the April 2nd meeting?" "A: I can't remember from today what specifically Randy Babbitt might have said." *Id.* Hollander now claims: "Babbitt did not mention to the MEC his earlier strategies that were designed to create some leverage. . . . Instead, he told the MEC 'there are no problems here.'" Hollander Decl. ¶ 14.

As discussed above at 9, Plaintiffs say no one told the TWA MEC about important provisions of the Transition Agreement, including the waiver of any claim to future collective bargaining with TWA LLC. In their letters to their constituents in early April 2001, however,

Named Plaintiffs Young and Hollander specifically alerted their constituents to this provision. Att. 121; Att. 122.

In short, Plaintiffs' declarations are not credible. They fail to conform to the requirements of Rule 56(e), assert legal conclusions, seek to evade the facts, and should be disregarded.

CONCLUSION

ALPA's summary judgment motion should be granted for the reasons set forth above and for those outlined in our opening brief.

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