IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

a

US Airways, Inc., a Deleware Corporation,

Plaintiff,

vs.

Don Addington, an individual, *et al*

and

US Airline Pilots Association,

Defendants.

Case No. 2:10-CV-01570-PHX-ROS

DECLARATION OF NICHOLAS PAUL GRANATH

I, Nicholas Paul Granath, Esq., declare as follows:

1. I am counsel of record for the US Airline Pilots Association ("USAPA") in the above cited matter, and in all related litigation. This Declaration is in support of USAPA's motion to drop the Addington defendants under Rule 21.

2. Attached, marked, and labeled Exhibit **A** is a true and correct copy of Doc. # 99 in Naugler v. ALPA, Case No. 05-4751 (Eastern District New York).

3. Attached, marked, and labeled Exhibit **B** is a true and correct copy of Doc. # 118 in Naugler v. ALPA, Case No. 05-4751 (Eastern District New York).

Pursuant to 29 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 1, 2010

/s/ Nicholas Paul Granath

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SETH NAUGLER, *et al.*, Plaintiffs, - v. - AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et ano.*, Defendants.	Case No. 05-CV-4751 (NG)(VVP)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATUTES

Pursuant to Federal Rule of Civil Procedure 56, defendants Air Line Pilots Association, International ("ALPA"), and Duane E. Woerth, as its former President (collectively, the "ALPA Defendants") submit this memorandum of law in support of their motion for summary judgment and dismissal of the Supplemental Complaint in its entirety.

PRELIMINARY STATEMENT

This is the second case brought by a group of pilots who worked for MidAtlantic Airways ("MDA") during its brief operations from 2004 to 2006. Some members of the plaintiff group obtained their positions at MDA because they were furloughed from US Airways – under the collective bargaining agreement between US Airways and its pilots' union, the Air Line Pilots Association, International ("ALPA"), jobs at MDA were offered first to furloughed US Airways pilots. And some members of the group obtained their positions because they were employed by regional airlines owned by US Airways – so too, the ALPA-US Airways collective bargaining agreement provided that MDA jobs not taken by furloughed US Airways pilots were to be offered to pilots for US Airways' regional airline subsidiaries.

In the first case, plaintiffs (both furloughed US Airways pilots, and those who had never worked for US Airways) alleged that their employment by MDA acted as a "recall" from US Airways furlough. They further alleged that this recall required that their MDA work be compensated at the higher rates earned by US Airways pilots, rather than the specific pay rates negotiated by ALPA for MDA work. Those allegations led to claims that ALPA violated the Railway Labor Act's duty of fair representation ("DFR") and the Racketeering Influenced and Corrupt Organization Act by failing to pursue their claim for higher compensation. In an Opinion and Order issued March 27, 2008, the Court held that their claims were either time-barred or legally inadequate.

In this second case, the plaintiffs take issue with their treatment in a process by which the pilot seniority lists of US Airways and America West Airlines were to be merged after the merger of the two companies. Specifically, they claim that representatives of the US Airways pilots violated the duty of fair representation by presenting an "erroneous seniority list" that "described as furloughed those who had flown 'MidAtlantic' equipment for US Airways." Supp. Compl. ¶ 53. They further allege that, because the "erroneous seniority list" was presented to the Arbitration Board charged with integrating the two seniority lists, "the arbitration award treated US Airways pilots who had previously flown 'MidAtlantic' aircraft as though they were still on furlough," and "failed to credit 'MidAtlantic' flying as US Airways flying." *Id.* ¶¶ 39-40.

This new claim – like the original claims – has no merit whatsoever. The undisputed factual record – after seventeen depositions and the exchange of thousands of pages of documents – shows that Defendants are entitled to summary judgment for several alternative and independent reasons.

First, all of the MDA pilots knew by no later than January 24, 2006, that their information would be listed in the way they now claim was "erroneous." The limitations period for duty of fair representation claims is six months, so any claims based on "erroneous" data would have to be filed by July 24, 2006. The Plaintiffs first raised this claim in a June 22, 2007 letter to the Court requesting a pre-motion conference; accordingly, the claim is time-barred.

Second, the undisputed evidence clearly shows that the merged seniority list has not been implemented. Indeed, the primary goal of the new union for the US Airways pilots is to prevent that list from ever being implemented, and the matter is currently the subject of litigation in the U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit. Thus, Plaintiffs have not suffered any injury and the case is not ripe for judicial review.

Aside from these procedural and doctrinal bars that mandate dismissal of the Supplemental Complaint, the undisputed facts further show that ALPA did not act arbitrarily, with bad faith, or discriminatorily toward the MDA pilots, as required to establish a breach of ALPA's DFR. To the contrary, the US Airways Merger Committee vigorously advocated on behalf of the MDA pilots, and indeed sought to have the Arbitration Board credit them for their service at MDA.

Finally, the undisputed record evidence also shows that the Arbitration Board did not rely on any "erroneous" list, and understood precisely what MDA was, as well as the employment situation of the MDA pilots. Accordingly, Plaintiffs cannot establish the requisite causal link between the alleged "erroneous" list and their place on the integrated list generated by the Arbitration Board.

STATEMENT OF FACTS

I. CHRONOLOGY OF THE CASE

Plaintiffs commenced this action on October 7, 2005, by filing a complaint (the "Initial Complaint") alleging claims against ALPA, Defendant Woerth, US Airways, Inc., US Airways Group, Inc., Republic Airways Holdings, Inc., Wexford Capital LLC, and America West Airlines, Inc. Docket no. 1. The Initial Complaint contained nine counts against the various defendants, alleging violations of ALPA's duty of fair representation, breaches of a collective bargaining agreement by US Airways, and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961. The gravamen of the complaint was that ALPA and US Airways had concealed the nature and corporate structure of MidAtlantic Airways ("MDA"), a division of US Airways that was in operation from April 2004 to May 2006. Initial Compl. at ¶¶ 308-569; US Airways, Inc. Form 8-K filed April 27, 2004, Ex. 99 p. 3; US Airways, Inc. Form 10-Q for Period Ended June 30, 2006 at 19, 48-50.

On July 12, 2006, the Court entered an order, pursuant to a stipulation between Plaintiffs and US Airways, Inc., US Airways Group, Inc., Republic Airways Holdings, Inc., Wexford Capital LLC, and America West Airlines, Inc., dismissing all claims against those parties, leaving the ALPA Defendants as the only remaining Defendants. Docket no. 21. Five days prior to the entry of that stipulation, on July 6, 2006, Plaintiffs filed an amended complaint (the "First Amended Complaint") that superseded the Initial Complaint and alleged claims against only ALPA and Defendant Woerth [Docket no. 16], again premised on alleged concealment of the nature and corporate structure of MDA. First Amended Compl. at ¶¶ 284-461.

On June 22, 2007, Plaintiffs wrote a letter to the court requesting a pre-motion conference to discuss their intention to move for leave to file a new complaint (the "Supplemental Complaint") alleging for the first time additional claims against ALPA and Defendant Woerth arising out of the proposed integration of the seniority lists of pilots flying for US Airways Inc. and America West Airlines Inc. ("America West") in connection with the corporate merger of the two airlines in 2005. Docket no. 44. On October 13, 2007, Plaintiffs moved for leave to file the Supplemental Complaint. Docket nos. 49-52.

On March 27, 2008, the Court entered an order dismissing all claims alleged in the First Amended Complaint and granting plaintiffs leave to file the Supplemental Complaint. Docket no. 61. On that same day, the Court dismissed a complaint by numerous flight attendants of US Airways, represented by the same counsel as Plaintiffs, against the labor union that represented flight attendants at US Airways. *Propst v. Association of Flight Attendants*, No. 06cv606, Order dated March 27, 2008 [Docket no. 33]; the Court's decision was affirmed by the Second Circuit [Docket no. 37], 330 Fed. Appx. 304 (2d Cir. June 19, 2009).

On April 18, 2008, Plaintiffs filed the Supplemental Complaint, and on May 21, 2008, Defendants ALPA and Woerth filed their Answer to the Supplemental Complaint. Dockets nos. 63, 67. Discovery in this case has now closed, after the production of over 30,000 pages of documents and seventeen depositions.[1] *See* Magistrate's Order entered September 28, 2009 [Minute entry].

II. THE PARTIES

A. Plaintiffs

Plaintiffs are approximately 235 pilots who flew Embraer-170 aircraft for MDA. Supp. Compl. As set forth in more detail below, MDA was a division of US Airways, Inc. ("US Airways" or the "Company"). Transcript of the Deposition of Captain Philip Carey ("Carey Dep. Tr.") at 66:22-25; Transcript of the Deposition of Captain James Brucia ("Brucia Dep. Tr.") at 16:10-12; 20:19-21:24; Transcript of the Deposition of Captain Robert Kirch ("Kirch Dep. Tr.") at 27:25-29:8.

Some plaintiffs, prior to flying for MDA, had been furloughed from pilot positions at US Airways, while others, such as lead plaintiff Seth Naugler, never flew for US Airways prior to flying for MDA but rather flew for certain wholly-owned subsidiary regional carriers of US Airways. Transcript of the Deposition of Seth Naugler ("Naugler Dep. Tr.") at 144:4 - 16:9 (Naugler's first position with US Airways was flying the Embraer 170 - i.e. flying for MDA).

[1] Specifically, Plaintiffs took the depositions of current ALPA President Captain John Prater, Nicolau Arbitration Pilot Neutral Captain James Brucia, US Airways Merger Committee members Captain Robert Kirch and Captain Philip Carey, US Airways Negotiating Committee Member Captain Donn Butkovic, US Airways MEC Chairman Captain William Pollock, US Airways MEC Vice-Chairman Captain Kim Snider, US Airways MEC member Captain Garland Jones, and US Airways MEC Communications Chairman First Officer Roy Freundlich. ALPA took the depositions of James Portale, Seth Naugler, Anthony Priddy, Mitchum Grace, Garth Wilkinson, John Carlisle, Elliott Odom, and Peter Test, who Plaintiffs' counsel indicated were representative of any witnesses to be presented in this case.

Defendants have twice sought judicial intervention to address plaintiffs' failure to respond to discovery. [Docket nos. 69, 71, 73, 79.] Nevertheless, and notwithstanding the substantial extensions of time granted by Defendants and the Magistrate Judge, many plaintiffs have still not complied with basic discovery requests.[2]

B. Defendant Air Line Pilots Association, International

Defendant Air Line Pilots Association, International ("ALPA") is a labor union that, in accordance with the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, represents pilots who fly commercial aircraft. ALPA is the largest airline pilots' union in North America, acting as the collective bargaining representative for more than 53,000 pilots at thirty-six airlines in the United States and Canada. Transcript of the Deposition of ALPA President Captain John Prater ("Prater Dep. Tr.") at 9:20-10:2.

ALPA represented pilots at US Airways, Inc. for many years until 2008. Prater Dep. Tr. at 10:3-13. When ALPA was the collective bargaining representative for US Airways, the US Airway pilots elected members to a body called a Master Executive Council ("MEC") that, in accordance with ALPA's Constitution and By-laws, was ALPA's coordinating council for representation of the US Airways pilots. Carey Dep. Tr. at 148:24-149:4.

ALPA's representation of US Airways pilots ended in April 2008, when, after an election, the National Mediation Board decertified ALPA as the collective-bargaining representative of US Airways pilots and certified the US Airline Pilots Association ("USAPA") as their collective bargaining representative. ALPA thus no longer has any responsibility for representation of US Airways pilots. Transcript of the Deposition of Captain Donn Butkovic ("Butkovic Dep. Tr.") at 23:12-18.

[2] Defendants intend to file a motion for sanctions, requesting that those Plaintiffs who have not adequately responded to discovery be dismissed from the case.

C. Defendant Duane E. Woerth

Defendant Duane E. Woerth is the former President of ALPA and held that office until he was succeeded by Captain John Prater on January 1, 2007. Prater Dep. Tr. at 5:19-6:2.

III. US AIRWAYS' ECONOMIC DISTRESS AND BANKRUPTCIES

A. Economic Distress

As described in detail below, US Airways[3] suffered extreme financial distress in the late 1990s and throughout the 2000s, leading to two bankruptcy filings within the space of three years, massive pilot economic concessions in wages, work rules, and benefits, and the furlough of roughly 1,700 pilots. *DiFelice v. US Airways, Inc.*, 436 F.Supp.2d 756 (E.D. Va. 2006); Carey Dep. Tr. at 36:18-23. *See also*, *Naugler v. ALPA*, No. 05 CV 4751(NG)(VVP), 2008 WL 857057, at *1-*2 (E.D.N.Y. Mar. 27, 2008).

Around the summer of 2000, US Airways began to suffer a decline in its financial prospects; for 2000, it recorded a net loss of $269 million and had the highest cost structure of any major airline in the United States. *DiFelice,* 436 F.Supp.2d at 766. It remained the highest-cost domestic airline carrier in 2001, and was also adversely affected by the overall economic decline associated with the bursting of the "dot-com bubble" in 2000 due to its heavy reliance on business fares and the growth of low-fare competitors in its markets. *Id.* at 765-67. US Airways tried to address its financial woes by merging with UAL Corporation, the parent corporation of United Airlines Inc., but that merger fell apart after the United States Department of Justice indicated, in the summer of 2001, its intention to file a lawsuit to prevent the merger. *Id.* at 767-68. The Company then announced, on August 15, 2001, a plan to restructure to improve its

[3] During 2002-2004, US Airways Group held US Airways, Inc., and seven wholly-owned subsidiary carriers. *In re US Airways Group, Inc.*, 296 B.R. 734, 737 (Bankr. E.D. Va. 2003).

financial condition, which included a plan to drastically reduce its labor costs by negotiating concessions with several labor unions representing various sectors of its workforce. *Id.* at 768.

US Airways was thus in an already-precarious financial position when the terrorist attacks of September 11, 2001 dealt a devastating blow to the airline industry in general and US Airways in particular; in response to the attacks, the federal government grounded all air traffic in the United States for three days. Ronald Reagan Washington National Airport in Washington, D.C., a key hub for US Airways, remained closed after the attacks for over three weeks, and as of March 22, 2002, US Airways was operating only 77% of its pre-September 11 departures from that airport, and was not permitted to return to its previous levels of service until April 15, 2002. *Id*. at 768-69.

As a result of the attacks and their fallout, the price for a share of stock of US Airways Group dropped from $11.62 on September 10, 2001 to $4.10 on September 27, 2001; further, Moody's downgraded the Company's debt from B1 to B2, and Standard & Poor's downgraded the Company's senior secured debt from B to CCC+, indicating that the debt was vulnerable to a risk of nonpayment. On September 24, 2001, US Airways announced that it was in a "struggle for its very survival" and would cut 11,000 employees from its workforce. *Id.* at 768-70.

1. The 2002 Restructuring Agreement

A key part of US Airways' efforts to stay financially afloat and out of bankruptcy was to obtain massive wage, benefit, and work-rule concessions. *US Airways,* 296 B.R. at 737. At the time US Airways was undergoing the financial turmoil that ultimately led to its bankruptcy, the terms and conditions of employment of all US Airways pilots were governed by a collective bargaining agreement between US Airways and ALPA (the "US Airways Pilots

Working Agreement" or "Working Agreement"),[4] and the labor concessions US Airways sought thus required changes to that Agreement. Butkovic Tr. at 52:14-24. Pursuant to ALPA policy, the US Airways MEC had a standing Negotiating Committee responsible for negotiating collective bargaining agreements and resolving disputes that arose under them; the concessions sought by US Airways required sweeping modifications to the Working Agreement. Butkovic Dep. Tr. at 42:13-44:12; 90:12-98:25; transcript of the Deposition of Captain William Pollock ("Pollock Dep. Tr.") at 27:25-28:5.

In June and July of 2002, just prior to US Airways' first bankruptcy filing, US Airways and ALPA negotiated and ultimately agreed to enter into an agreement that contained wage, benefit, work-rule and other concessions, and in addition authorized the Company to operate MDA (the "2002 Restructuring Agreement" or "Restructuring Agreement"). The US Airways MEC agreed to the 2002 Restructuring Agreement on July 13, 2002, and it was ratified by the US Airways pilots on August 11, 2002. Pls.' Ex. 5; Transcript of the Deposition of Captain Garland Jones ("Jones Dep. Tr.") at 10:18-11:10; Butkovic Tr. at 42:13-44:12; 90:12-98:25. The Plaintiffs here were thus aware of the 2002 Restructuring Agreement, because it was published to them and ratified by the US Airways pilots. Butkovic Dep. Tr. at 51:14-52:24; Priddy Dep. Tr. at 41:7-23.

The 2002 Restructuring Agreement embodied substantial pay concessions for the US Airways mainline pilots. It called for a reduction in pay rates back to the rates that were in effect on April 30, 2001, canceled a pay parity review for pay raises required under the Working

[4] The Working Agreement consists of a main agreement and numerous side letters called Letters of Agreement that are numbered in sequence. Defs.' Ex. 125 at § 30(A)(1).

Agreement, and eliminated a lump sum payment the pilots were scheduled to receive under the Working Agreement. Pls.' Ex. 5 at 1.[5]

(a) ALPA Agrees to Allow US Airways to Create MDA

While negotiating the huge wage, benefit, and work-rule concessions that would become part of the 2002 Restructuring Agreement, ALPA, with almost two thousand of its US Airways pilot members on furlough, sought to obtain the company's agreement to provisions that would provide job opportunities for those pilots. Butkovic Dep. Tr. at 42:13-51:23. Conversely, in addition to wage and benefit reductions, US Airways sought ALPA's agreement to modify the "Scope Clause,"[6] of the Working Agreement so that more of the flying of certain types of jets would be operated by entities separate from US Airways, Inc., including US Airways' wholly-owned subsidiaries. Butkovic Tr. at 42:13-43:19. Pilots for those regional airline subsidiaries were not covered by the terms of the Working Agreement, but the airplanes would still bear the US Airways logo and be held out to the public as US Airways operations. *Id.*. Specifically, one component of US Airways' restructuring plan was to operate the Embraer-170, which was larger than the jets operated by its wholly-owned subsidiaries but smaller than the jets operated by US Airways, Inc., through either another subsidiary or a separate division of US Airways, Inc., to be named MidAtlantic Airways. Butkovic Tr. at 45:13-46:24.

ALPA sought the Company's agreement to have the wages and working conditions of pilots flying for the contemplated MDA operation governed by the pay structures and work rules for mainline pilots under the Working Agreement but the Company, on the cusp

[5] Plaintiffs' exhibit 5 does not have a page number on the cited page. The page referred to here is the third page of the document, immediately after the signature page.

[6] The scope clause governed which flying identified as US Airways was covered by the Working Agreement and which such flying was not. *See* Working Agreement, Defs.' Ex. 125 at § 1.B.3 The scope clause covered, with certain exceptions, flying conducted by any air carrier under the US Airways name, logo, or marks, but provided that the flying done on certain small jets - defined as those with no more than sixty-nine seats - was not covered by the Working Agreement. Defs.' Ex. 125.

of its first bankruptcy, refused and "would have none of it." Butkovic Tr. at 49:4-51:23. ALPA ultimately agreed to allow MDA to operate under terms and conditions of employment different from those of the mainline operation. Pls.' Ex. 5 at 5-10.

To ensure, however, that the MDA regional jet operation would provide opportunities for furloughed US Airways pilots, the 2002 Restructuring Agreement provided that "[a]ll MDA positions will be filled first by US Airways pilots"; if there were not enough volunteers among US Airways furloughees to fill the available MDA positions, positions were to then be filled by volunteer pilots from US Airways' regional airline subsidiaries, and then pilots with no relationship to US Airways. Pls.' Ex. 5 at 7-8. For hiring at MDA, the US Airways MEC agreed to use two lists: (i) the "Affected Pilot List" or "APL" consisting of furloughed pilots, Pls.' Ex. 5 at 11-12, and then (ii) the "Combined Eligibility List" ("CEL"), consisting of pilots who came from US Airways' regional subsidiaries. Carey Dep. Tr. at 75:22-76:2; Brucia Dep. Tr. at 15:18-16:9.

A key provision of the agreement to create MDA provided that a furloughed US Airways pilot's acceptance of a position at MDA was completely voluntary, and the 2002 Restructuring Agreement ensured that there would be no adverse consequences for a pilot who declined an offer to come to MDA: "[a pilot] may bypass an offer of employment with MDA without losing his position on the Affected Pilot List" and thus without losing his seniority. Pls.' Ex. 5 at 8. The voluntary nature of an offer to fly for MDA was different from recall procedures to bring a furloughed pilot back to mainline flying. Under the Working Agreement, "[i]f a furloughed pilot is offered the opportunity to return to duty as a pilot for a minimum of ninety (90) days, and he elects not to return, if no junior pilots remain on furlough, his *recall rights shall terminate* forthwith and his *seniority shall be forfeited.*" Working Agreement, Defs.' Ex.

125 at § 23.I.4 (emphasis added). The 2002 Restructuring Agreement further provided that a pilot who had been recalled from MDA to the mainline but was prevented from flying for the mainline because of a hold at MDA (due to MDA's operational needs) could be held at MDA for only nine months after the date of recall. Pls.' Ex. 5 at 9. The precise nature of the corporate relationship between MDA and US Airways was not clearly set forth in the 2002 Restructuring Agreement but was left for later negotiations. Butkovic. Tr. at 42:13-45:12; 56:18-58:18.

B. Bankruptcy I

The concessions from ALPA (and US Airways' other unions) were not enough to avoid insolvency. On August 11, 2002, US Airways filed for Chapter 11 bankruptcy protection, and it did not emerge until a plan of reorganization was confirmed, effective March 31, 2003. *In re US Airways Group, Inc.*, 303 B.R. 784, 786 (Bankr. E.D. Va. 2003). During this first bankruptcy, US Airways was able to obtain $500 million in debtor-in-possession ("DIP") financing from Retirement Systems of Alabama ("RSA"), and an additional loan of $1 billion (with $900 million guaranteed by the Air Transportation Stabilization Board ("ATSB"[7])). But as a condition of that financing the Company was required to adhere to cost and revenue projections contained in a seven-year business plan. Butkovic Tr. at 42:13-45:45; *US Airways*, 296 B.R. at 737-38.

1. US Airways Mainline Pilots Take Further Concessions and MDA's Status as a Separate Division of US Airways is Solidified

A few months after filing for bankruptcy, the Company sought a second round of concessions from ALPA, including still further wage and benefit cuts, in order to meet the conditions of the RSA and ATSB financing. *US Airways*, 296 B.R. at 738. ALPA eventually

[7] The ATSB was created by the federal government to stabilize the nation's air transportation system after it was rocked by the events of September 11, 2001. 49 U.S.C. § 40101, *et seq.*

agreed to allow further cuts in wages and benefits, *e.g.,* 8% in 2003, 6.5% in 2004, and 5% in 2005. Pls.' Ex. 7, Attachment A, at 1-2; Jones Dep. Tr. at 16:17-17:2.

(a) ALPA Agrees to Authorize US Airways to Create MDA as a Separate Division with Vastly Inferior Wages, Work Rules and Benefits

In its second round of concessionary negotiations in December 2002, the Company also sought ALPA's express agreement to authorize it to operate MDA as a separate division of US Airways rather than a separate corporate entity. Butkovic Dep. Tr. at 44:13-45:16. As US Airways' financial condition continued to deteriorate and it appeared that it would be unable to obtain a separate operating certificate for MDA in a timely manner, ALPA conceded and agreed to allow MDA to be established as a division of US Airways. Butkovic Tr. at 44:13-45:16.

The status of the MDA division, and the terms and conditions of employment for pilots flying for MDA, were formalized and agreed to in a Letter of Agreement 84 dated December 13, 2002 ("LOA 84"). *See* Defs.' Ex. 5; Pls.' Ex. 7 at p. 84-3;[8] Butkovic Dep. Tr. at 99:1-103:25. LOA 84 clarified US Airways' authority to "operate MDA as a separate division within mainline - US Airways, Inc." LOA 84 also established the terms and conditions of employment for MDA pilots: "Wages, benefits and work rules [for MDA flying] will match the AA Eagle [American Eagle] pilots' agreement." Defs.' Ex. 5 at 9.

(b) MDA Begins Preliminary Operations

MDA began preparations to hire and train pilots in the fall of 2003. Transcript of the Deposition of Mitchum Grace ("Grace Dep. Tr.") at 13:10-14:19. In order to train the furloughed US Airways pilots to fly the Embraer-170, MDA generated operating manuals and

[8] Plaintiff's exhibit 7 is a complete copy of LOA 84 and Defendants' exhibit 5 is relevant excerpts of LOA 84.

other training materials, which were authored, at least in part, by some of the plaintiffs. Portale Dep. Tr. at 42:13-50:5; Transcript of the Deposition of Anthony Priddy ("Priddy Dep. Tr.") at 49:5-53:6. The manuals, which had been largely designed by one of the furloughed US Airways pilots, were sophisticated, state-of-the-art, electronic documents with hyperlinks and cross-references and "would have been a study dream." Priddy Dep. Tr. at 49:12-50:19. Unfortunately, once it became clear to all, including the FAA, that MDA would be a division of US Airways operating on US Airways' Operating Certificate rather than a subsidiary or affiliate, the manuals had to be rewritten to standardize them in accordance with the existing design and structure of other US Airways manuals such that "[t]hese manuals need[ed] to look like US Airways, they need[ed] to say US Airways, they need[ed] to smell like US Airways." Priddy Dep. Tr. at 48:4-53:7; Grace Dep. Tr. at 14:20-17:8.

(c) Pilots are Offered and Accept Positions at MDA

In preparation for its commencement of revenue operations in April, 2004, MDA began hiring pilots beginning with those who had been furloughed from US Airways, in seniority order. Kirch Dep. Tr. at 116:10-21. Pilots who were offered a position with MDA received a letter, bearing MDA letterhead, offering them a position and inviting them to attend a "New Hire Orientation" ("MDA Offer Letters"). *See, e.g.,* MDA Offer Letters sent to John Carlisle, Garth Wilkinson, Peter Test, and Seth Naugler, Defs.' Exs. 56, 87, 139, and 103. The MDA Offer Letters did not state that a pilot was being recalled from furlough and did not contain the words "recall" or "recalled." *See, e.g.* MDA Offer Letters sent to John Carlisle, Garth Wilkinson, Peter Test, and Seth Naugler, Defs.' Exs. 56, 87, 139, and 103. The MDA Offer Letters also made no reference whatsoever to the US Airways Pilots Working Agreement. *See, e.g.,* MDA Offer Letters sent to John Carlisle, Garth Wilkinson, Peter Test, and Seth Naugler, Defs.' Exs. 56, 87, 139, and 103. Additionally, MDA Offer Letters sent to furloughed US Airways were

substantially the same as those sent to CEL pilots who flew for wholly-owned or affiliated regional carriers and had never flown for the mainline operation. *Compare* MDA Offer Letter sent to Garth Wilkinson, Defs.' Ex. 87 *with* MDA Offer Letter Sent to Seth Naugler, Defs.' Ex. 103.

Pilots offered positions at MDA also received a letter from Frank Blazina, the "chief pilot" at MDA that said "Welcome to MidAtlantic Airways, a division of US Airways." *See* Letter from Frank Blazina received by Seth Naugler, Defs.' Ex. 104. They also received an additional letter from Dean Colello, Chairman of the USAirways Membership Services Committee, that stated "Although we are in a separate 'division' of mainline, it is our goal as pilots to operate as close to mainline as possible." *See* Letter from Dean A. Colello received by Seth Naugler, Defs.' Ex. 107.

(d) MDA Offer Letters Were Not Recall Notices

Unlike MDA Offer Letters, a furloughed pilot's recall to US Airways was governed by Section 23 of the Working Agreement. Butkovic Dep. Tr. at 86:1-13; Carey Dep. Tr. 139:21-140:11; Defs.' Ex. 1. As noted above, a furloughed pilot could refuse an offer of employment at MDA without affecting his seniority, but that was not the case for recalls to the mainline operation: Section 23 of the US Airways Pilots Working Agreement provided that a furloughed pilot who refused an opportunity to return to the airline after being offered the position for at least 90 days would forfeit his seniority if there were no junior pilots on furlough. Defs.' Ex. 125, Working Agreement § 23.I.4; Butkovic Dep. Tr. at 54:16-56:8.

Pilots who had been furloughed from US Airways received letters by Certified Mail from the Company informing them of the effective date of their furlough ("Furlough Notices"). *See, e.g.*, Furlough Notices sent to James Portale, Anthony Priddy, Garth Wilkinson, Mitchum Grace, Elliott Odom, and Peter Test, Defs.' Exs. 46, 65, 86, 97, 117, and 128.

Those Furlough Notices specifically referred to Section 23 of the Working Agreement. *Id.*

Some pilots who were furloughed from US Airways subsequently received a letter notifying them that they may "possibly be recalled in the near future," referring to Section 23 of the Working Agreement, and requesting that they inform the Company whether they intended to accept recall ("Notices of Potential Recall"). *See, e.g.,* Notices of Potential Recall sent to John Carlisle, Anthony Priddy, Mitchum Grace, Seth Naugler, Elliott Odom, and Peter Test, Defs.' Exs. 61, 66, 68, 98, 115, 120, 121, 131, 133, 134, 135.

Pilots who were recalled to US Airways received letters on US Airways letterhead indicating that they would be recalled if they chose to accept recall, explicitly referring to Section 23 of the Working Agreement. *See, e.g.,* Recall Notices sent to James Portale, Garth Wilkinson, and Peter Test, Defs.' Exs. 47, 94, 129, 140. Some Recall Notices sent to furloughed pilots informed them of the date of the "indoctrination training class" they would attend if they chose to accept. *See* Recall Notices sent to Mitchum Grace, Elliott Odom, and Peter Test, Defs.' Exs. 99, 122, 123, 136, 137. Several Plaintiffs expressly admitted that they did not receive any recall notices prior to 2006 (though some of them insist on characterizing their MDA Offer Letter as a recall notice). *See* Portale Tr. at 97:16-98:13; Transcript of the Deposition of Garth Wilkinson ("Wilkinson Dep. Tr.") at 77:4-79:21; Grace Dep. Tr. at 33:8-37:12.

Despite the drastically inferior wages and benefits associated with MDA flying, the positions were attractive enough so that many furloughed US Airways pilots took them when they became available. *See* Portale Dep. Tr. at 183:12-14 (testifying that he accepted an MDA position because he "loves flying."); Wilkinson Dep. Tr. at 57:6-14 (no civilian employment at the time received offer for MDA); Transcript of the Deposition of Roy Freundlich ("Freundlich Dep. Tr.:) at 5:21-7:7 (working as a consultant for ALPA at time of MDA offer); Defs' Ex. 116,

Excerpt to Responses to Interrogatories of Plaintiff Elliott Odom, at 71 (listing no employment in aviation industry between 11/05/2002 and 9/23/03); Transcript of the Deposition of Elliott Odom ("Odom Dep. Tr.") at 28:22-29:7. The wages, benefits, and work rules at MDA were so inferior to those under the Working Agreement, however, that many pilots never accepted offers to fly at MDA, and some were there for only a short time before leaving, in some cases for positions outside the aviation industry. *See, e.g.* Freundlich Dep. Tr. at 7:4-7:12 (furloughed US Airways pilot who accepted employment at MDA but later left to join the public relations department of a non-profit organization). Plaintiffs did not file any grievances against US Airways concerning their terms and conditions of employment at MDA, nor did they file grievances claiming that their MDA employment constituted a recall under Section 23 of the Working Agreement. See, e.g. Portale Dep. Tr. at 122:15-123:9. The time period for filing such a grievance is 120 days under the Working Agreement. Defs.' Ex. 125, Working Agreement § 20.C.

C. US Airways Exits Bankruptcy I as the Pilots' Defined Benefit Pension Plan is Terminated

Toward the end of Bankruptcy I, the Bankruptcy Court held that US Airways met the criteria for a "distress termination" of its pilots' defined benefit pension plan because termination of the plan was necessary for the Company's reorganization. *US Airways*, 296 B.R. at 735-36. ALPA subsequently agreed to the termination of the defined benefit pension plan. *Id.* at 741. Three days later, on March 31, 2003, US Airways emerged from Bankruptcy I. *US Airways*, 303 B.R. 784, 786.

D. Bankruptcy II and the Merger of US Airways and America West

After it emerged from bankruptcy, US Airways continued to struggle, due in part to penetration of low-cost carriers into its markets and the high cost of jet fuel. *See In re US Airways, Inc.*, 329 B.R. 793 (Bankr. E.D. Va. 2005). US Airways again found itself unable to

remain solvent and filed for bankruptcy for a second time on September 12, 2004. *In re US Airways, Inc.*, 2007 WL 3231573 (Bankr. E.D. Va. Oct. 31, 2007). In its second bankruptcy, US Airways sought, and obtained, additional concessions from ALPA. *Vaughn v. Air Line Pilots Ass'n, Int'l.*, 395 B.R. 520 (E.D.N.Y. 2008).

As part of its plan of reorganization to emerge from its second bankruptcy, US Airways agreed to merge with America West. *US Airways,* 329 B.R. at 795. US Airways and America West were vastly different airlines in 2005. US Airways was a "legacy" carrier with a traditional "hub-and-spoke" structure flying international and long national routes using wide-body aircraft while America West was a "hybrid" low-cost carrier. *US Airways*, 329 B.R. at 795; Carey Tr. at 28:13-14. Additionally, US Airways pilots, in the aggregate, were significantly older and had much greater lengths of service than America West pilots. Defs.' Ex. 26 at 5.

For example the most senior pilot at US Airways, Captain McGlothlin, was hired by US Airways in 1966, while the most senior pilot at America West, Captain McNerlin, was hired in 1983; the pilot with seniority number 1000 on the US Airways Certified Seniority List, Captain Showman, was hired in 1982, while the America West pilot with seniority number 1000, Captain Trent, was hired in 1997; the least-senior pilot on the US Airways Certified Seniority List, MDA First Officer Varini, was hired in 2000; the least-senior America West pilot, First Officer O'Dell, was hired in 2005. Compare Pls.' Ex 22 at 1, 23, and 125 *with* America West Seniority List, Exhibit A to the Declaration of James L. Linsey, at 1, 25, 47.

In accordance with the Plan of Reorganization in Bankruptcy II, US Airways and America West announced their intention to merge on May 19, 2005. Kirch Dep. Tr. at 49:13-50:4. The US Airways-America West corporate merger closed on September 27, 2005, the same

day that the Company emerged from Bankruptcy II. *Bank of America, NA v. US Airways, Inc.*, 06-cv-390, 2006 WL 2038412, *1 (E.D.Va. July 19, 2006).

IV. THE NICOLAU ARBITRATION AND AWARD

A. ALPA Merger Policy

ALPA policy has established procedures to govern the integration of pilot seniority lists in the event of a merger of two airlines that both employed ALPA-represented pilots. *See* ALPA Merger and Fragmentation Policy, Pls.' Ex. 20; Supp. Compl. at ¶¶ 5-8. At the time the merger was announced, the pilots employed by US Airways and the pilots employed by America West were both represented by ALPA. Supp. Compl. at ¶ 11.

1. Goals and Principles of ALPA Merger Policy

ALPA Merger Policy has as its goal the achievement of a fair and equitable result, and seeks to: (1) preserve jobs; (2) avoid windfalls to one pilot group at the expense of the other; (3) maintain or improve pre-merger pay and standards of living; (4) maintain or improve pre-merger pilot status; (5) minimize detrimental changes to career expectations. Pls.' Ex. 20 at 6, ALPA Merger and Fragmentation Policy § 45, Part 1.G.5. At the same time ALPA Merger Policy expressly recognizes that "what appears to be truly 'fair and equitable' often differs depending on the eyes of the beholder and that there may be no consensus of what is 'fair and equitable.'" Pls.' Ex. 20 at 2, ALPA Merger and Fragmentation Policy, Preamble. In implementing those general principles, the process is governed by a clear and inviolable rule: the relative order of pilots on their respective seniority lists cannot be changed. Pls.' Ex. 20 at 6-7, 16, ALPA Merger and Fragmentation Policy § 45, Part 1.G.4, Part 3.A.

2. Procedures Under ALPA Merger Policy

ALPA MECs are encouraged to appoint Merger Committees to oversee the integration of pilot seniority lists in connection with airline mergers. Pls.' Ex. 20 at 3, ALPA

Merger and Fragmentation Policy § 45, Part 1.D.3. Under ALPA Merger Policy, the activities of the Merger Committees are funded by assessments of the pilots at the respective airlines; ALPA itself does not fund any legal and consulting fees incurred by the Merger Committees and does not hire their merger legal counsel or consultants. Pls.' Ex. 20 at 11, ALPA Merger and Fragmentation Policy § 45, Part 1.J.1-5.

(a) Selection of a Policy Initiation Date

The first step in the seniority integration process is that ALPA's Executive Council and the MEC chairmen of the airlines involved in the merger agree on a "Policy Initiation Date" or "PID," defined as the date when it appears reasonably likely that a merger will occur. Pls.' Ex. 20 at 2-3, ALPA Merger and Fragmentation Policy § 45, Part 1.C.2.

The PID is essentially a procedural mechanism to set in motion ALPA's merger procedures and provide a date from which to measure various deadlines under that policy; it does not by its terms limit the discretion of the Arbitration Board in integrating the lists. Pls.' Ex. 20 at 2-3, ALPA Merger and Fragmentation Policy § 45, Part 1.C.2. The PID also does not act as a bar to consideration of events that occur thereafter. *See* Defs.' Ex. 13, US Airways Seniority List as of July 1, 2006; Kirch Dep. Tr. at 191:6-16.

(b) Selection of the Arbitration Board

Within twenty days of the determination of a PID, the Merger Committees select a three-member Arbitration Board to decide how the seniority lists will be integrated in the event the Merger Committees are unable to reach agreement on an integrated seniority list. Pls.' Ex. 20 at 7-8, ALPA Merger and Fragmentation Policy § 45, Part 1.H.3. Two members of the Arbitration Board are "Pilot Neutrals": non-voting ALPA members who are chosen from a list maintained by ALPA. Pls.' Ex. 20 at 7-9, ALPA Merger and Fragmentation Policy § 45, Part 1.H.3-4. The third member of the Arbitration Board is the Chairman, chosen from a list of

arbitrators maintained by ALPA. Pls.' Ex. 20 at 7-8, ALPA Merger and Fragmentation Policy § 45, Part 1.H.3-4. If the Merger Committees cannot agree on an arbitrator, one is chosen by a process whereby the respective Merger Committees alternatively strike arbitrators from the list maintained by ALPA. Pls.' Ex. 20 at 8, ALPA Merger and Fragmentation Policy § 45, Part 1.H.3.c.

(c) Compilation and Verification of Employee Data

The Merger Committees are responsible for compiling the relevant employment data for their pilots, such as dates of birth, dates of hire, furlough time, and leave of absence time. Pls.' Ex. 20 at 4, ALPA Merger and Fragmentation Policy § 45, Part 1.E.2. A pilot's date of hire, for purposes of seniority integration, is the date he or she appears on the airline's payroll and begins training to fly aircraft for the airline. Pls.' Ex. 20 at 4-5, ALPA Merger and Fragmentation Policy § 45, Part 1.E.4. ALPA Merger and Fragmentation Policy requires that "[e]ach furlough and leave of absence or any intervening periods of service other than as a flight deck crew member . . . be listed separately with an explanation covering the period." Pls.' Ex. 20 at 4, ALPA Merger and Fragmentation Policy § 45, Part 1.E.2.

Each Merger Committee is responsible for verifying the employment data of the pilots it represents. Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45, Part 1.F.1. The Merger Committee sends a certified letter (or email if the pilot has authorized it) containing employment data to each pilot whose data has not been verified or updated in a previous seniority integration proceeding. Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45, Part 1.F.2; Carey Tr. at 18:6-20:7. If a pilot disagrees with the employment data provided by the Merger Committee, he or she may protest that data and, if desired, request a hearing before the Merger Committee. Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45, Part 1.F.3. When the Merger Committee receives an employment data protest from a pilot, it

determines the validity of the protest and responds to the pilot in writing. Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45, Part 1.F.4.

After the employment data has been verified and protests resolved, the Merger Committee compiles a certified Flight Deck Crew Member Seniority List that reflects the proper seniority order of pilots at the airline. Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45, Part 1.F.5. The Merger Committees of the respective airlines then exchange the employment data and Certified Seniority Lists for their respective pilot groups. Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45, Part 1.F.5.

The Merger Committees may present information regarding events that occur subsequent to the exchange of the Certified Seniority lists to account for changes to pilots' employment situation that may occur after the PID but prior to the conclusion of the seniority integration process. Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45, Part 1.F.7 ("Additional employment data pertinent to the solution of integration problems shall be made available to all merger representatives."); Defs.' Ex. 124; Carey Dep. Tr. at 151:20-161:10. *See also* Kirch Dep. Tr. at 72:23-73:13.

(d) Negotiation-Mediation-Arbitration

After employment data and lists are exchanged, the parties then proceed through a three-step process: (1) direct negotiations between the merger committees; (2) mediation if negotiations are unsuccessful; and (3) binding arbitration if mediation is unsuccessful. Pls.' Ex. 20, at 6-7, ALPA Merger and Fragmentation Policy § 45, Part 1.G-H. The first task for the Merger Committees in the negotiation is to resolve inconsistencies in the pilot employment data that they have compiled; in doing so they have some leeway to compromise with regard to the resolution of differing views with respect to pilot data, but they may not under any circumstances

alter the relative position of pilots on their respective seniority lists. Pls.' Ex. 20 at 6, ALPA Merger and Fragmentation Policy § 45, Part 1.G.4-5.

If the two Merger Committees are unable to negotiate an integrated seniority list, the integration proceeds to mediation, where the same person selected to be Chairman of the Arbitration Board serves as Mediator. Pls.' Ex. 20, at 7, ALPA Merger and Fragmentation Policy § 45, Part 1.H.2. If 100 days pass without success in negotiating or mediating the seniority integration of pilots at affected airlines, the integration proceeds to arbitration. Pls.' Ex. 20 at 7, ALPA Merger and Fragmentation Policy § 45, Part 1.H.3.c.

As described above, the Arbitration proceeds before a three-person board, one of whom serves as Chairman and the other two as Pilot Neutrals. *Supra* at ¶¶ 101-104. The Arbitration Board meets with the Merger Committees to specify the scope of the evidence to be presented and establish a hearing schedule and procedural rules, and the Merger Committees and their respective legal counsel then present their case to the Arbitration Board. Pls.' Ex. 20 at 7, ALPA Merger and Fragmentation Policy § 45, Part 1.H.3.d-e. After the arbitration proceedings have concluded, the Chairman convenes an Executive Session of the Arbitration Board, and the Opinion and Award integrating the seniority lists is written during the Executive Session. Pls.' Ex. 20 at 9, ALPA Merger and Fragmentation Policy § 45, Part 1.H.5.a.

(e) Implementation

Once the Arbitration Board has issued an integrated seniority list, ALPA is then charged with using all reasonable efforts to ensure its implementation by the airline. Pls.' Ex. 20, at 9-11, ALPA Merger and Fragmentation Policy § 45, Part 1.I. Under ALPA merger policy, the airline may not use the integrated seniority list until the merged airline reaches a comprehensive and unified collective bargaining agreement with the merged pilot group. Pls.' Ex. 20 at 14, ALPA Merger and Fragmentation Policy § 45, Part 1.N.2.

B. Negotiation-Mediation-Arbitration in the US Airways-America West Merger

The US Airways MEC and the America West MEC each selected a Merger Committee which dealt with the announced merger. Prater Dep. Tr. at 80:2-14; Kirch Dep. Tr. at 16:12-17:19. The US Airways Merger Committee selected by the US Airways MEC had three US Airways pilot members: Captain Phil Carey, Captain Robert Kirch, and Captain Kevin Barry. Transcript of the Deposition of Captain Garland Jones ("Jones Dep. Tr.") at 7:4-11; Kirch Dep. Tr. at 15:5-18:25; Carey Dep. Tr. at 14:4-8, 16:25-17:6.

Both Merger Committees retained their own outside legal counsel to represent them in the merger process: the US Airways Merger Committee selected Dan Katz of Katz & Ranzman, P.C. because of Mr. Katz's extensive experience representing pilots in seniority arbitration proceedings, and the America West Merger Committee retained Jeffrey Freund of Bredhoff & Kaiser, P.L.L.C. Kirch Dep. Tr. at 182:19-183:2; Carey Dep. Tr. at 149:19-150:8; Pls.' Ex. 17, Pre-Arbitration Statement of the America West pilots at 17.

Arbitrator George Nicolau was chosen as Mediator and Chairman of the Arbitration Board by the Merger Committees. Carey Dep. Tr. at 26:15-28:13. From the perspective of the US Airways Merger Committee, Mr. Nicolau was chosen in part because, during a prior merger involving US Airways and US Airways Shuttle, he had weighed factors such as wide-body flying and pilot attrition in a manner that would be beneficial to the US Airways pilots in this merger. Carey Dep. Tr. at 26:15-28:14; Kirch Dep. Tr. at 151:12-152:23. Chairman Nicolau also had many years of experience arbitrating the integration of airline pilot seniority lists. Brucia Dep. Tr. at 98:24-99:3.

Additionally, the US Airways Merger Committee selected Continental Airlines pilot James Brucia to serve as a pilot Neutral on the Arbitration Board. Brucia Dep. Tr. at 7:22-12:7. Captain Brucia had experience both negotiating collective bargaining agreements and

serving as a merger representative in a seniority integration. *Id.* The America West Merger Committee selected Captain Stephen Gillen of United Airlines, Inc. Brucia Dep. Tr. at 12:15-17.

1. The May 19, 2005 US Airways Certified Seniority List

For purposes of the arbitration, and pursuant to ALPA Merger and Fragmentation Policy, the US Airways Merger Committee generated a seniority list of US Airways pilots as of May 19, 2005 (the "May 19, 2005 Certified Seniority List" or the "Certified Seniority List"). Pls.' Ex. 20 at 4-5, ALPA Merger and Fragmentation Policy § 45, Part 1.E; Kirch Dep. Tr. at 103:10-17; 121:14-122:22; Pls.' Ex. 22.

The May 19, 2005 Certified Seniority list contained pilots who fell into three sets: (1) active pilots who were flying for the US Airways mainline operations; (2) pilots who had been furloughed from the US Airways mainline; and (3) pilots who came to MDA from positions flying on one of US Airways' wholly-owned subsidiaries and who had never flown on the mainline. Kirch Dep. Tr. 115:10-116:21.

ALPA policy required that each Certified Seniority List include furlough data for each pilot who had been furloughed. Pls.' Ex. 20 at 4, ALPA Merger And Fragmentation Policy § 45, Part 1.E.2; *see* Pls.' Ex. 22. To comply with that obligation, the US Airways Merger Committee listed furlough start and end dates for those pilots who had been furloughed, including all MDA pilots who were furloughed US Airways pilots. Kirch Dep. Tr. at 122:10-22; Carey Dep. Tr. at 87:5-25; Pls.' Ex. 22 at 1. However, the Certified Seniority List did not describe MDA Pilots as "furloughed" in the status column. Carey Dep. Tr. at 79:7-80:4.

The US Airways Merger Committee attempted to persuade the Arbitration Board to use length of service as the basic metric for integrating the seniority lists, and in that process they sought to have the MDA pilots credited for their time flying for MDA. Thus, the May 19, 2005 Certified Seniority List contained a column designated "LOS," for "Length of Service."

Pls.' Ex. 22. Length of Service was defined as "LOS=Length of Service=D[ate]O[f]H[ire] to May 19, 2005 less furlough (incl. MDA)." Pls.' Ex. 22 at 1. MDA was defined as "MDA=Time on EMB-170 @MidAtlantic Division of USAirways." *Id.* s*ee* also Pls.' Ex. 22 at 81 (Showing Pilot Wilkinson [at SN 3541] with time for MDA and a longer LOS than Pilot Kady [at SN 3542] with no time at MDA and a shorter LOS though both pilots have same Furlough Start 1 [FS1] date). As Captain Kirch, a member of the US Airways Merger Committee testified:

> Remember that virtually all of the MidAtlantic pilots did not go non-stop one day at the mainline and the next day at MidAtlantic. So there's time that has to be accounted for there. We can't claim service time where they weren't at either. We obviously want to claim the most possible service time for these pilots, so we have to produce the data to back that claim up. So looking at it from a combination of data that we're required to produce, the fact that we have to recognize the furlough notices are there, that we're going to have to explain if we don't account for that information somehow, we came up with this display as a means of best advocating the MidAtlantic case.

Kirch Dep. Tr. at 124:3-22; *see also* Carey Dep. Tr. at 79:19-80:4 ("[T]hey had a furlough notice, they did not have a recall notice, but they had a job offer to go work at MidAtlantic. Q: And in fact, many were working at MidAtlantic, right? A: Yes. But they didn't -- the company did not provide us with a furlough-end date, so we couldn't just manufacture one.") The Arbitration Board understood the point. Arbitration Board member Captain Brucia testified that, in presenting the pilot employee data in this fashion, the US Airways Merger Committee was "arguing or trying to make a statement that there was a continuation of employment" at MDA. Brucia Dep. Tr. 76:7-10; *see also* Kirch Dep. Tr. 122:13-127:14.

The Merger Committee could not, however, propose an integrated list that would place MDA pilots ahead of pilots with greater seniority, because (i) ALPA's Merger and Fragmentation Policy contained a strict rule against reordering the seniority list, and (ii) the 2002

Restructuring Agreement provided that a furloughed pilot could decline to go to MDA without any adverse effect on his seniority. Kirch Dep. Tr. at 198:12-200:3; Carey Dep. Tr. at 88:17-89:17. In any event, the Plaintiffs state that they do not seek to jump over furloughed pilots who declined employment at MDA: "There is no way, nor should there be a way to reorder the seniority list" (Portale Dep. Tr. at 178:18-20); "If this was the seniority list as presented annually as required by ALPA constitution and bylaws, I filed no objection" (Priddy Dep. Tr. at 35:16-18); "I believe the order [of names on Plaintiffs' Exhibit 22] is correct" (Naugler Dep. Tr. at 39:21-22); "I believe the placement [of names on Plaintiffs' Exhibit 22] to be correct" (Carlisle Dep. Tr. at 34:22); "I agree completely that Hereter [a furloughed pilot with no time at MDA] is one number senior to me on that list, and on any other merged list will always remain ahead of me no matter of his job performance, as long as he was employed by the company." (Grace Dep. Tr. at 55:9-14, Pls. Ex. 22 at 118); "For purposes of seniority, no, my name shouldn't be higher [on Plaintiffs' Exhibit 22], not that I know of." (Odom Dep. Tr. at 33:4-5).

2. Data Verification

To comply with the pilot employment data verification provisions of ALPA Merger and Fragmentation Policy, the Merger Committee sent letters to each pilot whose pilot data had not been verified in connection with a previous merger ("Pilot Data Verification Letter"). Carey Dep. Tr. at 18:20-22:11. Thus, on December 6, 2005, the US Airways Merger Committee sent a Pilot Data Verification Letter via Certified Mail to each pilot who flew or had flown for MDA. Carey Dep. Tr. at 69:12-23; Pilot Data Verification Letters dated December 6, 2005 sent to John Carlisle, Anthony Priddy, Garth Wilkinson, and Seth Naugler, Defs.' Exs. 62, 69, 88, and 109.

For MDA pilots, the Pilot Data Verification Letters displayed the information for the pilot as it would be listed on the Certified Seniority List, and indicated furlough start and end

dates, and MDA start and end dates, where applicable. *See, e.g.,* Pilot Data Verification Letters sent to John Carlisle, Anthony Priddy, Garth Wilkinson, and Seth Naugler, Defs.' Exs. 62, 69, 88, and 109. The Pilot Data Verification Letters informed the pilots that they could protest their employment data by submitting a written protest and request a hearing. *See, e.g.,* Pilot Data Verification Letters sent to John Carlisle, Anthony Priddy, Garth Wilkinson, and Seth Naugler, Defs.' Exs. 62, 69, 88, and 109; Pls.' Ex. 20 at 5, ALPA Merger and Fragmentation Policy § 45 Part 1.F.3.

Some MDA pilots responded to the Merger Committee's Pilot Data Verification Letter by disputing the information contained in their Letters. Carey Dep. Tr. at 70:12-71:9. A number of MDA pilots, including several of the Plaintiffs, objected to the listing of furlough start dates without furlough end dates, and to the separate listing of MDA start and end dates, arguing that their MDA start date was really a furlough end date; however, they had no verification of a recall to support that argument. Carey Dep. Tr. 88:2-10; *see* Defs.' Exs. 63, 70, 89, 108. None of the Plaintiffs who produced their Pilot Data Protest Letters requested a hearing. *Id.*

On January 24, 2006, the Merger Committee responded to protesting pilots by sending letters explaining the Merger Committee's resolution of the pilot's protest. Defs.' Exs. 64, 71, 90 and 110. The Merger Committee responses informed the MDA pilots that the presentation of furlough data and MDA service data would not be changed for the arbitration. *See* Defs.' Exs. 64, 71, 90 and 110 (all stating that "[W] have determined that there are no errors in the employment data we previously sent to you. That data is shown below….We explained in our letter transmitting your individual employment data that we were separately noting the date of your employment at the MDA division of US Airways (as defined by the terms of the US Airways Pilots' Collective Bargaining Agreement) and we noted the date of recall from furlough

to the mainline division of US Airways, if any. We do not read your protest as challenging these dates or the events to which they relate. Instead, we understand your protest as representing your view of the significance of these dates for purposes of seniority integration.").

3. Mediation-Arbitration in the US Airways-America West Merger

At the outset of the mediation-arbitration process, the US Airways Merger Committee intended to propose a "date-of-hire" integration, whereby pilots would be integrated according to the date they had been hired at their respective airlines. Carey Dep. Tr. at 50:20-55:12. As the mediation process progressed over five days in October 2006, Chairman Nicolau indicated that he was not going to agree to a date-of-hire proposal because many US Airways pilots had been furloughed for significant periods of time; thus the US Airways Merger Committee determined that clinging to a date-of-hire integration would damage its credibility in the eyes of Chairman Nicolau. Carey Dep. Tr. at 51:20-53:10, 59:3-59:18; Kirch Dep. Tr. at 69:16-70:8.

The Merger Committee therefore advocated a length-of-service integration (a date of hire model modified by taking away furlough time) to account for the fact that US Airways had over a thousand pilots on furlough while America West had none. Carey Dep. Tr. at 51:20-56:6, 58:6-60:13; Kirch Dep. Tr. at 69:16-70:8.

4. The Arbitration Proceedings

The seniority integration ultimately went to the arbitration phase, and arbitration hearings were held over several months beginning in late 2006 and continuing into early 2007. Brucia Tr. at 11:15-12:10; Defs.' Ex. 26 at 3.

(a) The Merger Committee Sought Credit for Time Flying for MDA

The US Airways Merger Committee advocated that the merged seniority list should reflect that the US Airways pilots in the aggregate had much longer lengths of service than did the America West pilots, and specifically with regard to the MDA pilots, the Merger Committee sought to have the Arbitration Board recognize their time flying for MDA as part of their length of service with US Airways. Kirch Tr. 198:12-199: 23. *See, e.g.* Pls.' Ex. 22 at 81 (incorporating time flying for MDA into the length of service for pilots Colello, Gebhardt, Simants, Wilkinson, Pohlman, Rogers, Larsen, and Lewis).

In addition, during the arbitration proceedings, the US Airways Merger Committee submitted a "summary sheet" reflecting that MDA pilots were bringing jobs (flying for MDA) to the merger. Kirch Dep. Tr. at 192:3-7; Defs.' Ex. 7. Here, to advance the interests of US Airways pilots generally and the MDA pilots specifically, there was no indication on the summary sheet that the MDA pilots were on furlough. Kirch Dep. Tr. 192:8 -193:6; Defs' Ex. 7 (listing 164 Captain positions (abbreviated as CA) and 153 First Officer positions (abbreviated as FO) flying the Embraer 170 (abbreviated as EMB)); Brucia Dep. Tr. at 76:2-15.

The US Airways Merger Committee also submitted a proposed seniority list that would integrate the US Airways and America West seniority lists based on length of service as of July 1, 2006 (the "July 1, 2006 US Airways Merger Committee Length of Service Proposal"). Brucia Dep. Tr. at 148:10-149:7, Defs.' Ex. 9 [beginning at page marked ALPA-8013], Defs.' Ex. 124. Under the July 1, 2006 US Airways Merger Committee Length of Service Proposal, furloughed US Airways pilots, including MDA pilots, were placed above some active America West pilots. *Compare* Pls.' Ex. 22, US Airways Certified Seniority List, at 125 (MDA pilot Varini is most junior pilot) *with* July 1, 2006 US Airways Merger Committee Length of Service

Proposal, Defs.' Ex. 124, at 122-124 (pilot Varini appears on page 122 above 100 America West pilots). To support the July 1, 2006 US Airways Merger Committee Length of Service Proposal, the US Airways Merger Committee submitted a seniority list indicating pilots' status as of July 1, 2006, to show pilots who had been removed from the seniority list as they resigned or retired. Brucia Dep. Tr. at 161:5-162:7, Defs.' Ex. 13.

The US Airways Merger Committee "continually updated [its pilot] information to the arbitrator [to reflect post-merger recalls] during the -- during the process because the America West case went on in January [2007]." Carey Dep. Tr. at 156:14-161:10. For example, the US Airways Merger Committee's exhibit B-24 to the Nicolau Arbitration lists a number of pilots where were recalled "as of 1-08-07 Class Date" and states that "Recall[] Offered to 321[,] 108 Accepted." *See* Linsey Decl. Ex. B. Additionally, the US Airways Merger Committee's exhibit B-18(a) to the Nicolau Arbitration was an analysis of when the last US Airways Pilot would be recalled under various scenarios. See Linsey Decl. Ex. C.

After the arbitration hearing concluded, the Merger Committees submitted post-hearing briefs, and the US Airways Merger Committee again argued that US Airways pilots who were furloughed as of May, 19, 2005, including some MDA pilots, should be placed on the integrated list ahead of junior active America West pilots to account for their greater lengths of service and the fact that many of them had been recalled to active duty since the date the merger was announced. Kirch Dep. Tr. 180:7-21; Defs.' Ex. 28, at 37-39. The US Airways Merger Committee also pointed out that two thirds of US Airways pilots had been bypassing recall to the mainline since the May 19, 2005 merger announcement. The US Airways Merger Committee argued that, under that pattern, all of the furloughed US Airways pilots could expect to be recalled no later than December 2007. Defs.' Ex. 28 at 34-36.

5. The Dispute Over the MDA Pilots Who Came From US Airways' Regional Subsidiaries

Prior to the arbitration proceedings, the America West merger committee, through its counsel, submitted to the Arbitration Board a brief arguing that 105 MDA pilots taken from the CEL - i.e. those who had never flown for the mainline - should be excluded from the May 19, 2005 US Airways Certified Seniority List. Pls.' Ex. 17. In its brief, the America West merger committee argued that MDA pilots from the CEL did not appear on seniority lists published by US Airways in 2004 and 2005 and that MDA had its own separate seniority list. Pls.' Ex. 17 at 6. The US Airways Merger Committee, through its counsel, countered that US Airways had corrected its list to include the CEL pilots, and attached a Company seniority list that included the CEL Pilots. *See* Pls.' Ex. 36 at 2-3 and attachment.

During the arbitration hearing, the America West Merger Committee again argued that the MDA pilots who came from the CEL should not be on the May 19, 2005 Certified Seniority List, and in doing so cross-examined Captain Carey with an excerpt from a list produced by the Company that did not list the CEL pilots. Tr. of January 23, 2007 Arbitration Hearing at pp. 24-27, attached as Ex. D to the Linsey Decl.; America West Pilots' Merger Committee Cross-Examination Exhibit K, attached as Ex. E to the Linsey Decl.

In its post-hearing brief, the US Airways Merger Committee yet again argued to the Arbitration Board that the CEL pilots were properly included on the Certified Seniority List, and again rebutted the America West Merger Committee's contention that the CEL pilots did not appear on lists produced by the Company. *See* Defs.' Ex. 28, at 39-42 ("The [America West] Merger Committee has allowed an oversight in the publication of the January 2005 printed seniority list to distract them from these indisputable facts [that the CEL pilots were entitled to

be on the Certified Seniority List] . . . . The Company did correct the error when the next list was issued in June 2005, as the AW representatives concede.").

C. The Arbitration Board's Deliberation and Opinion and Award

After the arbitration hearing had concluded, the three members of the Arbitration Board deliberated over the issues for several weeks and wrote the award. Brucia Tr. at 18:12-19:8. Integration of the seniority lists required consideration of a whole host of differences between the airlines and pilot groups, including the significant demographic differences between the pilots, the differences in the type of aircraft operated and routes flown by the airlines, and the differences in the financial condition and outlook for the two airlines; the status of MDA was just one of many issues raised in the proceedings. Defs.' Ex. 26 at 3-4.

Arbitration Board member Captain James Brucia, the only Arbitration Board member called to testify in this case, stated that the only list used by the Arbitration Board to determine whether a US Airways pilot was furloughed or active was the May 19, 2005 Certified Seniority List:

> A: But answering your question from before, this is what -- this was our Bible. Okay? Exhibit B-2, Plaintiff's Exhibit --
> Mr. Linsey: 22
> The Witness: 20?
> Mr. Linsey: 22.
> A: -- 22 is the core reference for all the information. And it was -- again, the information presented here was stipulated to by both parties. So everything in here is what we were basing our decision on.
> ….
>
> Q: Well, what did you look at as the arbitration board to see if pilots were furloughed or active?
> A: We looked at the data in Exhibit B-2 that we've been talking about quite a bit, the US Airways pilot Exhibit B-2. And that's what we used. This was our Bible for determining what pilots were where, who was on furlough, who was not on furlough.
> Q: And that's Plaintiffs' Exhibit 22?
> A: Plaintiff's Exhibit 22. That's correct.

….

> Q: Again directing your attention to Plaintiff's Exhibit 22, which is Exhibit B-2 from the arbitration proceeding. I believe it was your testimony that this is the only list that the arbitration board relied on to determine whether a US Airways pilot was furloughed or active, as of May 19, 2005; is that correct?
> A: Yes.

Brucia Dep. Tr. at 131:19-132:7, 142:7-142:21; 173:12-21.

1. The Opinion and Award

On May 1, 2007, the Arbitration Board issued a 35-page Opinion and Award, authored by Chairman Nicolau, integrating the seniority lists of the US Airways and America West pilots; attached was a four-page Concurring and Dissenting Opinion by Captain Brucia and a 36-page integrated seniority list. Defs' Ex. 26. The Opinion and Award addressed and took into account the arguments of the Merger Committees with respect to the different demographics of the pilot groups, the nature of the flying done by the two carriers, and the relative financial health of the two carriers. Defs.' Exh. 26.

The Arbitration Board rejected the July 1, 2006 US Airways Merger Committee Length of Service Proposal as well as the proposal offered by the America West Merger Committee. The resulting list had the effect of placing all US Airways pilots, except for the 423 most senior, in the same relative positions as America West pilots who were decades younger and had decades less experience. For example, on the July 1, 2006 US Airways Merger Committee Proposal, America West pilot McNerlin was integrated immediately above US Airways pilot Brush, and both had been hired on the same day and had 22 years of service at their respective airlines. Defs.' Ex. 124 at 17. But, on the integrated list generated by the Arbitration Board, Pilot McNerlin was placed at seniority number 518, while Pilot Brush was placed at seniority number 1080, 562 places junior to Pilot McNerlin. See Defs. Ex. 26,

Attachment A (Integrated List), at 3, 6. A majority of the Arbitration Board recognized that their integrated list placed US Airways pilots and America West pilots with "disparate lengths of service next to each other." "That, however, is a result of the balancing of the equities inherent in ALPA merger policy, a balance that neither a top to bottom active pilot ratio as advanced by America West or a top to bottom length of service integration as proposed by US Airways achieves." Defs.' Ex. 26, Opinion and Award at 29-30.

The Arbitration Board also determined that pilots on furlough from US Airways at the time the merger was announced should be placed below active America West pilots, because of the "dim prospects" faced by US Airways at that time. Defs.' Ex. 26 at 28-29. In addition, the Arbitration Board specifically recognized that MDA pilots were furloughed. Defs.' Ex. 26 at 5 n.1. ("The 1691 [furloughed US Airways pilots] include 105 so-called CEL (Combined Eligibility List) pilots who never flew on the mainline, to be discussed below, and 212 other Mid-Atlantic Division (MDA) pilots. Though listed as active in a US Airways summary sheet, they are carried as furloughed on the US Airways Certified 5/1/05 List.").[9]

As for the CEL pilots, the Arbitration Board agreed with the US Airways Merger Committee that they should be on the integrated seniority list, rejecting the assertion by the America West Merger Committee that they should not. *See* Defs. Ex. 26, at 20-21.

The Arbitration Board was well aware that there had been recalls of US Airways pilots between May 19, 2005 and December of 2006, as it relied on that fact to justify placing the most junior America West Pilot, Dave O'Dell, immediately above the most senior US Airways furloughee as of May 19, 2005, Dean Colello. The America West Merger Committee had sought

[9] The Opinion and Award contains two typographical errors. "US Airways certified 5/1/05 List" should read "US Airways Certified 5/19/05 List" and "[t]he 1691 include 105 so-called CEL (Combined Eligibility List) pilots who never flew on the mainline," should read "[t]he 1691 *exclude* 105 so-called CEL (Combined Eligibility List) pilots who never flew on the mainline . . . ." Brucia Dep. Tr. at 63:5-66: 25.

to persuade the Arbitration Board to place O'Dell several hundred places above Colello on the integrated list, but the Arbitration Board refused, stating:

> That approach simply reaches too far. Today, Colello who was US Airways most senior furloughee on May 19, 2005, is *now a B757 First Officer with some 300 active US Airways pilots beneath him.* If Odell is placed on the list above Colello next to and just below Monda, who was the junior US Airways active pilot, that will [e]nsure that active pilots are integrated with active pilots and also give Odell a measure of protection the America West pilots justifiably seek.

Defs.' Ex. 26 at 29.

D. US Airways Pilots' Opposition to the Opinion and Award

US Airways pilots were unhappy with the Opinion and Award and sought to block its implementation. Kirch Dep. Tr. at 94:12-95:22, Pls.' Ex. 3. The US Airways MEC first asked ALPA President John Prater for a hearing before ALPA's Executive Council. That request was granted, but the Executive Council determined that ALPA Merger Policy had been followed, and that the Opinion and Award should be implemented. Prater Dep. Tr. at 12:16-14:15.

Notwithstanding their general displeasure, the Plaintiffs could not say with any specificity at their depositions what the Arbitration Board should have done differently with respect to MDA pilots. Portale Dep. Tr. 118:23-119:3 ("I have not looked at [the Opinion and Award] in terms of what [my seniority] number should be. I would be higher up on this list by over a thousand numbers. Q. Where? A. I don't know."); Priddy Dep. Tr. at 38:10-39:9 ("That's not my job [to say where the Arbitration Board should have placed him on the integrated list]."); Carlisle Dep. Tr. at 43:4-43:16 ("I don't know where I should be [on the integrated list]."); Wilkinson Dep. Tr. at 60:18-62:11 ("I don't know [where I should be on the integrated list]."; Grace Dep. Tr. at 40:13-43:18 ("I don't know exactly [where I should be on the

integrated list].”); Naugler Dep. Tr. at 51:16-52:21 (“I don’t know specifically [where I should be on the integrated list but it should have been in accordance with my] [d]ate of hire, wherever that would have fallen.”); Odom Dep. Tr. at 35:25-36:17 (“I have no idea [if I am in the correct position on the integrated list].”); Test Dep. Tr. at 69:15-70:10 (“I have no knowledge of what is in this document [the integrated list].”).

Some Plaintiffs also do not contend that the Arbitration Board made any errors in judgment and do not challenge its reasons for integrating the two pilot groups in the way that it did. Rather, their sole contention is that the Arbitration Board relied on bad information provided by ALPA. Portale Dep. Tr. at 118:2-15 (“A: I don't think George Nicolau did anything wrong based on the information that he had. I think he had bad information that was given to him based on a document created by the merger committee that led him to believe that this column here was representative of the pilots on furlough at that time. Q: And you are pointing to -- A: The MDA -- Q: Last column on Plaintiffs' Exhibit 22? A: No, sir, the second-to-the-last. The ‘MDA Start,’ which we had all interpreted, and I believe with all my heart, is the recall to US Airways.”); Priddy Dep. Tr. at 36:12-22 (“Q: And do you know whether Mr. Nicolau made any either substantive or typographical errors anywhere from page 1 through page 35 [of Defendants’ Exhibit 26]? A: No. Q: And I would like - A: Are there errors in it? Or did Mr. Nicolau make errors in it? Q: No. Are there errors, to your knowledge, in the verbiage contained at pages 1 through 35? A: No.”). One of the Plaintiffs faults the Arbitration Board for not integrating the pilot groups on a date-of-hire basis. Naugler Dep. Tr. at 52:5-15 (“Q: Do you believe you should have been awarded a lower seniority number? A: I do, yes. Q: What number? A: I don't know specifically. Q: Generally? A: Date of hire, wherever that would

have fallen. Q: So you believe that Arbitrator Nicolau should have used date of hire? A: Absolutely.")

1. Litigation to Vacate the Opinion and Award

Less than two months after the Arbitration Board issued the Opinion and Award, the US Airways MEC sued the America West MEC in Superior Court of the District of Columbia seeking to vacate the Opinion and Award, alleging that it "violates ALPA Merger Policy by depriving many US Airways pilots in active service at the time of the award of the seniority credit due them as active pilots [and] deprives long-serving, senior US Airways pilots of their career expectations by putting them below America West pilots who have far less service at America West." *See US Airways Master Executive Council v. America West Master Executive Council*, Application to Vacate Arbitration Award (June 26, 2007), Pls.' Ex. 30 at 5.

Once ALPA was decertified and replaced by USAPA as the representative of the pilots of the merged US Airways, the ALPA MECs at US Airways and America West both ceased to exist, so the District of Columbia litigation was dismissed as moot on May 7, 2008.

2. Litigation to Implement the Opinion and Award

As stated above, in April 2008, ALPA was decertified as the collective bargaining representative for pilots at the post-merger US Airways and replaced by USAPA. Butkovic Dep. Tr. at 22:19-23:8. The central tenet of USAPA's constitution is that seniority integration should be done on a date-of-hire basis: "to maintain uniform principles of seniority based on date of hire and perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." *Addington*, 2009 WL 2169164, *6 (D. Ariz. July 17, 2009).

Certain pilots who flew for America West prior to the merger filed suit in federal court on September 4, 2008, seeking to compel USAPA to abide by the Opinion and Award. *See Addington v. US Airline Pilots Association*, No. CV 08-1633-PHX-NVW (D. Ariz.). A jury

found that USAPA had breached its duty of fair representation by abandoning the Opinion and Award and seeking to implement a date-of-hire seniority integration. *Id.* The district judge in *Addington* issued an injunction ordering USAPA to negotiate with US Airways to implement the Opinion and Award as part of a single collective bargaining agreement covering all US Airways pilots. *Id.* at *28-29. USAPA appealed from the District Court's order on July 28, 2009, and the court denied USAPA's motion for a stay pending appeal of its injunction order. 2009 WL 2761928 (D. Ariz. Aug. 28, 2009).

Now, three years after the Arbitration Board issued its Opinion and Award, the Opinion and Award with its integrated seniority list has still not yet been implemented at US Airways; pilot operations at the former America West remain separate from the pilot operations of the former US Airways; USAPA and US Airways have not agreed on any process to implement the integrated list or merge the operations. Prater Dep. Tr. at 11:15-16.

ARGUMENT

I. THE MATERIAL UNDISPUTED FACTS SHOW THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

The statute of limitations for DFR claims is six months from the date the cause of action accrues. *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 170-72 (1983). The statute of limitations serves two basic purposes: "to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *See In re Worldcom Sec. Litig.*, 496 F.3d 245, 254 (2d Cir. 2007). Thus, "the cause of action accrues no later than the time when plaintiffs knew or reasonably should have known that such a breach of the duty of fair representation had occurred, even if some possibility of nonjudicial enforcement remained." *See Cohen v. Flushing Hosp. & Med. Ctr.*, 68 F.3d 64, 67 (2d Cir. 1995) (internal alterations omitted).

Here, Plaintiffs' claim is premised on the allegation that ALPA allowed an erroneous list to be submitted to the Arbitration Board. Supp. Compl. ¶¶ 52-59. It is, however, indisputable that the only US Airways seniority list relied upon by the Arbitration Board to determine whether a US Airways pilot was furloughed was the May 19, 2005 Certified Seniority List. Statement of Undisputed Material Facts ("SUMF") ¶ 178. Thus, any claim for a breach of DFR based on an "erroneous list" must be based on "errors" in that list. It is also undisputed that Plaintiffs were notified precisely how their information would be presented on the May 19, 2005 Certified Seniority list by letters dated December 6, 2005 from the US Airways Merger Committee that were sent to the MDA pilots via Certified Mail. SUMF ¶¶ 148-150. Some Plaintiffs responded, protesting that their employment by MDA was actually a recall to US Airways. SUMF ¶¶ 151-152. The US Airways Merger Committee rejected those protests in letters dated January 24, 2006, again sent by Certified Mail:

> [W]e have determined that there are no errors in the employment data we previously sent to you. That data is shown below . . . . We explained in our letter transmitting your individual employment data that we were separately noting the date of your employment at the MDA division of US Airways (as defined by the terms of the US Airways Pilots' Collective Bargaining Agreement) and we noted the date of recall from furlough to the mainline division of US Airways, if any. We do not read your protest as challenging these dates or the events to which they relate. Instead, we understand your protest as representing your view of the significance of these dates for purposes of seniority integration.

SUMF ¶¶ 153-54.

Plaintiffs were thus indisputably on notice that the US Airways Merger Committee intended to list their information in this manner as of January 24, 2006, their protests notwithstanding, and thus their claims accrued on that date.

The Plaintiffs did not pursue claims based on an "erroneous" list until June 22, 2007 – almost *fifteen months* after Plaintiffs' claims based on the May 19, 2005 Certified

Seniority List accrued – when they filed a letter requesting a pre-motion conference to discuss their planned motion for leave to file the Supplemental Complaint. Accordingly, their claims are time-barred.

II. THE CASE IS NOT RIPE FOR JUDICIAL REVIEW BECAUSE THE INTEGRATED SENIORITY LIST HAS NOT BEEN IMPLEMENTED

"To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Jungels v. New York*, 50 Fed. Appx. 43, 44 (2d Cir. 2002). The ripeness doctrine is "intended to prevent adjudication of issues that may never arise." *Auerbach v. Board of Educ. of the Harborfields Cent. School. Dist. of Greenlawn*, 136 F.3d 104, 109 (2d Cir. 1998).

Here, it is undisputed that the integrated seniority list has not been implemented. SUMF ¶¶ 197-203. Flight operations at America West and US Airways remain separate, with pilots who came from old US Airways flying the equipment and routes that came from US Airways, and likewise for the America West pilots. *Id.* Further, nobody knows when, if ever, the integrated list will become part of a new collective bargaining agreement because USAPA, the union that currently represents the US Airways pilots, is openly opposed to its implementation. SUMF ¶¶ 199. This case is thus similar to *Jungels*, where an employee of the State University of New York ("SUNY") sued to challenge a provision in a collective bargaining agreement between SUNY and the employee's union which authorized SUNY to contract out certain goods and services. *Jungels,* 50 Fed. Appx. at 43-44. Noting that SUNY had never used or indicated an intention to use the challenged provision against a tenured employee, the court held that federal subject matter jurisdiction was lacking. *Id.* at 44-45.

Indeed, as pointed out in this case to Plaintiffs' counsel by Magistrate Judge Viktor Pohorelsky:

> The Court: And until there's damages, you don't have a claim. You might have a claim for injunctive relief against somebody who's going to implement that. But these people [the ALPA Defendants] aren't the ones who are implementing it, so you can't get the relief against them . . . . And then once it's implemented, I suppose you'd then also have a right claim for damages, which would be accruing as it kept on being applied. But until there are damages, I don't see how you can get damages against these guys. Right? I mean, because if it's never implemented, you'll never have damages. Nobody will have been harmed by this.
> Mr. Haber: If nobody's ever harmed, then my clients and I will be very happy.

Transcript of December 30, 2008 hearing before Magistrate Judge Victor V. Pohorelsky [docket no. 80] at 33:21-24. The Magistrate Judge is exactly right - Plaintiffs have suffered no damages from the integrated seniority list, and will not unless and until it is implemented.

Further, even if the integrated seniority list is eventually implemented, the precise manner in which it is implemented will have a significant effect on the nature of Plaintiffs' claims. *See Jungels*, 50 Fed. Appx. at 44 ("the court has no way of knowing how the [employer] would implement the provision."). The integrated seniority list is only a list, with some conditions and restrictions attached. Its effects depend on the manner in which seniority is exercised by US Airways pilots, and that will necessarily be the subject of negotiations between US Airways and its current pilots union, USAPA. Since USAPA is openly opposed to implementation of the integrated list, eventual implementation (if any) could easily take completely unpredictable forms – with limitations and restrictions that have not existed before.

There is an additional, prudential reason why this case is not ripe: the *Addington* litigation in the U.S. District Court for the District of Arizona. *See Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 808 (2003) (while ripeness, as a question of subject matter

jurisdiction, mandates dismissal of unripe cases, "prudential" considerations play a role in determining whether a case is ripe). In *Addington*, several former America West pilots claim that their new union, USAPA, violated its DFR by seeking to overturn and block the implementation of the Opinion and Award. The *Addington* plaintiffs eventually won a jury trial and an injunction from the court ordering USAPA to bargain with the airline for a new collective bargaining agreement with the Opinion and Award. *Addington v. USAPA*, 2009 WL 2169164, at *1 (D. Ariz. July 17, 2009). But USAPA appealed, and oral argument occurred before the Ninth Circuit on December 8, 2009. *Addington*, Case No. 09-16564, Docket no. 37 (9th Cir. Dec. 8, 2009). The *Addington* litigation thus adds an additional layer of uncertainty to the question of whether the integrated list will ever be implemented. It also raises the prospect of inconsistent judgments, for if the *Naugler* litigation results in a judicial finding that the integrated list was somehow tainted by a breach of ALPA's DFR, that will create a conflict with the *Addington* court's implied holding, by virtue of its injunction ordering USAPA to bargain with US Airways for a new CBA implementing the integrated list, that the integrated list is valid.

III. THE MATERIAL UNDISPUTED FACTS SHOW THERE WAS NO BREACH OF ALPA'S DUTY OF FAIR REPRESENTATION

A. The Legal Standard

Although the RLA, 45 U.S.C. §§151-188, does not specifically state that a union possesses a "duty of fair representation" ("DFR") toward its members, that duty has been implied as a necessary corollary of each union's exclusive right to represent all employees within a bargaining unit. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-201 (1944). But as a unanimous Supreme Court explained in *ALPA v. O'Neill*, 499 U.S. 65, 78 (1991), this implied duty does not permit courts to second-guess decisions made by unions performing their collective bargaining function. Indeed, since a union, as the exclusive representative of a defined

group of employees, must balance the often-conflicting interests of its members, the Supreme Court further held that "the relationship between the courts and labor unions [i]s similar to that between the courts and the legislature," and that any review of the union's actions "must be highly deferential, recognizing the wide latitude" that is necessary for unions to perform their collective bargaining functions effectively. *Id.* at 66; *see also Steele*, 323 U.S. at 198-99.

Because of this deferential relationship, proving a violation of the duty of fair representation requires much more than showing that the union treated one group of employees differently than another. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected."). Nor is it sufficient to show that the union made a mistake, *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45-46 (1998) (the duty of fair representation "gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong"), or acted negligently, *United Steelworkers of Am., v. Rawson*, 495 U.S. 362, 372-73 (1990) ("The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today.").

Instead, the plaintiff must show that the union's actions are outside of the "wide latitude" granted to unions performing their collective bargaining functions, *O'Neill*, 499 U.S. at 78, either because those actions are "arbitrary," meaning that the actions are "so far outside a 'wide range of reasonableness'" that they are "wholly 'irrational,'" *id*. (quoting *Huffman*, 345 U.S. at 338); "discriminatory," meaning that the union's conduct was "intentional, severe, and

unrelated to legitimate union objectives," *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971); or in "bad faith," which is demonstrated by "'substantial evidence of fraud, deceitful action or dishonest conduct'" *id.* at 299 (quoting *Humphrey v. Moore*, 375 U.S. 335, 348 (1964)). *See also Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Moreover, a union's conduct can only be analyzed in light of the circumstances that existed at the time of its conduct. *See O'Neill,* 499 U.S. at 79.

In cases such as this one, where a union member alleges a breach of a union's DFR based on the union's conduct in connection with an arbitration proceeding, decisions made by the union member's representative that are "tactical in nature," will not establish a breach of the union's DFR, even if, in hindsight, they were "errors in judgment," unless they are "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." *Barr v. United Parcel Service, Inc.*, 868 F.2d 36, 43 (2d Cir. 1989); *see also Nicholls v. Brookdale Univ. Hosp. and Med. Ctr.*, 204 Fed. Appx. 40, 42 (2d Cir. 2006) ("While the Union may have committed a tactical (or even a negligent) error [in representing a member in an arbitration], such an error, even if established, does not constitute a breach of the Union's duty."); *Arteaga v. Bevona*, 21 F. Supp. 2d 198, 207 (E.D.N.Y. 1998) ("[D]ecisions that appear in hindsight to be mere tactical errors are not nearly sufficient to make out a prima facie case that [a] [u]nion breached its duty of fair representation.") (quoting *Barr*); *Hauge v. United Paperworkers Int'l Union*, 949 F.Supp. 979, 986-87 (N.D.N.Y. 1996) (no breach of DFR based on tactical decision in arbitration proceedings where union counsel testified that doing otherwise "would not be helpful, and indeed likely would be counterproductive"); *Lapir v. Maimonides Med. Ctr.*, 750 F. Supp. 1171, 1178 (E.D.N.Y. 1990) (no breach of DFR where union made a "rational, if not the right, decision").

Additionally, to prevail on a DFR claim, Plaintiffs must establish not only inappropriate conduct, but also "a causal connection between the union's wrongful conduct and their injuries." *Spellacy v. ALPA*, 156 F.3d 120, 126 (2d Cir. 1998) (upholding the trial court's decision setting aside a jury verdict). *Accord Sim v. NY Mail Handlers' Union No. 6*, 166 F.3d 465, 472 (2d Cir. 1999); *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1472-73 (9th Cir. 1992); *Deboles v. Trans World Airlines, Inc*., 552 F.2d 1005, 1018 (3d Cir. 1977); *Self v. Drivers, Local Union No. 61,* 620 F.2d 439, 443-44 (4th Cir. 1980). The injury causation test is "difficult to satisfy, and rightly so." *Ackley*, 958 F.2d at 1472. This test has been purposely constructed to protect the important public interest in the stability of collective bargaining relationships, which requires that collective bargaining agreements not be lightly overturned on the basis of a duty of fair representation challenge by disgruntled employees. *Id*. at 1472-73.

For DFR claims that arise from arbitration proceedings, the causation element of the DFR requires a plaintiff to show that the alleged breach "seriously undermined the arbitral process." *Gaines v. New York City Transit Auth.*, 528 F.Supp.2d 135, 150 (E.D.N.Y. 2007), *aff'd* 2009 WL 3806383 (2d Cir. Nov. 16, 2009); *Tomney v. Int'l Ctr. for the Disabled*, 357 F. Supp. 2d 721, 735 (S.D.N.Y. 2005); *Barr*, 868 F.2d at 43. To meet this strict standard, a Plaintiff must show that the "unsuccessful result was due to the union's wrongful conduct" and "it is insufficient to show that the outcome *might* have been different if [the union's] conduct had been different." *See Mullen v. Bevona*, 1999 WL 974023, at *6 (S.D.N.Y. Oct. 26, 1999) (emphasis in original). A DFR plaintiff must provide specific evidence to show how the arbitration outcome would have differed if the union had not committed the alleged breach, and conclusory and general statements will not suffice. *See Kirkland v. Local 32B/32J, Int'l Serv. Workers Union*, 1992 WL 71883, *4 (S.D.N.Y. Mar. 31, 1992) ("[Plaintiff] has enumerated no testimony that

[his lawyer] failed to elicit but which might have affected the arbitrator's decision."); *Phillips v. Lenox Hill Hosp.*, 673 F.Supp. 1207, 1214 (S.D.N.Y. 1987) ("[Plaintiff] has not provided the court with affidavits or deposition testimony from the uncalled witnesses [where the union's failure to present those witnesses was the alleged breach] to establish what they would have testified at the arbitration, an absence of proof which is fatal.").

B. ALPA's Actions Were Completely Proper

The Supplemental Complaint alleges only that ALPA violated its duty of fair representation by submitting a seniority list "that erroneously listed the 'MidAtlantic' pilots as currently furloughed." Supp. Compl. ¶ 59. However, during the course of discovery, some plaintiffs have asserted or hinted at two other ways in which (they believe) ALPA's conduct in the seniority integration proceedings was inappropriate: (i) by proposing an integration based on length of service, rather than date of hire; and (ii) by submitting a seniority list effective as of May 19, 2005, rather than a later date. Although not found in the Supplemental Complaint, we will address those new claims, as well as the claim they actually pled.

In subpart B.1 below, we show that the decision to abandon a date-of-hire proposal and rely on length of service was entirely reasonable in the circumstances. In B.2 we address the claim actually pled, and show that the seniority list in question was not erroneous, and in fact was set up in a manner that was specifically designed to help the MDA pilots. And in B.3 was show that the use of the May 19, 2005 Certified Seniority List was entirely reasonable.

1. <u>The July 1, 2006 US Airways Merger Committee Length of Service Proposal Was Reasonable</u>

The US Airways pilots would have benefited by a seniority integration that was based strictly on date of hire because, on average, the US Airways pilots had been hired much earlier than their counterparts at America West. SUMF ¶¶ 85-86, 162. Accordingly, from the

very earliest stages of the seniority integration proceedings, the three members of the US Airways Merger Committee met repeatedly with their counsel[10] to discuss how to achieve a date-of-hire integration. SUMF ¶¶ 125. The process began with the choice of arbitrators: the US Airways Merger Committee researched the available arbitrators, and evaluated them with an eye to who would be most receptive to a proposal based on the larger planes US Airways brought to the merger and the fact that US Airways pilots had, in the aggregate, been hired much earlier than their America West counterparts. SUMF ¶ 128.

But, during a mandatory mediation process over five days in October 2007, Arbitration Board Chairman George Nicolau made it clear that he was unlikely to integrate the seniority lists on a strict date-of-hire basis, because many US Airways Pilots had been furloughed for significant periods during their careers. SUMF ¶ 157. So the US Airways Merger Committee developed an alternative proposal (the July 1, 2006 US Airways Merger Committee Length of Service Proposal) that relied on periods of actual employment, and eliminated periods of furlough. SUMF ¶ 158. Although less advantageous for the US Airways pilots than a strict date-of-hire proposal, US Airways pilots, on average, also had greater lengths of service than America West pilots, so the proposal was still relatively advantageous. SUMF ¶ 162. The tactical decision to move from a strict date-of-hire proposal to the July 1, 2006 US Airways Merger Committee Length of Service Proposal was, as Captains Kirch and Carey testified, a clearly rational attempt to balance the interests of the US Airways pilots in an integration that would place them, in the aggregate, as high on the list as possible while at the same time maintaining credibility in front of the Arbitration Board. SUMF ¶¶ 156-58. Such a rational tactical decision, even if wrong, -- and here there is no evidence it was wrong -- cannot

[10] Consistent with ALPA merger policy, the US Airways Merger Committee was represented by outside counsel, not counsel provided by ALPA. That attorney had vast experience representing pilots in the integration of seniority lists in connection with airline mergers. SUMF ¶ 125.

provide the basis for a DFR claim. *See Hauge*, 949 F.Supp. at 986-87; *Lapir*, 750 F. Supp. at 1178-79.

2. ALPA Did Not Stipulate to the Introduction of an Erroneous List

The evidence is undisputed that the May 19, 2005 Certified Seniority List was (a) the only seniority list relied on by the Arbitration Board to determine whether a US Airways pilot was furloughed for purposes of the seniority list integration, (b) not erroneous, and (c) created in a format that was specifically designed to provide the greatest benefit to MDA pilots.

(a) *The Arbitration Board Relied on the May 19, 2005 Certified Seniority List*

For the purposes of the integration proceedings – and as required by ALPA policy – the US Airways Merger Committee generated a seniority list of US Airways pilots as of May 19, 2005. SUMF ¶¶ 133-155. The May 19, 2005 Certified Seniority List contained the data required by ALPA policy for each US Airways pilot, including date of hire, furlough time, and leaves of absence. *See* Pls.' Ex. 22.

There is no dispute that the Arbitration Board relied exclusively on the May 19, 2005 Certified Seniority List to determine whether US Airways pilots were furloughed or active. Arbitration Board member Captain James Brucia – the only person deposed by plaintiffs with personal knowledge of the Arbitration Board's deliberations – testified that the May 19, 2005 Certified Seniority List was "our Bible for determining what pilots were where, who was on furlough, who was not on furlough"; that it was "the core reference for all the information"; and that it was "the only list that the arbitration board relied on to determine whether a US Airways

pilot was furloughed or active." SUMF ¶ 178. No other Arbitration Board members were called to testify, and there is no evidence to contradict Capt. Brucia's clear testimony.[11]

(b) *The May 19, 2005 Certified Seniority List Was Not Erroneous*

Plaintiffs allege that the "erroneous" seniority list discussed in the Supplemental Complaint was in error because "it described as furloughed those who had flown 'MidAtlantic' equipment for US Airways." Supp. Compl. ¶ 53. But there can be no dispute that MDA pilots *were* furloughed from US Airways; indeed, the positions at MDA were specifically made available to them *because* they were furloughed US Airways pilots. SUMF ¶ 37.

Plaintiffs may argue that their employment at MDA was equivalent to recall from furlough, and for that reason they should not have been listed as furloughed on the May 19 list. That argument has no merit whatsoever. The ALPA-US Airways collective bargaining agreement clearly established employment by MDA as distinct from employment for the "mainline" of US Airways. SUMF ¶¶ 65-76. As Plaintiffs admit, MDA pilots had significantly less desirable wages, benefits, and work rules than mainline pilots. SUMF ¶ 74. For that reason (and most importantly for this case), the collective bargaining agreement made clear that the choice of whether to work for MDA was completely voluntary for each furloughed pilot, with no consequences to a pilots's seniority rights if he or she declined to fly for MDA. Thus, the collective bargaining agreement stated that a pilot on the US Airways pilots seniority list could "bypass an offer of employment with MDA without losing his position on the Affected Pilot List, regardless of his preference." SUMF ¶ 40, Pls.' Ex. 5 at 8. In contrast, the collective bargaining agreement makes clear that recall from furlough is *mandatory* (subject to limited

[11] Plaintiffs have implied that the "erroneous list" pled in the Supplemental Complaint was a Company-produced list that was introduced by the America West pilots in an effort to eliminate the CEL pilots, who were not on that Company list. But that argument would make no sense. The US Airways Merger Committee did not (as plaintiffs pled) "stipulate[]" to the introduction of that list. Supp. Compl. ¶ 57. Instead, they actively opposed its introduction, SUMF ¶¶ 171-175, and convinced the Arbitration Board to include the MDA/CEL pilots on the integrated list. SUMF ¶ 187.

rights to defer the timing of the recall) if no junior pilot is available to accept recall. In other words, declining recall is akin to resignation:

> If a furloughed pilot is offered the opportunity to return to duty as a pilot for a minimum of ninety (90) days, and he elects not to return, if no junior pilots remain on furlough, his recall rights shall terminate forthwith and his seniority shall be forfeited.

SUMF ¶ 41, Defs.' Ex. 125, Working Agreement § 23.I.4.

Further, pretending that the MDA pilots had been recalled to US Airways mainline flying would have been inconsistent with the plain language of the 2002 Restructuring Agreement. That Agreement provided that "[a] pilot who has been recalled to US Airways but is prevented from accepting recall solely because he is being held at MDA, a Participating Affiliate Carrier or Participating Wholly-Owned Carrier for coverage purposes may be held at that Carrier for a maximum of nine months from the effective date of recall." SUMF ¶ 42, Pls.' Ex. 5 at 9. If offers of employment at MDA were actually recall notices to US Airways, this provision would make no sense: a pilot being "held at MDA" would have already been recalled to US Airways, and therefore could not be "prevented from accepting recall solely because he is being held at MDA."

Moreover, the Plaintiffs are fully aware of the distinction between employment at MDA and recall to US Airways, because many of them were actually later recalled to US Airways. Those plaintiffs first received a notice from US Airways informing them that their seniority number was among those that might be recalled in the near future, and asking them to contact US Airways to indicate whether they would accept recall if offered. SUMF ¶ 69. The Notices of Potential Recall explicitly mentioned that the plaintiff might be "recalled" and referred to Section 23 of the US Airways Pilots Working Agreement. *Id.* Then, when they were in fact recalled, they received letters that specifically referred to Section 23 of the US Airways

Pilots Working Agreement, and explicitly stated that the plaintiff was being "offered recall" or asked the plaintiff to notify the company as to his or her "acceptance of recall." SUMF ¶ 70. Some recall notices also referenced a "recall indoctrination training class." SUMF ¶ 71. The letters that Plaintiffs received offering employment with MDA, by contrast, did not say "recall" or any variant thereof anywhere on them, made no reference to Section 23 of the US Airways Pilots Working agreement, and made clear that Plaintiffs were "new hire[s]". SUMF ¶¶ 59-61.

To obscure these differences between flying for MDA and being recalled to the US Airways mainline, as Plaintiffs claim the US Airways Merger Committee should have done, would have presented the US Airways Merger Committee with a host of problems and inconsistencies that it would have been unable to explain away during the arbitration proceedings. SUMF ¶¶ 146-47. The argument that pilots flying for MDA had been recalled to active flying on the US Airways mainline, then, would have been easily rebutted by the America West Merger Committee and made the US Airways Merger Committee appear to be overreaching and would have severely damaged its credibility in the eyes of the Arbitration Board. SUMF ¶ 146. The US Merger Committee's tactical decision to preserve its credibility cannot provide a basis for a DFR claim. *See Hauge*, 949 F.Supp. at 986-87; *Lapir*, 750 F. Supp. at 1178; *see also Williams v. Air Wisconsin, Inc*., 874 F.Supp. 710, 717 (E.D. Va. 1995) (no breach of DFR when union did not call witness to testify at arbitration proceeding where union determined that witness was not credible).

(c) *The May 19, 2005 Certified Seniority List Was Specifically Designed to Help the MDA Pilots*

A great irony of Plaintiffs' Supplemental Complaint here is that the May 19, 2005 Certified Seniority List was constructed in certain ways specifically with the goal of assisting

MDA pilots, within the bounds permitted by ALPA's policy on seniority list integration proceedings.

That policy specifically requires the committee from each merging carrier to gather and present certain data for each pilot, including "furlough" time. SUMF ¶ 104. Accordingly, the US Airways Merger Committee listed, for each pilot currently on furlough from US Airways, a "furlough start date" and, if the pilot had been recalled, a "furlough end date." SUMF ¶ 135. Those MDA pilots who were furloughed from US Airways had no "furlough end date," because they had not been recalled from furlough. SUMF ¶ 146.

But the US Airways Merger Committee included another column on the List – titled "status" – that was blank for active pilots, but held a code ("FUR" for furloughed, "MED" for medical leave of absence, etc.) for pilots who were inactive. SUMF ¶ 145; Pls. Ex. 22. The US Airways Merger Committee specifically chose to leave that column blank for MDA pilots, indicating that they were active in some respect. SUMF ¶ 136. In addition, the US Airways Merger Committee specifically included columns listing the start and end dates for MDA flying, in an effort to obtain some credit for that work. SUMF ¶¶ 137, 142. 145.

The US Airways Merger Committee could not, however, give credit for MDA work by advancing MDA pilots on the May 19, 2005 Certified List ahead of US Airways pilots who chose not to work at MDA. That would have been directly contrary to the ALPA-US Airways collective bargaining agreement, which stated that a furloughed pilot could forgo the opportunity to work at MDA without affecting his place on the seniority list. SUMF ¶ 40, Pls.' Ex. 5 at 8. In addition, it would have violated a primary tenet of ALPA's policy on seniority integration, which bars the representatives of merging airlines from re-ordering their own seniority lists as part of the integration process. SUMF ¶ 93. Indeed, the Plaintiffs do not

dispute the relative order of names on the May 19, 2005 Certified Seniority List or their placement thereon. SUMF ¶ 144.[12]

3. The US Airways Merger Committee Did Not Breach Its DFR By Using the May 19, 2005 Policy Initiation Date

Plaintiffs have hinted that they may also argue that the May 19, 2005, Certified Seniority List was inadequate because it did not reflect the fact that many furloughed pilots, including many MDA pilots, were recalled to US Airways before the arbitration hearings began in late 2006. Plaintiffs apparently believe that (i) the US Airways Merger Committee arbitrarily chose May 19, 2005 for their Certified List, and (ii) did not present evidence of the intervening recalls. Both beliefs are plainly false.

First, May 19, 2005, was not an arbitrary date chosen by the US Airways Merger Committee; instead, it was a date established under ALPA policy. That policy defines a "Policy Initiation Date (PID)" as the date on which ALPA's governing bodies determine that merger is

[12] But, as pointed out by former U.S. Airways MEC member Garland Jones, while the arbitration proceedings were taking place, plaintiff Portale indicated he *did* want the US Airways Merger Committee to violate ALPA Merger Policy and the 2002 Restructuring Agreement so that MDA pilots would receive seniority credit for their time at MDA vis-à-vis furloughed pilots who had not flown for MDA, and expressed this view to other MDA pilots via an internet message board used by MDA pilots to communicate. Portale Dep. Tr. at 155:14-171:7; Jan. 28, 2007 email from James Portale to MidAtlanticPilots@yahoogroups.com, Defs.' Ex. 49 ("However, I understand that the proposed seniority integration list impedes our junior MDA pilots from actually getting credit for time at MDA because the merger committee has imposed a 'fence' that does not allow anyone who worked at MDA to advance ahead of anyone else on the APL despite credit for their time at MDA. This applies, of course, to those APL pilots who did not accept a position at MDA because they were not aware that MDA was, in fact, US Airways . . . .You can give three years credit to the MDA pilot but if he can't move ahead of the furloughed pilot one number senior to him then his time at MDA doesn't count for anything and the merger committee[']s position is merely a smokescreen.") This communication came in the context of the operation by some of the MDA pilots of an organization called the "MidAtlantic Pilots Association," which has never been certified as the collective bargaining representative of any pilots under the Railway Labor Act. Portale Dep. Tr. at 18:5-20:15, 20:20-22:8. Plaintiff Portale also disseminated to the MDA group a purported transcript he received from two individuals who claimed to have heard Captains Snider and Carey discussing possible ways the Arbitration Board might integrate the seniority lists. Portale Dep. Tr. at 124:8-128:6, 138:15-23, Defs.' Ex. 48; Carey Dep. Tr. at 99:24-109:12. But that document, even if accurate, is unremarkable in simply suggesting possible strategy in an alleged discussion of a break point in the seniority lists that the Arbitration Board might use. Notably, even though Portale's editorial comments on that "transcript" reflect misplaced outrage over comments allegedly made by Captain Kim Snider, Plaintiffs' counsel, when deposing Captain Snider, did not ask him about the transcript or, indeed, anything about the conversation at all. *See* Transcript of the Deposition of Captain Kim Snider.

reasonably likely to occur (SUMF ¶ 97), and in this case the PID was May 19, 2005 – the date the merger of America West and US Airways was announced. SUMF ¶ 87.

Second, the PID was simply a date that triggered the initiation of procedures and timelines under ALPA merger policy, and did not act as a bar to introducing evidence of post-merger events in the Arbitration proceedings. Indeed, in this case, the US Airways Merger Committee presented copious data about the recalls of US Airways Pilots that had taken place since the merger was announced, and those recalls were a key component of its argument that the ongoing and significant attrition of US Airways pilots was a factor that should weigh in the US Airways pilots' favor in constructing the integrated list. SUMF ¶¶ 167-70. Thus, the July 1, 2006 US Airways Merger Committee Length of Service Proposal listed pilot data as of July, 2006, more than a year after the May 19, 2005 merger announcement date. SUMF ¶¶ 164-65.

C. THE ALLEGEDLY IMPROPER ACTIONS DID NOT HARM THE PLAINTIFFS IN ANY RESPECT

Even if the Plaintiffs could show that ALPA's actions were arbitrary ("so far outside a 'wide range of reasonableness'" as to be "wholly 'irrational,'" *O'Neill*, 499 U.S. at 78), discriminatory ("intentional, severe, and unrelated to legitimate union objectives," *Lockridge*, 403 U.S. at 301), or in "bad faith" (demonstrated by "substantial evidence of fraud, deceitful action or dishonest conduct," *id.* at 299), their claim would still fail. As noted above, to prevail on a DFR claim, Plaintiffs must establish not only inappropriate conduct, but also "a causal connection between the union's wrongful conduct and their injuries." *Spellacy*, 156 F.3d at 126. And for DFR claims that arise from arbitration proceedings, the causation element requires a plaintiff to show that the alleged breach "seriously undermined the arbitral process." *Gaines*, 528 F.Supp.2d at 150.

Here, there is no evidence that any of ALPA's allegedly improper actions harmed the Plaintiffs in any respect.

1. The July 1, 2006 US Airways Merger Committee Length of Service Proposal Did Not Harm the Plaintiffs

As noted above, the US Airways Merger Committee offered the July 1, 2006 Merger Committee Length of Service Proposal specifically because the Chairman of the Arbitration Board made clear that he was unlikely to support an integration based strictly on date of hire. SUMF ¶ 157. That prediction turned out to be true. Defs' Ex. 26. More importantly, the Arbitration Board did not even accept the less-favorable July 1, 2006 US Airways Merger Committee Length of Service Proposal offered by the US Airways Merger Committee. The Arbitration Board concluded that US Airways was much weaker financially than America West and, therefore, "even if the position of US Airways is viewed in the most [favorable of] lights, the fact is that the career expectations of the America West pilots on May 19, 2005 were far superior to those of the US Airways pilots." Defs.' Ex. 26 at 17. For that reason, the Arbitration Board significantly discounted *both* the earlier dates of hire and greater lengths of service for US Airways pilots:

> As previously stated, giving sole consideration to date of hire and length of service would put the senior America West pilot some 900 to 1100 numbers down the combined list. US Airways[']s proposed restrictions, both as to aircraft and length, would unduly deprive too many senior America West pilots of upgrade opportunities for too long a time, and would also put a number of active America West pilots below long-furloughed US Airways pilots who, until the merger, had little prospect of an early return.

Defs.' Ex. 26 at 27. Later, when specifically addressing the status of furloughed pilots, the Arbitration Board majority reiterated that career expectations, and not date of hire or length of service, were the basis for their conclusions:

> A majority of the Board has also decided that the totality of pre-merger career expectations weighs in favor of active pilots as of the date of the [corporate merger] announcement. When one considers the number and length of furloughs on the US Airways side and the dim prospects the airline faced and compares it to the lack of furloughs on the America West side, which furloughs ceased to exist long before the merger took place, merging active pilots with furloughees, despite the length of service of some of the latter, is not at all fair or equitable under any of the stated criteria.

Defs' Ex. 26 at 28.

Accordingly, the actions of the US Airways Merger Committee did not "seriously undermine[] the arbitral process," *Gaines*, 528 F.Supp.2d at 150, by switching from a date-of-hire proposal to a length-of-service proposal. Instead, that change had no negative impact at all on the Plaintiffs.

2. The May 19, 2005 Certified Seniority List Did Not Harm the Plaintiffs

The undisputed record is quite clear that the Arbitration Board completely understood the situation of the MDA pilots. The Opinion and Award states that, as of May 19, 2005, 1691 US Airways pilots were on furlough, and a footnote specifically describes the furloughed pilots:

> The 1691 include 105 so-called CEL (Combined Eligibility List) pilots who never flew on the mainline, to be discussed below, and 212 other Mid-Atlantic Division (MDA) pilots. Though listed as active in a US Airways summary sheet, they are carried as furloughed on the US Airways Certified 5/1[9]/05 list.[13]

SUMF ¶ 185, Defs.' Ex. 26 at 5 n.1. Later, the Arbitration Board demonstrated a thorough understanding of MDA/CEL pilots, their relationship to MDA, and the operational status of MDA:

[13] As noted above, *see supra* at 35 n.9, the Arbitration Board Pilot Neutral Captain Brucia clarified that the footnote contains two minor errors: the Certified List was dated May 19, 2005 (not May 1), and the list of 1691 total furloughed pilots did not "include" the MDA/CEL pilots, but rather "excluded" them, because they, unlike the other MDA pilots, had not been furloughed from the mainline but rather came from the wholly-owned subsidiary carriers. SUMF ¶ 185 n.9.

> Before turning to the building blocks of our decision and the reasons for those choices, a preliminary matter needs to be addressed. That is the question of the CEL pilots. Some 105 such pilots (4993-5098) appear on the US Airways May 19, 2005 Certified Seniority List. However, none had flown for the mainline; all were pilots at Mid-Atlantic Airways, a regional carrier designed to be a US Airways wholly-owned subsidiary, but actually flown at all time during its short existence on the mainline's operating certificate as a division of US Airways.

SUMF ¶ 186, Defs' Ex. 26 at 20.

Thus, even if the May 19, 2005 Certified Seniority List was somehow wrong (and it was not), the alleged errors could not have affected the MDA pilots, because the Arbitration Board clearly understood the relevant facts. In other words, there is no evidence to suggest that the Board's decision would have been different if the May 19, 2005 Certified Seniority List had been constructed differently, an "absence of proof which is fatal." *Phillips,* 673 F.Supp. at 1214.

3. The Use of the May 19, 2005 PID Did Not Harm the Plaintiffs

Finally, the use of a Certified Seniority List created as of the PID (May 19, 2005) did not "seriously undermine[]" the arbitration proceedings by somehow prohibiting the introduction of evidence of post-May 19, 2005 recalls of US Airways pilots. As noted above, the undisputed factual record leaves no doubt that the US Airways Merger Committee actually introduced evidence of such recalls. SUMF ¶¶ 165-171. Moreover, the Arbitration Board's decision shows that they not only understood the evidence, but also that they understood its practical effect. SUMF ¶ 190. As stated in a portion of the Opinion and Award quoted above, no America West pilots were furloughed as of the date the merger was announced, and the Arbitration Board determined that the relatively grim career prospects of US Airways pilots made it unfair to merge furloughed US Airways pilots with active America West pilots. Defs. Ex. 26 at 28. Therefore, the Arbitration Board majority chose to place America West's most junior pilot (Odell) immediately ahead of the most senior US Airways furloughee from the May

19, 2005 Certified Seniority List (Colello). Defs. Ex. 26 at 29. The America West representatives objected, noting that Odell would be placed at risk of furlough, when furlough was unlikely for America West pilots prior to the merger. The Arbitration Board overruled the objection by noting that Colello had long since been recalled to US Airways:

> That approach simply reaches too far. Today, Colello who was US Airways most senior furloughee on May 19, 2005, is *now a B757 First Officer with some 300 active US Airways pilots beneath him.* If Odell is placed on the list above Colello next to and just below Monda, who was the junior US Airways active pilot, that will [e]nsure that active pilots are integrated with active pilots and also give Odell a measure of protection the America West pilots justifiably seek.

SUMF at ¶ 190, Opinion and Award at 29 (emphasis added). Thus, once again, there is no evidence whatsoever use of a Certified Seniority List creaed as of a date different than the PID would have resulted in a different outcome. *Mullen*, 1999 WL 974023, at *6.

CONCLUSION

As set forth above, the Plaintiffs were on notice of the "erroneous" information that they claim affected the Nicolau Arbitration *fifteen months* before they sought to amend their complaint and raise the issue for the first time. Additionally, the have not been damaged by the Nicolau Award, because it has not been implemented and may well never be. Further, there is no evidence whatsoever that the US Airways Merger Committee acted arbitrarily, discriminatorily, or in bad faith. Finally, the undisputed evidence makes perfectly clear that the Arbitration Board did not place the pilots below active America West pilots because it was confused or misled by any action of the US Airways Merger Committee. Rather, a majority of the Arbitration Board simply disagreed with the Plaintiffs (and many other US Airways pilots) as to what a fair and equitable seniority integration would be, and Plaintiffs therefore cannot establish the required element of causation.

For those reasons, the ALPA Defendants respectfully request that the Court grant their Motion for Summary Judgment and dismiss the Supplemental Complaint.

Dated: March 31, 2010

Respectfully submitted,

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Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SETH NAUGLER, *et al.*, Plaintiffs, - v. - AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et ano.*, Defendants.	Case No. 05-CV-4751 (NG)(VVP)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATUTES

Pursuant to Federal Rule of Civil Procedure 56, defendants Air Line Pilots Association, International ("ALPA"), and Duane E. Woerth, as its former President (collectively, the "ALPA Defendants") submit this reply memorandum of law in support of their motion for summary judgment and dismissal of the Supplemental Complaint in its entirety.

PRELIMINARY STATEMENT

In our opening memorandum (Defendants' Memorandum" or "Defs.' Mem."),[1] the ALPA Defendants described four independent bases for summary judgment: (i) the Plaintiffs' claims are barred by the statute of limitations; (ii) those claims are not ripe; (iii) no reasonable jury could conclude that the US Airways Merger Committee acted "wholly irrationally," as Plaintiffs would have to show to prevail on their DFR claim; and (iv) Plaintiffs cannot show the required causal connection between the alleged DFR breach and the claimed injuries.

In their eighty-page opposition ("Plaintiffs' Memorandum" or "Pls.' Mem."), Plaintiffs do not address point (iv) at all, except in a single, conclusory reference. The law is clear, especially in this Circuit: to prevail on a DFR claim, plaintiffs must demonstrate "a causal connection between the union's wrongful conduct and their injuries." *Spellacy v. ALPA*, 156 F.3d 120, 126 (2d Cir. 1998). Accordingly, as we show in Part I below, Plaintiffs' failure to demonstrate that required causal connection is, by itself, fatal to their case.

In Parts II and III, we address Plaintiffs' response with respect to ripeness and the statute of limitations, and we show that the case should be dismissed for those reasons, as well.

Finally, in Part IV we address Plaintiffs' attempt to show that ALPA's actions could be characterized as "wholly irrational," which they must show to prove a violation of the

[1] Other defined terms have the same definitions in this memorandum as they do in Defendants' Memorandum.

DFR. On that score, Plaintiffs' Memorandum sweeps much more broadly than the Supplemental Complaint, and much more broadly than the Court's decision granting leave to file that Supplemental Complaint. The Supplemental Complaint is narrowly drawn, and claims only that ALPA breached its DFR because the US Airways Merger Committee "stipulated to" the submission of an "erroneous" seniority list of US Airways Pilots in the seniority integration arbitration. Supp. Compl. ¶¶ 51-63. This narrow allegation was the basis for the Court's grant of leave to file the Supplemental Complaint: "the alleged breach is not about the process or terms of the arbitration award . . . but that the union knew of, and stipulated to, the introduction of an erroneous, previously-corrected seniority list." Opinion and Order [Docket no. 61] at 27. Plaintiffs' Memorandum, however, asserts the broader theory that the US Airways Merger Committee did not advocate fiercely enough at the arbitration to convince the Arbitration Board that there was no distinction between MDA and US Airways Mainline. It is thus an echo of the contention in the Initial Complaint that ALPA breached its DFR by not convincing US Airways that MDA and US Airways were indistinguishable, and, therefore, MDA pilots were entitled to the wages, benefits, and other terms and conditions of employment that were established for US Airways Mainline pilots in the Working Agreement between ALPA and US Airways. Since that Initial Complaint was dismissed, and since the Court's Order permitting this Supplemental Complaint specifically referred to the narrow allegations of that Supplemental Complaint, Plaintiffs should be permitted to litigate only the narrow issue stated in that Supplemental Complaint: whether the US Airways Merger Committee behaved in a "wholly irrational" manner by submitting to the Arbitration Board a Certified Seniority List that, Plaintiffs claim, was "erroneous." Supp. Compl. ¶¶ 53, 54, 57. As we showed in our opening memorandum, the data on the list were entirely accurate, and the strategic decisions of the US Airways Merger

Committee with respect to which data to include on the list were entirely proper. In Part IV.A we show that Plaintiffs cannot demonstrate otherwise.

But Plaintiffs' broader allegations also fail. In Part IV.B we show that the evidence — in the form of a lengthy arbitration transcript, a huge volume of exhibits, and depositions taken in this case — all demonstrate that ALPA advocated actively on behalf of the MDA pilots.[2] And in Part IV.C, we show that Plaintiffs' completely new (and completely unsupported) claim that they were deceived with respect to the Merger Committee's arguments on their behalf is — like the rest of their case — wholly without merit.

ARGUMENT

I. PLAINTIFFS CANNOT ESTABLISH A CAUSAL CONNECTION BETWEEN THE ALLEGED BREACH AND THEIR CLAIMED INJURIES

To prevail on their DFR claims, Plaintiffs must point to facts that will establish "a causal connection between the union's wrongful conduct and their injuries." *Spellacy*, 156 F.3d at 126. Because they challenge their representation in arbitration proceedings, they must show that the Merger Committee's conduct "seriously undermined the arbitral process," *Gaines v. New York City Transit Authority*[3], and that the "unsuccessful result was due to the union's wrongful conduct." *Mullen v. Bevona*, 1999 WL 974023, at *6 (S.D.N.Y. Oct. 26, 1999). "[I]t is insufficient to show that the outcome *might* have been different if [the union's] conduct had been different," *id.* (emphasis in original); to establish a breach of the DFR, the Plaintiffs must show

[2] Plaintiffs bizarrely complain that the ALPA Defendants did not submit any affidavits or declarations in support of their motion. Pls.' Mem. at 3, 49 n.33. Defendants have, of course, submitted numerous key documents and days of deposition testimony that was taken under oath and subject to cross-examination. Plaintiffs make no attempt to explain why dueling declarations would provide a better basis for the Court to decide this motion than documents and testimony taken under oath and subject to cross-examination. Indeed, the one declaration Plaintiffs submitted, that of plaintiff James Portale, is replete with hearsay and assertions regarding matters as to which Portale has no personal knowledge, thus demonstrating the superiority of the ALPA Defendants' approach to this motion.

[3] 528 F.Supp.2d 135, 150 (E.D.N.Y. 2007), *aff'd* 2009 WL 3806383 (2d Cir. Nov. 16, 2009), *cert denied*, ___ U.S. ___, 2010 WL 979212, (June 14, 2010).

the result of the arbitration *would* have been different if the Merger Committee had acted differently.

Plaintiffs have made no such demonstration here. Instead, they simply offer the unsubstantiated assertion that, if the Merger Committee had pretended that jobs at MDA were the same as jobs at US Airways Mainline, it would have "propelled the arbitrator to incorporate a sizeable group of pilots … higher up the merged seniority list." Pls.' Mem. at 47. But even if it would have been appropriate for the Merger Committee to undertake that form of deception, there is no reason to believe that the Arbitration Board would have been deceived. The Board's decision shows clearly that it correctly understood all of the relevant facts regarding the status of MDA and the MDA pilots. Thus, the decision states at one point:

> "[A] preliminary matter needs to be addressed. That is the question of the CEL pilots. Some 105 such pilots (4993-5098) appear on the US Airways May 19, 2005 Certified Seniority List. However, none had flown for the mainline; all were pilots at Mid-Atlantic Airways, a regional carrier designed to be a US Airways wholly-owned subsidiary, but actually flown at all times during its short existence on the mainline's operating certificate as a division of US Airways.

Defs.' Ex. 26 at 20. Elsewhere, the Board accurately states that, in addition to the 105 CEL[4] pilots, US Airways' Certified Seniority List includes 212 MDA pilots who were furloughed from US Airways, but were listed as "active" on a summary sheet provided by the US Airways Merger Committee. Defs.' Ex. 26 at 5 n.1.

Moreover, there is no reason to believe the Board's decision would have been influenced in any way *even if it had been deceived about the furlough status of MDA pilots.* The Board's ruling relies primarily on the relative financial health of each carrier, and it concluded

[4] As explained in Defendants' Memorandum, the CEL pilots were pilots who came to MDA from US Airways' wholly owned subsidiaries and affiliates, rather than by way of furlough from the US Airways Mainline. Defs.' Mem. at 11, 32-33.

that "US Airways was the weaker." Defs.' Ex. 26 at 25. For that reason, and notwithstanding the acknowledged fact that US Airways had been recalling furloughed pilots, the Board concluded that the most appropriate seniority integration placed all of the former America West pilots ahead of the 1700 most junior US Airways pilots — including over 300 pilots that had already been recalled from furlough. One member of the Board would have given additional credit to US Airways furloughees who had been recalled to the mainline, but the majority held that even that was improper, given the horrible financial situation of US Airways at the time of the merger:

> As evidenced by Captain Brucia's Concurring and Dissenting Opinion, attached hereto, he disagrees with this aspect of the Award. His view is that at a minimum consideration should be given to those US Airways pilots already recalled; that treatment of them as active pilots consistent with their present status would serve to recognize the substantial time they had already invested in their airline. In the majority's view, this gives weight to post-merger expectations rather than pre-merger expectations, contrary to what ALPA policy foresees. In so doing it fails to recognize the prospects the US Airways pilots faced before the merger; including the reduction of the active pilot work force from 5500 to close to 3000, the sharp reduction in the size of the fleet since the 1990's; the absence of recalls though many active pilots were retiring; the successive bankruptcies and the inability to successfully emerge from that condition. When all that is considered, in the majority's view, it is far more appropriate to combine those who brought jobs to the merger, particularly when the protection of career expectations is of such overriding concern.

Defs.' Ex. 26 at 30-31.

So even if the Merger Committee could have deceived the Arbitration Board into believing that the 212 furloughed US Airways pilots who worked for MDA were not actually furloughed during their MDA employment, and even if the Merger Committee could have deceived the Arbitration Board into believing that the 105 CEL pilots who had never worked for the US Airways Mainline were actually US Airways Mainline pilots, there is no reason to believe that deception would have made any difference, because it would not have changed the

fundamental fact that motivated the Board: US Airways' weak financial condition at the time of the merger. *See Kirkland v. Local 32B/32J, Int'l Serv. Workers Union*, 1992 WL 71883, *4 (S.D.N.Y. Mar. 31, 1992) ("[Plaintiff] has enumerated no testimony that [his lawyer] failed to elicit but which might have affected the arbitrator's decision."); *Phillips v. Lenox Hill Hosp.*, 673 F.Supp. 1207, 1214 (S.D.N.Y. 1987) ("[Plaintiff] has not provided the court with affidavits or deposition testimony from the uncalled witnesses [where the union's failure to present those witnesses was the alleged breach] to establish what they would have testified at the arbitration, an absence of proof which is fatal.").

II. PLAINTIFFS' CLAIMS ARE NOT RIPE

As explained in Defendants' Memorandum, the doctrine of ripeness exists to ensure that courts adjudicate actual cases and controversies and to prevent them from squandering their resources "adjudicate[ing] issues that may never arise." *Auerbach v. Bd. of Educ. of the Harborfields Cent. School Dist. of Greenlawn*, 136 F.3d 104, 109 (2d Cir. 1998). A claim is unripe where a plaintiff has not suffered any actual injury. *Jungels v. New York*, 50 F. App'x. 43, 44 (2d Cir. 2002).

Although Plaintiffs spend several pages of their memorandum reciting general hornbook law on the ripeness doctrine and making irrelevant observations,[5] when it comes to the application of the law to the facts of this case, they essentially concede that they have suffered no injury: "as soon as the merged seniority list *were to be implemented*, plaintiffs *would suffer* immediate and crushing damage to their careers." Pls.' Mem. at 66 (emphases added). But there is no dispute that, as of now, the integrated seniority list has not been implemented (and may

[5] *See, e.g.*, Pls.' Mem at 67 ("the vast majority of cases in which ripeness has arisen as an issue are cases in which governmental agency regulations are involved.")

never be), and there is no dispute that Plaintiffs' employment situation has not changed in any way that can be traced to that merged list.

Plaintiffs rely primarily on the district court decision in *Addington v. US Airline Pilots Association*[6], to support their argument that their claims are ripe. As an initial matter, Plaintiffs misconstrue the reason that ALPA brought *Addington* to the Court's attention. It was not to suggest that the Court should look to that decision for its ripeness analysis, but merely to make the Court aware of the potential for conflicting decisions regarding the propriety of the Opinion and Award. Defs.' Mem. at 42-43.

More importantly, and fatal to Plaintiffs' ripeness arguments, is the fact that the Ninth Circuit, on June 4, 2010, reversed the district court in *Addington* and held that the America West pilots' DFR claims were not ripe.[7] In that case, the former America West pilots claimed that the new union for the merged US Airways, USAPA,[8] violated the DFR by refusing to negotiate for a CBA that would implement the Opinion and Award. In contrast to the situation here, the plaintiffs in *Addington* experienced harm resulting from the actions that were the subject of their complaint, because former America West pilots were being laid off when, if the merged seniority list had been implemented, those layoffs would have fallen on the pilots who came from pre-merger US Airways. *Id.* at *3. Nevertheless, the Ninth Circuit held that the claims were unripe, because "[a]t this point, neither the [former America] West Pilots nor USAPA can be certain what seniority proposal ultimately will be acceptable to both USAPA and

[6] Nos. CV 08-1633-PHX-NVW, 2009 WL 2169164 (D. Ariz. July 17, 2009).

[7] ___ F.3d ___, 2010 WL 2220058 (9th Cir. June 4, 2010).

[8] The Court in *Addington* misstated the mechanism by which ALPA was replaced by USAPA as the collective bargaining representative of the merged US Airways pilots, stating that ALPA was "decertified." *Id.* at *2. Defendants' Memorandum also misstated the procedure. *See* Defs' Mem. at 6. Unlike under the National Labor Relations Act, however, there is no procedure for decertification under the Railway Labor Act. *In re Chamber of Commerce*, 14 N.M.B. 347 (1987); The Railway Labor Act 11, 213-14 (Michael E. Abram, *et al.*, eds., 2d ed. 2005). Thus, ALPA was not decertified but instead replaced by USAPA as the bargaining representative of the US Airways pilots.

the airline as part of a final CBA. Likewise, it is not certain whether that proposal will be ratified by the USAPA membership as part of a new, single CBA." *Id.* at *4. Indeed, because USAPA's constitution commits USAPA to date-of-hire seniority integration, and provides that ratification of a new CBA requires a vote of the full union membership,[9] coupled with the fact that the pilots who came from US Airways greatly outnumber those who came from America West, it may be very unlikely that the merged seniority list will be implemented at any time in the foreseeable future. In the meantime, because of a Transition Agreement that ALPA and the merged US Airways entered into in September 2005, there is a "fence" between the operations such that, for purposes of pilot careers and working conditions, each group remains governed by the pre-merger collective bargaining agreement, and the operations will not be integrated until a single CBA can be negotiated. *Addington*, 2010 WL 22200058, at *1-2, Transition Agreement, attached as Exhibit B to the Supp. Linsey Decl., at 2-6.

Here, the Plaintiffs' claims are even weaker than the claims of the America West pilots that the Ninth Circuit held were unripe. While USAPA's refusal to negotiate a CBA incorporating the merged seniority list resulted in actual furloughs of some America West pilots that would not otherwise have occurred, here, the Plaintiffs may be injured only if (i) USAPA agrees to violate its constitution by implementing the Arbitration Board's merged seniority list as part of a new comprehensive collective bargaining agreement, (ii) the US Airways pilots agree by majority vote to ratify that new collective bargaining agreement,[10] and (iii) the list is implemented without any conditions to alleviate or eliminate the perceived negative effect on the

[9] *See* USAPA Constitution and Bylaws, Exhibit A to the Supplemental Declaration of James L. Linsey ("Supp. Linsey Decl."), at 8, § 8.D and 25, § 5.A.3.

[10] The court in *Addington* noted that "[a]dditionally, USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award," and thus the implementation of a CBA that does not include the Arbitration Board's merged list would not necessarily be a breach of USAPA's DFR. 2010 WL 2220058 at *5.

Plaintiffs. Indeed, such an action by USAPA and the US Airways pilots would be a superseding cause breaking any chain of causation emanating from ALPA's alleged DFR breach. *See Ramey v. Dist. 141, IAM*, 473 F.Supp.2d 365, 368 (E.D.N.Y. 2007) (dismissing DFR claim because unforeseen events broke chain of causation). Thus, even more so than in *Addington*, there are "contingencies that could prevent effectuation of [the Opinion and Award] and the accompanying injury," and Plaintiffs' claims should be dismissed as unripe. *Addington*, 2010 WL 2220058, at *4.

III. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

If the Court determines that Plaintiffs' claims are ripe, then those claims are clearly barred by the statute of limitations.

Defendants' Memorandum explained that Plaintiffs' claims accrued when the Merger Committee informed them in December 2005 and then again, at least for some of them, in January 2006, that it rejected the position they now press: that MDA flying was indistinguishable from a recall to the mainline. Defs.' Mem. at 39-41. But Plaintiffs waited until July of 2007, well outside the 6-month statute of limitations, before making any suggestion that they intended to pursue a claim based on the presentation of that information.

In response, Plaintiffs first assert that "it has not been established that each plaintiff received such a letter." Pls.' Mem. at 49. But Captain Carey testified that letters were sent to each MDA pilot. SUMF ¶ 148; Carey Dep. Tr. at 69:12-23. A party opposing a motion for summary judgment must "come forward with evidence that would be sufficient to support a jury verdict in his favor." *Woods v. Enlarged City School Dist. of Newburgh*, 473 F.Supp.2d 498, 519 (S.D.N.Y. 2007), *aff'd*, 288 F.App'x 757 (2d. Cir. 2008). If one of the Plaintiffs did not receive a Pilot Data Verification Letter, or received such a letter with information substantively different from those in the record, it should be simple enough for Plaintiffs to submit a

declaration from that plaintiff so stating. Plaintiffs did not do so, and thus have not established a dispute of material fact.

Next, Plaintiffs argue that the Pilot Data Verification Letters did not put them on notice of the Merger Committee's position. But a brief examination of the Pilot Data Verification Letters shows that that argument has no merit. For pilots who had been furloughed from the Mainline operation, the Pilot Data Verification Letters listed furlough start dates without furlough end dates, which (Plaintiffs assert elsewhere)[11] "trumpeted" the fact that the MDA pilots were furloughed. SUMF ¶ 149, Defs.' Exs. 62, 69, 88, and 109. Indeed, Plaintiffs concede that the letters drew a distinction — which they characterize as erroneous — between the US Airways Mainline operation and MDA. Pls.' Mem. at 50.

Plaintiffs also argue that the Pilot Data Verification Letters' "definition of 'furlough time' would likely dissuade a pilot from taking any further steps to protect his interests." Pls.' Mem. at 51. But that cannot be true, because several of the Plaintiffs *did* take such steps: they complained, in their Pilot Data Protest Letters, about the very fact that their MDA time was not presented as a recall to the mainline. SUMF ¶ 152, Defs.' Exs.' 63, 70, 89, and 108.[12] In any event, the letters make very clear that the Merger Committee did not define "furlough time" in the way the Plaintiffs sought: "the furlough time shown below is time away from the *Mainline Operation of US Airways*, and *is not reduced by MDA service*." *See* Defs.' Exs. 62, 69, 88, and 109 (emphases added).

[11] Pls.' Mem. at 82, 83.

[12] Similarly absurd is Plaintiffs' contention that the phrase "time serving in the MDA operation is listed separately" somehow suggested there would be more information beyond the eight lines of data included in the Pilot Data Verification Letters. Pls.' Mem. at 52. First, "is listed" is not the same as "will be listed." Second, the sentence immediately preceding begins "the furlough time shown below," and thus any reasonable person would understand that the MDA time was also "shown below." Defs.' Exs. 62, 69, 88, and 109.

For those Plaintiffs who did protest the Pilot Data Verification Letters, the statute of limitations was surely triggered by the Merger Committee Responses to those protests. Plaintiffs argue that the Merger Committee Responses "strongly suggest[ed]" that the Merger Committee had not yet compiled, verified, and/or certified that information, Pls.' Mem. at 53, but in fact the Merger Committee Responses, sent in January 2006, said "we have determined that there are no errors in the employment data we previously sent to you," and then repeated that data, with MDA time listed separately, and furlough start dates without furlough end dates (where applicable). SUMF ¶ 154. Plaintiffs also misleadingly excerpt a quote from the Merger Committee Responses to suggest that they were "lulled…into a false sense of security" by stating that the Merger Committee would advocate for their "active service" at MDA. Pls.' Mem. at 53. The full quote, however, is "advocate for your credit for your active service *as an MDA division pilot*." (emphasis added). Since Plaintiffs argue that there was *no such thing* as the MDA division (indeed, several of the Pilot Data Protests assert that very thing, *see* Defs.' Exs. 63, 70, 89, and 108), such a statement could not have provided the comfort they now claim. Further, the Pilot Data Verification Letters and Merger Committee Responses both made clear that the Merger Committee would be drawing a distinction between MDA and the mainline. Both types of document stated, in bold-face, italicized, and underlined type right above a pilot's data, "Note: The ending date for your current furlough period should be blank pending a recall." *See* Defs.' Exs.' 62, 64, 69, 71, 88, 90, 109, and 110.

Plaintiffs cite a litany of cases for the undisputed proposition that a claim for a breach of a union's DFR is apparent to the member at the time she learns of the union action or inaction about which she complains. Pls.' Mem. at 56. But they found only a few cases for the proposition that no DFR claim can arise in connection with a union's conduct during an

arbitration proceeding until the arbitrator has issued an award, and none of Plaintiffs' cases are helpful to their cause.

In *Clarke v. CWA*,[13] the DFR claim was not based, as it is here, on the union's conduct in representing its members during an arbitration proceeding. Rather, the DFR claim was that the union did not pursue arbitration of the plaintiffs' grievances at all. *Id.* at 51. Similarly, in neither *Ghartey v. St. John's Queens Hospital*[14] nor *Lettis v. USPS*,[15] was there any evidence that the union had, prior to the arbitration, informed the plaintiff that it would not be making the argument the plaintiffs thought it should have made, and which failure the plaintiff later claimed breached the union's DFR. Nor is *Ramey v. District 141, IAM*,[16] of any use to Plaintiffs. That case involved a negotiation, not an arbitration, between the plaintiffs' union and the carrier, and whether the plaintiffs would be harmed was contingent on whether the carrier would exercise an option to purchase the plaintiffs' employer five years after the union had made the announcement of its position. *Id.* at 278. Here, however, there was no such contingency that would create doubt as to whether the alleged breach would occur.

Plaintiffs' attempt to distinguish *Buttry v. General Signal Corporation*,[17] is unpersuasive. Here, as was the case in *Buttry*, the Pilot Data Verification Letters and the Merger Committee Responses indicated unequivocally that the Merger Committee would not be deceiving the Arbitration Board by pretending that the MDA pilots were flying on the mainline and the Court should, as did the Second Circuit in *Buttry*, flatly reject the Plaintiffs' contention that "their cause of action accrued only upon entry of the arbitrator's award." *Id.* at 1492. While

[13] 318 F.Supp.2d 48 (E.D.N.Y. 2004).

[14] 869 F.2d 160 (2d Cir. 1989).

[15] 39 F.Supp.2d 181 (E.D.N.Y. 1998).

[16] 378 F.3d 269 (2d Cir. 2004).

[17] 68 F.3d 1488 (2d Cir. 1995).

Plaintiffs argue that Defendants "concede that ALPA's approach and tactics shifted over time," that shift was only to move from a strict date-of-hire approach to a length-of-service-proposal, and had nothing whatsoever to do with the notion that MDA was the same as the US Airways Mainline. SUMF ¶¶ 156-58.

IV. THE US AIRWAYS MERGER COMMITTEE DID NOT BREACH ITS DUTY TO FAIRLY REPRESENT THE PLAINTIFFS IN THE SENIORITY INTEGRATION ARBITRATION

Under Supreme Court precedent, and described more fully in Defendants' Memorandum, a union does not breach its DFR to its members unless its actions are "so far outside a wide range of reasonableness" as to be "wholly irrational." *ALPA v. O'Neill*, 499 U.S. 65, 78 (1991). Even negligence is insufficient to establish a DFR breach. *Vaughn v. ALPA*, 604 F.3d 703, 709 (2d. Cir. 2010). Where a union represents its members in an arbitration proceeding, "decisions that appear in hindsight to be mere tactical errors are not nearly sufficient to make out a prima facie case that [a] [u]nion breached its duty of fair representation." *Arteaga v. Bevona*, 21 F.Supp.2d 198, 207 (E.D.N.Y. 1998) (internal quotations omitted). Nor is a union member "entitled to have his Union representative advance every conceivable theory at an arbitration hearing." *Tsikitas v. N.Y. Hotel and Motel Trades Council*, No. 00 Civ. 3450, 2001 WL 940565, at *6 (S.D.N.Y. Aug. 20, 2001) (citing *Cook v. Pan Amer. World Airways*, 771 F.2d 635, 645 (2d Cir. 1985).

A. The US Airways Merger Committee Did Not Breach Its Duty to Fairly Represent the Plaintiffs by the Manner in Which It Presented Their Information on the Certified Seniority List

Plaintiffs take issue with the Certified Seniority List, Plaintiffs' Exhibit 22, on two grounds. First, they argue that it showed that the Plaintiffs were furloughed as of May 19, 2005. *See, e.g.*, Pls.' Mem. at 3, 6, 82, 83. Second, they complain that the Merger Committee did not construct the list to allow the argument that flying for MDA and flying for the US

Airways Mainline were the same. *See, e.g.*, Pls.' Mem. at 27, 30-34. 43-45. The undisputed record, however, shows that the Certified Seniority List did not list the MDA pilots as furloughed, and it further shows that the Merger Committee's decision not to conceal the distinction between MDA and the mainline from the Arbitration Board was entirely rational.

1. The Merger Committee Did Not List the MDA Pilots as Furloughed on the Certified Seniority List

Plaintiffs assert that the Certified Seniority List "trumpeted" that the MDA pilots were furloughed[18] and that it "could be interpreted only"[19] as showing that the MDA pilots were furloughed. But the Certified Seniority List does not have "FUR" in the status column next to the names of the MDA pilots, while other pilots, who were furloughed and did not take positions at MDA, or left MDA before May 19, 2005, did have "FUR" listed next to their names. And as the two members of the Merger Committee testified, this choice was explicitly made in an effort to convince the Arbitration Board that the MDA pilots were active pilots flying on the US Airways operating certificate.

> Q: I believe you testified and again directing your attention to entries at page 81 -- if an individual such as Mr. Colello had a blank under the "Status" rather than an "FUR" under the "Status," that was to represent to the arbitrator that he should be treated as an active pilot; is that right?
>
> A: That's correct.

Kirch Dep. Tr. at 196:12-20.

> Q: I'm asking if they were active pilots on the US Airways seniority list.
>
> A: The CEL pilots that came to MidAtlantic?
>
> Q: Those who were flying the 170. Yes.

[18] Pls.' Mem. at 82.

[19] Pls.' Mem. at 83.

> A: They were on the US Airways pilots seniority list, and we listed them as active.
>
> Q: Okay. But the APL pilots who were flying the 170 were not active?
>
> A: No. They were active. We -- we have them listed as active and not furloughed. We tried to -- we tried to not flag this for the arbitrator, that they got furlough notices and never got recall notices. But we wanted to account for their time at MidAtlantic, so that's how we did it.

Carey Dep. Tr. at 78:3-22.

Moreover, Arbitration Board member Captain Brucia fully understood the point: the Merger Committee was "arguing or trying to make a statement that there was a continuation of employment." SUMF ¶ 138; Brucia Dep. Tr. 76:7-10.

2. The US Airways Merger Committee's Decision to List Furlough Dates and MDA Time for the MDA Pilots was Not "Wholly Irrational"

As set forth more fully in Defendants' Memorandum, the uncontradicted record shows that the reason the Merger Committee listed furlough start and furlough end dates, and separate MDA start and end dates, was because it did not feel it could credibly pretend that there was no distinction between MDA and the mainline, while at the same time it wanted the Arbitration Board to take into account MDA time in the seniority integration to the benefit of both the MDA pilots specifically and the US Airways Pilots generally. Defs.' Mem. at 50-52; SUMF ¶¶ 145-46. Thus, Plaintiffs have no DFR claim based on the Certified Seniority List unless they can establish that drawing this distinction was wholly irrational. The undisputed facts, however, show that it was not.

The relationship between an employer and its collectively-bargained employees, including the seniority rights of those employees, is governed by the collective bargaining agreement between the employer and the employees' collective-bargaining representative. *See, e.g., Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968) ("Seniority is

wholly a creation of the collective agreement and does not exist apart from that agreement. The incidents of seniority can be freely altered or amended by modification of the collective agreement."). Accordingly, the only facts relevant to whether MDA was distinct from the mainline, for purposes of the terms and conditions of employment, including seniority, of the MDA pilots are the terms of the 2002 Restructuring Agreement and LOA 84. Thus, Plaintiffs' assertion that MDA was not really a "division" of US Airways because it operated on the US Airways operating certificate, or because it was not a wholly-owned subsidiary, or because the FAA took the position that it was a "fleet type," or because its training manuals had to be rewritten, is of no consequence. For purposes of seniority and other terms and conditions of employment, the only aspect of MDA of any relevance is that the 2002 Restructuring Agreement and LOA 84 drew a clear distinction between mainline flying and MDA. As Plaintiffs concede, pilots flying for MDA had wages, benefits, and work-rules that were significantly inferior to those for the mainline operation. SUMF ¶ 74. And, most importantly, a furloughed US Airways pilot could decline a position at MDA without adversely affecting his or her seniority on the US Airways Pilot Seniority List, but a pilot who declined recall to the US Airways Mainline would lose his or her seniority and would be removed from the US Airways Pilot Seniority List. SUMF ¶¶ 40, 41.[20]

[20] Plaintiffs seek to avoid this clear distinction by dissembling about the text of the 2002 Restructuring Agreement. Though they do not make this argument in their Memorandum, Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts, at paragraph 40, asserts that "[o]ne provision of the 2002 Restructuring Agreement was that a pilot 'may bypass an offer of employment with MDA without losing his position on the Affected Pilot List' and, similarly, 'may bypass an offer of employment with a Participating Wholly-Owned Carrier or a Participating Affiliate Carrier' so long as there are junior APL pilots available to accept such an offer, *see* Pltfs' Exh. 5, at 8." Thus, Plaintiffs apparently wish the Court to believe that an offer to fly for MDA was the same as a recall to the mainline: an MDA position could be declined without negative seniority consequences only if there were junior APL [furloughed] pilots available to accept the position. The Court need only glance at the 2002 Restructuring Agreement to reject Plaintiffs' misleading presentation of the document. That agreement actually states that "[h]e may bypass an offer of employment with MDA without losing his position on the Affected Pilot List, regardless of his preference." That is the entirety of the sentence dealing with bypass of an MDA offer. *See* SUMF ¶ 40, Pls. Ex. 5, at 8. That same paragraph then goes on to state that "[h]e may bypass an offer of employment with a Participating Wholly-Owned Carrier or a Participating Affiliate Carrier without losing his

As a result, there were significant differences between the offers that the MDA pilots received in connection with their commencement of service there, and letters that furloughed US Airways pilots received when they were recalled to the mainline. SUMF ¶¶ 59-72. Most obviously, Recall Notices said "recall" and MDA Offers did not. SUMF ¶¶ 60, 70, 71. Recall Notices referred to Section 23 of the Working Agreement — the furlough and recall provision. MDA Offer Letters did not. SUMF ¶ 61, 70. Recall Notices referred to an "indoctrination training class" while MDA Offer Letters referred to "New Hire Orientation." SUMF ¶¶ 59, 71.

In light of these differences, the Merger Committee members did not feel they could pretend that MDA flying was indistinguishable from flying for the mainline. "[T]here was a furlough notice issue that we had to be prepared to deal with as an exhibit. So if we pretended that it wasn't out there, that's not going to represent the MidAtlantic pilots well." Kirch Dep. Tr. at 125:21-25. "[T]he company did not supply us with a furlough-end date, so we couldn't just manufacture one." Carey Dep. Tr. at 79:25-80:4. It is important to bear in mind that the Merger Committee was charged with representing *all* of the over 5,000 US Airways pilots, and not just the 321 MDA pilots. It was eminently reasonable — and certainly not "wholly irrational" — for the Merger Committee to conclude that completely ignoring the distinction between MDA and the mainline, as Plaintiffs do, would risk its credibility with the Arbitration Board to the detriment of *all* of the US Airways pilots.

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position on the Affected Pilot List, regardless of his preference, so long as there are junior Affected Pilots available to accept such offer." That limitation with regard to junior pilots thus applied only to offers to fly at *wholly-owned or subsidiary carrier*s, but not to MDA offers. There would thus be no loss of seniority for a pilot who declined a position to come to MDA, regardless of whether there were junior pilots available to take the offer. Plaintiffs' attempt to tie "so long as there are junior APL pilots available to accept such an offer" to "bypass an offer of employment with MDA without losing his position on the Affected Pilot List" is a blatant misrepresentation of the text of the 2002 Restructuring Agreement and thus, unlike recall to the mainline or an offer to fly for a wholly-owned subsidiary or affiliate, a pilot was completely free to accept or decline an MDA offer without any negative consequences for his or her seniority, irrespective of whether there were junior pilots available to take the position.

3. Plaintiffs' Attempts to Obfuscate the Distinction Between MDA and the Mainline Have No Merit

(a) Plaintiffs' Arguments Based on the Section of the Working Agreement Governing Furloughs and Recalls Have No Merit

Plaintiffs argue that "the section of the CBA governing furloughs and recalls does not specify precisely what constitutes a notice of recall, such that it is respectfully submitted that an offer of employment to fly the E-170 is a sufficient notice of recall." Pls.' Mem. at 21. But to prove that ALPA violated the DFR, Plaintiffs must show that it would be "wholly irrational" to interpret that section of the CBA (Section 23) differently, and there is no support whatsoever for that conclusion. Recall notices under Section 23 referred specifically to that section of the CBA, and used the word "recall"; the MDA Offer Letters did not mention Section 23, and did not use the word "recall" in any way. SUMF ¶¶ 60, 70, 71; *compare* Defs.' Exs. 47, 94, 99, 122, 123, 129, 136, 137, and 140 *with* Defs.' Exs. 56, 87, 139, and 103. So it could not be "wholly irrational" to conclude that an MDA Offer Letter was not a recall notice — especially given the terms of the 2002 Restructuring Agreement and LOA 84, discussed above, that established MDA as a separate operation.[21]

Plaintiffs also argue that the MDA Offer letters were actually Section 23 recall notices because they received furlough notices in connection with MDA's cessation of operations in May 2006, and "they could not have been furloughed again by US Airways without an intervening recall." Pls.' Mem. at 22. But since MDA was a separate operation, nothing prohibited them from being furloughed from that separate operation without being recalled to US

[21] Plaintiffs, at paragraph 41 of their Statement of Disputed Material Facts, point out that LOA 84 provided that a pilot could bypass "recall" to a "large SJ" - i.e. an Embraer-170. Pls.' Ex. 7 at 9. But LOA 84 further provided that a pilot could "bypass recall to a Large SJ position" and would "then be offered recall when his seniority entitles him to a position on an aircraft larger than a Large SJ." This provision, despite its use of the word "recall," thus reaffirmed the difference between recall to the mainline and "recall" to MDA. In the former case, a pilot had to accept or lose all of his or her seniority rights, while for the latter, a pilot who bypassed would suffer no consequences and would be offered a position at the mainline the next time his or her seniority so provided.

Airways. In other words, there were two furlough notices without an intervening recall because Plaintiffs were furloughed from two separate operations: the Mainline operation in 2003, and the MDA division in 2006. In fact, if Plaintiffs had been recalled to US Airways Mainline, then they would not have been working at MDA when that separate operation ceased in 2006, and would never have received that MDA furlough notice. While the furlough notices in 2006 did bear US Airways letterhead, they also made clear that "all remaining pilots will be furloughed *from MidAtlantic* effective May 31, 2006." Defs.' Ex. 111 (emphasis added). The MDA furlough notices also thanked the pilots for "maintaining an excellent safety record *for the division*" and for their service "on behalf of US Airways *and MidAtlantic*." *Id.* (emphases added).

(b) The Provision of the 2002 Restructuring Agreement Whereby a Senior Pilot Could Bid for an MDA Position to Prevent the Furlough of a Junior Pilot is Immaterial

Plaintiffs also point out that there was a provision of the 2002 Restructuring Agreement whereby any pilot who "would otherwise not have been furloughed" could bid for an MDA position to prevent furlough of a junior pilot. Pls.' Mem. at 11. Plaintiffs then argue that this provision is "rather telling" because it is unlikely that a US Airways pilot would ever consider bidding for an MDA position if that placement would amount to being placed on furlough. But there is no reason to believe that it would amount to being placed on furlough. The MDA Pilots were not listed, on the Certified Seniority List, as having furlough start dates without furlough end dates simply because they were working for MDA, but *because they had a furlough notice without a corresponding recall notice*. SUMF ¶¶ 145-146.[22]

[22] There is no evidence that any of the plaintiffs or any other US Airways pilot took advantage of this provision.

(c) The Size of the Embraer-170 Relative to Other US Airways Aircraft Is Not Material

Plaintiffs repeatedly assert that the Embraer-170 was similar in size to "certain other aircraft traditionally flown by US Airways." Pls.' Mem. at 12, 10 n.9. Whether Plaintiffs' characterization is true or not, it is irrelevant. The 2002 Restructuring Agreement and LOA 84 clearly established that the Embraer-170 would be flown by MDA, and set forth the terms and conditions of employment for the MDA pilots, which differed from those for mainline pilots. It is those collective bargaining agreements, not the size of the Embraer-170, that establishes a distinction between flying for MDA and flying for the mainline. Further, Plaintiffs, as a matter of law, were on notice of that distinction. *See Palancia v. Roosevelt Raceway, Inc.*, 551 F.Supp. 549, 553 (E.D.N.Y. 192), *aff'd mem.*, 742 F.2d 1432 (2d Cir. 1983) ("Union members are charged with knowledge of the contents of their collective bargaining agreement.") While Plaintiffs feel this distinction somehow worked an injustice against them, the Court previously dismissed any DFR claims based on the negotiation of the 2002 Restructuring Agreement and LOA 84. Opinion and Order [Docket no. 61] at 12-16.

(d) Individual Opinions as to Whether MDA Was a "Division" of US Airways Are Not Material

In addition to relying on irrelevancies such as MDA's operating certificate, corporate structure, and training manuals, Plaintiffs also attempt to create a disputed issue by relying on purportedly inconsistent statements from various ALPA officials as to the nature of MDA.

Plaintiffs cite to numerous statements to the effect that the status of MDA as a wholly-owned subsidiary or division of the mainline, was initially unsettled. Pls.' Mem. at 12-14. This is not in dispute. SUMF ¶ 43. They then point out that US Airways was eventually granted the authority to operate MDA as a division of US Airways. Pls.' Mem. at 14. This is

also not in dispute. SUMF ¶¶ 49-52. But the corporate structure of MDA *vis a vis* US Airways, Inc. is not relevant to any of the issues in this case. The MDA pilots' employment relationship, including seniority, was governed by the 2002 Restructuring Agreement and LOA 84, and neither of those agreements contain any language that conditions those terms and conditions of employment on the corporate structure of MDA.

In any event, the "confusion" attributed to ALPA officials is manufactured by Plaintiffs. Thus, Roy Freundlich's statements that MDA was a "separate airline" and "an airline that was a separate entity that was still a part of US Airways" are completely correct; not examples of "considerable confusion." Pls.' Mem. at 15. MDA *was* separate from US Airways in the sense that it was labeled a division by the carrier, had, as Plaintiffs admit, certain operating functions that were separate from the mainline, and, in the only aspect that is relevant to the allegations in the Supplemental Complaint, MDA flying was clearly demarcated from the US Airways Mainline with respect to pilot working conditions and seniority rights.[23]

Plaintiffs also argue that statements of Captain William Pollock "compound[ed] such confusion" by asserting that MDA was "contemplated" as both a wholly-owned subsidiary and as a division of US Airways. But those statements are also completely correct. During the negotiation process, as Captain Butkovic explained, MDA was initially planned as a wholly-owned subsidiary, but the company eventually secured ALPA's agreement to operate it as a division rather than a wholly-owned subsidiary.

[23] Similarly inconsequential is the purported inconsistency between Freundlich and Butkovic as to whether MDA was part of the Jets for Jobs program. The 2002 Restructuring Agreement provided that Jets for Jobs was a protocol whereby non-MDA carriers could operate small jets if they agreed to certain conditions. Pls.' Ex. 5 at 17. Jets for Jobs thus was separate from MDA, but, given that both were designed to provide jobs for US Airways pilots flying smaller-than-mainline aircraft, it is not surprising that Freundlich's recollection of this minor detail was imperfect. In any event, whether MDA fell under the Jets for Jobs protocol is not relevant to any issues in this case.

Further, Plaintiffs' assertion that ALPA President Captain Prater did not have "any specific" understanding of the meaning of "division" is taken out of context. As President Prater testified, his term as ALPA's president began in 2007, long after MDA had ceased to exist. Responding to attempts by Plaintiffs' counsel to engage in the semantic debate that underpins their theory of the case, Captain Prater simply testified to the plain meaning of the word "division": "[i]t means it's a part of something that's larger." Prater Dep. Tr. at 25:10-11. Despite Plaintiffs' best efforts to turn a semantic dispute into a factual one, Captain Prater's testimony was clear and expresses the common-sense understanding of "division." MDA was a part of the larger US Airways operation. It was the same in some respects — i.e. it was part of the same corporation and flew on the same operating certificate — but different in others, most importantly, wages, benefits, work-rules, and seniority rights for its pilots.

B. The US Airways Merger Committee Did Not Otherwise Breach its Duty to Fairly Represent the Plaintiffs In the Seniority Integration Arbitration

1. The US Airways Merger Committee Consistently Maintained the Position that the MDA Pilots were Active US Airways Pilots During the Arbitration Proceeding

Plaintiffs now argue for the first time that ALPA's alleged DFR breach was not limited to the use of an allegedly "erroneous" seniority list. *Compare* Supp. Compl. ¶¶ 53, 54, 57. In addition, they now claim that ALPA breached its DFR through the Merger Committee's general failure to advocate the position that the MDA pilots were not furloughed. *See, e.g.*, Pls.' Mem. at 54, 72-73, 74, 83. As noted at the outset, such claims are beyond the scope of the Supplemental Complaint and the Court's Order permitting that filing, and should be rejected for that reason alone. In addition, those claims are wholly without merit. We will separately address the points raised by Plaintiffs below.

(a) Plaintiffs claim that Merger Committee member Kirch abandoned the position that MDA pilots were "no longer furloughed upon their accepting positions" at MDA. Pls.' Mem. at 33-34. That claim is false in two respects.

First, Kirch did not adopt the position that MDA pilots were no longer furloughed *from the mainline* after they accepted positions at MDA. There is no dispute about that fact; indeed, Plaintiffs' claim of "error" with respect to the Certified Seniority List is based entirely on the fact that the Certified List — created by Kirch and the other members of the Merger Committee — contains a furlough start date without a furlough end date, and contains separate columns for MDA Start and MDA End. Pls.' Mem. at 74. At his deposition, Kirch went to great lengths to explain that, notwithstanding that furlough, the Merger Committee presented the MDA pilots as active US Airways pilots flying for the MDA division. Kirch Dep. Tr. at 108:2-113:16. Plaintiffs' counsel did not ask a question demanding the answer — and Kirch did not state — that their employment by MDA acted as a recall from furlough from the mainline. Instead, he explained that the Merger Committee did everything that it could to argue that MDA pilots should be treated as active employees of US Airways. Kirch Dep. Tr. at 107:2-114:14.[24]

Second, Kirch's testimony at the arbitration hearing was completely consistent with the Merger Committee's position that the MDA pilots should be considered as active US Airways employees. Plaintiffs have excerpted a small portion of the testimony on page 33 of their memorandum, but they omitted the introductory text, which makes two things clear:

[24] Kirch testified that, if the Arbitration Board had "recognized the service time at MidAtlantic" — which the Merger Committee urged it to do — that "would not re-sequence" the US Airways seniority list, in violation of ALPA policy. Kirch Dep. Tr. at 142:11-18. Plaintiffs misinterpret that statement as if Kirch had testified that treating MDA pilots as being recalled to mainline would not have improperly resequenced the list, Plaintiffs' Memorandum at 46, and claim that Kirch thereby "thoroughly refuted" a point made about resequencing made in Defendants' Memorandum at 53-54. But Kirch correctly understood and consistently applied the distinction between being recalled to mainline (which the MDA pilots were not) and being active employees of US Airways (which the MDA pilots were).

(i) Capt. Kirch was being asked about only CEL pilots, who had never flown for mainline US Airways, and (ii) the "furlough" at issue was a furlough from MDA, which had ceased operations as of the time of the arbitration hearing. So the quoted arbitration testimony is entirely irrelevant to Plaintiffs' claims:

> Q: Mr. Varini is a CEL pilot; correct?
>
> A: That is correct.
>
> Q: And I am not here to ask you questions to set up an argument about whether the CEL pilots belong in the seniority integration or don't belong in the seniority integration, that is a matter that is before Mr. Nicolau that has been fully briefed, but it is correct, is it not, that Mr. Varini and, what, about 106 folks on this list senior to Mr. Varini, is that the rough number of CEL pilots?
>
> A: That is correct.
>
> Q: It is correct that Mr. Varini and I guess 105 above him before they started flying at US Airways they were flying for, they were flying regional aircraft for wholly-owned commuter carriers of US Airways; correct?
>
> A: Yes. Prior to moving up to the mid-Atlantic division they were at one of Piedmont's wholly-owned commuters.
>
> Q: And they moved up to the mid-Atlantic division to fly Embraer 170s; correct?
>
> A: That is correct.
>
> Q: And they flew those EMB 170s at the mid-Atlantic division for however long it was that the mid-Atlantic division operated at US Airways; correct?
>
> A: Correct.
>
> Q: They never touched the stick of a 737 or an A320 in any capacity; correct?
>
> A: That is correct.

> Q: They were never in one other than perhaps as a passenger; correct? They didn't fly –
>
> A: They did not fly on the US Airways main line division.
>
> Q: And so as they sit here today they are presently on furlough; correct?
>
> A: That is correct.
>
> Q: And your list has them integrated among working A320 and 737 America West first officers; correct?
>
> A: That is correct.
>
> Q: Who have never seen, so far as you know -- let's just take a quick peak -- doesn't look to me as though they have seen a day of furlough in their career; correct?

See December 12, 2006 Arbitration Hearing Tr., Supp. Linsey Decl. Ex. C, at 127-29.[25]

(b) Plaintiffs also assert that Captain Carey made "troubling comments" at the arbitration hearing,[26] because the Embraer-170 was listed in a separate exhibit from the other aircraft flown by US Airways. Pls.' Mem. at 28-29. But this does not suggest any impropriety or lack of vigilance in representing the MDA pilots. As set forth in Defendants' Memorandum, the US Airways Merger Committee sought to convince the Arbitration Board to use the July 1, 2006 US Airways Merger Committee Length of Service Proposal as its basis for integrating the lists. Defs.' Mem. at 30-31. Defendants' Memorandum further explained the reason that the Merger Committee used July 1, 2006 as the date of its proposal was because there had been, in the fourteen months since the merger had been announced, recalls of furloughed US Airways pilots to Mainline positions, and the Merger Committee wanted the Arbitration Board to

[25] Plaintiffs assert that this statement was made on December 4, 2006, but the transcript shows it was made at the proceedings on December 12, 2006. *See* December 12, 2006 Arbitration Hearing Tr., Supp. Linsey Decl. Ex. C, at 1.

[26] Pls.' Mem. at 28. Plaintiffs state the Captain Carey made the "troubling comments" on December 4, 2006, but, as with Captain Kirch's statements, they set forth an incorrect date of the comments. The transcript shows they were actually made on December 11, 2006. *See* December 11, 2006 Arbitration Hearing Tr., Supp. Linsey Decl. Ex. D, at 1.

be aware of that and give credit to the US Airways pilots for those intervening recalls. Defs.' Mem. at 30-31, 55.

By July 1, 2006, however, the Embraer-170s had been sold to Republic Airways, and MDA had ceased operations. Thus, the situation at US Airways with regard to Embraers had changed between the date the merger was announced and the beginning of the arbitration hearings: the Embraer 170s had been sold, and Embraer 190s had been acquired. So it was entirely appropriate to separate the exhibits that related to those two models of aircraft from the exhibits that described other types of aircraft. Captain Carey's arbitration testimony — again in a portion omitted from Plaintiffs' brief excerpt — makes it clear that he was explaining to the Arbitration Board that, between the time of the merger announcement on May 19, 2005 and the arbitration proceedings in December 2006, all of the Embraer-170s had been sold to Republic Airways and were no longer operated by US Airways, and US Airways had begun preparations to operate the Embraer-190. *See* December 11, 2006 Hearing Tr., Supp. Linsey Decl. Ex. D, at 40-43.[27]

(c) As with Captain Kirch, Plaintiffs argue that Captain Carey, by the time of his deposition in this case, had "departed from the position" that the MDA pilots were not furloughed. Pls.' Mem. at 34. But again, that misstates Carey's (and the Merger Committee's) position. Captain Carey explained it clearly: "[t]hey hadn't been — they had not received a recall notice to US Airways mainline. But they were flying at MidAtlantic…. They were given furlough notices and they were never given a recall notice to US Airways. But they were given an offer of employment for MDA." Carey Dep. Tr. at 77:5-8, 74:7-10. Thus,

[27] Plaintiffs should understand this, as at least some of them were recalled to the mainline in connection with US Airways' acquisition of the Embraer-190s. Pls.' Mem. at 23.

Captain Carey drew a distinction between recall to the mainline and an offer to MDA, and his testimony, including the portions quoted by Plaintiffs, is entirely consistent with that position.

(d) Plaintiffs further argue that a January 2005 company-generated seniority list was "entered into evidence with the consent of counsel for the US Airways Merger Committee, leaving the US Airways pilots in the untenable position of having advocated against the inclusion of many of their own pilots in a merged seniority list." Pls.' Mem. at 41-42. This is simply nonsense. Defendants' Memorandum clearly shows that the US Airways Merger Committee *successfully rebutted* the America West Merger Committee's attempt to use the January 2005 seniority list as evidence that the CEL pilots should not be on the merged list, and the Arbitration Board did not rely on the list. Defs.' Mem. at 32-33, 49-50 n.11. Moreover, Plaintiffs fail to note that, in the process of rebutting the January 2005 list, the US Airways Merger Committee was able to submit a list from June 2005 that "for the first time showed the furloughed Mainline pilots flying for MDA as *active pilots* and added the CEL pilots at MDA to the Mainline seniority list." Pls.' Ex. 17 at 11 (emphasis added).

2. There Are No Material Facts to Establish Animus Toward the Plaintiffs

Plaintiffs also appear to suggest that the Merger Committee somehow held them in disdain or otherwise sought to hurt them. Pls.' Mem. at 8, 39, 43-44. First, they assert that ALPA had a "longstanding…preference for limiting the number of small jets that may be flown by a legacy carrier's Affiliates." Pls.' Mem. at 8. While this assertion is not particularly relevant to the rationality of the conduct of the US Airways Merger Committee, Plaintiffs offer it apparently to give the Court the impression that ALPA bore some kind of animus to pilots who flew relatively small jets such as the Embraer-170. Plaintiffs, however, cite to nothing in the record — because there is nothing — to support their contention that ALPA had such a

preference. Although Plaintiffs refer to the deposition transcripts of Captain Don Butkovic and Captain Kim Snider to support this contention, neither of those individuals testified to any such thing. *See* Butkovic Dep. Tr. at 43-44 (testifying that US Airways sought to have larger and larger jets — not smaller jets — flown at affiliate carriers — not the mainline), Snider Dep. Tr. at 14-15 (testifying that an interim small jet agreement entered into in connection with a contemplated merger of US Airways and United Airlines doubled the number of fifty-seat jets that could be flown by US Airways).

Plaintiffs also assert that "reportage was made by MEC member John Brookman that he and his wife had overheard a conversation" between Captains Carey and Snider that somehow suggest a disdainful attitude toward the MDA pilots. Pls.' Mem. at 44, Portale Decl. at ¶ 55. First, assuming the "reportage was made" to Portale, Portale's testimony that John Brookman told him that he heard a conversation between Carey and Snider is hearsay, inadmissible to show that the conversation occurred or who said what to whom, and cannot be considered in opposition to ALPA's motion for summary judgment. *See* FRE 801, 802 (hearsay is inadmissible); FRCP 56(e)(1)("A supporting or opposing affidavit must be made on personal knowledge [and] set out facts that would be admissible in evidence.") Further, as explained in Defendants' Memorandum, that conversation is nothing more than a discussion of how the Arbitrator Board might integrate the lists and does not suggest animus toward the MDA pilots. Defs.' Mem. at 54 n.12.

3. Statements of Other ALPA Officials are Consistent with the Position of the US Airways Merger Committee

Plaintiffs also seek to rely on several statements by various MEC members, from their depositions taken years after the arbitration proceedings, that the MDA pilots were furloughed, in a futile effort to raise some sort of controversy as to what the Merger Committee

and MEC position was during the arbitration proceedings. Pls.' Mem. at 35-38. As with Plaintiffs' quotations of statements of the Merger Committee, any alleged confusion or inconsistency disappears if one recognizes — as Plaintiffs refuse to — that there was a distinction between the MDA division and the US Airways mainline. We address these statements separately.

(a) Plaintiffs claim that a statement attributed to US Airways MEC member Garland Jones by the America West Merger Committee shows a conflict within the Merger Committee about the position of the MDA pilots. Pls.' Mem. at 43. According to the America West Merger Committee, Jones "stated clearly that US Airways pilots who were flying at MDA remained furloughed from US Airways and would be treated as such in the US Airways – America West pilot seniority integration." Pls.' Ex. 17 at 11 n.7. But the only difference between that statement and the position of the US Airways Merger Committee is one of emphasis: the US Airways Merger Committee promoted the MDA pilots as active US Airways employees, notwithstanding the fact that they had not been recalled to the mainline. And even on that score, the America West Merger Committee observed that between the time of Jones's statement — prior to the merger proceedings, in July 2005, and not, as Plaintiffs assert, in "July 2006 — two months after the merger," — Jones adopted the US Airways Merger Committee's emphasis on active employment. Pls.' Ex. 17 at 11 n.7. Thus, the America West Merger Committee pointed out that Jones "apparently succumbed to the political pressure from the furloughed pilots and later sponsored an MEC resolution 'that the US Airways MEC support[] the Merger Committee utilization of the 337 MDA positions brought to the merger to advance the status of the most senior 337 furloughed US Airways pilots in the merger process.'" *Id.*

(b) Accordingly, Plaintiffs' claim that Jones was "activist" in support of the "disenfranchisement" of MDA pilots, is not just wrong, it is bizarre. Pls.' Mem. at 36. As Jones made clear, and as Plaintiffs concede by quoting correctly from his deposition, working for MDA was different than working for the mainline: there was no way "to make, by some magic, the MDA pilots not furloughed pilots but, in fact, active *main line* pilots." *Id.* at 36-37 (emphasis added). And when Jones stated that he "would not have supported it, nor can I imagine the merger committee or the MEC support it," the "it" is the position that there was no distinction whatsoever between MDA and the mainline.

(c) Finally, the US Airways MEC's May 21, 2007 resolution, which Plaintiffs note at pages 38 and 39 of their memorandum, is entirely consistent with the US Airways Merger Committee's position. The full relevant text of that resolution (again, Plaintiffs' choice of quotes is highly selective) is as follows:

> At the other end of the AW list, the Nicolau Award integrates the junior AW pilot, hired on 4/4/05, senior to all of the US pilots who were actively flying EMB aircraft under the ALPA-US Airways CBA on 5/19/05, the date of announcement of the merger. Arbitrator Nicolau's Opinion incorrectly states that the US Merger Committee's Certified List shows these pilots as furloughed as of that date. In fact, our Certified List shows 326 of them, starting with Dean Colello, as flying at MDA on that date. Those pilots were paying dues to ALPA, flying EMB jet aircraft on the US certificate, pursuant to pay and other arrangements specified in the ALPA-US Airways CBA. First Officer Colello and several hundred of his colleagues are now actively flying Airbus and Boeing aircraft again, as they have for nearly twenty years of their piloting careers.

Pls.' Ex. 3 at 2. Thus, the MEC resolution draws the same implicit distinction between MDA and the mainline that the Merger Committee, and every ALPA official who testified in this case, drew. The MDA pilots were flying for MDA and thus not on furlough from US Airways as a whole, though they remained on furlough *from the*

mainline. Further, the statement points out, as the US Airways Merger Committee did at the arbitration, that in the period between the merger announcement and the issuance of the Opinion and Award, many MDA pilots had been recalled to the mainline, i.e. flying Boeing and Airbus aircraft.

C. THERE ARE NO MATERIAL FACTS TO SUPPORT PLAINTIFFS' APPARENT ARGUMENT THAT THEY WERE DECEIVED AS TO HOW THE MERGER COMMITTEE WOULD REPRESENT THEM

Plaintiffs appear to argue, at a few scattered points in their Memorandum, that ALPA breached its DFR to them by representing that the Merger Committee would advocate that they were active US Airways pilots, while in fact the Merger Committee represented them as furloughed.[28] An examination of Plaintiffs' Memorandum, however, reveals not a single quotation, paraphrase, or any other actual assertion of fact that even suggests that any member of the Merger Committee (or the MEC) told the pilots it would advocate a position different from the one it took during the arbitration. Plaintiffs have not cited *any* particular instances where a Merger Committee or MEC made a representation, prior to the arbitration, as to how the MDA pilots would be represented. Plaintiffs' conclusory assertions in their Memorandum, of course, are not evidence. *See Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 219 (2d Cir. 2005) ("Nor is a genuine issue created merely by the presentation of assertions that are conclusory.")

The only conceivable evidence as to what the MDA pilots were told about how they would be represented during the arbitration proceedings is Portale's testimony that "the answer was always that we were active US Airways pilots." Portale Decl. at ¶ 44. As set forth

[28] *See, e.g.* Plaintiffs' Memorandum at 20 ("More troubling is that they made representations as to how they would present the E-170 pilots, and reneged on those representations"), and 83 ("To be clear, plaintiffs are not merely assailing ALPA's tactical methodologies used during the arbitration. During the same time period that ALPA representatives were telling the 'MDA' pilots what they wanted to hear —- that the union and the merger representatives recognized them as active pilots who were not on furlough status, those union representatives designed a document that could be interpreted only in a manner antithetical to the representations that they had made.")

above, however, the Merger Committee's position, consistent with the Certified Seniority List and the testimony of the Merger Committee members during the arbitration, is and was that the US Airways pilots were active pilots flying for the MDA Division of US Airways. Thus, they were represented as active US Airways pilots, consistent with the alleged representations. What they were not represented as were active US Airways *mainline* pilots, because that would have been a false representation, easily rebutted, and taking such an easily-rebutted position could well have harmed *all* of the US Airways pilots in the arbitration proceeding.

Further, the Pilot Data Verification Letters and Merger Committee Responses put the lie to any notion that the Merger Committee dishonestly represented the US Airways pilots. They clearly showed the pilots without "FUR" as their status, with MDA time listed separately, but with furlough start dates and no furlough end dates. Indeed, some MDA pilots, including several of the Plaintiffs, complained about the very fact that the Merger Committee did not intend to present them as active mainline pilots. The Pilot Data Verification Letters and Merger Committee Responses both made clear that the Merger Committee would be drawing a distinction between MDA and the mainline. As discussed above in our discussion of the statute of limitations, both types of document stated, in bold-face, italicized, and underlined type right above a pilot's data, "Note: The ending date for your current furlough period should be blank pending a recall." *See* Defs.' Exs.' 62, 64, 69, 71, 88, 90, 109, and 110. Thus, there can be no question that the Merger Committee told the pilots precisely how their status as US Airways pilots flying for the MDA division would be represented, and any claims based on an alleged misrepresentation of the Merger Committee's intention must therefore fail.

CONCLUSION

For the foregoing reasons, the ALPA Defendants respectfully request that the Court grant their motion for summary judgment and enter an order dismissing the Supplemental Complaint in its entirety.

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Respectfully submitted,

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