**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. | ) | Motion Date: April 6, 2009 |
| | ) | |
| Defendants. | ) | |

---

**MEMORANDUM**
**OF DEFENDANT AIR LINE PILOTS ASSOCIATION, INT'L,**
**IN SUPPORT OF**
**ITS MOTION FOR SUMMARY JUDGMENT**

---

Archer & Greiner
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, New Jersey 08033-0968
(856) 795-2121
By: John C. Connell, Esq.
Alexander Nemiroff, Esq.

*Pro Hac Vice*:
Daniel M. Katz, Esq.
Jason M. Whiteman, Esq.
Katz & Ranzman, P.C.
4530 Wisconsin Ave., N.W., Suite 250
Washington, DC 20016
(202) 659-4656

Counsel for Defendant Air Line Pilots Association, International

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....

INTRODUCTION ..... 1

SUMMARY OF MATERIAL FACTS NOT IN DISPUTE ..... 4

I. ALPA's Role at TWA ..... 4

II. TWA's Financial Distress and American's Offer to Purchase Assets ..... 4

III. American's Conditions ..... 5

IV. ALPA's Options ..... 6

V. Seniority Integration Negotiations ..... 7

VI. APA Takes Over at TWA-LLC ..... 8

APPLICABLE LEGAL STANDARDS ..... 9

I. Summary Judgment ..... 9

II. Duty of Fair Representation ..... 9

ARGUMENT ..... 11

I. ALPA SATISFIED ITS DFR FROM THE ANNOUNCEMENT OF THE AMERICAN ACQUISITION ON JANUARY 9, 2001, THROUGH THE TWA MEC'S DECISION TO WAIVE THE TWA PILOTS' LPPS ON APRIL 2, 2001. ..... 11

A. The TWA MEC Was Not Misled About the Need to Waive Its LPPs. ..... 11

B. The TWA MEC's Role in the Decision Bars a Finding That ALPA Coerced the TWA MEC Into Waiving the Seniority Protections ..... 15

C. As a Matter of Law, the Statements About Which Plaintiffs Complain Cannot Constitute the Basis for a Fair Representation Violation. ..... 18

D. None of Plaintiffs' Post-Hoc Theories Has Merit ..... 19

1. Attempting to Stall the Section 1113 Process Would Not Have Affected the Results. ..... 19

2. Plaintiffs Mischaracterize the Meaning of a Section 1113 CBA "Rejection." ..... 21

3. Plaintiffs Place Undue Reliance on a Supposed Right to Strike. ..... 22

4. Petitioning DOT for LPPs Would Have Been Pointless. ..... 23

II. ALPA's Minimal and Short-Lived Efforts to Organize the American Pilots Presented No Conflict of Interest in Its Representation of the TWA Pilots; Those Efforts Terminated Upon the Announcement of the Proposed Merger of American and TWA, and They Were Not Concealed from Plaintiffs, In Any Event. ..... 24

A. ALPA Did Not Conduct an Organizing Campaign at American. ..... 25

B. The Independent Card Campaign of Hunnibell and Clark. ..... 28

1. Hunnibell and Clark Began Their Effort in May 2001. ..... 28

2. Rindfleisch's Emails Do Not Reflect an ALPA Organizing Campaign. ..... 30

3. ALPA Did Not Pay the Expenses Incurred by Hunnibell and Clark. ..... 31

C. Plaintiffs Knew of ALPA's Program to Bring Non-ALPA Pilot Groups into ALPA and of the Hunnibell/Clark Card Campaign. ..... 32

III. ALPA's POST-APRIL 2 Actions Met Its DFR. ..... 33

A. ALPA Properly Handled the Negotiations on Seniority Integration. ..... 33

B. ALPA Properly Decided Not to Initiate Wilder's Proposed Litigation. ..... 36

C. ALPA Properly Responded to the NMB Proceeding. ..... 37

D. ALPA Did Not Violate the DFR by Failing to Challenge Supplement CC. ..... 39

E. ALPA Properly Made No Calls For Boycotts. ..... 40

CONCLUSION ..... 42

**List of Attachments**

Att. 1. Excerpts from the Transcript of the Deposition of Randy Babbitt on August 28, 2008.

Att. 2. Excerpts from the Transcript of the Deposition of Jeffrey Brundage on September 12, 2008.

Att. 3. Excerpts from the Transcript of the Deposition of Major John Clark, Jr., on December 1, 2006.

Att. 4. Excerpts from the Transcript of the Deposition of Michael Glanzer on September 18, 2008.

Att. 5. Excerpts from the Transcript of the Deposition of Howard Hollander on September 19, 2006.

Att. 6. Excerpts from the Transcript of the Deposition of David Holtzman on September 9, 2008.

Att. 7. Excerpts from the Transcript of the Deposition of Mark Hunnibell on October 24, 2006.

Att. 8. Excerpts from the Transcript of the Deposition of ALPA General Manager Jalmer Johnson on July 24, 2008.

Att. 9. Excerpts from the Transcript of the Deposition of ALPA General Manager Jalmer Johnson on August 28, 2008.

Att. 10. Excerpts from the Transcript of the Deposition of Kevin McCormick on December 5, 2008.

Att. 11. Excerpts from the Transcript of the Deposition of Terrence McCullough on October 31, 2008.

Att. 12. Excerpts from the Transcript of the Deposition of Jerome Mugerditchian on November 9, 2006.

Att. 13. Excerpts from the Transcript of the Deposition of Robert Pastore on September 27, 2006.

Att. 14. Excerpts from the Transcript of the Deposition of Ronald Rindfleisch on November 13, 2006.

Att. 15. Excerpts from the Transcript of the Deposition of Ronald Rindfleisch on August 27, 2008.

Att. 16. Excerpts from the Transcript of the Deposition of Seth Rosen on August 26, 2008.

Att. 17. Excerpts from the Transcript of the Deposition of Richard Seltzer on September 19, 2008.

Att. 18. Excerpts from the Transcript of the Deposition of Steve Tumblin on September 22, 2008.

Att. 19. Excerpts from the Transcript of the Deposition of Clay Warner on September 16, 2008.

Att. 20. Excerpts from the Transcript of the Deposition of Roland P. Wilder, Jr., on August 8, 2008.

Att. 21. Excerpts from the Transcript of the Deposition of Duane Woerth on October 29, 2008.

Att. 22. Excerpts from the Transcript of the Deposition of Sally Young on September 15, 2006.

Att. 23. Declaration of David Holtzman

Att. 24. Excerpts of ALPA's Constitution and By-Laws.

Att. 25. Statement of William F. Compton, President & CEO, Trans World Airlines, Inc., Before the Senate Committee on the Judiciary (Feb. 7, 2001).

Att. 26. Excerpts of the Testimony of Scott Schwartz Before the U.S. Bankruptcy Court for the District of Delaware on March 9, 2001.

Att. 27. Affidavit of Roland P. Wilder, Jr.

Att. 28. Memorandum from Roland P. Wilder, Jr., Baptiste & Wilder, P.C., to TWA MEC Officers (Mar. 13, 2001).

Att. 29. Memorandum from Clay Warner, ALPA Legal Department, to Seth Rosen, Director, ALPA Representation Department & Jonathan Cohen, Director, ALPA Legal Department (Aug. 6, 2001).

Att. 30. E-mail from Terry Hayes to David Holtzman & Others (Mar. 31, 2001).

Att. 31. E-mail from Randy Babbitt to Clay Warner, ALPA Legal Department (Mar. 28, 2001).

Att. 32. The Air Line Pilots Association, International's Board of Director's Pilot Unity Resolution (Oct. 16, 2000).

Att. 33. Charges to APA Organizing for 2000 and 2001.

Att. 34. Letter from Mark Hunnibell to Ronald Rindfleisch, ALPA (Dec. 18, 2001).

Att. 35. ALPA Corporate Credit Card Item Expense Report for Jerome Mugerditchian (July 27, 2001).

Att. 36. E-mail from Ronald Rindfleisch, ALPA, to Clay Warner, ALPA Legal Department (Mar. 7, 2002).

Att. 37. E-mail from Ronald Rindfleisch, ALPA, to Mark Hunnibell & John Clark (Dec. 21, 2001).

Att. 38. APA Information Hotline (June 1, 2001).

Att. 39. Fax from Leroy "Bud" Bensel to Kirsten Gillibrand (Nov. 29, 2001).

Att. 40. Agreement for Engagement of Facilitator (July 23, 2001).

Att. 41. Extension of Agreement for Engagement of Facilitator (Aug. 31, 2001).

Att. 42. Letter from Jeffrey Brundage, Vice President-Employee Policy & Relations, American Airlines, Inc., to Capt. Duane Woerth, President, ALPA (Oct. 12, 2001).

Att. 43. Final Award in *ALPA-TWA LLC-American*, ALPA Case No. 61-01 (Apr. 18, 2002).

Att. 44. Draft Award in *ALPA-TWA LLC-American*, ALPA Case No. 61-01 (Mar. 20, 2002).

Att. 45. Letter from Roland P. Wilder, Jr., Baptiste & Wilder, P.C., to Capt. Robert Pastore, Chairman, TWA MEC (Oct. 31, 2001).

Att. 46. Letter from Jonathan Cohen and Clay Warner, ALPA Legal Department, to Eileen M. Hennessey, Investigator, NMB (Jan. 10, 2002).

Att. 47. Letter from Jonathan Cohen and Clay Warner, ALPA Legal Department, to Eileen M. Hennessey, Investigator, NMB (Feb. 11, 2002).

Att. 48. Excerpts from ALPA's Administrative Policies Manual.

Att. 49. E-mail from Capt. Robert Pastore, Chairman, TWA MEC, to TWA Pilots (Feb. 20, 2001).

Att. 50. Excerpts from the TWA Inc.-ALPA CBA (Sept. 1, 1998).

Att. 51. Fax from Leroy "Bud" Bensel to Robert Pastore (Sept. 22, 2000).

Att. 52. TWA MEC Resolution #00-97 (Nov. 2, 2000).

Att. 53. Emergency Motion for Interim and Final Orders, Under 11 U.S.C. §§ 105, 361, 362, and 364, (A) Approving Postpetition Financing and Related Relief and (B) Setting Final Hearing Pursuant to Bankruptcy Rule 4001(c), *In re Trans World Airlines, Inc.*, Case No. 01-0056 (PJW) (Bankr. D. Del. Jan. 10, 2001).

Att. 54. Press Release, TWA MEC, TWA Pilots React to Bankruptcy, Asset Acquisition by American (Jan. 10, 2001).

Att. 55. TWA MEC Information Update (Jan. 12, 2001).

Att. 56. Press Release, TWA MEC, TWA Pilots to Attend Wednesday's Bankruptcy Hearing (Feb. 20, 2001).

Att. 57. Excerpt of Asset Purchase Agreement Between TWA Inc. and American Airlines, Inc. (Jan. 9, 2001).

Att. 58. Limited Objection of the Air Line Pilots Association International to Debtors' Motion for the Sale of Substantially All of Their Assets Free and Clear of Liens, Claims and Encumbrances, *In re Trans World Airlines, Inc.*, Case No. 01-0056 (PJW) (Bankr. De. Del. Feb. 28, 2001).

Att. 59. Declaration of Terry L. Hayes in Support of Motion Pursuant to 11 U.S.C.§ 1113 to Reject Certain Collective Bargaining Agreements of Trans World Airlines, Inc., *In re Trans World Airlines, Inc.*, Case No. 01-0056 (PJW) (Bankr. D. Del. Mar. 16, 2001).

Att. 60. Letter from Capt. Ronald A. Kiel, Chairman, TWA MEC Negotiating Committee to Terry L. Hayes, Vice President-Labor Relations, TWA (Mar. 5, 2001).

Att. 61. Excerpts from the American Airlines, Inc.-Allied Pilots Association CBA (May 5, 1997).

Att. 62. ALPA Merger and Fragmentation Policy (Sept. 1998).

Att. 63. Allegheny-Mohawk Labor Protective Provisions Sections 3 and 13.

Att. 64. Objection of the Air Line Pilots Association, International in Opposition to the Debtor TWA's Motion for an Order Authorizing the Rejection of Its Collective Bargaining Agreements Pursuant to 11 U.S.C. § 1113 [Docket No. 986], *In re Trans World Airlines, Inc.*, Case No. 01-0056 (SR) (Bankr. D. Del. Mar. 30, 2001).

Att. 65. Letter from Roland P. Wilder, Jr., Babtiste & Wilder to Capt. Duane Woerth, President, ALPA (Mar. 26, 2001).

Att. 66. Excerpts of Transition Agreement Between TWA LLC and ALPA (April 10, 2001).

Att. 67. Letter from American Airlines, Inc., to Robert Pastore (Mar. 30, 2001).

Att. 68. APA Information Hotline (Apr. 9, 2001).

Att. 69. TWA MEC Resolution #01-01 (Jan. 11, 2001).

Att. 70. Letter from Capt. Robert Pastore, Chairman, TWA MEC, to Capt. John E. Darrah, President, APA, Jeffrey Brundage, Vice President, American Airlines, Inc. (Oct. 23, 2001).

Att. 71. Letter from Capt. John Darrah, President, APA, to Capt. Robert Pastore, Chairman, TWA MEC (Oct. 23, 2001).

Att. 72. Letter from Jeffrey Brundage, Vice President-Employee Policy & Relations, American Airlines, Inc., to Capt. Robert Pastore, Chairman, TWA MEC (Oct. 24, 2001).

Att. 73. Transition Agreement Between American Airlines, Inc. and APA (July 10, 2001).

Att. 74. Letter from Capt. Edwin C. White, Jr., Chairman, APA Mergers & Acquisitions Committee, to Capt. Michael J. Day, Chairman, TWA MEC Merger Committee (Sept. 18, 2001).

Att. 75. Letter from Baptiste & Wilder, P.C., to ALPA Representation and Legal Departments (July 2, 2001).

Att. 76. Letter from Roland P. Wilder, Jr., Baptiste & Wilder, P.C., to ALPA Legal Department (Aug. 16, 2001).

Att. 77. Letter from Jonathan Cohen, Clay Warner & Marta Wagner, ALPA Legal Department, to Duane Woerth (Sept. 28, 2001).

Att. 78. Letter from Capt. Duane Woerth, President, ALPA, to Capt. Daniel T. Cooney, Chairman, System Board of Adjustment (Oct. 26, 2001).

Att. 79. Letter from Harry A. Rissetto, Morgan, Lewis & Bockius LLP, to Capt. Daniel T. Cooney, Chairman, System Board of Adjustment (Nov. 20, 2001).

Att. 80. TWA MEC Minutes for the TWA MEC Special Meeting on October 20-22, 2001.

Att. 81. Excerpt of the Transcript of the Arbitration Between ALPA, TWA LLC and American Airlines, Inc., ALPA Case No. 61-01, on December 12, 2001.

Att. 82. Excerpt of the Transcript of the Arbitration Between ALPA, TWA LLC and American Airlines, Inc., ALPA Case No. 61-01, on December 13, 2001.

Att. 83. Post-Hearing Brief of ALPA, *ALPA-TWA LLC-American Airlines, Inc.*, ALPA Case No. 61-01 (Feb. 4, 2002).

Att. 84. Post-Hearing Brief of American Airlines, Inc., *ALPA-TWA LLC-American Airlines, Inc.*, ALPA Case No. 61-01 (Feb. 4, 2002).

Att. 85. Post-Hearing Brief of TWA LLC, *ALPA-TWA LLC-American Airlines, Inc.*, ALPA Case No. 61-01 (Feb. 4, 2002).

Att. 86. Text of the Airline Workers Fairness Act, S. 1479, 107th Cong. (2001).

Att. 87. TWA MEC Information System Update (Dec. 19, 2001).

Att. 88. Letter from Duane Woerth, President, ALPA, to Senator Christopher Bond (Oct. 3, 2001).

Att. 89. Letter from Robert Pastore, Chairman, TWA MEC, to Julie Dammann, Chief of Staff, Office of Senator Christopher Bond, United States Senate (Oct. 17, 2001).

Att. 90. Letter from Capt. John Darrah, President, APA, to Trevor Blackann, Legislative Assistant, Senator Christopher Bond (Oct. 17, 2001).

Att. 91. Three Party Term Sheet with Brundage Changes (Nov. 7, 2001).

Att. 92. Draft of Minutes for TWA Special Meeting on November 7-8, 2001.

Att. 93. Supplement CC Agreement Between American Airlines, Inc., and APA (Nov. 8, 2001).

Att. 94. Letter from Edgar N. James, APA General Counsel, James & Hoffman, to Stephen E. Crable, Chief of Staff, NMB (Nov. 9, 2001).

Att. 95. APA Board of Directors Resolution R2000-92.

Att. 96. Draft Transcript of Capt. Duane Woerth's Remarks Before the APA Board of Directors on October 27, 2000.

Att. 97. Excerpt of the October 25-30 & November 6-10, 2000 Fall APA BOD Meeting Minutes.

Att. 98. Letter from Duane Woerth, President, ALPA, to Benetta M. Mansfield, Chief of Staff, NMB (Mar. 18, 2002).

## TABLE OF AUTHORITIES

### FEDERAL CASES

*ALPA v. DOT*, 791 F.2d 172 (D.C. Cir. 1986) ..... 23

*Air Line Pilots Association, International v. O'Neill*, 499 U.S. 65 (1991) ..... *passim*

*In re Alabama Symphony Association*, 155 B.R. 556 (Bankr. N.D. Ala. 1993) ..... 22

*Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1972) ..... 23

*Amalgamated Association of St., Electric Railway And Motor Coach Emp. of America v. Lockridge*, 403 U.S. 274 (1971) ..... 11

*American Airlines, Inc. v. Allied Pilots Association*, 228 F.3d at 586-87 ..... 37

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 9

*Bensel v. Allied Pilots Association*, 387 F.3d 298 (3d Cir. 2004) ..... 36, 39

*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) ..... 9

*Comair Inc. v. Air Line Pilots Association (In re Delta Air Lines, Inc.)*, 359 B.R. 491 (Bankr. S.D.N.Y. 2007) ..... 22

*Considine v. Newspaper Agency Corp.*, 43 F.3d 1349 (10th Cir. 1994) ..... 10

*Cooper v. TWA Airlines, LLC*, 274 F. Supp. 2d 231 (E.D.N.Y. 2003) ..... 10, 41

*In re Durastone Flexicore Corp.*, 159 B.R. 102 (Bankr. D.R.I. 1993) ..... 22

*Jeffreys v. Communications Workers of America, AFL-CIO*, 354 F.3d 270 (4th Cir. 2003) ..... 10, 11

*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... 9

*Mesaba Aviation, Inc. v. Aircraft Mechanical Fraternal Association*, 350 B.R. 112 (Bankr. D. Minn. 2006) ..... 22

*Morales v. P.F. Laboratories, Inc.*, 2000 WL. 33678049 (D.N.J.) ..... 10, 41

*Northwest Airlines Corp. v. Association of Flight Attendants-CWA*, 483 F.3d 160 (2d Cir. 2007) ..... 22

*Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992) ..... 3, 17, 36, 40

*Riley v. Letter Carriers Local No. 380*, 668 F.2d 224 (3d Cir. 1981) .....9, 10

*Smith v. Exxon Mobil Corp.*, 2005 WL.1712023 (D.N.J.).....9

*Switchmen's Union v. NMB*, 320 U.S. 297 (1943).....38

*Tenet Healthsystem Philadelphia, Inc. v. National Union of Hospital and Health Care Employees (In re Allegheny Health, Education and Research Foundation)*, 383 F.3d 169 (3d Cir. 2004).....21, 22

*In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003).....11, 12, 20

*In re Trans World Airlines, Inc.*, 2001 WL. 1820326 (Bankr. D. Del.) .....12, 20

*United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990) .....9

**STATE CASES**

*United Jersey Bank v. Kensey*, 704 A.2d 38 (N.J. Super. 1997).....19

**FEDERAL STATUTES**

Bankruptcy Code, 11 U.S.C. § 363.....1

Bankruptcy Code, 11 U.S.C. § 1113.....5

11 U.S.C. § 1113(c) .....14

**RULES**

Rule 56(c).....9

**MISCELLANEOUS**

*Tex. Int'l-Pan Am.-Nat'l Acquisition*, CAB Order 79-163 .....23

## INTRODUCTION

The focal point of Count I of the Complaint is the meeting of Air Line Pilots Association's ("ALPA") TWA Master Executive Council ("TWA MEC") on April 2, 2001, at which the TWA MEC approved the package of agreements that its Negotiating Committee had worked out with TWA and American Airlines in order to facilitate American's acquisition of TWA's assets and employees pursuant to Section 363 of the Bankruptcy Code, 11 U.S.C. § 363. Among these agreements were many items of great value to the TWA pilots, over and above the continuation of their employment, including written guarantees of jobs at American, pay raises, payment of overdue and future pension plan contributions, increases to American pay rates by the end of the year and American's reasonable best efforts letter as to seniority integration. However, they also included acceptance of American's demand, set forth in the corporate acquisition agreement itself, that TWA's unions waive the provisions in their collective bargaining agreements ("CBAs") that are known as "labor protective provisions" ("LPPs"). The LPPs in ALPA's CBA with TWA established, among other things, a process culminating in arbitration to integrate seniority lists in the event of a merger or acquisition.

The present case arises from buyer's remorse. Having secured the benefits of these agreements, Plaintiffs now contend that they should be released from the effect of the waiver of LPPs. They contend that their lot would have been better if the TWA MEC had chosen a different option on April 2, 2001. That is wishful thinking, obscured by hindsight.

The record leaves no room for doubt that, absent the TWA MEC's consent to these agreements, one of two events would have occurred. Both were worse for the TWA pilots than the road they actually travelled. Either American would have exercised its right to walk away from the transaction, leaving TWA without any prospect but liquidation, and eliminating the TWA pilots' jobs altogether. Or the bankruptcy court would have granted TWA's Section 1113

motion and authorized TWA to reject the pilots' CBA, which would have left them in a legal no-man's land, without the significant guarantees of the proposed agreements and without any of the protections of a CBA at all.

The key American executive made the situation clear at his deposition, as he and others had at the time: American's demand for the removal of these LPPs was non-negotiable. SMF ¶ 16; Att. 2: Brundage 57.[1] The existing CBA between American and the Allied Pilots Association ("APA"), representing the American pilots, addressed the seniority of pilots coming to American in a corporate transaction, and those provisions did not contemplate arbitration. Since American could not force APA to participate in a seniority integration arbitration, and since APA had adamantly refused to participate voluntarily, American could not promise a seniority integration arbitration to the TWA pilots without taking on inconsistent obligations to its incumbent and incoming employee groups. American would not assume those conflicting obligations.

So there were no other options. There was no possibility of obtaining positions at American with all the contractual benefits negotiated, along with a seniority integration arbitration. And being thoroughly advised about the options as they existed, the TWA MEC chose to waive LPPs, and give up the seniority integration arbitration. As the Seventh Circuit ruled in a similar case involving an earlier TWA merger,

> A voluntary choice may not be withdrawn because the choice was an effort to make the best of a bad situation. Adult pilots, of sound mind and well aware of the consequences of their acts, must expect to keep their contracts, even when they wish they could have made better deals.

[1] SMF refers to ALPA's Statement of Material Facts Not in Dispute, submitted pursuant to Local Rule 56.1. Citations to the pages of the transcripts of depositions will be in the format: [Name of Witness] [Page Number(s)]. The relevant portions of the transcripts we cite are attached as attachments 1-22.

*Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1534 (7th Cir. 1992). This is the controlling legal principle as to the TWA MEC's decision to accept the package of agreements proposed by TWA and American, as shown in Point I below. A deal is a deal.

The Complaint seeks to evade the consequences of the bargain the TWA MEC made by alleging that ALPA conspired with APA to bring the American pilot group into ALPA in return for ALPA taking a dive with respect to the TWA pilots' seniority. But no such conspiracy has been uncovered by Plaintiffs' thorough and wide-ranging discovery, because none existed. To the contrary: ALPA did everything within its power to get the best possible seniority arrangements for the TWA pilots.

With respect to the April 2 TWA MEC decision to waive the TWA pilots' labor protective provisions ("LPPs"), in particular, no evidence exists showing that anyone at ALPA or APA was doing anything to solicit the American pilots to rejoin ALPA at that time, as we discuss in Point II below. Two American pilots, Mark Hunnibell and John Clark, mailed authorization cards to the American pilots in mid-May, but that effort was entirely their own. They initiated it without discussing it with anyone at ALPA, composed the language for the cards on their own, mailed the cards, did all of the other work on the project themselves and paid all of their own expenses. ALPA did not bankroll, encourage or assist them in any manner. Significantly, they first contacted someone at ALPA about their activities after they mailed the cards in mid-May, so their campaign clearly had nothing to do with the TWA MEC's decision on April 2 or the advice the TWA MEC's lawyers and other professionals provided at the April 2 MEC meeting.

Plaintiffs' contentions relating to the post-April 2 period miss the mark even farther, as we show in Point III. Some rest on the flawed premise of an APA duty of fair

representation ("DFR") to the TWA pilots prior to APA's assumption of the representation rights for that group. Others depend on fanciful schemes such as an AFL-CIO boycott of American Airlines bringing APA to its knees or ALPA's winning a representation election among the combined craft or class of American and TWA pilots.

## SUMMARY OF MATERIAL FACTS NOT IN DISPUTE[2]

### I. ALPA's Role at TWA

For decades, ALPA served as the collective bargaining representative for pilots at TWA. SMF ¶ 1; Att. 23: Holtzman Decl. ¶ 2. As a consequence, ALPA and TWA were parties to a succession of CBAs setting forth the terms and conditions of employment for TWA pilots. SMF ¶ 3; Att. 23: Holtzman Decl. ¶ 3. The most recent of these agreements was signed in 1998. SMF ¶ 3; Att. 23: Holtzman Decl. ¶ 3.

### II. TWA's Financial Distress and American's Offer to Purchase Assets

By the end of 2000, TWA was in dire financial circumstances, on the brink of bankruptcy. SMF ¶ 4; Att. 23: Holtzman Decl. ¶ 4. On January 9, 2001, TWA and American announced that American would purchase substantially all of the assets of TWA. SMF ¶ 6; Compl. ¶ 32. Under the terms of the Asset Purchase Agreement governing the transaction, the purchase would occur through a process that involved TWA filing for bankruptcy. SMF ¶ 8; Compl. ¶ 40. Although the transaction was initially challenged by some of TWA's creditors, the bankruptcy court rejected those challenges because, as the court repeatedly found, TWA would immediately cease operations and liquidate without the acquisition by American. SMF ¶ 11; Att. 23: Holtzman Decl. ¶ 5 & Ex. 1 at 809-10, 813-14.

[2] For a more complete rendition of the facts, please refer to ALPA's SMF.

## III. American's Conditions

As part of its offer, American promised to hire nearly all of TWA's union-represented employees. SMF ¶ 12; Att. 23: Holtzman Decl. ¶ 6 & Ex. 2. However, as a specific condition to the transaction itself, American required TWA to eliminate certain provisions from its CBAs. SMF ¶ 13; Att. 23: Holtzman Decl. ¶ 7. TWA attempted to comply with American's requirement by negotiating with ALPA for the removal of specific provisions in the CBA. SMF ¶¶ 15-17, 25-27; Att. 23: Holtzman Decl. ¶ 8. But ALPA refused to agree to American's demand immediately, and TWA moved under Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, to reject the TWA pilots' CBA in its entirety. SMF ¶ 28; Att. 23: Holtzman Decl. ¶ 8 & Ex. 3.

Since American was willing to guarantee wage and benefit levels for pilots hired in accordance with the Asset Purchase Agreement, the most difficult demand was for the elimination of TWA CBA provisions addressing seniority integration. SMF ¶ 17; Att. 23: Holtzman Decl. ¶ 9. The TWA-ALPA CBA contained specific protections regarding seniority integration in the event TWA was purchased or merged with another airline. SMF ¶ 10; Att. 23: Holtzman Decl. ¶ 10. In general terms, those LPPs required TWA to ensure that any purchaser agreed to a set of procedures, including arbitration, to achieve a fair and equitable seniority integration for the pilots of the merging airlines. SMF ¶ 10; Att. 23: Holtzman Decl. ¶ 10.

American's agreement with its pilots' union, APA, contained conflicting LPPs, which did not require APA to arbitrate the integration of seniority lists in the event of a merger. SMF ¶ 24; Att. 23: Holtzman Decl. ¶ 10. Pilots joining American in a corporate transaction were to be treated as newly hired employees, and given seniority effective as of the date they became American employees. SMF ¶ 24; Att. 23: Holtzman Decl. ¶ 10. All pilots joining American in a corporate transaction would thus be junior to all incumbent American pilots. So American could not agree to provide the TWA pilots with a seniority integration arbitration without violating its

existing agreement with the APA. Accordingly, American insisted that the LPPs be eliminated from the TWA CBA. SMF ¶ 17; Att. 23: Holtzman Decl. ¶ 9; Att. 6: Holtzman 57-58; Att. 1: Babbitt 58-59; Att. 21: Woerth 185-86.

**IV. ALPA's Options**

ALPA acts through its MECs, each of which is mandated by ALPA's Constitution and By-Laws, Article IV, Section 2.A, to "function as a coordinating Council for the membership on that airline." Att. 24 at 36; SMF ¶ 3; Compl. ¶ 31; ALPA Answer ¶ 31. ALPA utilizes its MECs to make the critical determinations of how ALPA should respond to the various situations that confront it, taking into account the interests of the membership and the Association's general policies. Att. 21: Woerth 249-50.

On April 2, 2001, after consulting at length with bankruptcy counsel, labor counsel, an investment banking firm, and an aviation consulting firm, the TWA MEC adopted a resolution agreeing to eliminate the CBA provisions identified by American, including the LPPs. SMF ¶ 31; Att. 23: Holtzman Decl. ¶ 11 & Ex. 4. In return, American agreed to provide ALPA with a CBA that would cover the employment of TWA pilots with TWA Airlines-LLC ("TWA-LLC"), which was the subsidiary that American established to acquire the assets and conduct the operations of TWA until such time as those assets and operations could be merged with those of American. SMF ¶ 33; Att. 23: Holtzman Decl. ¶ 13.

All six voting members of the TWA MEC cast at least some portion of their roll call votes in favor of the resolution, and the resolution passed by a roll call majority of 1501 to 450. SMF ¶ 36; Att. 23: Holtzman Decl. ¶ 11 & Ex. 4. Named Plaintiff Sally Young cast 400 of her 605 votes in favor and Named Plaintiff Howard Hollander cast 55 of his 235 votes in favor. SMF ¶ 36; Att. 23: Holtzman Decl. ¶ 11 & Ex. 4.

The following day, Named Plaintiff Robert Pastore, Chairman of the TWA MEC, sent a communication to all TWA pilots explaining that no other reasonable alternatives existed. SMF ¶ 41; Att. 23: Holtzman Decl. ¶ 12 & Ex. 5. Pastore explained that, if ALPA had refused American's demands to modify the CBA, TWA would have pressed forward with its Section 1113 motion to reject the entire agreement. SMF ¶ 42; Att. 23: Holtzman Decl. ¶ 12 & Ex. 5. In that circumstance, Pastore explained, all of the TWA MEC's advisors -- including the independent advisors chosen by the MEC -- believed the Section 1113 motion would succeed, which would result in a complete loss of contractual protections for the TWA pilots. SMF ¶ 43; Att. 23: Holtzman Decl. ¶ 12 & Ex. 5. In addition, Pastore noted that, by agreeing to waive the CBA provisions identified by American, ALPA achieved additional commitments from American, including pay increases and the payment of past due pension contributions. SMF ¶ 44; Att. 23: Holtzman Decl. ¶ 12 & Ex. 5.

On April 6, 2001, the bankruptcy court approved a Stipulation and Order implementing the April 2 TWA MEC Resolution and a similar waiver agreement with another union representing TWA employees. SMF ¶ 45; Att. 23: Holtzman Decl. ¶ 14 & Ex. 6. The Stipulation and Order confirmed that the TWA MEC had waived the provisions American had insisted on, and that TWA's Section 1113 motion was withdrawn. SMF ¶ 46; Att. 23: Holtzman Decl. ¶ 14.

## V. Seniority Integration Negotiations

American's purchase of TWA's assets closed on April 10, 2001, and almost all TWA pilots then became employees of TWA-LLC. SMF ¶ 47; Att. 23: Holtzman Decl. ¶ 15. Once the transaction was announced, the TWA pilots, through the TWA MEC, and the American pilots, through APA, began negotiations regarding the integration of the American and TWA-LLC pilot seniority lists. SMF ¶ 49; Att. 23: Holtzman Decl. ¶ 15. Those negotiations occurred

against the backdrop of the APA-American CBA, which required American to treat the pilots of any acquired carrier like new hires by placing them at the bottom of the American seniority list, and ALPA's waiver of the LPPs in its contract with TWA. SMF ¶ 50; Att. 23: Holtzman Decl. ¶¶ 10-11.

APA and the TWA MEC never reached agreement on seniority integration. SMF ¶¶ 54, 67-69; Compl. ¶¶ 58-60. On November 8, 2001, APA and American executed an agreement ("Supplement CC") that imposed a seniority integration formula on the TWA-LLC pilots. SMF ¶ 70; Compl. ¶ 61. That agreement modified the APA CBA to allow some TWA-LLC pilots to be interspersed into the American pilots' seniority list, but most were placed at the bottom. SMF ¶ 72; Compl. ¶¶ 61, 63. Supplement CC was to become effective when the National Mediation Board ("NMB") determined that the operations of American and TWA-LLC were sufficiently integrated to constitute a single employer for the purposes of collective bargaining, and on November 9, 2001, APA petitioned the NMB to make such a determination. SMF ¶ 73; Att. 23: Holtzman Decl. ¶ 16.

**VI. APA Takes Over at TWA-LLC**

On March 5, 2002, despite two submissions by ALPA arguing that APA's petition was premature, the NMB determined that American and TWA-LLC constituted a single carrier for Railway Labor Act purposes. SMF ¶¶ 74, 84; Compl. ¶ 65. The NMB extended APA's certification as exclusive bargaining agent to cover all American and TWA-LLC pilots on April 3, 2002, and terminated ALPA's certification as the collective bargaining agent for the TWA-LLC pilots on that date, at which time Supplement CC took effect. SMF ¶ 87; Compl ¶ 65.

## APPLICABLE LEGAL STANDARDS

### I. Summary Judgment

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Factual disputes preclude summary judgment only if they are "genuine," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts"), and "material" to the outcome of the suit, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

### II. Duty of Fair Representation

In reviewing a union's representation, the court does not "substitute its own view of the proper bargain for that reached by the union," but rather is "highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). The Supreme Court has explained that "the relationship between the courts and labor unions [i]s similar to that between the courts and the legislature...." *Id.*

Because of this deferential relationship, the DFR "is a purposefully limited check" on a union's exercise of its authority. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 374 (1990). "[M]istakes, negligence or poor judgment on the part of the union will not alone rise to the level of a breach." *Smith v. Exxon Mobil Corp.*, 2005 WL1712023, at *7 (D.N.J.). *See Rawson*, 495 U.S. at 372-73; *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224, 228-29 (3d

Cir. 1981). Moreover, "'mere disagreements over tactics and strategy' will not support a claim for breach of the duty of fair representation." *Morales v. P.F. Laboratories, Inc.*, 2000 WL 33678049 (D.N.J.) (quoting *De Fillippes v. Star Ledger*, 872 F. Supp. 138, 141 (D.N.J.1994)).

A plaintiff claiming that a union breached its DFR must prove that "its actions are either 'arbitrary, discriminatory, or in bad faith.'" *O'Neill*, 499 U.S. at 67 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). These are three distinct strands.

A union's conduct is "arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *O'Neill,* 499 U.S. at 67 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). This approach recognizes "the strong policy favoring the peaceful settlement of labor disputes" and "the importance of evaluating the rationality of a union's decision in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *Id.* at 78. The possibility that a better deal may have been available, in hindsight, does not indicate that a union behaved arbitrarily. *Id.* at 79 ("A settlement is not irrational simply because it turns out *in retrospect* to have been a bad settlement.").

In defining prohibited DFR "discrimination," as the appellate court explained in *Jeffreys v. Communications Workers of America, AFL-CIO,* 354 F.3d 270, 276 (4th Cir. 2003):

> The duty of fair representation prohibits only 'invidious' discrimination, such as discrimination based on constitutionally protected categories like race or gender, or discrimination that arises from animus or prejudice. *O'Neill,* 499 U.S. at 81; *see also Considine v. Newspaper Agency Corp.,* 43 F.3d 1349, 1359-60 (10th Cir. 1994).

*Accord Cooper v. TWA Airlines, LLC,* 274 F.Supp.2d 231, 243 (E.D.N.Y. 2003). The discriminatory conduct must be "intentional, severe, and unrelated to legitimate union

objectives." *Amalgamated Ass'n of St., Elec. Ry. And Motor Coach Emp. of America v. Lockridge,* 403 U.S. 274, 301 (1971).

A DFR violation based on bad faith requires "substantial evidence of fraud, deceitful action or dishonest conduct." *Id.* at 299 (quoting *Humphrey v. Moore,* 375 U.S. 335, 348 (1964)). *Accord Jeffreys,* 354 F.3d at 276 (quoting *Aguinaga v. United Food & Commercial Workers Int'l Union,* 993 F.2d 1463, 1470 (10th Cir. 1993)).

## ARGUMENT

### I. ALPA SATISFIED ITS DFR FROM THE ANNOUNCEMENT OF THE AMERICAN ACQUISITION ON JANUARY 9, 2001, THROUGH THE TWA MEC'S DECISION TO WAIVE THE TWA PILOTS' LPPS ON APRIL 2, 2001.

Plaintiffs' primary contention in this case has been that ALPA, through its employees, representatives and attorneys, made misleading statements to the TWA MEC that coerced the MEC into relinquishing seniority protections. Compl. ¶ 101. But as we demonstrate in A below, Plaintiffs have not provided any evidence to show that these statements were either false or misleading. Moreover, most of the advice received by the MEC came from independent advisors chosen by the MEC itself, so it makes no sense to claim that those advisors bullied the MEC into actions contrary to the interests of the TWA pilots, as we show in B. Finally, in C we explain that many of these statements were predictions, rather than assertions of fact, which are inherently incapable of providing the basis for Plaintiffs' claim that they were defrauded.

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

The advice given to the TWA MEC at its meeting on April 1-2, 2001, derived from a careful examination of the factual context in which the negotiations between American and TWA took place.

The precarious financial position of TWA in early 2001 is uncontroverted. As the Third Circuit noted in *In re Trans World Airlines, Inc.* 322 F.3d 283, 286 n.3 (3d Cir. 2003), TWA

"had not earned a profit in over a decade," had $10-20 million less in cash than it needed to fund its operations the day after it filed for Chapter 11 protection, was losing several million dollars a day, and had searched in vain for nearly a year for a source of funding.

The transaction with American was the only viable alternative to liquidation. SMF ¶ 11; Att. 23: Holtzman Decl. ¶¶ 5, 8 & Ex. 1 at 809-10, 813-14; *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *13-14 (Bankr. D. Del.). In a hearing before the Senate Judiciary Committee on February 7, 2001, TWA President and CEO Bill Compton testified (Att. 25 at 2):

> We recognized that the viability of our airline was at stake and we went knocking on doors to find a solution. There is not an airline of any size in America that we did not approach. No one was interested in TWA as a going concern.
>
> Only American Airlines saw fit this winter to come forward with a proposal that was not merely an offer to cherry-pick a prized asset here or there.

"Given the strong likelihood of a liquidation absent the asset sale to American," the court of appeals held that, if American's deal had failed, all 2,300 TWA pilots would have lost their jobs immediately. *Trans World Airlines*, 322 F.3d at 293. The bankruptcy court also held that TWA would have liquidated if American failed to close the transaction. SMF ¶ 11; Att. 23: Holtzman Decl. ¶¶ 5, 8 & Ex. 1 at 809-10, 813-14; *Trans World Airlines*, 2001 WL 1820326, at *13-14.

For these reasons, TWA MEC Vice Chairman Scott Schwartz testified for the TWA pilots in bankruptcy court in March 2001 in support of the American transaction, TWA MEC Chairman (and Named Plaintiff) Robert Pastore and the other 14 members of TWA's board of directors voted in favor of the American transaction, and Pastore told the ALPA Executive Council in January 2001 that TWA would go out of business if the American deal did not close. SMF ¶ 9; Att. 13: Pastore 31; Att. 21: Woerth 169-71; Att. 26: Tr. 160, 165, 169, I*n re Trans World Airlines, Inc.*, No. 01-0056 (Bankr. D. Del. Mar. 9, 2001).

Plaintiffs accept the irrefutable reality of TWA's desperate condition, but argue that American would still have consummated the deal if the TWA pilots had not conceded the LPPs in accordance with American's demand. Compl. ¶ 105; Att. 22: Young 150. This is a convenient position for Plaintiffs to take -- indeed, a necessary prerequisite of their claim that the allegedly coerced waiver harmed them. It is, however, a position at odds with the undisputed facts.

American's acquisition agreement gave it the absolute right to call off the deal if the prescribed provisions of ALPA's CBA were not waived. SMF ¶ 13; Att. 23: Holtzman Decl. ¶ 7 & Ex. 2. And during the course of the three months of negotiations leading up to the TWA MEC's decision to waive these provisions on April 2, 2001, TWA, American and APA made it clear that American's condition on elimination of LPPs was non-negotiable: American would not assume conflicting obligations, and APA would not agree to arbitrate seniority integration. SMF ¶¶ 14, 16; Att. 2: Brundage 58-59; Att. 1: Babbitt 58-59; Att. 21: Woerth 185-86; Att. 6: Holtzman 57-58. American's Vice President-Employee Relations, Jeff Brundage, confirmed at his deposition: "Not only was it not a bluff, it wasn't even open for negotiation." Att. 2: Brundage 21-22, 57.

TWA MEC advisor Randy Babbitt participated in phone calls with Brundage and American CEO Don Carty, and Carty expressly told him that "absent finding a way, either a process agreement around or some other agreement by the TWA pilots, that he simply wouldn't consummate the deal." Att. 1: Babbitt 58; Att. 2: Brundage 58-59. Carty also told ALPA President Duane Woerth that "he knew for certain that there would be no arbitration and [he] hoped there was a negotiated settlement." Att: 21: Woerth 186. APA President John Darrah told Woerth that APA would never agree to arbitration; APA would do what it could through

negotiations, "but when the negotiations [were] done it [would] be done." *Id.* at 205. TWA's negotiators consistently and emphatically told the TWA MEC Negotiating Committee that the elimination of the LPPs was essential to the consummation of the American deal. Att. 6: Holtzman 56-57.

Thus, it was indisputable that American would not proceed with the transaction "in any way, shape or form" unless the LPPs were removed from the TWA agreements. Att. 2: Brundage 21, 32. The acquisition was Carty's project, but there were "factions within American management that opposed the transaction and thought it was not financially viable," and American was committed to avoiding a repetition of the mistake it made in the American-Reno transaction -- purchasing another carrier when the acquisition led to a dispute with APA. Att. 4: Glanzer 58-59, 62; SMF ¶ 14. TWA MEC investment banker Michael Glanzer told the TWA MEC that "it was a highly risky proposition to conclude that American would not walk away from the transaction" without a waiver of the seniority provisions. Att. 4: Glanzer 59.

Furthermore, when TWA's initial attempt to secure the relevant concessions from ALPA failed, TWA commenced a motion with the bankruptcy court to reject its CBA with its pilots in its entirety under 11 U.S.C. § 1113(c). SMF ¶ 28. The odds of ALPA defeating this motion were slim to none. Att. 17: Seltzer 105-06; Att. 18: Tumblin 89-90. However, allowing the motion to proceed to a decision would have put far more at risk than accepting American's non-negotiable demand. If the bankruptcy court authorized TWA to reject ALPA's CBA, the entire agreement would be gone and the TWA pilots would lose their grievance-arbitration machinery, their scope of work and merger protections and their seniority system itself, as well as the pay raises, pension contributions and other contractual enhancements that were promised in the event of the consummation of the proposed American transaction. Att. 17: Seltzer 106-07. On the

other hand, a victory in the bankruptcy court on the Section 1113 motion -- as purely theoretical as that was -- would have permitted American to terminate the proposed acquisition, in its sole discretion.

Both of these threats were very real. The TWA MEC's consultation with bankruptcy counsel, labor counsel, an investment banking firm and an aviation consulting firm all confirmed that TWA would prevail in its Section 1113 motion, and that a failure to meet American's conditions one way or another would kill the deal. *Id.* at 105-06; Att. 6: Holtzman 85-86; Att. 4: Glanzer 58-59; Att. 1: Babbitt 123-24. These conclusions, and the advice and actions that flowed from them, were the antithesis of arbitrary or irrational. Not a shred of evidence suggests that the advice provided at the TWA MEC meeting on April 1-2 was anything other than the honest opinion of the competent professionals who gave it. And in light of the prevailing circumstances, these advisors' endorsement of the package of agreements from TWA and American, including the TWA MEC's waiver of the relevant LPPs, constituted a good faith attempt to make the best of a less than ideal situation for the TWA pilots.

### B. The TWA MEC's Role in the Decision Bars a Finding That ALPA Coerced the TWA MEC Into Waiving the Seniority Protections.

Plaintiffs allege that the TWA MEC would not have voted for the package of agreements on the table on April 2, 2001, but for the misrepresentations and omissions made by their advisors, who supposedly "induced their capitulation." Compl. ¶ 101. Yet, in addition to mischaracterizing these professionals' advice as misrepresentations, these allegations ignore the crucial fact that the TWA MEC selected its own independent advisors, and that it consulted with them as it saw fit in reaching its ultimate decision. SMF ¶ 30; Att. 13: Pastore 90-91.

Here, the very text of the April 2 TWA MEC resolution makes careful note of the body's consultation with a wide range of experts in formulating its decision: "Whereas the MEC has

considered extensive advice from its bankruptcy counsel (Steve Tumblin and Richard Seltzer), merger counsel (Roland Wilder), investment advisor (Michael Glanzer) and former ALPA President Randy Babbitt, as well from ALPA staff . . . ." Att. 23: Holtzman Decl. Ex. 4; SMF ¶ 31. The TWA MEC retained Steve Tumblin to advise it about corporate, securities and financial matters in 1991, and he continued to advise the MEC for ten years, serving for part of the time as the TWA MEC representative on the TWA Board of Directors. Att. 18: Tumblin 7-8; Att. 13: Pastore 48. Tumblin served as lead counsel for the Association and the TWA pilots in TWA's Chapter 11 cases. Att. 18: Tumblin 8. Alongside Tumblin, Richard Seltzer worked on the Section 1113 proceeding; he and his firm are the leading practitioners in this field. Att. 17: Seltzer 14-28. The TWA MEC chose Michael Glanzer as its investment banker and financial advisor many months before the American transaction was announced. Att. 4: Glanzer 23-24. TWA MEC members approached Randy Babbitt directly in January 2001 to ask for his assistance with the project. Att. 1: Babbitt 44-46.

Plaintiffs' extensive discovery efforts have not unearthed any evidentiary foundation for the claim that ALPA staff and retained advisors bullied the TWA MEC into an erroneous course of action. Duane Woerth held positions as a member and officer of two ALPA MECs and later served sixteen years as ALPA's First Vice President and President. Att. 21: Woerth 7-10. He explained,

> MEC [members] and pilots are extremely strong, stand-up individuals and routinely throw staff out of the room, ignore their advice, legal advice, professional advice and do what they want. So I don't buy for a minute that this MEC or any MEC that I know of was ever railroaded into a decision.

*Id.* at 226. It is certainly not the fault of the national union or the advisors whom the TWA MEC chose that the options available in early 2001 were all worse than the TWA pilots would have

hoped for. *See Rakestraw*, 981 F.2d at 1534 ("Straightened circumstances these were, but a decision to make the best of a poor position does not vitiate a choice.").

The day after the TWA MEC resolved to waive the relevant provisions, Pastore circulated a statement to the TWA pilots explaining the MEC's decision. SMF ¶ 41; Att. 23: Holtzman Decl. Ex. 5. He incorporated the language from the resolution quoted above, and noted that "[n]ot one of our advisors" -- including the independent advisors chosen by the MEC -- had predicted that the MEC would prevail against TWA on the pending Section 1113 motion. Att. 23: Holtzman Decl. Ex. 5 at 2; SMF ¶ 43. He further noted that the concessions in question brought with them additional commitments from American, including pay increases and payment of past due and future pension contributions. SMF ¶ 44; Att. 23: Holtzman Decl. Ex. 5 at 2-3.

Furthermore, the TWA MEC did not receive unanimous advice. TWA MEC Merger Counsel Roland Wilder spent almost an hour outlining a different approach to the MEC, but he "received no encouragement from anyone on the MEC, on the Merger Committee, ALPA's advisors, or anybody in the room." Att. 27: Wilder Aff. ¶¶ 2-3 & Ex. A at 100; *see also* SMF ¶ 32. Wilder proposed to sue American to bar the consummation of its acquisition of TWA's assets on the ground that it would violate the TWA pilots' CBA for TWA to merge without providing them their LPPs. SMF ¶¶ 33-34; Att. 28: Memo from Wilder to TWA MEC Officers (Mar. 13, 2001); Att. 20: Wilder 60-61.

The goal of Wilder's proposed lawsuit was to create leverage by delaying the transaction with a Railway Labor Act suit in federal district court. Att. 17: Seltzer 121-22; SMF ¶ 34. But the lawsuit would have jeopardized the American acquisition and the TWA pilots' jobs, because American, TWA and APA officials had unequivocally maintained for three months that removal of the LPPs was a precondition to consummation of the deal. In addition, the legal support for

the strategy was questionable, at best, because it failed to consider the preeminent case on the issue of filing suit against a debtor-in-possession in federal district court and was "terribly misleading. It was based on incorrect statements of law." Att. 17: Seltzer 120, 122.[3] It's no wonder that the TWA MEC was uninterested in pursuing Wilder's proposed course of action, and chose instead to go with the best of the available choices.

### C. As a Matter of Law, the Statements About Which Plaintiffs Complain Cannot Constitute the Basis for a Fair Representation Violation.

The alleged misrepresentations about what American and the bankruptcy court would do were statements of judgment -- predictions about likely outcomes. These judgments were reached after diligent analysis by experienced professionals, retained at the direction and with the consent of the TWA MEC. Att: 17: Seltzer 62-68; Att. 4: Glanzer 57-62. Not a scintilla of evidence supports the notion that anyone from ALPA's headquarters instructed or even suggested that these professionals change, shade or color their opinions or advice. Att. 21: Woerth 222; Att. 17: Seltzer 140-41 ("I take my responsibilities as a lawyer very, very seriously....People don't tell me what legal advice to give."). In other words, the retention of the advisors and the professionals' judgments were made in good faith, were not discriminatory, and were not by any means determinations outside the "wide range of reasonableness," the standard for arbitrariness against which the Court evaluates a claim of breach by a union of the DFR. *O'Neill*, 499 U.S. at 78.

Also, Plaintiffs premise their DFR claim on a theory analogous to legal fraud, but "[l]egal

---

[3] An ALPA Legal Department memo, August 6, 2001, called Wilder's proposal "misguided": (1) the strategy had no legal support, (2) halting the transaction would have had horrible consequences for TWA pilots, since TWA would have ceased operations immediately, (3) American could easily have used Section 1113 of the Bankruptcy Code to eliminate the entire TWA-ALPA collective bargaining agreement – including the provisions in Section 1 that Wilder planned to use as the basis for an injunction.
Att. 29 at 4 n.2.

fraud consists of 'a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely [on the misstatement], resulting in reliance by that party to his detriment.'" *United Jersey Bank v. Kensey,* 704 A.2d 38, 43 (N.J. Super. 1997) (citations omitted). Plaintiffs do not accuse these experienced professionals of making erroneous representations about "a presently existing or past fact," but only of making mistaken assertions about what a third party would do in the future. Att. 13: Pastore 103-05. Such predictions cannot, as a matter of law, violate ALPA's DFR. *O'Neill,* 499 U.S. at 78.

### D. None of Plaintiffs' Post-Hoc Theories Has Merit.

Plaintiffs have pursued a variety of theories to attack ALPA since they filed the Complaint in 2002. Some sprung from references in the Complaint, but Plaintiffs invented most during discovery. As we show immediately below and in Point III, the desperate weakness of these various contentions demonstrates the poverty of Plaintiffs' case.

#### 1. Attempting to Stall the Section 1113 Process Would Not Have Affected the Results.

Plaintiffs argue that attempting to delay the Section 1113 proceeding might have resulted in American pressuring APA to relent in its absolute refusal to arbitrate seniority integration. Such second-guessing does not constitute a basis for finding a DFR violation. *O'Neill,* 499 U.S. at 67, 79. Even in retrospect, moreover, passing up the agreements on the table would not have affected the fundamental dispute in which the TWA pilot group was engaged.

TWA filed its application for rejection of its CBAs on March 15, 2001 (SMF ¶ 28; Att. 23: Holtzman Decl. Ex. 3), and Section 1113(d)(1) of the Bankruptcy Code required the bankruptcy court to begin the hearing on it no later than April 6, 2001.[4] The package deal

[4]Sections 1113(d)(2) and (3) required the bankruptcy court to rule on the application no later than May 6,

offered by TWA and American to the TWA pilots on March 31, 2001, established a deadline withdrawing the offer when the Section 1113 hearing started. SMF ¶ 38. Specifically, the offer, by its terms, would "remain in effect to the commencement of the hearing on TWA's motion to reject the ALPA collective bargaining agreement," and would be "withdrawn at that time if not accepted." Att. 30: E-mail from Terry Hayes, TWA, to Holtzman & Others (Mar. 31, 2001); Att. 10: McCormick 133; SMF ¶ 38. Missing this deadline could have led to the withdrawal of the entire package and its many beneficial provisions, and there was no assurance that these provisions would be available if the bankruptcy court abrogated the TWA CBA.

Stalling the Section 1113 process would have also created a risk that American would walk away from the proposed transaction. American funded TWA's operations through debtor-in-possession financing, which it had already increased because "the losses which TWA was sustaining were larger than anticipated." Att. 4: Glanzer 66; *see also* SMF ¶ 10; *In re Trans World Airlines, Inc.*, 322 F.3d 283, 286 (3d. Cir. 2003); *In re Trans World Airlines, Inc., et al.*, No. 01-0056, slip. op. at 10 (Bankr. D. Del. Apr. 2, 2001) (finding that TWA's cash burn rate was $3 million per day). American was "not interested in a long, drawn-out process." Att. 2: Brundage 32. Glanzer counseled that delaying the Section 1113 process could provide American with "a chance to see if there was some way to get out of [the] deal." Att. 17: Seltzer 127. TWA MEC members also expressed concern during their April 2 meeting that delaying the Section 1113 process would risk any good will that American may have had for the TWA pilots. *Id.* at 130.

The notion that delaying the Section 1113 process as a means of buying time to persuade APA to arbitrate seniority integration was thus poorly reasoned. With APA's emphatically

---

2001, and provided that if the court did not rule on TWA's application by that date, TWA could unilaterally remove the seniority protective provisions from the CBAs.

expressed unwillingness to arbitrate, the LPPs would either be waived or the CBA would be abrogated. This was not a typical labor negotiation or Section 1113 case with a variety of issues and potential compromises available at every turn. The parties were not negotiating a concessionary pay cut of some number of dollars, which might entail a degree of flexibility, but confronting American's non-negotiable demand that it would not consummate the acquisition if it meant assuming conflicting obligations. No alternatives existed to eliminating the LPPs.

Given American's inflexibility and expedited timeline, dissenting voices within its management and TWA's precarious finances, any ALPA effort to delay the transaction through the Section 1113 process could have led to American walking away from the transaction, TWA liquidating and all 2,300 TWA pilots losing their jobs. Attempts to create additional leverage for the negotiations with APA by delaying the Section 1113 process were thus misguided.

**2. Plaintiffs Mischaracterize the Meaning of a Section 1113 CBA "Rejection."**

Plaintiffs also have no support for their contention that the lawyers and others at the TWA MEC meeting on April 1-2 exaggerated the adverse impact of a potential bankruptcy court ruling authorizing the rejection of the TWA pilots' CBA under Section 1113(c). Plaintiffs' contention that "rejection" might only have undone the TWA pilots' LPPs simply misstates the law.

TWA's motion asked the bankruptcy court to "reject" the TWA pilots' CBA, not to "modify" it. SMF ¶ 28; Att. 23: Holtzman Decl. Ex. 3 at 4. Section 1113(e) authorizes a bankruptcy court to permit a debtor-in-possession to "modify" a CBA on an interim basis, but TWA filed its motion under Section 1113(c), which deals with "rejection" of CBAs. Bankruptcy law provides for the "rejection" of contracts in general and a commercial contract rejected under Section 365 of the Bankruptcy Code is rejected *in toto*. *See, e.g., Tenet Healthsystem*

*Philadelphia, Inc. v. National Union of Hosp. and Health Care Employees (In re Allegheny Health, Educ. and Research Found.),* 383 F.3d 169, 177 (3d Cir. 2004). Courts have resolved this issue against employees. *In re Durastone Flexicore Corp.,* 159 B.R. 102, 103 (Bankr. D.R.I. 1993); *In re Alabama Symphony Ass'n,* 155 B.R. 556, 572 (Bankr. N.D. Ala. 1993).

If American acquired the assets of TWA under Section 363 of the Bankruptcy Code after the bankruptcy court had rejected the TWA pilots' CBA pursuant to Section 1113(c), the TWA pilots would have had no rights under their former airline's CBA and the contractual protections of the pilots hired at the new airline would be totally uncertain. Att. 17: Seltzer 101-08. Even the right to ALPA representation arose from the TWA pilots' CBA -- instead of NMB certification -- and the CBA, upon Section 1113 rejection, would no longer exist.

**3. Plaintiffs Place Undue Reliance on a Supposed Right to Strike.**

Plaintiffs complain that no one advised the TWA MEC on April 2 of the right of the TWA pilots to go on strike in the event of a bankruptcy court rejection of their CBA pursuant to Section 1113(c). The courts that have ruled on the issue have determined that there is no such right for airline employees. *Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA,* 483 F.3d 160, 175 (2d Cir. 2007); *Mesaba Aviation, Inc. v. Aircraft Mech. Fraternal Ass'n,* 350 B.R. 112, 133 (Bankr. D. Minn. 2006); *Comair Inc. v. Air Line Pilots Ass'n (In re Delta Air Lines, Inc.),* 359 B.R. 491, 509 (Bankr. S.D.N.Y. 2007).

Too, there was no practical value to striking an employer that was about to liquidate. Att. 17: Seltzer 111-12. If American acquired TWA's assets and TWA liquidated, it would have been pointless for the TWA pilots to withhold their services from TWA, which was not continuing to operate. *Id.* Instead, the operations were to be conducted by a new airline, formed from the assets of TWA and wholly owned by American, and the potential for striking that airline would have been murky, at best. *Id.* Alternatively, if American decided not to acquire

TWA's assets, the situation would not have improved with a pilots' strike against TWA, which would have liquidated immediately upon the withdrawal of American's financing of its operations. In any scenario, the right to strike was not a useful weapon for the TWA pilots in April 2001.

**4. Petitioning DOT for LPPs Would Have Been Pointless.**

Plaintiffs speculate that the TWA pilots' position might have improved if ALPA had petitioned the U.S. Department of Transportation ("DOT") to require American to arbitrate seniority integration. That idea was actually pursued, even though it had no real chance of success.

Prior to the enactment of the Airline Deregulation Act of 1978, the Civil Aeronautics Board ("CAB") routinely conditioned its approval of airline mergers on carrier acceptance of LPPs, which mitigated the potential hardship of such transactions on employees. *See ALPA v. DOT*, 791 F.2d 172, 176-78 (D.C. Cir. 1986). The standard formulation of the CAB's LPPs was promulgated in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22, 31-32 (1972), and included a requirement for the mandatory arbitration of seniority integration disputes. After the passage of the Airline Deregulation Act, however, the CAB warned airline unions: "LPP's will no longer be imposed as a matter of course, or because tradition dictates their use. We therefore advise labor to negotiate its own protections through the collective bargaining process at the first opportunity." *Tex. Int'l-Pan Am.-Nat'l Acquisition,* CAB Order 79-163/164/165 at 67 (Oct. 24, 1979). DOT followed this rule when it took over the CAB's functions in 1985 and it consistently refused to award LPPs to labor. *See, e.g., ALPA v. DOT*, 791 F.2d at 173-74 & n.1.

In any event, TWA MEC Vice Chairman Scott Schwartz, MEC Legislative Affairs Chairman Matt Comlish, and ALPA attorney Clay Warner met with DOT officials in person on March 27 to request that DOT impose LPPs as a condition of approving the transaction, but they

received no encouragement. Att. 19: Warner 65-68. The next day, Babbitt circulated a draft letter to DOT making the same request. Att. 31: E-mail from Babbitt to Warner (Mar. 28, 2001). But that letter was never sent, because the request had been made (and declined) in person.

## II. ALPA's Minimal and Short-Lived Efforts to Organize the American Pilots Presented No Conflict of Interest in Its Representation of the TWA Pilots; Those Efforts Terminated Upon the Announcement of the Proposed Merger of American and TWA, and They Were Not Concealed from Plaintiffs, In Any Event.

As outlined in Point I above, the advice rendered to the TWA MEC was well within the "wide range of reasonableness" the DFR permits, and Plaintiffs therefore cannot show that ALPA's conduct in this respect constituted arbitrary action. The only remaining basis for their claim that the Association breached its DFR in connection with the TWA MEC's waiver of the TWA pilots' LPPs is their allegation that ALPA acted in bad faith, in that ALPA was simultaneously seeking to enroll the American pilots in its membership. This supposed goal, Plaintiffs allege, motivated ALPA's President and former President, as well as all of the ALPA staff and outside professionals involved in the representation of the TWA pilots, to mislead the TWA MEC into agreeing unnecessarily to concessions that advantaged the American pilots. Compl. ¶¶ 102-03. We show below that the supposed motivation for bad faith did not exist.

There was never much interest among the American pilots and their leadership in rejoining ALPA and this essentially non-existent level of interest trailed off entirely once American announced its proposed acquisition of TWA's assets and employees on January 9, 2001. APA wanted to control the terms of the seniority integration, but affiliation with ALPA would have prevented that because ALPA Merger Policy requires ALPA pilot groups to arbitrate the integration of pre-merger seniority lists. Compl. ¶ 79.

Plaintiffs further allege that this supposed bad motive/conflict of interest was kept secret, leading the TWA MEC to misplace its reliance on this advice in its decision to go along with the concessions American demanded.

Plaintiffs, however, have uncovered no factual foundation for either of these assertions, and discovery has proven them false.

**A. ALPA Did Not Conduct an Organizing Campaign at American.**

In October 2000, before the announcement of American's acquisition of TWA's assets, the ALPA Board of Directors adopted a "Pilot Unity" resolution at its biennial convention endorsing the goal of bringing all U.S. and Canadian airline pilots into the fold, including the pilots of American. Att. 32; SMF ¶ 78; Att. 21: Woerth 18. The independent unions representing the largest pilot groups that were not in ALPA were mentioned in the resolution, including the Independent Association of Continental Pilots, the FedEx Pilots Association and APA. Att. 32. Enthusiasm for merging their organizations into ALPA soon appeared among the pilot leaderships at Continental and FedEx. Att. 21: Woerth 24-25. But ALPA understood from the outset -- as it had known for decades -- that bringing the American Airlines pilots into ALPA was not a realistic goal, and the organization therefore wasted no time, money or energy on that effort, even prior to the announcement of the TWA acquisition. *Id.* at 24.

Some insignificant communications occurred between ALPA and APA following ALPA's adoption of its Pilot Unity resolution. On October 27, 2000, Woerth addressed a meeting of APA's Board of Directors, which commissioned some of its number, called the "ALPA Exploratory Committee," to collect information about ALPA. SMF ¶ 77, 80; Att. 21: Woerth 28, 42. A $5,000 services contract was negotiated for ALPA's staff to develop a bargaining survey for APA to send to its members. Att. 9: Johnson II:6. And ALPA staffers met twice with American pilots in Dallas (on November 1 and December 7, 2000) to gauge the level

of interest in rejoining ALPA among American's pilots and to provide information to the Exploratory Committee. Att. 15: Rindfleisch II:37, 39; Att. 8: Johnson I:114-15. None of this activity went anywhere.

When the merger was announced on January 9, 2001, APA's Exploratory Committee deferred issuing its report for several months and then let it die a quiet death upon its issuance. Att. 3: Clark 62-63. The survey was designed and APA paid ALPA for the work involved, but nothing further developed from the task or the contract. Att. 9: Johnson II:6. ALPA General Manager Jalmer Johnson was the designated point man for ALPA's dealings with APA and he testified that he could tell from his contacts with APA officers that they had no serious interest in merging their union into ALPA. Att. 8: Johnson I:117-18. The November 1 Dallas meeting revealed no interest in ALPA among the American pilots -- only one or two showed up. Att. 15: Rindfleisch II:40. In sum, there was "no serious outreach by ... the leadership of APA that gave any indication that they were thinking about or willing to even consider joining ALPA." Att. 21: Woerth 24.

Plaintiffs mistakenly contend that bringing the American pilots into ALPA constituted a high priority for ALPA. To be sure, "there was probably no time that any ALPA president would not have wanted one of the largest pilot groups in the country, for the collective bargaining purposes and political clout to rejoin the union." *Id.* at 31-32. But, at ALPA,

> whenever we've had lists regarding who are the likely merger candidates or organizing candidates, this goes back to the pilot unity resolution that was passed in 2000 and even before that, American was always on the bottom of the list. It was always the view that American pilots would be the last independent union that would join ALPA.

Att. 8: Johnson I:122. *Accord* Att. 21: Woerth 26: "We always felt Allied if they ... joined ALPA, [it] would be only after every single other independent union in the country had already joined ALPA."

When the ALPA Board of Directors adopted its Pilot Unity resolution in October 2000, accordingly, ALPA's "business plan would include a strategy and money allocated to go after the [IACP], which is Continental, and FPA, which is the Federal Express pilots, and that was the end of the [plan]." Att. 21: Woerth 22-23. APA differed from the "Continental pilots and FedEx where we had a large portion of the leadership who was very interested in merging with ALPA." *Id.* at 25. *Accord* Att. 16: Rosen 128 ("most feasible [organizing project] was Continental and then FedEx").

ALPA continued to have passing contacts with the American pilots,[5] but those sporadic events were in stark contrast to the IACP and FPA projects, which required an intensive investment of ALPA funds and staff resources. Att. 21: Woerth 19-20. Committed volunteers from the target carrier collaborated and developed contacts, phone trees and mailing lists. *Id.* Volunteers from ALPA carriers visited crew rooms at the carriers being organized. Literature and videos were prepared and distributed. In late 2000 and early 2001 ALPA worked with the officers of the IACP and a merger of that organization into ALPA was accomplished in June 2001. *IACP*, 28 N.M.B. 473, 474 (2001). Next, the FPA coordinated efforts with ALPA officers and staff to negotiate a merger agreement and secure its approval by the governing bodies of ALPA and the FPA and the FPA membership. That merger was completed in June 2002. *Fedex Express,* 29 N.M.B. 320, 321 (2002).

By contrast, there was no budget during 2001-02 for organizing at American. No ALPA activity occurred there, as Plaintiffs' discovery confirmed, from the announcement of the TWA acquisition, January 9, 2001, through the NMB's transfer of the bargaining rights for the TWA

[5] Woerth accepted APA's last minute invitation and spoke briefly at its Board of Directors meeting in Dallas on April 5, 2001, and in late 2002 and early 2003 (after APA began representing the TWA pilots), Woerth accepted invitations to speak at APA domicile meetings. Att. 21: Woerth 86-87, 237, 240-41, 244-45, 247-48.

pilots to APA on April 3, 2002. SMF ¶ 81; Att. 21: Woerth 19-20, 23-24, 27, 54, 58, 61, 65-67; Att. 9: Johnson II:24-26; Att. 6: Holtzman 51-52, 198-200.[6]

Moreover, whatever minimal activities existed at American promptly ended when the acquisition of TWA was announced. SMF ¶ 81; Att. 21: Woerth 61. At a membership meeting in St. Louis on January 11, 2001, Bob Christy, an ALPA staff member from the headquarters office, told more than one hundred TWA pilots that all efforts to organize at American Airlines had ceased. SMF ¶ 81; Att. 6: Holtzman 51-52; 198-200. Accordingly, even if Plaintiffs could show that ongoing organizational efforts would have presented a conflict of interest, the prompt discontinuation of the efforts removed any such concerns.

### B. The Independent Card Campaign of Hunnibell and Clark.

#### 1. Hunnibell and Clark Began Their Effort in May 2001.

Another red herring is Plaintiffs' allegation that ALPA was behind the efforts of two American pilots, John Clark and Mark Hunnibell, who embarked on a campaign to return their pilot group to ALPA in mid-May 2001. As Woerth explained to the TWA pilots in his letter of February 27, 2002 (SMF ¶ 76; Att. 23: Holtzman Decl. Ex. 8 at 2), they were acting on their own: "The 'Representation Campaign' ... is a 'home-grown' effort pursued by American pilots themselves. It is not an ALPA-run campaign .... *ALPA did not initiate that campaign, ALPA is not involved in the planning for the campaign, and ALPA has not funded the campaign.*" Plaintiffs sought throughout discovery to tie ALPA to the activities of Clark and Hunnibell,

[6] Plaintiffs attempt to make a mountain out of a molehill by referring to a $54,000 line item termed "APA Organizing" in ALPA's calendar year 2000 budget, published to all ALPA members. Compl. ¶ 75. That was the year ALPA's Board of Directors adopted the Pilot Unity resolution. *See* SMF ¶ 78. The expenses were almost all for legal services performed in 2000 for researching ALPA's potential liability, in the event that it became the bargaining agent for the American pilots, for APA's $45 million contempt fine and for damages from passenger lawsuits arising from a 1999 APA job action. SMF ¶ 79; Att. 33: Charges to APA Organizing for 2000 and 2001; Att. 8: Johnson I:110-12; Att. 21: Woerth 39-40; Att. 17: Seltzer 35-39; *see Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 204 (5th Cir. 2001); *American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 586-87 (5th Cir. 2000).

without the least bit of success; the fact is that they received no assistance from ALPA in their effort. Att. 21: Woerth 311; Att. 7: Hunnibell 73; Att. 3: Clark 133-34, 149-50. They launched their self-styled "ALPA Representation Campaign" -- funded with their own personal assets and voluntary donations from other American pilots -- without discussing it in advance with anyone at ALPA. Att. 3: Clark 137. And they didn't begin the campaign until May 14, 2001 – well after the TWA MEC voted to waive its LPPs. SMF ¶ 82.

Clark and Hunnibell did not even meet anyone from ALPA until July 22, 2001, when they came to Washington, D.C., at their own expense, for one night. Att. 7: Hunnibell 58, 67; Att. 34: Letter from Hunnibell to Ron Rindfleisch, ALPA (Dec. 18, 2001). They had a get-acquainted visit with ALPA's Vice President-Administration, who bought them dinner at a restaurant near their hotel (total cost of dinner for three: $65.44, plus tip). Att. 7: Hunnibell 70-72; Att. 12: Mugerditchian 138-41; Att. 35: ALPA Corporate Credit Card Item Expense Report for Jerome Mugerditchian (July 27, 2001).

Clark and Hunnibell collected 1,549 signed cards. Att. 36: E-mail from Rindfleisch to Warner (Mar. 7, 2002). Under NMB rules the cards were valid for only one year after they were signed. Att. 7: Hunnibell 51. Clark gave them to an ALPA officer in Las Vegas on December 5, 2001. Att. 21: Woerth 306-08. ALPA never used them for any purpose. Att. 16: Rosen 136-43.

Nor would ALPA have used these cards in attempting a hostile takeover. "If you have a group that's represented by an independent, ... it's our policy and our practice to try and merge with that group." *Id.* at 142. As ALPA General Manager Johnson explained (Att. 8: Johnson I:119), "[O]ur whole approach in bringing pilots that are organized and have an incumbent union into [ALPA] is through union mergers. It's not through card campaigns because we focus on

having a merger as being a unifying event and not a disunifying event." *Accord* Att. 21: Woerth 24; Att. 15: Rindfleisch II:35, 41, 118, 255.

After Hunnibell mailed representation cards in mid-May 2001, he telephoned ALPA organizer Ron Rindfleisch, who informed him that a card campaign "was not the way [ALPA] wanted to do business, they made that clear." Att. 7: Hunnibell 51-52, 81-82. Rindfleisch told Clark, too, that ALPA would not encourage a card campaign. Att. 3: Clark 150; Att. 15: Rindfleisch II:121.

**2. Rindfleisch's Emails Do Not Reflect an ALPA Organizing Campaign.**

Plaintiffs attempt to make something out of the substantial number of emails between American pilots and Rindfleisch, but virtually all of the emails were outside the period January 9 to April 2, 2001, and they had nothing to do with the advice provided at the TWA MEC meeting on April 1-2, 2001. Indeed, Rindfleisch was not providing any services to the TWA MEC at any time during the pendency of the seniority integration process. Att. 14: Rindfleisch I:222-23.

None of the emails was sent from anyone at ALPA to an American pilot during the period January 9-April 2, 2001. Rindfleisch **received** many from Clark, Hunnibell and other American pilots and sometimes forwarded them to his internal distribution list at ALPA. However, he **responded** only occasionally to American pilots during the two years beginning in September 2000 – and he sent all of his responses after April 2, 2001. The substance and infrequency of these communications demonstrates, as Johnson testified, that there was "no organizing project" under way at the time.

Rindfleisch's title is "New Member Liaison," and his principal duties include communicating with the representatives of pilot groups new to the Association, in order to make sure that they are aware of the services that ALPA provides and the manner in which they can gain access to those services. *Id.* at 31. Rindfleisch's duties also include keeping in touch with

pilots at non-ALPA carriers. *Id.* at 17-18. And in this context he was contacted by Hunnibell, Clark and a few other American Airlines pilots. If they asked about the possibility of securing ALPA representation at American, he explained to them, as Hunnibell and Clark testified, that they should work through their APA officers to generate support for an APA merger with ALPA. *Id.* at 90-91. At no time pertinent to the events alleged in the Complaint did Rindfleisch ever initiate any ALPA organizing activity at American. Nor did he have the authority to do so. Att. 21: Woerth 90, 313-14; Att. 8: Johnson I:45; Att. 14: Rindfleisch I:19-20.

**3. ALPA Did Not Pay the Expenses Incurred by Hunnibell and Clark.**

Plaintiffs erroneously assert that Rindfleisch's December 21, 2001 email to Hunnibell and Clark (Att. 37), which suggested that ALPA would reimburse their card campaign expenses, proves the existence of a conspiracy to bring American pilots into ALPA during the seniority integration process. But Rindfleisch lacked the authority to approve reimbursements, which is a decision "made by the general manager [Jalmer Johnson] . . . or the national officers." Att. 15: Rindfleisch II:182-83. After sending the December 21 email, Rindfleisch asked Johnson about reimbursing the expenses, and Johnson decided the issue on the spot. *Id.* at 219-20. He directed Rindfleisch "that the expenses would not be reimbursed and to forward . . . the expenses that we received from . . . Hunnibell and Clark over to Kevin Barnhurst who was then the director of finance of ALPA and to hold them and put them in a file." Att. 9: Johnson II:12. Johnson declined to authorize the reimbursement because "there was no ALPA sponsored organizing activity at APA. There was no organizing project and . . . reimbursement was inappropriate." *Id.* at 19. ALPA records show no reimbursement was paid. *Id.* at 10-11.

Hunnibell and Clark confirmed that their expenses were not reimbursed, and that neither received any type of compensation or benefit from ALPA for their card campaign efforts. Att. 3: Clark 136; Att. 7: Hunnibell 124. They submitted an expense request to create a record of their

willingness to sacrifice their personal assets in the belief that ALPA was the best organization to represent them professionally. Att. 3: Clark 137. More importantly, both Hunnibell and Clark eventually realized that ALPA was not interested in getting involved in their card campaign. *Id.* at 149-50.

### C. Plaintiffs Knew of ALPA's Program to Bring Non-ALPA Pilot Groups into ALPA and of the Hunnibell/Clark Card Campaign.

Plaintiffs' allegation that ALPA's efforts to organize the American pilots were concealed from them also conflicts with the uncontroverted facts. Most notably, Named Plaintiffs Young and Hollander and the other members of the TWA MEC, as well as Named Plaintiff Pastore, as TWA MEC Chairman, attended ALPA's Board of Directors meeting in October 2000 when the Pilot Unity resolution was adopted. Att. 22: Young 16; Att. 5: Hollander 14; Att. 23: Holtzman Decl. Ex. 8.

Moreover, although neither ALPA nor APA supported the Hunnibell-Clark card campaign initiated in mid-May 2001, the effort was highly visible and public. Plaintiffs produced in discovery a document (Att. 38), "APA Information Hotline – June 1, 2001," which discouraged American pilots from signing the Hunnibell-Clark authorization cards:

> Many pilots have called APA with questions regarding the recent mailing of ALPA representational cards by a former candidate for National Office. Your APA leadership reminds you that this effort is not sanctioned by the APA, ALPA, or the NMB. At the present time, we are facing a seniority integration, which will affect many of our pilots for the remainder of their careers .... The APA Board of Directors and National Officers recommend you not participate in this initiative. Now is not the time.

Hunnibell and Clark maintained a website to publicize their project and mailed cards to all of the more than 11,000 American Airlines pilots. Att. 7: Hunnibell 38-39, 52.

Similarly, when Bud Bensel secured from the internet APA's "DFW Domicile News" for November 28, 2001, he faxed it immediately to the Boies law firm, which made the same

allegations at the NMB as Plaintiffs do in the instant case regarding an ALPA-APA conspiracy. Att. 39: Fax from Bensel to Kirsten Gillibrand (Nov. 29, 2001). In the portion of this APA publication that Bensel flagged for his lawyers, however, APA urged American pilots not to sign the authorization cards distributed by Hunnibell and Clark and to "consider revoking it at this time" if they had already signed one. *Id.* at P03624. APA reasoned *(id.)*:

> While APA's seniority integration agreement has been negotiated with management, we don't believe it advisable to have a new ALPA MEC taking the position that ALPA merger policy should apply to acquisitions, and thus, undercutting whatever defense of the agreement is possible...unless, of course, you prefer to arbitrate the integration.

APA's response to the Hunnibell-Clark card campaign therefore undermines Plaintiffs' conflict-of-interest theory. If the American pilots had chosen ALPA as their bargaining representative during 2001, the TWA pilots could have argued for a right to arbitrate the integration of seniority lists under ALPA Merger Policy. That is one of the reasons that such an effort could not possibly have succeeded and that ALPA made no effort even to try to accomplish it while the seniority integration was going on.

## III. ALPA's POST-APRIL 2 Actions Met Its DFR.

Plaintiffs allege a number of additional ALPA breaches of its DFR after the TWA-MEC's waiver of LPPs. None of these allegations, however, is supported by any facts or evidence. Nor do the assertions amount to a violation of the DFR.

### A. ALPA Properly Handled the Negotiations on Seniority Integration.

On April 10, 2001, American closed its purchase of TWA's assets, at which point nearly all of the TWA pilots became employees of TWA-LLC. The waiver the TWA MEC had approved eight days earlier essentially left the question of seniority integration in the hands of APA, with a promise from American to use its reasonable best efforts to facilitate the process of securing a fair and equitable merged pilot seniority list. Plaintiffs are correct that the seniority

negotiations between the representatives of the two affected pilot groups failed to result in agreement, and that on November 8, 2001, APA and American executed their seniority integration formula, Supplement CC. Compl. ¶¶ 59, 61. There is no merit, however, in their allegation that ALPA breached its DFR because "American and TWA-LLC refused to negotiate with the TWA-MEC and excluded the TWA-MEC or any other representatives of ALPA from any discussions concerning Supplement CC and seniority integration...." *Id.* ¶¶ 60, 62.

On the contrary, it is undisputed that even before the consummation of the acquisition, "the TWA MEC's merger committee had been involved in negotiations with their counterparts from APA for several months in an effort to reach an agreement on the integration of the TWA (now TWA LLC) and American pilot seniority lists, and those negotiations continued through the summer." Att. 23: Holtzman Decl. ¶15; SMF ¶¶ 49, 52, 54, 61, 66-67. The negotiations were even aided by a professional mediator, whose mandate was extended through the middle of September. SMF ¶¶ 52-53; Att. 40: Agreement for Engagement of Facilitator (July 23, 2001); Att. 41: Extension of Agreement for Engagement of Facilitator (Aug. 31, 2001). But the two merger committees were unable to reach an agreement on the integration of pilot seniority lists. SMF ¶ 54.

American Airlines executive Jeff Brundage proposed to sponsor additional seniority negotiations in mid-October 2001, but Pastore and the TWA MEC refused to participate in the talks. Att. 2: Brundage 68-72; SMF ¶ 64. Brundage testified that American and APA were each prepared to sweeten the deal for the TWA pilots and the TWA MEC's torpedoing of these negotiations thus resulted in a missed opportunity. Att. 2: Brundage 75-77; Att. 42: Letter from Brundage to Woerth (Oct. 12, 2001).

That the negotiations failed to result in agreement between the parties does not support Plaintiffs' allegations that ALPA violated its DFR by "[f]ailing to require American and TWA-LLC to negotiate the terms of seniority integration" and "[p]ermitting American and TWA-LLC to require the TWA MEC to negotiate seniority integration with APA." Compl. ¶ 107(a), (b). As Pastore recognized when the TWA MEC granted the concessions American sought, the pilots had gained "[w]ritten assurance from American to exercise its best efforts to encourage a fair and equitable seniority integration process with the APA." Att. 23: Holtzman Decl. Ex. 5 at 3; SMF ¶ 40. In other words, negotiation with APA was a necessary consequence of the deal to which the TWA MEC consented on April 2, 2001. Given the pre-existing CBA between APA and American -- which required American to treat the pilots of any acquired carrier as new hires -- the former TWA pilots faced an uphill battle in the seniority integration negotiations.

ALPA's efforts in these negotiations could not have been reasonably expected to achieve everything the former TWA pilots might have desired. In ruling that American had fulfilled its obligations under the reasonable best efforts letter of agreement, SMF ¶ 63, Arbitrator Richard Bloch explained the context in the following terms at 5 (Att. 43):

> Pilot labor relations at American Airlines had been historically troublesome, made no less so by the lengthy and divisive work stoppage emanating from the recent Reno Air acquisition and that subsequent seniority integration. American pilots, for their part, were understandably protective of their scope clause which ... made no provision whatsoever for integration by arbitration. From their standpoint, virtually any concession to the newly-acquired pilot force was intrusive, unnecessary and, given the elimination of the Allegheny-Mohawk provisions in the TWA contract, unachievable.

Plaintiffs have failed to establish anything that ALPA could have done to improve the results.[7]

[7] Plaintiffs' so-called experts argue that Woerth should have personally attended more than one session of the seniority discussions between the two merger committees and that Seth Rosen should have been assigned to attend these talks. We have seen no evidence that the TWA MEC requested more input from either Woerth or Rosen. Seniority negotiations involve complex and interrelated issues, moreover, and the interjection of additional participants may have impeded the efforts on behalf of the TWA pilots.

The issue, moreover, is whether ALPA's actions were within the "wide range of reasonableness" the DFR demands, not whether the union achieved the best of all possible outcomes. That Plaintiffs were ultimately dissatisfied with the results of the negotiations -- stacked as they were against the former TWA pilots by the unfortunate circumstances in which TWA's failure as a business had left them -- in no way suggests that ALPA's conduct was arbitrary or in bad faith. *O'Neill,* 499 U.S. at 78-81; *Rakestraw,* 981 F.2d at 1534.

**B. ALPA Properly Decided Not to Initiate Wilder's Proposed Litigation.**

Plaintiffs contend that ALPA arbitrarily and in bad faith missed an opportunity to improve the terms of the TWA pilots' seniority integration by declining Wilder's invitations to litigate. Wilder theorized that APA owed a DFR to the TWA pilots between April 2, 2001, and April 3, 2002, and proposed to sue American and APA to bar them from agreeing to seniority integration arrangements. The ALPA Legal Department reviewed all of the support Wilder offered for that theory, as well as other authorities, and concluded that Wilder was wrong: "a union does not owe a fair representation duty to pilots that it does not represent," and APA would not represent the TWA pilots until the National Mediation Board determined that the TWA and American pilots were part of a single collective bargaining unit. Att. 29. The analysis concluded that "the claim that APA would violate a duty of fair representation ignores the fundamental (and indisputable) rule that no such duty exists with respect to employees outside the bargaining unit." *Id.* at 1; SMF ¶ 57.

The Third Circuit agreed with the ALPA Legal Department's analysis. In its decision in this case, the court held that APA did not possess a DFR to the TWA pilots until the NMB determined that a single bargaining unit existed, and on that ground dismissed the Plaintiffs' claims against APA. *Bensel v. Allied Pilots Ass'n,* 387 F.3d 298, 312-15 (3d Cir. 2004).

Wilder's litigation proposal was also strategically flawed. The scheme depended for its success on intimidating APA into concessions and APA had already shown it was not susceptible to such pressure. In the earlier acquisition of Reno Air, APA acted in such a pertinacious manner in defense of its CBA that it received a federal district court injunction and then a $45 million contempt fine. *American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d at 586-87.

Wilder also offered a second litigation theory, which became relevant when the mediated negotiations between the two pilot groups' merger committees reached impasse in mid-September. ALPA filed a grievance on September 24 charging that American had failed to fulfill its responsibilities under the reasonable best efforts letter of agreement. SMF ¶ 58. Wilder had earlier proposed that ALPA sue American to compel its participation in the arbitration to resolve this grievance and to preserve the status quo pending the arbitration. Att. 19: Warner 142. The ALPA Legal Department had initially seen some merit in the idea. *Id.*; SMF ¶ 56. But American agreed to participate in an expedited arbitration, thus rendering the suggested litigation superfluous. Att. 19: Warner 142; SMF ¶ 60.

The arbitration proceedings were expedited. Hearings were held on December 12 and 13, briefs were submitted on February 4, SMF ¶ 62, and Arbitrator Bloch released a tentative decision in American's favor on March 20, 2002. Att. 44; SMF ¶ 63. The final decision was issued on April 18, shortly after the NMB transferred the bargaining rights for the TWA pilots to APA. SMF ¶¶ 63, 87. Thus, once American vitiated the need for an action to compel it to arbitrate, the need for a status quo injunctive suit simultaneously evaporated. Att. 19: Warner 142, 145-46; SMF ¶ 60.

### C. ALPA Properly Responded to the NMB Proceeding.

Plaintiffs claim that ALPA "took no action to prevent APA certification" and breached its DFR to the former TWA pilots by "[f]ailing to challenge the certification of APA as the certified

collective bargaining agent of the former TWA pilots as requested of them by the TWA-MEC." Compl. ¶¶ 65, 107(d). There is no support for that claim.

The first contention – that ALPA "took no action to prevent APA certification" – has no factual support. Contrary to Plaintiffs' assertions, ALPA submitted comments to the NMB on January 10 and February 11, 2002, opposing APA's petition as premature on the ground that American and TWA-LLC were not sufficiently integrated to constitute a single transportation system. Atts. 46-47; *Allied Pilots Ass'n*, 29 N.M.B. 201, 203-04 (2002); SMF ¶ 74. ALPA argued as well that the NMB should delay ruling until the completion of a system board proceeding on ALPA's grievance alleging that American had failed to comply with its agreement to use its "reasonable best efforts" with APA "to secure a fair and equitable process for the integration of seniority." *Allied Pilots Ass'n*, 29 N.M.B. at 203-04.

Moreover, ALPA's actions in the NMB proceedings, and its decision not to sue over the NMB's decision, fail to support a claim of a breach of the DFR. It was not within ALPA's power to prevent APA from filing for an NMB single carrier determination, nor to stop this federal agency from ruling on the APA application once APA had filed it. And the law is plain: federal district courts lack power to review action of NMB in issuing certification of bargaining agent. *Switchmen's Union v. NMB*, 320 U.S. 297, 300-04 (1943). So a lawsuit would have been a waste of time, at best.

Plaintiffs further assert that ALPA breached its DFR by arbitrarily failing to seek certification as the collective bargaining representative of the combined American-TWA pilot group, Compl. ¶ 107(c), but they have adduced no evidence showing that ALPA's decision not to seek representation rights for the combined pilot group was irrational or arose from an

improper motive. Att: 22: Young 159. ALPA fully evaluated the issue in March 2002 and decided that the effort would be pointless. Att. 16: Rosen 145-48.

Any ALPA attempt to win an election to become the bargaining agent for the combined American-TWA pilot group would have failed, for reasons Plaintiffs have conceded. Plaintiffs recognize that "American employed over 11,000 pilots, compared to the approximately 2,300 pilots employed by TWA." Compl. ¶ 37. Plaintiffs further admit that "a critical obstacle to ALPA's attempt to organize American pilots was that those pilots wanted complete control over the seniority integration of the TWA pilots into American." *Id.* ¶ 79. These numbers of pilots in the two groups and the desire of the larger group to control the seniority integration are substantial reasons why any ALPA organizing effort at American could not have succeeded once the proposed merger was announced. Att. 16: Rosen 147-48. Seeking an election would have created "a hopeless, futile situation" (*id.* at 148), and the election "was going to be a catastrophic failure." Att. 19: Warner 193. Declining to pursue such a futile course did not constitute a breach of the DFR.

**D. ALPA Did Not Violate the DFR by Failing to Challenge Supplement CC.**

Plaintiffs allege that ALPA violated its DFR by "[f]ailing to take action to challenge Supplement CC." Compl. ¶ 107(e). But the Third Circuit rejected Plaintiffs' claims that Supplement CC was invalid, holding that the agreement did not violate a DFR to the TWA pilots because APA and American agreed to Supplement CC before APA represented the TWA pilots. *Bensel*, 387 F.3d at 315-17. Plaintiffs argued that their inclusion in the APA bargaining unit was inevitable and Supplement CC was addressed to them specifically, but the court rejected those allegations as a basis for the DFR: "[I]t is *actual* inclusion in the bargaining unit – not 'impending' inclusion – that triggers attachment of the duty of fair representation." *Id.* at 314.

Moreover, as judged from the legal and factual landscape at the time, ALPA clearly acted within the "wide range of reasonableness" labor laws allow. *O'Neill,* 499 U.S. at 78-82; *Rakestraw,* 981 F.2d at 1534-37. ALPA President Woerth understood that APA did not owe a DFR to the TWA pilots on November 8, 2001, when APA and American entered into their agreement. Att. 21: Woerth 251-52; Att. 29. An ALPA suit premised on this theory would not only have failed, but also would have encouraged APA and American to have changed their agreement in ways that made it worse for the TWA pilots. Att. 16: Rosen 95-97. The failure to undertake frivolous and potentially counterproductive litigation was proper.

**E. ALPA Properly Made No Calls For Boycotts.**

Although the Complaint contains no allegations about the absence of any ALPA attempt to initiate boycotts against American Airlines and its pilots, Plaintiffs have argued in discovery that ALPA arbitrarily and in bad faith declined to advise all ALPA pilots to bar American pilots from using the jumpseats on their aircraft. Assuming for the sake of argument that the TWA MEC requested such a boycott, the request would not have been well-reasoned.

Barring the American pilots from jumpseats would have been "inconsistent with . . . [ALPA's] policy [of] not ... politiciz[ing]" jumpseats. Att. 16: Rosen 86. ALPA's Administrative Manual establishes a policy against the "[d]enial of jumpseat privileges as a means of punishing, coercing or retaliating against other pilot groups or individuals." Att. 48 at 115-2. Pastore recognized the importance of this principle in a message to all TWA pilots on February 20, 2001, discouraging a jumpseat boycott against Continental pilots. Att. 49.

Furthermore, seeking to prohibit the American pilots from riding in jumpseats would have had a "negative impact" on the TWA pilots, and other ALPA pilots, too. Att. 16: Rosen 86. APA would likely have retaliated for a jumpseat boycott by making its seniority integration proposal worse for the TWA pilots, and by encouraging American pilots to deny jumpseats on

American aircraft to ALPA pilots. The proposed boycott would have adversely affected not only the TWA pilots, but all ALPA pilots. *Id.* at 87-89.

Plaintiffs now argue that ALPA should have adopted the ban because rather than causing APA to make its integration offer worse, the proscription would have put pressure on APA to improve its seniority proposal. Their theory merely reflects a different judgment call on bargaining strategy, and cannot, as a matter of law, form the basis for a DFR violation finding. *O'Neill*, 499 U.S. at 78-81; *Jeffreys*, 354 F.3d at 275-77; *Morales,* 2000 WL 33678049, at *2; *Cooper*, 274 F. Supp. 2d at 243-46. ALPA's adherence to its well-established policy against politicizing the use of jumpseats was reasonable and made in good faith.

Similarly, although we have found no TWA MEC request for an AFL-CIO boycott of American, Plaintiffs have nonetheless contended in discovery that ALPA should have sought one. They argue that a boycott would have led American to force APA concessions in the seniority integration for the TWA pilots. But it is likely that a boycott would have had the opposite effect, inviting American and APA to retaliate against the TWA pilots.

Nor did ALPA give any "serious consideration" to asking the AFL-CIO for a boycott, "largely because of the TWU." Att. 21: Woerth 300. The Transport Workers Union is an AFL-CIO affiliate with 250,000 members, which represented 28,457 American employees in 2001. *TWU*, 29 N.M.B. 240, 245 (2002). The TWU would have opposed a boycott of an employer of 28,457 of its members and the AFL-CIO would not have adopted one. Again, ALPA's conduct was rational and in good faith.

## CONCLUSION

Plaintiffs have engaged in extensive discovery efforts, but have found no evidence of ALPA bad faith, discrimination or arbitrariness. The record reveals no genuine dispute as to any material fact. On April 2, 2001, after being fully advised, the TWA MEC made the decision to accept the package of agreements offered by American and TWA and the consequences of that decision cannot be evaded. ALPA did not conduct an organizing campaign at American and the TWA MEC's decision cannot be voided on that ground. Nor does anything that occurred during the post-April 2 period constitute a basis for a DFR claim against ALPA, which undertook every reasonable action available to secure for the TWA pilots the best possible seniority integration at American. ALPA's summary judgment motion should be granted.

Dated: March 12, 2009

Archer & Greiner
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, New Jersey 08033-0968
(856) 795-2121

By: /s/John C. Connell
John C. Connell, Esquire
Alexander Nemiroff, Esquire

*Pro Hac Vice*:
Daniel M. Katz, Esquire
Jason M. Whiteman, Esquire
Katz & Ranzman, P.C.
4530 Wisconsin Ave., N.W., Suite 250
Washington, DC 20016
(202) 659-4656

Counsel for Defendant Air Line Pilots Association, International

3886372v1