Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re: AMR Corporation, *Debtor*.

JOHN KRAKOWSKI, *et al.*,
Petitioners,

v.

ALLIED PILOTS ASSOCIATION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

COURT OF APPEALS DECISION

Krakowski v. Allied Pilots Association, 834 Fed. Appx. 660, 2021 U.S. App. LEXIS 2644, 2021 WL 319443, Appeal Nos. 19-3506 (L), 19-4378 (CON) (2d Cir. Feb. 1, 2021).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE: AMR CORP., Debtor,	No. 19-3506(L) No. 19-4378(CON)
JOHN KRAKOWSKI, *et al.*, Plaintiffs-Appellants	D.C. No. 17-CV-03237 (KMW)
v.	D.C. No. 18-cv-06187 (LAK)
ALLIED PILOTS ASSOC., AMERICAN AIRLINES, INC. Defendants-Appellees.	UNPUBLISHED OPINION

Appeal from the United States District Court for the Southern District of New York District Judges Kimba Wood and Lewis A. Kaplan

February 1, 2021

Before Circuit Judges Amalya L. Kearse, Pierre N. Leval, Raymond J. Lohier, Jr.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court are AFFIRMED.

The Plaintiffs-Appellants are pilots formerly employed by Trans World Airlines, Inc. ("TWA") and now employed by American Airlines, Inc. They appeal from both an October 2, 2019 judgment of the District Court (Kaplan, J.) and a December 18, 2019 judgment of the District Court (Wood, J.). Each judgment affirmed orders entered by the United States Bankruptcy Court for the Southern District of New York (Lane, B.J.) granting summary judgment in favor of Allied Pilots Association ("APA") and American Airlines on some claims and dismissing all other claims on a motion to dismiss. The Plaintiffs-Appellants claimed that APA, the union representing all American Airlines pilots, including legacy TWA pilots, breached its duty of fair representation, and that American Airlines colluded in that breach. We assume the parties' familiarity with the underlying facts and prior record of proceedings, to which we refer only as necessary to explain our decision.

We affirm the dismissals of the Plaintiffs-Appellants' claims against APA and American Airlines for substantially the reasons stated (a) by the Bankruptcy Court in its opinions and orders entered June 3, 2014, September 3, 2015, September 22, 2015, April 14, 2017, and June 12, 2018, (b) by Judge Kaplan in his opinion and order dated October 2, 2019, and (c) by Judge Wood in her opinion and order dated December 17, 2019.

We have considered the Plaintiffs-Appellants' remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgments of the District Court are AFFIRMED.

DEC. 2019 DISTRICT COURT DECISION
(*Krakowski II*)

Krakowski v. American Airlines, Inc., 610 B.R. 714, 2019 U.S. Dist. LEXIS 218479, 2019 WL 6879517, Case No. 17-CV-03237 (S.D.N.Y. Dec. 17, 2019).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN KRAKOWSKI, *et al.*, Plaintiffs-Appellants — No. 17-CV-03237 (KMW)

v.

ALLIED PILOTS ASSOC., AMERICAN AIRLINES, INC. Defendants-Appellees. — UNPUBLISHED OPINION

Appeal from the United States Bankruptcy Court for the Southern District of New York
Bankruptcy Judge Sean H. Lane

December 17, 2019

Before District Judge Kimba M. Wood

OPINION & ORDER

John Krakowski, Kevin Horner, and M. Alicia Sikes (together, the "Appellants") are pilots, currently employed by American Airlines, Inc. ("American") and represented by the Allied Pilots Association ("APA").

They were employed by Trans World America ("TWA") until it merged with American. In the adversary bankruptcy proceeding below, they bring several claims arising from American's and APA's treatment of former TWA pilots during and after the American-TWA merger.

In a pair of decisions, the Bankruptcy Court, Hon. Scan H. Lane, dismissed all of Appellants' claims, as follows: (1) a breach of contract claim against American, for failure to state a claim; (2) a breach of duty of fair representation claim against APA, as procedurally barred, under the law of the case doctrine, by the Bankruptcy Court's prior dismissal of an identical claim in a separate adversary proceeding between the same parties; and (3) a claim that American colluded in APA's breach of the duty of fair representation, because plaintiffs did not have a viable duty of fair representation claim, and, in any event, failed to adequately allege collusion.

Appellants now appeal from the Bankruptcy Court's orders dismissing their claims. For the following reasons, the decisions of the Bankruptcy Court are AFFIRMED.

BACKGROUND

I. Relevant Facts

Appellants are former TWA pilots who currently fly for American. (Second Amended Complaint ("SAC") ¶ 8.) In April 2001, American acquired TWA's assets. (*Id*. ¶ 16.) In November 2001, American and APA executed a document called "Supplement CC", which merged the former TWA pilots into American's pilot

seniority list. (*Id.* ¶ 17.) Under Supplement CC, former TWA pilots were integrated into American's seniority list with none or a fraction of the seniority they had earned at TWA. (*Id.* ¶¶ 18-19.) To compensate the former TWA pilots for their loss of seniority, Supplement CC established what the parties call a "protective fence" in TWA's former hub of St. Louis, Missouri. The "fence" guaranteed a certain number of captain and first officer positions for St. Louis-based former TWA pilots, and thus permitted former TWA pilots to fly St. Louis-based routes that would otherwise be unavailable due to their reduced seniority. (*Id.* ¶ 19-20.)

Supplement CC was a supplement to American's then-existing collective bargaining agreement with APA (the "Old CBA"). When American and APA agreed to Supplement CC, the former TWA pilots were not represented by APA. They were represented by a different union. (*Id.* ¶ 27.) After the acquisition, however, the former TWA pilots became part of the bargaining unit of American pilots represented by APA. (*Id.* ¶ 29.)

Roughly a decade later, in November 2011, American filed for bankruptcy. (*Id.* ¶ 34.) As part of the bankruptcy proceedings, the Bankruptcy Court granted American's request to abrogate the Old CBA. (*Id.* ¶ 36.) The Old CBA and its supplements, including Supplement CC, became null and void as of September 5, 2012. (*Id.* ¶ 37.)

In the course of negotiating a replacement collective bargaining agreement, American and APA signed a

letter of agreement called "LOA 12-05".[1] It had two main provisions. First, the seniority list established by Supplement CC would remain in place, notwithstanding the termination of Supplement CC. (LOA 12-05 at 1, Appendix to Appellants' Opening Brief ("App'x") at 134). Second, the protective "fence," which gave preferential flying rights to former TWA pilots on St. Louis-based routes, would not remain in place. (SAC ¶ 39.) APA and American agreed to appoint an arbitrator to decide how to compensate the former TWA pilots for the loss of the "fence." The parties agreed that the arbitrator would not be permitted to revise the seniority list established by Supplement CC but could award other types of compensation. (LOA 12-05 at 1.)

II. Procedural History

Appellants have brought many cases against American and APA, several of which are now adversary proceedings in American's bankruptcy case. The parties refer to these adversary proceedings, chronologically by date of filing, as *Krakowski I* and *Krakowski II*. The earlier case is *Krakowski I*. *See Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, Case No. 11-15463, Adv. Proc. No. 13-01238 (Bankr. S.D.N.Y.) [hereinafter *Krakowski I*]. The instant matter is known as *Krakowski II*. *See Krakowski v. Am. Airlines, Inc. (In re AMR*

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[1] Although Appellants did not include the New CBA in their appendix on appeal, they appended it to the First Amended Complaint. The Bankruptcy Court properly considered the New CBA and its supplements, including LOA 12-05, in deciding APA's motion to dismiss. *See In re AMR Corp.*, 538 B.R. 213, 217 (Bankr. S.D.N.Y. 2015) (citing *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)).

Corp.), Case No. 11-15463, Adv. Proc. No. 14-01920 (Bankr. S.D.N.Y.) [hereinafter *Krakowski II*].[2] A brief description of the proceedings in *Krakowski I* and *Krakowski II* follows.[3]

a. *Proceedings in Krakowski I*

Krakowski I was initially filed in the Eastern District of Missouri in 2012. *See Krakowski I*, 927 F. Supp. 2d 769, 771 (E.D. Mo. 2013). It was transferred to the Bankruptcy Court for the Southern District of New York on March 4, 2013. *Id*. at 776.

In *Krakowski I*, Appellants claimed APA breached its duty of fair representation to former TWA pilots by agreeing, in the New CBA, to compensate former TWA pilots for the loss of the protective "fence" via an arbitration procedure that could not modify the unfair seniority list established by Supplement CC. Appellants also claimed American colluded in this breach. *See Krakowski I*, 199 L.R.R.M. (BNA) 3584, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *4-6 (Bankr. S.D.N.Y. June 3, 2014).

On June 3, 2014, the Bankruptcy Court dismissed the complaint for failure to state a claim, reasoning that APA's agreement not to modify the seniority list

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[2] There is a third case, which the parties call *Krakowski III*, but it is not relevant to the present appeal. *See Krakowski v. Am. Airlines (In re AMR Corp.)*, Case No. 11-15463, Adv. Proc. No. 16-01138 (Bankr. S.D.N.Y.).

[3] For clarity, all filings in these cases, regardless of the court in which they were filed, are cited as "Krakowski I" or "Krakowski II."

when negotiating the New CBA did not breach APA's duty of fair representation. *See id*. On October 2, 2019, the District Court, Hon. Lewis Kaplan, affirmed the Bankruptcy Court's dismissal of the complaint.[4] *See Krakowski I*, 610 B.R. 434, 2019 U.S. Dist. LEXIS 171319, 2019 WL 4857640, at *7 (S.D.N.Y. Oct. 2, 2019) (Kaplan, J.).

b. *Proceedings in Krakowski II*

The instant case, *Krakowski II*, was initially filed in the Eastern District of Missouri on May 1, 2013. (App'x at 9-19). Appellants filed their First Amended Complaint six days later, on May 7, 2013. (First Amended Complaint ("FAC"), App'x at 20-31.). Thereafter, the case was transferred to the Southern District of New York on motion of the defendants, where it was referred to the Bankruptcy Court. (App'x at 8.)

The First Amended Complaint in *Krakowski II* made three claims. In Count One, Appellants alleged that American breached the New CBA by placing former TWA pilots on American's seniority list according to Supplement CC, rather than crediting them for seniority they earned at TWA. (FAC ¶¶ 36-45.) In Count Two, Appellants alleged that APA breached its duty of fair representation by agreeing to continue to use the seniority list established by Supplement CC, which violated the New CBA; was unfair to former TWA pilots; and treated former TWA pilots worse than

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[4] Judge Kaplan also affirmed several other decisions of the Bankruptcy Court that are not directly relevant to the appeal now before the Court. *See Krakowski I*, 2019 U.S. Dist. LEXIS 171319, 2019 WL 4857640, at *6-13.

the pilots of other airlines acquired by American. (*Id*. ¶¶ 43-50.) In Count Three, Appellants alleged that American colluded with APA in APA's breach of the duty of fair representation. (FAC ¶ 52-54.)

On September 22, 2015, the Bankruptcy Court partially granted Appellees' motions to dismiss the First Amended Complaint. *Krakowski II*, 538 B.R. 213, 215 (Bankr. S.D.N.Y. 2015). The Bankruptcy Court dismissed Count One, the breach of contract claim against American, for failure to state a claim, reasoning that Appellants' argument was incompatible with the plain language of the New CBA. *Id*. at 218-22. The Bankruptcy Court permitted Appellants to proceed with Count Two, the duty of fair representation claim against APA, but only to the extent the claim was based on the alleged unfairness of the seniority list established by Supplement CC, and only as it pertained to the narrow time period after the Old CBA was abrogated but before the New CBA was executed.[5] *Id*. at 223-24. The Bankruptcy Court warned Appellants that they would be duplicating their claims in *Krakowski I* if they argued that APA breached its duty of fair representation by agreeing to continue Supplement CC's allegedly unfair seniority list in the New CBA. *Id*. The Bankruptcy Court granted plaintiffs leave to amend Count Two, the duty of fair representation claim, and Count Three, the accompanying claim that

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[5] In a subsequent conference, the Bankruptcy Court confirmed that Count Two survived only in relation to this discrete time period, when "the old CBA was abrogated … and before there was a new CBA." *Krakowski II,* 567 B.R. 247, 253 (Bankr. S.D.N.Y. 2017).

American colluded in APA's breach of its duty of fair representation. *Id*. at 223-24.

On October 22, 2015, Appellants filed their Second Amended Complaint. (App'x at 219-28). The Bankruptcy Court dismissed the Second Amended Complaint on April 14, 2017. *See Krakowski II*, 567 B.R. 247, 250 (Bankr. S.D.N.Y. 2017). The Bankruptcy Court found that Appellants' amended duty of fair representation claim pertained only to APA's agreement to the New CBA, rather than to the narrow time period between the Old CBA and the New CBA. *Id*. at 254-58. The claim, as pled, was essentially identical to the parallel claim in *Krakowski I*, which the Bankruptcy Court had already dismissed. Appellants' duty of fair representation claim in *Krakowski II* was accordingly dismissed under the law of the case doctrine. *Id*. at 258. Appellants' accompanying claim that American colluded in APA's breach of its duty of fair representation was also dismissed. *Id*. The court also noted that Appellants failed to allege any acts by American that would be legally sufficient to prove that it colluded with APA in a breach of the duty of fair representation. *Id*. at 258-60.

Appellants appealed the Bankruptcy Court's dismissals of the First Amended Complaint and Second Amended Complaint to this Court on April 28, 2017. (App'x at 414-16.)

LEGAL STANDARD

When hearing an appeal from an order of the Bankruptcy Court, this Court reviews the Bankruptcy Court's findings of law *de novo* and its findings of fact

for clear error. *See In re Bayshore Wire Prods. Corp.*, 209 F.3d 100, 103 (2d Cir. 2000). The Bankruptcy Court's decisions regarding the management of its docket are reviewed for abuse of discretion. *See In re Fletcher Intern. Ltd.*, 536 B.R. 551, 557 (S.D.N.Y. 2015) (Sullivan, J.). This Court may affirm on any ground supported by the record, not just the ones relied upon by the Bankruptcy Court. *See Freeman v. Journal Register Co.*, 452 B.R. 367 369 (S.D.N.Y. 2010) (Koehl, J.).

A complaint must be dismissed if it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*; *see also Fed. R. Bankr. P.* 7012. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Aschroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).[6]

Where a complaint alleges that a union has violated its duty of fair representation, the District Court has a

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[6] Appellants' assertion that this case is governed by the "no set of facts" standard set forth in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), is without merit. The *Conley* standard was overruled by *Iqbal* and *Twombly* and has no continuing vitality. *See Iqbal*, 556 U.S. at 670.

special duty to "construe complaints so as to avoid dismissals and … give plaintiffs the opportunity to file supplemental pleadings unless it appears beyond doubt that a good cause of action cannot be stated." *Eatz v. DAIS Unit of Local Union Number 3 of Intl. Bhd. of Elec. Workers*, 794 F.2d 29, 34 (2d Cir. 1986).

"In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the facts stated in the complaint, documents attached to the complaint as exhibits and documents incorporated by reference in the complaint." *Hayden v. Cty. of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999).

DISCUSSION

The Bankruptcy Court properly dismissed all of Appellants' claims because none states a claim upon which relief could be granted. Appellants' claims are reviewed in the order in which they were initially pled.

I. The Bankruptcy Court Did Not Err in Dismissing Appellants' Breach of Contract Claim Against American.

In Count One of the First Amended Complaint, Appellants claim American breached the New CBA by placing former TWA pilots on the seniority list established by Supplement CC. According to Appellants, in order to comply with the New CBA, American should have placed the former TWA pilots on its seniority list according to the time they started working at TWA. (FAC ¶¶ 36-39.) The Bankruptcy Court dismissed this claim, holding that it "is inconsistent with the plain language of the New CBA." *Krakowski II*, 538 B.R. at 218. Appellants now argue the Bankruptcy Court

erroneously failed to consider American's general practices when interpreting the New CBA. (Appellants' Opening Brief ("Op. Br.") at 22-24, ECU' No. 6.) Their position is unpersuasive.

"When courts interpret CBAs, traditional rules of contract interpretation apply as long as they are consistent with federal labor policies. When provisions in the agreement are unambiguous, they must be given effect as written. Only when provisions are ambiguous may courts look to extrinsic factors—such as bargaining history, past practices, and other provisions in the CBA—to interpret the language in question." *Aeronautical Indus. Lodge 91 of Int'l Ass'n of Machinists and Aerospace Workers v. United Techs. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000) (citations omitted).

Appellants argue the New CBA required American to place the former TWA pilots on its seniority list according to their "Occupational Date," a date that Appellants claim is tied to the time the former TWA pilots started working at TWA. Appellants allege that Section 2(AA) of the New CBA requires a pilot's placement on American's seniority date be determined by his or her "Occupational Date." (FAC ¶ 23.) They allege that, under American's "general practice," a pilot's "Occupational Date" is simply his or her date of hire, plus a period of about seven weeks. (*Id.* ¶ 22). They further claim "American has consistently acknowledged each former TWA pilot's 'Date of Hire' as the date they were hired by TWA." (*Id.* ¶ 20.) Thus, Appellants conclude that that American breached the New CBA when it failed to base the former TWA pilots' seniority on the dates they started working at TWA, and instead

placed them on its seniority list according to Supplement CC. (*Id.* ¶ 25.)

As the Bankruptcy Court correctly determined, however, this was the very outcome that the New CBA required. Section 13 of the New CBA sets out the New CBA's general seniority rules, but also provides that "certain other rules in this Agreement stipulating specific methods and procedures of applying system seniority shall govern such application of system seniority." (Appendix to APA's Brief ("APA App'x") at 4.) Thus, the parties agreed that, whatever the New CBA's general seniority rules were, they would be trumped by any other, more specific seniority provisions in the New CBA. One such rule was outlined in LOA 12-05, which was incorporated into the New CBA. (Appendix to American's Brief ("American App'x") at SA000008, 10.) LOA 12-05 provides that the "TWA Pilots' existing seniority placements on the Pilots' System Seniority List are final and shall continue pursuant to Section 13 of the CBA, notwithstanding the termination of Supplement CC and any preferential flying rights associated with those seniority placements." (LOA 12-05 at 1.) In other words, the parties agreed that LOA 12-05, rather than the general seniority provisions of the CBA, would govern seniority for former TWA pilots.

Thus, rather than breaching the New CBA, American followed the New CBA's express provisions when it continued to use the seniority list placements established by Supplement CC, rather than ranking the former TWA pilots according to their Occupational Dates or Dates of Hire. Even though the Bankruptcy

Court made this precise point when dismissing Count One of the First Amended Complaint, Appellants' Opening Brief makes no mention whatsoever of LOA 12-05. Thus, Appellants fail to identify any error in the Bankruptcy court's dismissal of their breach of contract claim.

Even if LOA 12-05 did not trump the general seniority provisions of the New CAA, Appellants' claims, based on those general provisions, would still fail. According to Appellants, American has "consistently acknowledged" that former TWA pilots' "Date of Hire" is the date the pilot was hired by TWA, and American's "general practice" was that a pilot's Occupational Date is a date some 45 to 49 days after the Date of Hire. (FAC §§ 20, 22.) The New CBA, however, states that a pilot's Occupational Date is "the date a pilot is first scheduled to complete initial new hire training with the Company." (APA App'x at 3.) The New CBA defines "Company" as "American Airlines, Inc." (Id. at 2.) Moreover, the New CBA defines "date of hire" as "[t]he first day as an AA pilot." (American App'x at SA000027.)

These provisions unambiguously tie seniority to a pilot's start at American, not at any other airline. The Court cannot look to extrinsic evidence, such as American's past or general practices, to interpret their meaning. *See Aeronautical Indus. Dist. Lodge 91*, 230 F.3d at 576. Thus, even if LOA 12-05 did not govern the seniority of former TWA pilots (which it does), American would not have breached the New CAA by failing to place pilots on its seniority list according to their start dates at TWA.

Appellants argue that the New CBA's seniority rules are ambiguous as applied to them, such that extrinsic evidence may be used to discern their meaning. First, they argue the New CBA's general seniority rules must have been ambiguous because American did not follow them; that is, former TWA pilots were not placed on the seniority list according to their start date at American. (Op. Br. at 24.) But the manner in which American implemented the New CBA is simply more extrinsic evidence, rather than evidence of ambiguity in the language of the New CAA. Even if this extrinsic evidence could be considered, it would not be persuasive. American's reason for failing to follow the general seniority rules of thy New CBA was not that those rules were ambiguous; rather, it was simply that, per LOA 12-05, American agreed not to apply those rules to former TWA pilots.

Appellants also argue that the CBA's requirement that Occupational Date is tied to a pilot's "new hire training" is ambiguous as applied to former TWA pilots because, as experienced pilots, they never underwent "new hire training." (Appellants' Reply Brief at 16, ECF No. 16). But this fact was not pled, and Appellants do not contest the Bankruptcy Court's refusal to take judicial notice of it. Nor was the Bankruptcy Court's decision in this regard erroneous, since Appellants failed to explain why the type of training former TWA pilots received at American is a "fact … not subject to reasonable dispute," and thus suitable for judicial notice. *Fed. R. Evid, 201(b)*; *201(c)(2)* (court must grant party's request for judicial notice if it is "supplied with the necessary information").

Accordingly, even if the New CBA's general seniority provisions are applicable to former TWA pilots—and they are not—Appellants fail to state a claim for breach of contract by arguing that American failed to place them on its seniority list in accordance with an Occupational Date based on their first day at TWA.[7]

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[7] American argues that, even if Appellants state a claim for breach of contract, they may not pursue it in federal court because they have not exhausted their contractual and administrative remedies. (American's Brief at 23-26, ECF No. 12.) Like the Bankruptcy Court, this Court declines to reach the issue. *See Krakowski II*, 538 B.R. at 221 n.10. Under the Railway Labor Act ("RLA"), "minor disputes," such as those involving the interpretation of collective bargaining agreements, must be arbitrated before the boards of adjustment. See 45 U.S.C. §§ 153, 184. This remedy must be exhausted before an employee can pursue a breach of contract claim based on a collective bargaining agreement in federal court. *See Drywall Tapers and Pointers of Greater N.Y., Local 1974 v. Local 530 of Operative Plasterers and Cement Masons Int'l Ass'n*, 954 F.2d 69, 77 (2d Cir. 1992). An employee need not pursue these remedies, however, if doing so "would be wholly futile." *Id.* (citing *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330, 89 S. Ct. 548, 21 L. Ed. 2d 519 (1969). Here, Appellants concede their breach of contract claim is a "minor dispute." (FAC ¶ 45.) They claim they need not pursue arbitration, however, since most of the members of the arbitration panel would be chosen by American or APA, rendering the process "futile." (*Id.*) Because Appellants fail to state a claim for breach of contract, the Court need not address whether Appellants should be excused from pursuing administrative remedies. *See Peltzman v. Cent. Gulf Lines, Inc.*, 497 F.2d 332, 335 n.5 (2d Cir. 1974) (district court should address whether plaintiff employee should be excused from exhausting RLA's administrative remedies only if it first determines that plaintiff's breach of contract claim is viable).

II. The Bankruptcy Court Did Not Err in Dismissing Appellants' Breach of Duty of Fair Representation Claim.

In the Second Amended Complaint, Plaintiffs allege that APA breached its duty of fair representation to the former TWA pilots, and that American was complicit in that breach. (SAC ¶¶ 42,44.) The Bankruptcy Court's dismissal of these claims was sound.

a. Appellants Fail to State a Claim that APA Breached its Duty of Fair Representation.

Appellants claim APA violated its duty of fair representation to the former TWA pilots by agreeing, in the New CBA, to continue to use the seniority list established by Supplement CC but without the protective "fence" in St. Louis. (Op. Br. 16-19.) This claim is barred by both the rule against duplicative litigation and the law of the case doctrine.

As the Bankruptcy Court explained in its September 22, 2015 Order, Appellants' duty of fair representation claims survived dismissal only to the extent they addressed a narrow subject: whether APA breached its duty of fair representation by continuing to use the allegedly unfair seniority list established by Supplement CC in the time period between the abrogation of the Old CBA and the implementation of the New CBA. *See Krakowski II*, 538 B.R. at 223-24. To the extent the claim addressed APA's agreement to the New CBA, it would be duplicative of *Krakowski I*. *See id*. Despite this guidance, Plaintiffs' Second Amended Complaint includes no allegations whatsoever that APA breached its duty of fair representation in the time period

between the two CBAs. Instead, the Second Amended Complaint merely repeats earlier allegations that APA breached its duty by agreeing to the terms of the New CBA. (SAC ¶ 42.)

This claim, as pled, is barred by the rule against duplicative litigation, which permits a federal court to "stay or dismiss a suit that is duplicative of another federal court suit." *Sacerdote v. Cammack Larhette Advisors, LLC*, 939 F.3d 498, 505 (2d Cir. 2019) (citing *Curtis v. Citibank, N.A.*, 226 F.3d 133.138 (2d Cir. 2000)). This is because "plaintiffs may not file duplicative complaints in order to expand their legal rights." *Curtis*, 226 F.3d at 140.[8] The rule applies where a suit features the same parties or interests, rights asserted, relief prayed for, factual basis, and "essential" legal basis, as a suit already pending in federal court. *Sacerdote*, 939 F.3d at 506 (citing *The Haytian Republic*, 154 U.S. 118, 124, 14 S. Ct. 992, 38 L. Ed. 930 (1894)). Such is the case here. In *Krakowski I*, Appellants "allege[d] that the APA breached its duty of fair representation by agreeing to terminate Supplement CC and to limit any potential relief from altering the seniority of legacy TWA pilots." *Krakowski I*, 2019 U.S. Dist. LEXIS 171319, 2014 WL 2508729, at * 4. This is essentially the same claim Appellants make in the instant matter: in both suits, Appellants allege the APA breached its duty of fair representation by agreeing to use the seniority list established by Supplement CC, without

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[8] *Sacerdote* and *Curtis* refer to the authority of a federal District Court to manage lawsuits that are duplicative of suits already pending in other District Courts. The Court is of the opinion that Bankruptcy Courts have the same authority.

the possibility of revising it, and without the benefit of the "fence." Thus, Appellants have duplicated their claims in *Krakowski I*. The Bankruptcy Court did not err in ordering Appellants to narrow their claims to avoid duplication, or by dismissing their claims when they failed to follow its clear guidance.

In addition to being barred by the rule against duplicative litigation, Appellants' claims alternatively fail under the law of the case doctrine. This is because the *Krakowski I* court considered and dismissed the claim that Appellants duplicate in the instant proceedings. The law of the case doctrine provides that "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). In *Krakowski I*, the Bankruptcy Court dismissed Appellants' duty of fair representation claim against APA, reasoning that APA had no obligation to prioritize the former TWA pilots over other American pilots in the "zero sum game" of seniority when it negotiated the New CBA. *See Krakowski I*, 2019 U.S. Dist. LEXIS 171319, 2014 WI. 2508729, at * 4; *see also Krakowski I*, 536 13.R. at 371-72 (confirming dismissal of Appellants' duty of fair representation claim). Although *Krakowski I* is, of course, a different adversary proceeding than the one now before the court, "[c]ourt have held that the law-of-the-case doctrine applies to different adversary proceedings filed within the same main bankruptcy case." *In re Motors Liquidation Co.*, 590 B.R. 39, 62 (S.D.N.Y. 2018) (Furman, J.) (quotation marks omitted); *see also In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991) (noting that law of the case

doctrine "has application to different lawsuits between the same parties"). Thus, the Bankruptcy Court's earlier ruling on APA's duty of fair representation to the former TWA pilots during the negotiation of the New CBA is the law of the case, and it governs the instant, nearly-identical claims.

b. Appellants Fail to State a Claim that American Colluded in APA's Breach of its Duty of Fair Representation.

Because Appellants fail to state a claim that APA breached its duty of fair representation, they necessarily fail to state a claim that American colluded in any such breach. *See Flight Attendants in Reunion v. Am. Airlines, Inc.*, 813 F.3d 468, 475 (2d Cir. 2016).[9]

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[9] The Bankruptcy Court concluded that, even assuming APA breached its duty of fair representation, Appellants' claims would still fail because Appellants failed to plead facts that would prove American's collusion in the breach. The Court declines to reach this alternative ground for dismissal. It is well-established that a plaintiff employee is excused from exhausting the Railway Labor Act's administrative remedies in pursuing a breach of contract claim against his employer if he also claims the union breached its duty of fair representation against him. *See, e.g., O'Mara v. Erie Lackmvanna R.R. Co.*, 407 F.2d 674, 679 (2d Cir. 1969). Whether this combination of claims can render the employer liable for the union's breach of duty is less clear. The Second Circuit has suggested that "collusion" between a union and an employer in a union's breach of the duty of fair representation may give rise to liability on the employer's part for that breach, but it has never identified what conduct would amount to "collusion," or held an employer liable on this basis. *See Flight Attendants in Reunion*, 813 F.3d at 475 (citing *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985)); *but see Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 603-610 (9th Cir. 2019) (holding

CONCLUSION

The Bankruptcy Court's partial dismissal of the First Amended Complaint and dismissal of the Second Amended Complaint are AFFIRMED.

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that "collusion" cannot be the basis for an employer's liability in the union's breach of its duty of fair representation). In the absence of a viable duty of fair representation claim against APA, the Court declines to broach the subject.

OCT. 2019 DISTRICT COURT DECISION
(*Krakowski I*)

Krakowski v. American Airlines, Inc., 610 B.R. 434, 2019 U.S. Dist. LEXIS 171319, Case No. 18-cv-06187 (S.D.N.Y. Oct. 2, 2019).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: AMR CORP.	No. 18-CV-06187 (LAK)
JOHN KRAKOWSKI, *et al.*, Plaintiffs-Appellants	
v.	
ALLIED PILOTS ASSOC., AMERICAN AIRLINES, INC. Defendants-Appellees.	UNPUBLISHED OPINION

Appeal from the United States Bankruptcy Court for the Southern District of New York Bankruptcy Judge Sean H. Lane

October 2, 2019

Before District Judge Lewis A. Kaplan

MEMORANDUM OPINION

This high-flying bankruptcy appeal arises from a dispute between three airline pilots (the "TWA pilots"),

their labor union Allied Pilots Association ("APA"), and their current employer American Airlines ("AA"). The TWA pilots, who worked for Trans World Airlines, Inc. ("TWA") until it merged with AA, allege on behalf of a putative class of similarly situated individuals that APA breached its duty of fair representation throughout an arbitration process involving AA and that AA colluded in this conduct. The United States Bankruptcy Court for the Southern District of New York (Lane, J.) dismissed some of these claims under Rule 12(b)(6) at the pleading stage and decided the remainder in the defendants' favor on summary judgment. I affirm.

Facts[1]

A. The TWA-AA Merger

The airline industry hit a rough patch in the early 2000s. High oil prices, an economic crisis, and changes wrought by the terrorist attacks of 9/11 caused many major airlines to cut back their operations or fold into bankruptcy.[2] Among the struggling carriers was TWA, an airline with a St. Louis hub that sold many of its

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[1] [I] take the following facts primarily from the statements of material facts. The TWA pilots neglected to include their responses to AA's statement of material facts on the record, while AA filed that statement—but not the TWA pilots' responses—alongside its brief. I therefore reviewed the response statement from the bankruptcy court's docket. *See* Bkr. Ct. Docket, DI-122 (hereinafter "AA SMF").

[2] *See* ELM Ben-Yosef, *The Evolution of the US Airline Industry: Technology, Entry, and Market Structure—Three Revolutions*, 72 J. AIR L. & COMM. 305, 314-15 & n.64 (2007).

assets to AA in 2001.[3] At the time of the sale, TWA employed roughly 1,300 pilots, 650 of whom were based in St. Louis.[4]

APA is a union authorized to collectively bargain on behalf of AA pilots, a group that includes, following the sale, former TWA pilots.[5] At the time of the TWA sale, APA and AA added to their existing CBA an agreement called "Supplement CC," which governed the integration of the TWA pilots into AA's workforce.[6] Supplement CC specified that, for the purpose of AA's "seniority list," a ranking of pilots by years of experience that has significant implications for pay and scheduling preferences,[7] the pilots would not receive credit for the full number of years they served at TWA.[8] The pilots would, however, receive the benefit of a "protective fence" around the St. Louis base.[9] The metaphorical

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[3] AA SMF ¶¶ 1-2.

[4] *Modified Supplemental Class Action Complaint for Damages and Declaratory Relief* ("MSC") ¶¶ 9,11 [DI 48].

[5] *Id.* ¶ 5.

[6] AA SMF ¶ 2.

[7] As one website explains, "[t]he three most important things in the airline piloting profession are seniority, seniority[,] and seniority." Joel Freeman, *How Becoming an Airline Pilot Works*, HOWSTUFFWORKS, https://science.howstuffworks.com/transport/flight/modern/pilot6.htm.

[8] AA SMF ¶ 2.

[9] *Id.*

fence guaranteed former TWA pilots at that base a certain number of captain positions and preferential bidding rights.[10]

B. AA's Bankruptcy and Subsequent CBA Negotiations

AA and its corporate parent, AMR, filed for bankruptcy in the SDNY in 2011.[11] In February 2012, AA began the process of abrogating the CBA with its pilots, including Supplement CC, under 11 U.S.C. § 1113.[12] It served APA with a term sheet indicating that it would eliminate Supplement CC and close the St. Louis base that year.[13] The proposal stated that the TWA pilots would retain their current places on the seniority list and that AA would consider "[p]ossible protections for TWA pilots" to replace those provided by Supplement CC.[14]

APA's board of directors at this time included two locally selected members from each of several pilot bases.[15] In St. Louis—where around 93 percent of AA

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10 *Id.*

11 *Id.* 13.

12 Plaintiffs' Response to APA's Statement of Material Facts, and Their Statement of Additional Material Facts ("APA SMF") ¶ 4 [TWA Pilot App. 143].

13 *Id.*

14 *Id.*

15 *Id.* ¶¶ 19-10.

pilots formerly were of TWA—the representatives were Keith Bounds and Doug Gabel, both TWA pilots.[16] Gabel had been a union representative for over a decade,[17] and Bounds was an experienced representative as well.[18]

Upon receiving the term sheet from AA, APA's board approved a motion proposing three neutral arbitrators to decide how to protect the TWA pilots if Supplement CC were eliminated.[19] The motion proposed also that the arbitrators would be unable to make any changes to the AA seniority list.[20] APA informed its members of this motion the day the board approved it.[21]

In September 2012, the bankruptcy court granted AA leave to abrogate the CBA, including Supplement CC.[22] Three months later, AA and APA, with significant and frequent input from Gabel and Bounds, nego-

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16 *Id.* ¶¶ 11-12.

17 *Id.* ¶ 13.

18 *Id.* ¶ 16. At some point in 2012, Marcus Spiegel, also a TWA pilot, replaced the term-limited Gabel. *Id* ¶ 17.

19 *Id.* ¶ 5.

20 *Id.* ¶ 6.

21 *Id.*

22 AA SMF ¶ 2.

tiated a new CBA.[23] A side letter agreement, LOA 12-05, provided that AA would have the exclusive right to close the St. Louis base and that "a dispute resolution procedure is necessary to determine what alternative contractual rights should be provided to TWA pilots as [a] result of the loss of flying opportunities due to the termination of Supplement CC and the closing of the [St. Louis] base."[24] The dispute resolution procedure would be "final and binding interest arbitration" before a panel of three neutral arbitrators led by Richard Bloch.[25] AA and APA agreed that Bloch was a prominent arbitrator and familiar to industry practitioners.[26] LOA 12-05 provided additionally that "[t]he arbitrators shall decide what non-economic conditions should be provided to TWA pilots," while specifying that "[i]n no event shall the arbitrators have authority to modify [AA's seniority list] … or impose material costs beyond training costs on [AA]."[27]

Gabel and Bounds approved of all the language in LOA 12-05 except, the TWA pilots assert, the limitation on changes to the seniority list.[28] They did not

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[23] *Id.* ¶¶ 4-5; APA SMF ¶¶ 18-19.

[24] AA SMP ¶ 5.

[25] *Id.* ¶ 16.

[26] *Id.*

[27] *Id.* ¶ 7.

[28] APA SMF ¶ 20.

object to the selection of Bloch,[29] and at least Gabel heard feedback from other TWA pilots before determining Bloch would be "a good choice."[30] APA's membership ratified the new CBA, and the bankruptcy court approved the CBA and LOA 12-05.[31] 81 percent of the St. Louis pilots voted in favor of the CBA.[32]

C. The LOA 12-05 Arbitration

In January 2013, AA and APA reached a protocol agreement for the upcoming LOA 12-05 arbitration.[33] It specified that Stephen Goldberg and Ira Jaffe—both nationally recognized arbitrators recommended to APA by Gabel—would round out the arbitration panel.[34] Gabel recommended Goldberg because he had previously ruled in favor of APA in a $23 million arbitration against AA.[35] No TWA pilot complained to Gabel about Goldberg or Jaffe.[36]

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[29] *Id.* ¶ 42.

[30] *Id.* ¶ 41.

[31] *Id.* ¶¶ 8, 10, 60.

[32] *Id.* ¶ 9. AA and APA agreed at the time, and agree now, that a "yes" vote would not preclude the sort of duty of fair representation claims underlying this litigation. *Id.*

[33] AA SMF ¶ 1.

[34] *Id.* ¶ 12; APA SMF ¶ 51.

[35] APA SMF ¶ 52.

[36] *Id.* ¶ 53.

The protocol agreement provided that the TWA pilots and all other AA pilots would be represented by separate committees with their own counsel.[37] There is no dispute that AA played no role whatsoever in selecting the committees or their counsel.[38] Gabel chaired the TWA pilots committee and selected its members—all TWA pilots—and the committee chose as its legal counsel John O'B. Clarke, who had argued three cases involving the same labor statutes before the Supreme Court, and represented the TWA pilots several other times both before and after the arbitration.[39] The AA pilots committee included AA pilots not formerly of TWA.[40] It selected Wesley Kennedy as counsel.[41] The parties dispute whether APA influenced the selection of counsel for both committees,[42] and the TWA pilots committee asserted at the time that Kennedy was conflicted because he was advocating on behalf of all AA pilots in a separate arbitration involving AA's merger with U.S. Airways.[43] APA hired an attorney specializing in ethics to address this concern, and the

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37 AA SMF ¶ 14.

38 *Id.* ¶¶ 17, 20.

39 *Id.* ¶¶ 16, 19; APA SMF ¶¶ 25, 61-66.

40 AA SMF ¶¶ 15, 19.

41 *Id.*

42 APA SMF ¶ 60.

43 *Id.* ¶ 72.

attorney concluded there was no conflict.[44] Despite the committee structure, APA informed the TWA pilots well in advance that they had the right to participate individually in the arbitration.[45] Hundreds did by attending the hearings, accessing the arbitration materials, and making written submissions or oral presentations.[46]

The arbitration began on April 2, 2013. The TWA pilots committee submitted briefing, presented and cross-examined witnesses, and introduced evidence throughout.[47] It argued that LOA 12-05 required the panel to "replicate" Supplement CC's protections.[48] The panel disagreed, reading LOA 12-05 to require "alternative" or "substitute" protections and finding that replicating Supplement CC would be impossible because the St. Louis base was closing.[49] The TWA pilots sought also to reassert their TWA hire dates for the purpose of AA's seniority list.[50] Objecting, AA pointed to LOA 12-05's stipulation that the panel could

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44 *Id.* ¶¶ 75, 78. AA was unaware of the allegations involving Kennedy. AA SMF ¶ 21.

45 APA SMF ¶ 79.

46 *Id.* ¶¶ 87-88; AA SMF ¶ 25.

47 AA SMF ¶¶ 23-24.

48 APA SMF ¶¶ 104-07.

49 *Id.* ¶ 109.

50 *Id.* ¶ 118.

"[i]n no event" modify the seniority list.[51] The panel agreed with AA.[52] As an alternative to these proposals, and in opposing the replication standard, the AA pilots committee suggested that TWA pilots receive "pay protection"—effectively, a guarantee that 340 TWA pilots earn a captain's salary.[53] AA objected to this proposal as exceeding the panel's jurisdiction to "decide what *non-economic* conditions" should be awarded.[54] The panel agreed with AA.[55]

Additionally, the TWA pilots made two "procedural" proposals for future arbitrations: that the panel establish a "multi-party adjustment board" to resolve disputes arising from their proposed "Revised Supplement CC," and that TWA pilots be granted "separate party status" in any future seniority-list negotiation.[56] APA submitted a three-page brief objecting to both proposals as outside the arbitrators' jurisdiction based on LOA 12-05.[57] The panel disagreed with APA's juris-

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[51] *Id.* ¶ 120.

[52] *Id.* ¶ 122.

[53] *Id.* ¶ 112.

[54] *Id.* ¶ 113 (emphasis added).

[55] *Id.* ¶ 116.

[56] *Id.* ¶¶ 124-27.

[57] *Id.* ¶ 124.

dictional argument but nonetheless declined to adopt the proposals on their merits.[58]

Based on the foregoing, the panel issued a unanimous merits award, the contents of which are not detailed in the stipulations and are not relevant here.[59] AA and APA, working with the TWA and AA pilots committees, drafted contractual language to implement the award.[60]

D. Procedural History

Dissatisfied with the arbitration process, the TWA pilots filed a complaint against APA and AA in the Eastern District of Missouri in 2012.[61] The case was transferred to this district's bankruptcy court in 2013.[62] That court dismissed the complaint with prejudice in 2014 while allowing the TWA pilots to amend certain claims in their then-pending Modified Supplemental Class Action Complaint for Damages and Declaratory Relief ("MSC").[63] The primary allegation in the MSC is that APA breached its duty of fair representation of the

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58 *Id.* ¶ 130.

59 *Id.* ¶¶ 131-32.

60 *Id.* ¶¶ 133-34.

61 Docket No. 13-01283 (Bankr. S.D.N.Y. 2013) at 4 [TWA Pilot App. 4].

62 *Id.*

63 Order at 1-2 [TWA Pilot App. 37-38].

TWA pilots and AA colluded with APA in its alleged breaches.

In 2015, the bankruptcy court dismissed the MSC in part. Drawing from the MSC's own organization, the court explained that the single breach count relied on ten alleged breaches.[64] Treating these as effectively separate claims, the court dismissed the claims that APA:

> 1. Failed to bargain on behalf of the TWA pilots over the abrogation of Supplement CC;
>
> 2. Agreed with AA to abrogate Supplement CC without securing equivalent job protections;
>
> 3. Falsely represented to the bankruptcy court that the LOA 12-05 arbitration's purpose was to "replicate" Supplement CC's protections;
>
> 4. Precluded the panel from addressing the seniority list and failed to require that the panel "replicate" Supplement CC's protections.[65]

However, the court allowed the TWA pilots to proceed with their theories that APA:

> 5. Selected the arbitrators without input from the TWA pilots;
>
> 6. Selected the arbitration participants without such input;

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[64] Memorandum of Decision ("Dismissal Op.") at 14 [TWA Pilot App. 69] (citing MSC ¶ 48 [TWA Pilot App. 33]).

[65] *Id.* [TWA Pilot App. 69]; MSC ¶ 48 [TWA Pilot App. 33].

7. Selected the lawyers without such input;

8. Hired Kennedy to represent the AA pilots despite his alleged conflicts;

9. Pursued through the AA pilots committee a position adverse to the TWA pilots;

10. Objected to the TWA pilots committee's procedural proposals.[66]

Following discovery, the bankruptcy court found on summary judgment for the defendants on all six remaining claims.[67] The TWA pilots timely appealed.

Discussion

"District courts … review the legal conclusions of the Bankruptcy Court de novo, and its findings of fact under the clearly erroneous standard."[68] I assume familiarity with the standards governing motions to dismiss under Rule 12(b)(6) and motions for summary judgment under Rule 56.[69]

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[66] Dismissal Op. at 14 [TWA Pilot App. 69]; MSCI ¶ 48 [TWA Pilot App. 33-34].

[67] Memorandum of Decision ("Summary Judgment Op.") at 2-3 [TWA Pilot App. 81-82].

[68] *See, e.g., In re Motors Liquidation Co.*, 428 B.R. 43, 51 (S.D.N.Y. 2010) (citing *AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.)*, 493 F.3d 82, 85 (2d Cir. 2007)).

[69] The TWA pilots argue for a more forgiving pleading standard than *Iqbal* and *Twombly*'s plausibility test. They note that the Supreme Court stated in *Czosek v. O'Mara*, a 1970 decision predating these more recent cases, that "where the courts are

The Supreme Court has been somewhat unclear about the precise source of a union's duty of fair representation.[70] But there is no doubt the duty exists. For our purposes, it is simple. To state a claim for a breach of the duty of fair representation, plaintiffs must allege (1) that the union's "conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith," and (2) "a causal connection between the union's wrongful conduct and their injuries."[71] "A union's actions are 'arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational."[72] Mere "tactical errors" and "even negligence" do not suffice for arbi-

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called upon to fulfill their role as the primary guardians of the duty of fair representation, complaint should be construed to avoid dismissals." 397 U.S. 25, 27, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970). Nothing about this language is at odds with the plausibility test or purports to create a different standard.

[70] *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 76, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991) (describing the doctrine as a "duty grounded in federal statutes, [for which] federal law therefore governs").

[71] *White v. White Rose Food, a Div. of DiGiorgio Corp.*, 237 F.3d 174, 179 (2d Cir. 2001) (first quoting *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44, 119 S. Ct. 292, 142 L. Ed. 2d 242, and then quoting *Spellacy v. Airline Pilots Ass'n–Int'l*, 156 F.3d 120, 126 (2d Cir. 1998)).

[72] *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010) (quoting *O'Neill*, 499 U.S. at 67 (citation and quotation marks omitted)).

trariness.[73] As to "discriminatory," "'substantial evidence' [must] indicate[] that [the union] engaged in discrimination that was 'intentional, severe, and unrelated to legitimate union objectives."[74] "Bad faith, which 'encompasses fraud, dishonesty, and other intentionally misleading conduct,' requires [well-pleaded factual allegations] that the union acted with 'an improper intent, purpose, or motive.'"[75]

The TWA pilots argue that the bankruptcy court failed to construe the complaint as a whole by analyzing separately the ten components of the single, sprawling breach count.[76] This argument is meritless.[77] The court in fact drew its organization from the MSC

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[73] *Id.*

[74] *Id.* (quoting *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971)).

[75] *Id*. at 709-10 (quoting *Spellacy*, 156 F.3d at 126).

[76] Appellant Br. 29-31.

[77] No case to which the TWA pilots point forbids courts from taking this approach. In fact, the Second Circuit analyzed a duty of fair representation claim similarly in *Vaughn v. Air Line Pilots Association, International. See* 604 F.3d at 710-12. Moreover, in rejecting this argument below, the bankruptcy court asserted that it "has examined each of the [TWA pilots'] allegations and has found no basis for the individual claims asserted. … *This assessment does not change whether those allegations are evaluated as a whole or parsed individually*." Summary Judgment Op. at 53 n.41 [TWA Pilot App. 132] (emphasis added).

itself,[78] and the TWA pilots largely follow that framing in their brief. As viewing the components of the alleged breach separately is a sensible way of construing the MSC as a whole, I do so here.

I. The Bankruptcy Court Correctly Dismissed the First Four Claims.

The first four claims were resolved on a motion to dismiss. The analysis that follows therefore ignores the discovery record and assumes the allegations in the MSC to be true.

A. Claims One and Two

Claims one and two center on the abrogation of Supplement CC: that APA (1) failed to bargain on behalf of the TWA pilots over the abrogation of Supplement CC, and (2) agreed to abrogate Supplement CC without securing equivalent job protections. The bankruptcy court held APA's alleged conduct, even if true, could not have injured the TWA pilots because there was no true bargaining or agreement over Supplement CC's termination—the court abrogated it.[79] Moreover, in taking judicial notice of the abrogation proceedings previously before it, the court found that "APA opposed the termination of the collective bargaining agreement at every turn."[80]

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78 *See* MSC ¶ 48 [TWA Pilot App. 33].

79 Dismissal Op. at 14-16 [TWA Pilot App. 69-71].

80 *Id.* at 15.

The TWA pilots devote a single paragraph in their brief to each of their first two claims. As to the first, they argue that the bankruptcy court "ignor[ed] the fact that APA had agreed to terminate Supplement CC before the CBA was abrogated."[81] But the bankruptcy court observed that any "agreement" to terminate Supplement CC "was only a piece of the negotiations" and was not binding in any sense.[82] For that reason, APA's decision to enter into a nonbinding agreement, when the court itself abrogated Supplement CC, cannot satisfy the causation requirement for a duty of fair representation claim.

On the second claim, the TWA pilots argue that "[a]brogation of the CBA [including Supplement CC] did not preclude APA from negotiating with [AA] for 'equivalent job protections.'"[83] Again, this argument fails because the bankruptcy court abrogated Supplement CC.

In effect, the TWA pilots would hold APA accountable for something it did not do. The dismissal of the first two claims is affirmed.

B. Claim Three

Claim three fares no better. The TWA pilots allege that APA and AA falsely told the bankruptcy court during a hearing that the LOA 12-05 arbitration was

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81 Appellant Br. 31.

82 Dismissal Op. at 15-16 [TWA Pilot App. 70-71].

83 Appellant Br. 31.

intended to "replicate" Supplement CC's protections.[84] They appear to read "replicate" as literally as one can —a promise to produce an exact copy of Supplement CC's protections. Thus, their claim is that APA and AA misled the bankruptcy court into believing that it would duplicate Supplement CC via arbitration, and that the court therefore approved LOA 12-05 when it otherwise would not have.

In rejecting this claim, the bankruptcy court relied on the text of LOA 12-05, which, of course, had been presented to it years earlier when it approved the letter.[85] The LOA states that the purpose of the arbitration was "determin[ing] what *alternative* contractual rights should be provided to TWA Pilots as a result of the loss of flying opportunities due to [the] termination of Supplement CC and the closing of the

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[84] MSC ¶ ¶ 22, 48(c).

[85] Dismissal Op. at 17 [TWA Pilot App. 72]. This document was not attached to the MSC, but the court took judicial notice of its contents. The TWA pilots have waived any objection to this decision by not challenging it in their brief. I find, alternatively, that the court properly took judicial notice of the contents of the letter. I find also that the MSC incorporated LOA 12-05 by reference. Claim three references "LOA 12-05" by name, *see* MSC ¶ 48(c) [TWA Pilot App. 33], and the LOA is highly relevant to the allegations throughout the MSC. "In most instances where [incorporation by reference applies], the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint." *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006).

[St. Louis] base."[86] The court observed also that the word "replicate" appears nowhere in LOA 12-05, and it found impossible the premise that the arbitration was intended to "replicate" Supplement CC because the St. Louis base was closing and the protective fence no longer could exist.[87]

The TWA pilots now argue that the bankruptcy court erroneously dismissed their claim because literal replication was the true meaning of LOA 12-05.[88] This argument in fact undermines their claim. The MSC alleges that APA and AA *misrepresented* to the court that the arbitration would replicate Supplement CC's protections. This means the MSC's position is that the true intent of LOA 12-05 arbitration was *not* literal replication. If we agree with the TWA pilots' current argument that literal replication was the true meaning of LOA 12-05, there was no misrepresentation—and therefore no breach by APA—and their claim must be dismissed.

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[86] Dismissal Op. at 17 [TWA Pilot App. 72] (citation omitted).

[87] *Id*. at 18-19.

[88] Of course, the underlying claim is that the court prior to approving LOA 12-05 *did* understand it to require literal replication. This leaves the TWA pilots in the awkward position of arguing that the same court that once was duped into believing that "replicate" *should be* taken literally erroneously dismissed their claim based on its then-present belief that "replicate" *should not* be taken literally, and in fact asserted that it never understood LOA 12-05 in that way. By appealing this issue, the TWA pilots are effectively accusing the court of misrepresenting its initial understanding of what LOA 12-05 required.

Even setting aside this confusion, the TWA pilots' unnatural reading of "replicate" raises several concerns. Chief among them is that it is utterly implausible that APA promised to do the impossible by building a protective fence around an AA hub that was slated for closure. One cannot build even a metaphorical fence around something that does not exist. Agreeing with the TWA pilots would require further a belief that APA and AA left no hint in LOA 12-05 of their agreement to do the impossible, but instead revealed their hidden intent in a stray comment before disclaiming that position as soon as the arbitration began.[89] This is beyond implausible.[90]

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[89] In their brief, the TWA pilots attempt to add further evidence that AA and APA intended a literal replication standard. In their words, the evidence comes from "discovery conducted after [the bankruptcy court's] erroneous ruling," Appellant Br. 32—*i.e.*, facts not alleged in the MSC. They cite to statements from APA's general counsel, none in the text of LOA 12-05, that the arbitration would create protections "just like," "equivalent to," or "not better or worse than" the prior ones. *Id*. (emphasis omitted). Even if it were appropriate to consider this evidence on appeal from a motion to dismiss—it is not—no fair-minded reader could conclude these statements indicate that APA and AA agreed via LOA 12-05 to replicate Supplement CC. Rather, these comments indicate that the parties believed LOA 12-05 would create, as it stated, "alternative" protections.

[90] *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

C. Claim Four

The bankruptcy court dismissed also the claim that APA breached its duty by precluding the arbitrators via LOA 12-05 from addressing the seniority list and failing to require them to "replicate" Supplement CC's protections. It found that even if this allegation were true, the TWA pilots would not be entitled to relief because the claim incorrectly assumes that the only satisfactory remedies in arbitration were changing the seniority list and replicating Supplement CC's protections.[91] Instead, the court found, APA's duty was to balance the interests of two groups of pilots, and the TWA pilots had not alleged APA discriminated in balancing those interests.[92]

To begin, the half of this claim that faults APA for not requiring the arbitrators to impossibly "replicate" Supplement CC fails for the same reasons noted above. And the TWA pilots do not argue that we should read "replicate" more reasonably for the purpose of this claim.[93] In fact, they do not advance any argument at

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[91] Dismissal Op. 19 [TWA Pilot App. 74].

[92] *Id*. at 20.

[93] Even if they did, the MSC alleges that the purpose of the arbitration was resolving the "TWA pilot issue"—the hole left by Supplement CC's abrogation. MSC ¶ 19 [TWA Pilot App. 27]. The TWA pilots thus cannot argue that APA's decision to sign LOA 12-05 precluded them from finding an alternative to Supplement CC. Moreover, "a showing that union action has disadvantaged a group of members, without more, does not establish a breach of the duty of fair representation" because "a union by necessity must differentiate among its members in a variety of contexts." *Flight*

all for why the bankruptcy court's decision to dismiss this claim was erroneous; their argument focuses entirely on the seniority list.[94]

As to APA's agreement precluding the arbitrators from revisiting the seniority list, the bankruptcy court concluded that APA had no duty to demand revisiting it through the arbitration because doing so would harm the AA pilots by lowering their positions on the list. While the TWA pilots find this reasoning "incorrect," they make no clear argument for why this is so.[95]

Binding precedent supports the bankruptcy court's holding. Under the similar facts of *Flight Attendants in Reunion v. American Airlines*,[96] TWA's flight attendants were placed at the bottom of AA's seniority list after the two airlines merged.[97] When AA and U.S. Airways agreed to merge in 2013, the AA flight attendants' union entered into negotiations with the U.S. Airways' attendants' union over integrating their

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Attendants in Reunion v. Am. Airlines, Inc., 813 F.3d 468, 473 (2d Cir. 2016) (quoting *Haerum v. Air Line Pilots Ass'n*, 892 F.2d 216, 221 (2d Cir. 1989)). Even construed generously, the MSC simply does not allege the necessary "substantial evidence" that APA's conduct was "intentional, severe, and unrelated to legitimate union objectives." *Id.* (quoting *Lockridge*, 403 U.S. at 301).

94 *See* Appellant Br. 33-35.

95 *See id.*

96 813 F.3d 468.

97 *Id.* at 470-71.

seniority lists.[98] The U.S. Airways attendants' union argued that TWA attendants should be given seniority based on their TWA dates of hire, but the AA union threatened that the U.S. Airways attendants might not be credited for their years with U.S. Airways if they maintained that position.[99] The unions subsequently agreed to integrate their seniority lists, which meant the TWA attendants would continue receiving no credit for their TWA years.[100]

The TWA attendants sued for breach of the duty of fair representation, and the Second Circuit affirmed the lower court's dismissal of that claim.[101] Based on the aforementioned facts, it held that "the union's decision not to reorder the existing seniority list at [AA] prior to the merger and to agree to integrate the two separate seniority lists based on each flight attendant's 'length of service' cannot fairly be described as either irrational or discriminatory, even though it ultimately, and unfortunately, disadvantaged the plaintiffs."[102] It found principally that the union could not be held liable for merely balancing its members' necessarily competing interests when refusing to modify its existing seniority list in the course of negotiating the

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98 *Id*. at 471.

99 *Id.*

100 *Id.*

101 *Id*. at 472-75.

102 *Id*. at 473-74.

integration of that list with another.[103] "[C]atapulting the former TWA flight attendants up the [AA] seniority list would have resulted in other [AA] flight attendants losing their relative seniority, and such a 'juggl[ing] [of] the existing seniority ladder … would have exposed [the union] to countervailing claims."[104]

The TWA pilots offer no reason why APA's decision was irrational, discriminatory, or in bad faith.[105] They assert only that the bankruptcy court's reasoning that seniority is a "zero sum game" was flawed. Whether the bankruptcy court engaged in an error of reasoning (it did not) is insufficient for reversal on *de novo* review. In any event, *Flight Attendants in Reunion* makes clear that declining to modify an existing seniority list to address past grievances when negotiating the integration of that list with another is not, without more, a breach of the duty of fair representation. As the TWA pilots make no effort to assert the additional facts necessary to advance their claim, they have waived any argument to that effect.[106]

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103 *Id.* at 474.

104 *Id.* (quoting *Haerum*, 892 F.2d at 221).

105 Appellant Br. 33-35.

106 Even then, and as noted with respect to the "replicate" theory, nothing in the MSC when construed generously in favor of the TWA pilots suggests that APA's decision was irrational, discriminatory, or in bad faith, particularly when it is compared to the factually similar decision blessed by the Second Circuit in *Flight Attendants in Reunion*.

Nothing about this analysis changes when these four claims are viewed in the context of the entire MSC. The dismissal order is affirmed.

II. The Bankruptcy Court Correctly Entered Summary Judgment for APA on the Remaining Six Claims.

The remaining six claims were resolved in AMA's favor in a summary judgment order. While the parties agree largely on the basic facts, there are several purported questions of material fact that the bankruptcy court resolved in its opinion. I introduce them where relevant in the sections that follow, mindful that I review the bankruptcy court's fact finding for clear error.[107]

A. Claims Five, Six, Seven, and Eight

As alleged in the MSC, claims five through eight charge APA with:

> 5. Selecting the arbitrators without input from the TWA pilots;
>
> 6. Selecting the arbitration participants without such input;
>
> 7. Selecting the lawyers without such input;
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> 8. Hiring Kennedy to represent the AA pilots committee as counsel despite his alleged conflicts.

Each of these claims turns on APA's alleged role in setting up the arbitration process. None is meritorious. What follows is akin to a "greatest hits" version of their

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[107] *In re Motors*, 428 B.R. at 51 (citing *In re AppliedTheory*, 493 F.3d at 85).

defects, a more comprehensive discussion of which is found in the bankruptcy court's opinion.

The TWA pilots have abandoned claim five by not advancing in their appellate brief any argument that the bankruptcy court resolved the claim erroneously against them. In addition, however, the TWA pilots' own stipulations defeat the claim. The parties agree that Gabel and Bounds, the TWA pilots' union representatives, approved of LOA 12-05's language naming Bloch as lead arbitrator. Gabel in fact determined Bloch would be "a good choice" after hearing feedback from other TWA pilots. Gabel himself recommended the remaining two arbitrators, one of whom had ruled in APA's favor in a $23 million arbitration against AA. Despite these stipulations, the TWA pilots theorize that APA controlled the TWA pilots committee and, thus, that the selection of the panel should be attributed to APA. The bankruptcy court found "no evidence to support [the] assertions that APA in some way controlled or directed the decisions made by the pilots committees."[108] Nothing the TWA pilots argue on appeal suggests this finding was clearly erroneous. As there is thus no dispute of material fact that APA played no role in the committee's decisionmaking, no reasonable jury could conclude that APA acted in an arbitrary, discriminatory, or bad-faith manner with respect to selecting the arbitrators—or that it acted at all. Nor could a reasonable jury conclude that APA caused the TWA pilots' injuries by sitting on the sidelines, or even that the composition of the arbitration panel caused any injuries to the TWA pilots.

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[108] Summary Judgment Op. at 22 [TWA Pilot App. 101].

Claim six fails for similar reasons. The parties stipulate that the TWA pilots' St. Louis union representatives chose Gabel to chair their arbitration committee.[109] They stipulate also that Gabel selected the committee members, all of whom were TWA pilots.[110] It therefore is undisputed that the TWA pilots, not APA, selected the committee members. The stipulations reveal also that APA played no role in selecting the AA pilots committee, whose members the parties agree were selected by an AA pilot.[111] To whatever extent these stipulations do not demonstrate APA's nonparticipation, the bankruptcy court expressly found that APA did not select the committee members. As nothing the TWA pilots argue suggests this finding was clearly erroneous, claim six fails.[112] Even then, the TWA pilots do not argue, and no reasonable jury could infer from this record, that the committee members failed to perform their duties in a manner that injured the TWA pilots. The overwhelming evidence that the committees acted properly severs causation as a matter of law.

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109 APA SMF ¶ 24 [TWA Pilot App. 149].

110 *Id.* ¶ 25.

111 *Id.* ¶¶ 33-35; AA SMF ¶ 15.

112 Moreover, the TWA pilots stipulate that "it would not have been fair for the former TWA pilots to participate in selecting the members of [the] AA Pilots Committee." APA SMF ¶ 36. That stipulation further absolves APA with regard to the AA pilots committee, as the TWA pilots concede APA had no duty to consider their input in forming that committee.

On claim seven, the TWA pilots object to a paragraph in the stipulated facts stating that each committee selected its own counsel.[113] But they do in fact concede that the committees selected their own counsel, as their only objection is to the assertion that the committees did so without influence from APA.[114] APA's influence, they argue, stems from the allegation, rejected above, that "[t]he TWA Pilot Committee was formed by APA as an AD Hoc Committee of itself."[115] The court below did not clearly err by finding that the committees chose their own counsel without APA's influence.[116] Moreover, the TWA pilots have failed to show causation, as they have not argued, and no evidence suggests, that the committee's decision to hire experienced counsel—who represented the TWA pilots in matters both before and after the arbitration—caused their injuries.

Claim eight, that APA hired the allegedly conflicted Kennedy to represent the AA pilots committee, fails for similar reasons. The bankruptcy court found that the AA pilots committee—not APA—hired Kennedy.[117] The

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113 *Id.* ¶¶ 61, 68.

114 *Id.* ¶ 61 [TWA Pilot App. 159].

115 *Id.*

116 Summary Judgment Op. at 21-22, 43-44 & nn. 31-32 [TWA Pilot App. 100-01, 122-23].

117 *Id.* at 44 n.32 ("[N]othing presented the [TWA pilots] suggests that APA controlled or otherwise dictated who the AA Pilots Committee should hire as counsel.").

TWA pilots point to no evidence contradicting this finding and continue resting on their argument that APA controlled the committees. Further, although I need not wade into Kennedy's alleged conflicts, they are de minimus at best, and an independent ethics attorney advised APA that they were not disqualifying. The TWA pilots have not explained how APA's supposed decision to hire Kennedy was bad-faith conduct. And as for the previous three claims, there is no evidence that Kennedy's selection caused the TWA pilots any injury or that the process would have gone differently if the AA pilots committee had retained a different attorney.

B. Claims Nine and Ten

The final two claims turn on APA's alleged conduct during the arbitration.

There is no merit to claim nine, *viz*, that APA pursued, through the AA pilots committee, a position in the arbitration designed to take jobs away from the TWA pilots when it should have attempted to "replicate" Supplement CC's protections. The lack of evidence that APA controlled the AA pilots committee is decisive. But the court below construed the claim more generously as one that APA failed to prevent the AA pilots committee from taking a position adverse to the TWA pilots.[118] This framing does not rescue the claim.

When a union is "faced with two groups of its members with objectives that [are] directly at odds …

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[118] Summary Judgment Op. 46-49 [TWA Pilot App. 125-28].

[s]ubmission of the impending dispute to arbitration [is] an equitable and reasonable method of resolving it," and not "arbitrary, discriminatory, in bad faith, or wholly outside the range of reasonableness."[119] It logically follows that dividing the members into committees is a reasonable way of working around such conflicts when a union negotiates with a third party on behalf of members with directly competing interests. The premise of APA's committee approach to the LOA 12-05 arbitration was that the TWA and AA pilots had conflicting goals. No matter how the new CBA ultimately addressed the treatment of the TWA pilots, there would be winners and losers. When advantages to one group are disadvantages to another, balancing their interests is a zero-sum game.

Viewed in this light, it is easy to see why APA had no duty to control the committees' bargaining positions or to endorse the substantive positions of the TWA pilots. If a union submits a dispute to arbitration to avoid conflicts among its members and then advocates on behalf of some members to the detriment of others, that advocacy would defeat the purpose of the arbitration, and the union would expose itself to legal action by the members it sided against.[120] Agreeing with the TWA pilots would have stranded the union between Scylla and Charybdis—it would breach its duty of fair

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[119] *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1107 (2d Cir. 1991).

[120] That APA unfairly took sides is, of course, the premise of this lawsuit, and of claim nine in particular.

representation by taking sides, and it would breach it by not taking sides.

Even if we passed the duty hurdle, the TWA pilots have failed to show causation. The undisputed facts indicate that the TWA pilots vigorously pursued their positions on replicating Supplement CC's protections and rearranging the seniority list. That APA supporting their position would have swayed the arbitrators' views is extraordinarily unlikely, particularly where "replicating" Supplement CC's protections was impossible and LOA 12-05 expressly precluded the arbitrators from ordering much of the relief the TWA pilots sought.

Claim ten is that APA improperly objected to the TWA pilots' two procedural proposals. The TWA pilots have abandoned this claim by not pursuing it in their appellate brief. But in any event, the undisputed facts would preclude a finding of causation. The procedural proposals concerned future negotiations, and therefore had no bearing on *this* negotiation, the results of which form the basis of the alleged injury. Further, the TWA pilots agree that they had a full and fair opportunity to respond to APA's objections.[121] But most compelling of all is that *the arbitrators disagreed with APA's objections*, which were jurisdictional, and ruled against the TWA pilots' procedural proposals on their merits.[122]

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[121] APA SMF ¶ 86 [TWA Pilot App. 167].

[122] *Id.* ¶ 130

C. Remaining Claims

Although I have now gone through the TWA pilots' entire complaint, they pursue several other claims in their brief. The first of these is that APA breached its duty of fair representation by failing to present an "institutional position against [AA]."[123] In effect, the claim is that LOA 12-05 was rotten from the start—and made rotten everything that followed—because APA acted in "brazen bad faith" by dividing the TWA and AA pilots into separate committees for arbitration.[124] Instead, the TWA pilots argue, APA should have resolved the differences between the two groups internally and then argued on their collective behalf in arbitration.

There are several problems with this theory, the most glaring of which is that it appears nowhere in the MSC. The bankruptcy court found that the TWA pilots raised it for the first time in their response to the defendants' motions for summary judgment and accordingly held it was waived.[125] It is black-letter law that courts will not consider an argument raised for the first time in an opposition brief.[126] But to make matters worse, the TWA pilots do not challenge the bankruptcy

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123 Appellant Br. 37.

124 *Id.* at 39.

125 Summary Judgment Op. at 25-26 [TWA Pilot App. 104-05].

126 *Wright*, 152 F.3d at 178.

court's waiver finding in their appellate brief. They therefore have waived their waiver argument.[127]

That problem aside, the TWA pilots would need to show that the bankruptcy court abused its discretion by declining to consider a theory raised for the first time in an opposition to summary judgment.[128] Even if it did, the TWA pilots then would need to show that APA acted in bad faith by dividing two conflicted groups into separate committees, each with its own representation and counsel.[129] As explained above, dividing union members into committees for arbitration involving a third party is, without more, not evidence of bad faith. The TWA pilots offer no compelling evidence of bad faith. Even construing the facts generously in their favor, the only reasonable inference to draw from APA's decision is that APA wanted to

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[127] *See, e.g., EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 (2d Cir. 2007) (holding the failure to raise an argument in an opening brief constitutes waiver).

[128] *See, e.g., Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 843 (2d Cir. 2013) ("The District Court held that because the plaintiff had never asserted a claim of hostile work environment until her brief in opposition to the motion for summary judgment, it would not consider the claim. We agree with the District Court and will not address the merits of that late-asserted claim."); *Greenidge v. Allstate Ins. Co.*, 446 F.3d 356, 361 (2d Cir. 2006) ("abuse of discretion").

[129] The TWA pilots do not appear to argue that the decision was discriminatory or arbitrary. These arguments are thus waived, but in any event the decision was not discriminatory because it applied equally to both groups and was not arbitrary because APA clearly sought to mitigate the conflicts among the TWA and AA pilots.

avoid the obvious litigation risk that might arise from the forced marriage of the TWA and AA pilots.

The "institutional position" argument fails also for lack of causation. The undisputed facts demonstrate that the TWA pilots had a full and fair opportunity to raise their arguments at arbitration, and the arbitration panel rejected them largely because they fell outside the scope of LOA 12-05. The TWA pilots advance no compelling argument, and no reasonable jury could find, that any institutional position would have been similar to their own or resulted in better relief.

The second additional claim the TWA pilots advance is that APA failed to enforce LOA 12-05 in various ways. This claim undergirds many of those considered above and primarily recycles the allegation that LOA 12-05 bound APA to "replicate" the protections of Supplement CC. The TWA pilots point to cherry-picked statements, none from the text of LOA 12-05, that supposedly shed light on this reading.

As discussed at length, the "replicate" standard would impossibly require APA to build a protective fence around an airport base that soon no longer would exist. No reasonable jury could read LOA 12-05 as setting this goal, particularly as the word "replicate" appears nowhere in the LOA. The actual text states that AA and APA "agree that a dispute resolution procedure is necessary to determine what alternative contractual rights should be provided."[130] None of the statements APA points to contradicts this straightforward language. Many of them in fact bolster the

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[130] AA SMF ¶ 5 (emphasis added).

theory that the parties agreed to negotiate for alternative protections."[131] In these circumstances, no reasonable jury could conclude that APA violated LOA 12-05 by not pushing for the "replicate" theory or that APA's failure to advocate for impossible relief caused the panel to reject it.[132]

III The Bankruptcy Court Correctly Entered Summary Judgment for AA on the Collusion Claim.

The collusion claim against AA hinges on the existence of a breach of duty by APA.[133] As there was no breach, there was no collusion to commit a breach. Other than a lengthy string of citations supporting the rule that an employer can be held liable when it colludes with a union, the TWA pilots spend just four sentences asking for reversal on the collusion claim, the first of which admits that "[AA's] liability, if any, is derivative of APA's liability."[134] Their only real argument is that we should reverse here for the same reasons we should reverse with respect to AA.

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131 *See* note 89, *supra*.

132 We need not reach the issue of whether APA had any duty to assert itself into the arbitration proceedings once it became apparent that AA did not read LOA 12-05 to require replication of Supplement CC.

133 *See, e.g., Flight Attendants in Reunion*, 813 F.3d at 475 ("Because the plaintiffs fail to state a claim for a breach of the duty of fair representation by [their union], the plaintiffs also fail to state a claim that [the employer] colluded in [the union's] breach.").

134 Appellant Br. 57.

The TWA pilots state also, in half a sentence, "that the evidence shows that [AA] had knowledge of, and was complicit in, nearly all of the facts that demonstrate[] APA breached its [duty of fair representation]." This assertion is cursory and includes no citation to any supporting evidence. "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."[135] As the TWA pilots make no real argument that AA colluded with APA, I decline to make one for them.

Conclusion

The judgment appealed from is affirmed.

SO ORDERED.

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135 *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

JUNE 2018 BANKRUPTCY COURT DECISION (*Krakowski I*)

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 2018 Bankr. LEXIS 1726, 2018 L.R.R.M. 208039, Adv. No. 13-01283 (Bankr. S.D.N.Y. June 12, 2018).

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: AMR CORP., *et al.*, Reorganized Debtors.	Chapter 11 Case No. 11-15463 (SHL) (Confirmed)
JOHN KRAKOWSKI, *et al.*, individually and on behalf of those similarly situated, Plaintiffs, v. AMERICAN AIRLINES, INC., *et al.*, Defendants.	Adv. No. 13-01283 (SHL)

June 12, 2018

Before Bankruptcy Judge Sean H. Lane

MEMORANDUM OF DECISION

Before the Court are the Defendants' motions for summary judgment [ECF Nos. 111-1, 114][1] with respect to the Plaintiffs' modified supplemental class action complaint filed on behalf of the Plaintiffs and all persons similarly situated (the "Complaint") [ECF No. 48]. Plaintiffs John Krakowski, Kevin Horner, and M. Alicia Sikes are former Trans World Airlines ("TWA") pilots that are now employed by American Airlines, Inc. ("American"). The Complaint alleges that the Allied Pilots Association ("APA")—the pilots' union at American—breached its duty of fair representation to the Plaintiffs and that American colluded in that breach.[2]

As part of American's bankruptcy restructuring, the company sought and received authority to reject its then-existing collective bargaining agreement with APA (the "Old CBA"). *See Plaintiffs' Response to American's Statement of Material Facts* ("Resp. to American SMF") ¶ 3 [ECF No. 122]. American subsequently negotiated a new collective bargaining agreement with APA (the "New CBA") that eliminated certain job protections that legacy TWA pilots like the Plaintiffs

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[1] Unless otherwise specified, references to the Case Management/Electronic Case Filing ("ECF") docket are to this adversary proceeding.

[2] The Plaintiffs originally brought this action in the United States District Court for the Eastern District of Missouri. The Missouri District Court transferred the case to this Court on March 6, 2013. *See Memorandum and Order*, Case No. 4:12-cv-00954-JAR [ECF No. 1].

had held under the Old CBA. *See* Resp. to American SMF ¶¶ 2-4. At the same time, American and APA entered into a letter agreement that contemplated an arbitration proceeding to create new job protections for these legacy TWA pilots as an alternative to those lost under the New CBA. *See* Resp. to American SMF ¶¶ 4-6.

The Court has issued two prior decisions in this adversary proceeding granting dismissal of many of the claims asserted by the Plaintiffs against the Defendants. *See Krakowski v. American Airlines, Inc. (In re AMR Corp.)*, 536 B.R. 360 (Bankr. S.D.N.Y. 2015); *Krakowski v. American Airlines, Inc. (In re AMR Corp.)*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729 (Bankr. S.D.N.Y. Jun. 3, 2014).[3] The Plaintiffs' remaining claims allege breaches of APA's duty of fair representation with respect to the procedures used to conduct the

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[3] Today's decision is but one part of an ongoing blizzard of litigation involving these parties. In addition to the two decisions referenced above, the Court in this case has also issued a decision denying the Plaintiffs' request for a stay of the arbitration. *See Krakowski v. American Airlines, Inc. (In re AMR Corp.)*, 2015 Bankr. LEXIS 1721, 2015 WL 2414750 (Bankr. S.D.N.Y. May 19, 2015). Moreover, the Court has issued two opinions in another adversary proceeding filed by these same Plaintiffs relating to disputes between the same parties over the alternative job protections to be awarded legacy TWA pilots. *See Krakowski v. American Airlines, Inc. (In re AMR Corp.)*, 538 B.R. 213 (Bankr. S.D.N.Y. 2015); *Krakowski v. American Airlines, Inc. (In re AMR Corp.)*, 567 B.R. 247 (Bankr. S.D.N.Y. 2017). Last but not least, these Plaintiffs have filed another case involving the same parties regarding the arbitration on the alternative job protections. *See* Adv. No. 16-01138. This extensive litigation history will become relevant in analyzing certain legal issues below.

arbitration, and assert that American colluded in those breaches. *See generally Krakowski*, 536 B.R. 360; Compl. ¶¶ 48(E)-(J), 57. For the reasons set forth below, the Court grants the Defendants' motions for summary judgment and denies the Plaintiffs' related motion to amend the Complaint. [ECF No. 134].

BACKGROUND

A. The Collective Bargaining Agreement and Establishment of the Arbitration

In 2001, American acquired the assets of TWA. *See* Resp. to American SMF ¶ 1. Shortly thereafter, American and APA executed an agreement entitled "Supplement CC" that integrated the TWA pilots into American's pilot group. *See* Resp. to American SMF ¶ 2. Supplement CC modified American's pilot seniority list to include the former TWA pilots, but stripped these former TWA pilots of much of the seniority earned while at TWA. *See* Resp. to American SMF ¶ 2. But it also constructed a "protective fence" at American's St. Louis pilot base, which created a minimum number of captain positions for legacy TWA pilots and provided them with preferential bidding for first officer positions. *See* Resp. to American SMF ¶ 2.

In November 2011, American filed for protection under Chapter 11 of the Bankruptcy Code. *See* Resp. to American SMF ¶ 3. As part of its reorganization, American sought and obtained the Court's permission to abrogate its obligations under the Old CBA, including Supplement CC, pursuant to Section 1113 of the Bankruptcy Code. *See* Resp. to American SMF ¶ 3; *In re AMR Corp.*, 477 B.R. 384, 393-95 (Bankr. S.D.N.Y. 2012); *In re AMR Corp.*, 478 B.R. 599, 601-02 (Bankr.

S.D.N.Y. 2012); *In re AMR Corp.*, 2012 Bankr. LEXIS 4168, 2012 WL 3834798 (Bankr. S.D.N.Y. Sept. 5, 2012), *aff'd*, 523 B.R. 415 (S.D.N.Y. 2014), *aff'd*, 622 Fed. App'x 64 (2d Cir. 2015). In December 2012, American and APA came to an agreement on the New CBA, which included a side letter of agreement numbered 12-05 ("LOA 12-05"). *See* Resp. to American SMF ¶¶ 4-5. Later that month, the Court entered an order approving the New CBA. *See* Resp. to American SMF ¶ 10.

The New CBA, including LOA 12-05, was voted on and ratified by APA membership, including the legacy TWA pilots. *See* Resp. to American SMF ¶ 8. Approximately 81% of the participating pilots at American's St. Louis domicile voted in favor of the New CBA. *See* Resp. to American SMF ¶ 9. Significantly, about 85% of the legacy TWA pilots at American were APA members in St. Louis at the time of the vote. *See* Resp. to American SMF ¶ 9.

LOA 12-05 provided that American "will have the right, in its sole discretion, to decide whether to close the existing STL pilot base," and that "a dispute resolution procedure is necessary to determine what alternative contractual rights should be provided to TWA Pilots as a result of the loss of flying opportunities due to termination of Supplement CC and the closing of the STL base."[4] Resp. to American SMF ¶ 5 (quoting Am.

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[4] Due to American's desire to close the St. Louis base, and the difficult and politically charged nature of the debate that had surrounded Supplement CC, APA's Board of Directors (the "APA Board") determined that American and APA should let three neutral arbitrators decide the protections for the affected pilots if

Ex. A, LOA 12-05 at 1 [ECF No. 117-1]). With respect to the dispute resolution process, LOA 12-05 stated that the parties would "engage in final and binding interest arbitration" in front of a panel "consist[ing] of three neutral arbitrators who are members of the National Academy of Arbitrators with Richard Bloch as the principal neutral." Resp. to American SMF ¶ 6 (quoting Am. Ex. A, LOA 12-05 at 1, 2 [ECF No. 117-1]). Under LOA 12-05, the arbitrators were to "decide what non-economic conditions should be provided to TWA Pilots," but "[i]n no event shall the arbitrators have authority to modify the Pilots' System Seniority List … or impose material costs beyond training costs on the Company." Resp. to American SMF ¶ 7 (quoting Am. Ex. A, LOA 12-05 at 2 [ECF No. 117-1]).

During the relevant time period, the APA Board was composed of two members from each of several geographic pilot "bases," including the St. Louis base, who were elected by APA members at their respective bases and served as advocates for those pilots. *See* Resp. to APA SMF ¶¶ 9-10. During the period relevant to this case, nearly all of APA's members at the St. Louis base—at least 93%—were legacy TWA pilots. *See* Resp. to APA SMF ¶ 11. In 2012, the APA Board members that were elected from the St. Louis base

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Supplement CC were eliminated. *See Plaintiffs' Response to APA's Statement of Material Facts* ("Resp. to APA SMF") ¶ 5 [ECF No. 124]. The APA Board approved a motion to that effect in February 2012. *See* Resp. to APA SMF ¶ 5. APA posted a public message to the pilots explaining the motion. *See* Resp. to APA SMF ¶ 7. American and APA ultimately agreed to resolve the issue through the process described in the February 2012 motion, and that agreement became LOA 12-05. *See* Resp. to APA SMF ¶ 8.

were Captain Keith Bounds and Captain Douglas Gabel, both of whom were legacy TWA pilots. *See* Resp. to APA SMF ¶ 12. During 2012, Captain Gabel reached his term limit as an APA Board member and Captain Marcus Spiegel, a legacy TWA pilot, was elected by the St. Louis base to replace Captain Gabel. *See* Resp. to APA SMF ¶ 17.

APA attorney Edgar James, Esq. negotiated the language of LOA 12-05 on behalf of APA. *See* Resp. to APA SMF ¶ 18. In doing so, he consulted frequently with Captains Gabel, Bounds and Spiegel from the St. Louis base. *See* Resp. to APA SMF ¶ 19. Indeed, Captain Gabel "was involved in the formation of LOA 12-05 from the early drafts in February 2012 through the final agreement." *See* Resp. to APA SMF ¶ 19 (quoting Pl. Ex. 4, Decl. of Douglas J. Gabel ¶ 13 [ECF No. 97-4]). While Captains Gabel and Bounds opposed the limitation on changes to seniority contained in LOA 12-05, it is undisputed that they approved all of the other language of LOA 12-05, including the language identifying Arbitrator Bloch as the principal arbitrator. *See* Resp. to APA SMF ¶¶ 20, 39-40; Resp. to American SMF ¶ 8. Additionally, American and APA both agreed that Arbitrator Bloch should serve as the principal arbitrator because he was a prominent Railway Labor Act arbitrator that was familiar to airline industry practitioners. *See* Resp. to American SMF ¶ 6.

In January 2013, American and APA entered into a protocol agreement regarding the LOA 12-05 arbitration (the "Protocol Agreement"). *See* Resp. to American SMF ¶ 11. The Protocol Agreement stated that the LOA 12-05 arbitration would "provide for party status and the hearings and for substantive presentations by:

(1) American Airlines, Inc.; (2) a representative committee of AA Pilots … and (3) a representative committee of TWA Pilots … .” Resp. to American SMF ¶ 14 (quoting Am. Ex. B, Protocol Agreement ¶ 1 [ECF No. 117-2]).

The representative committee of legacy AA Pilots (the “AA Pilots Committee”) was chaired by Captain Mark Stephens and also included Captain Michael Mellerski, Captain James Eaton, and Captain Drew Engelke. *See* Resp. to American SMF ¶ 15. Captain Stephens chose the other members of the AA Pilots Committee. *See* Resp. to APA SMF ¶ 34. The representative committee of legacy TWA Pilots (the “TWA Pilots Committee”) was chaired by Captain Gabel and also included Captain Dave Williams, Captain John Swanson, First Officer Cary Bouchard, and First Officer Thomas Duncan, all of whom were legacy TWA pilots. *See* Resp. to American SMF ¶ 16; Resp. to APA SMF ¶ 25. Captain Gabel was chosen as the chair of the TWA Pilots Committee by Captains Bounds and Spiegel, the two legacy TWA pilots that were then serving as the elected representatives from the St. Louis base. *See* Resp. to APA SMF ¶ 24. Captain Gabel chose the other members of the TWA Pilots Committee. *See* Resp. to APA SMF ¶ 25.

American was not consulted or otherwise involved in selecting the members of either pilot committee or their committee chairs, and was unaware of how committee members were chosen. *See* Resp. to American SMF ¶ 17. Thus, American was not aware of the committee members and chairs that were chosen until after the decisions had been made. *See* Resp. to American SMF ¶ 17. APA budgeted $100,000 for each of the

pilot committees but, as of October 2013, it had reimbursed the TWA Pilots Committee fees and expenses in the amount of $532,971 and the AA Pilots Committee in the amount of $336,657. *See* Resp. to APA SMF ¶ 102.

The Protocol Agreement further provided that in addition to Arbitrator Bloch, the members of the arbitration panel would include Arbitrators Stephen Goldberg and Ira Jaffe. *See* Resp. to American SMF ¶ 12. Captain Gabel suggested the appointment of Arbitrators Goldberg and Jaffe as the remaining two arbitrators and APA accepted the suggestion. *See* Resp. to APA SMF ¶ 51; Resp. to American SMF ¶ 12. American subsequently accepted Arbitrators Goldberg and Jaffe because they were nationally prominent arbitrators that were familiar to airline industry practitioners. *See* Resp. to American SMF ¶ 12.

B. The Arbitration Process

During the course of the arbitration, the TWA Pilots Committee, the AA Pilots Committee and American were each represented by separate counsel. *See* Resp. to American SMF ¶ 19. The AA Pilots Committee was represented by Wesley Kennedy, Esq., while the TWA Pilots Committee was represented by John O'B. Clarke, Esq. *See* Resp. to American SMF ¶ 19. American chose its own counsel, but was not consulted or otherwise involved in selecting counsel for the pilot committees, and was unaware of how the committees' counsel were selected. *See* Resp. to American SMF ¶¶ 19-20. Thus, American was also unaware of who represented the pilot committees until after the decisions had been made. *See* Resp. to American SMF ¶ 20.

At some point during the arbitration, the TWA Pilots Committee claimed that Mr. Kennedy had a conflict of interest in representing the AA Pilots Committee, but American was not aware of this allegation until after the arbitration concluded. *See* Resp. to American SMF ¶ 21.

Prior to the commencement of the LOA 12-05 arbitration, APA emailed all pilots about the arbitration process and gave them contact information for the TWA Pilots Committee and the AA Pilots Committee. *See* Resp. to APA SMF ¶ 79. APA also posted a document informing pilots that they had a right to participate individually in the LOA 12-05 proceeding. *See* Resp. to APA SMF ¶ 79.

The LOA 12-05 arbitration began with a procedural hearing on April 2, 2013, followed by several days of evidentiary hearings in April and May 2013, and closing arguments in June 2013. *See* Resp. to APA SMF ¶ 80. Prior to the arbitration commencing, the TWA Pilots Committee submitted a pre-hearing brief of approximately 40 pages. *See* Resp. to American SMF ¶ 24. During the arbitration, the TWA Pilots Committee presented five witnesses and cross-examined all witnesses called by the AA Pilots Committee and American. *See* Resp. to American SMF ¶ 24. The TWA Pilots Committee also introduced dozens of exhibits, in addition to the joint exhibits that were submitted by the parties. *See* Resp. to American SMF ¶ 24. Subsequent to the arbitration, the TWA Pilots Committee submitted a 44-page brief in support of its proposal, as well as a 29-page reply brief. *See* Resp. to American SMF ¶ 24.

The Plaintiffs and all other legacy TWA pilots had access to all materials from the arbitration, including hearing transcripts, through a website on which the materials were promptly posted. *See* Resp. to APA SMF ¶ 87. All pilots were also allowed to attend the hearings, and Plaintiffs Sikes and Horner did so. *See* Resp. to APA SMF ¶ 88. Indeed, Plaintiff Krakowski read transcripts of the hearings and both Plaintiffs Krakowski and Horner reviewed the briefs submitted to the arbitrators. *See* Resp. to APA SMF ¶ 88. Additionally, all affected pilots, including all legacy TWA pilots, were allowed to present written submissions and make oral presentations to Arbitrator Bloch in Washington, D.C. and St. Louis on May 14-15, 2013, regarding the impact on them from the loss of Supplement CC and the St. Louis base. *See* Resp. to APA SMF ¶¶ 93, 96; Resp. to American SMF ¶ 25. In all, the arbitrators received 270 written pilot submissions, and approximately 43 of the 55 pilots that made oral presentations were legacy TWA pilots. *See* Resp. to American SMF ¶ 25. This included Plaintiff Sikes, who endorsed the proposal made by the TWA Pilots Committee, and Keith Bounds, a St. Louis representative who presented a statement on behalf of 120 legacy TWA pilots. *See* Resp. to American SMF ¶ 25.

C. Arguments at Arbitration and Arbitrators' Rulings

The parties focus on three substantive issues that are relevant to the legal challenges raised regarding

the arbitration.[5] First, the TWA Pilots Committee argued that the arbitrators should seek to "replicate" Supplement CC's protections, relying on a statement previously made by APA attorney Edgar James in court proceedings and on testimony by Captain Gabel that the intent of LOA 12-05 was to "replicate" Supplement CC. *See* Resp. to APA SMF ¶¶ 104, 106-07. APA did not take a position on the "replicate" issue. *See* Resp. to APA SMF ¶ 108. Though opposed to the "replicate" standard, the AA Pilots Committee argued that its proposal best satisfied that standard. *See* Resp. to APA SMF ¶ 110. American objected to the TWA Pilots Committee's advocacy of a "replicate" standard, arguing that it contravened the terms of LOA 12-05. *See* Resp. to American SMF ¶ 28. The arbitrators ultimately agreed, concluding that "replicate" was not the proper standard:

> the Panel does not seek to re-establish, reproduce or replicate Supplement CC or its customized preferences. Given the termination of that document and the impending St. Louis base closing, that effort would be both fruitless and contrary to the manifested intent of LOA 12-05, which is to determine 'alternative' rights and to 'substitute' for the lost preferential flying opportunities.

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[5] The Plaintiffs' duty of fair representation challenge relates to how the arbitration was conducted and not what the arbitrators ultimately awarded. Accordingly, this decision focuses on facts that relate to the process of the arbitration itself, not those that relate solely to the substance of the arbitrators' ultimate award.

Resp. to APA SMF ¶ 109 (quoting APA Ex. 1-F, LOA 12-05 Merits Opinion at 5 [ECF No. 92-9]).

Second, the AA Pilots Committee proposed "pay protection" for a certain number of legacy TWA pilots. See Resp. to APA SMF ¶ 112. Under this proposal, if fewer than 340 legacy TWA pilots were able to acquire captain positions after the closing of the St. Louis base, American would offer "pay protection" to the number of legacy TWA pilots that equaled the difference between 340 and the number of legacy TWA pilots then serving as captains. *See* Resp. to APA SMF ¶ 112. American would in effect pay 340 legacy TWA pilots as if they were captains, whether or not such individuals were actually able to obtain captain positions. *See* Resp. to APA SMF ¶ 112. American argued that this proposal was outside the arbitrators' jurisdiction because LOA 12-05 permitted the arbitrators only to award "non-economic conditions," and not to increase costs for American. *See* Resp. to APA SMF ¶ 113. APA did not take a position on the issue because, as explained by Edgar James, "[i]t's the company's role to object to additional costs. It's not the union role." Resp. to APA SMF ¶ 115 (quoting APA Ex. 15, James Depo. Tr. 103:19-20, June 14, 2016 [ECF No. 111-23]).[6] While the AA Pilots Committee responded that the baseline for measuring economic costs should be the status quo as of the LOA 12-05 arbitration, *see* Resp. to APA SMF

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[6] The Plaintiffs deny this statement of fact because they assert the pay protection proposal was made by the AA Pilots Committee. But for reasons discussed more fully below, there is no evidence that APA was responsible for the positions taken by the AA Pilots Committee (or the TWA Pilots Committee) during the arbitration.

¶ 114, the arbitrators indicated that they agreed with American's position. *See* Resp. to APA SMF ¶ 116.[7] The AA Pilots Committee subsequently revised its proposal, including a more limited pay protection proposal. *See* Resp. to APA SMF ¶ 117; APA Ex. 9-L, Closing Brief of AA Pilots Committee at 11, 68 [ECF No. 111-16].

Third, the TWA Pilots Committee made a proposal regarding how legacy TWA Pilots were permitted to bid on schedules. As described by the arbitrators, the TWA Pilots Committee's initial proposal would have permitted legacy TWA pilots bidding for schedules to bid based on seniority determined by "their TWA date of hire, while AA pilots against whom they bid would use their AA date of hire," or, in the alternative, employ a "percentile bidding methodology to accomplish the same goal." Resp. to APA SMF ¶ 118 (quoting APA Ex.

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[7] *See also* APA Ex. 9-H, LOA 12-05 Arbitrator Panel Suggestions Regarding Post-Hearing Submissions at 2 [ECF No. 111-12] ("In reviewing the submissions thus far, we are concerned that the APA AA Pilots' Committee proposal, which includes pay protection provisions for certain narrow-body captain positions and certain small-wide body captain positions amounts to an 'economic condition,' the imposition of which is foreclosed to this Panel by agreement of the parties to LOA 12-05. For similar reasons, we are troubled by that portion of the APA AA Pilots' Committee Proposal suggesting that the pay protection proposal is not material (perhaps not even economic) because, on balance, it is claimed, the Company will save more by closing St. Louis as a pilot domicile than it will expend by means of pay protection. We are not convinced either that the premises [sic] underlying the analysis are necessarily correct or, more importantly, that without regard to arguments concerning calculations, these are non-economic conditions or material costs beyond those associated with training.").

9-H, LOA 12-05 Arbitrator Panel Suggestions Regarding Post-Hearing Submissions at 3 [ECF No. 111-12]). In support of this argument, the TWA Pilots Committee presented evidence regarding the intent of LOA 12-05, including testimony regarding Captain Gabel's conversations with Mr. James. *See* Resp. to APA SMF ¶ 121. American opposed this proposal, arguing that by imposing a date of hire bidding methodology, the proposal did not provide "preferential flying rights" as required by LOA 12-05 but instead substituted a new seniority list in violation of the prohibition on modifications to the seniority list. *See* Resp. to APA SMF ¶ 120. The TWA Pilots Committee disagreed, contending that its proposal provided only "preferential flying rights," that the bidding rules would only apply "inside … your equipment group," and that "[t]he relative order among TWA pilots [was] the same relative order as TWA pilots stand [on] the system seniority list." Resp. to APA SMF ¶ 120 (quoting APA Ex. 9-A, LOA 12-05 Arbitration Tr. 780:2, 777:20-22, Apr. 2, 2013 [ECF No. 111-5]).

After hearing these arguments, the arbitrators concluded that the TWA Pilots Committee proposal regarding bidding violated LOA 12-05 because it did not constitute "preferential flying rights" but rather "effectively modif[ied] the position of the TWA pilots on the system seniority list (at least for some purposes)." Resp. to APA SMF ¶ 122 (quoting APA Ex. 9-H, LOA 12-05 Arbitrator Panel Suggestions Regarding Post-Hearing Submissions at 3 [ECF No. 111-12]). Like the AA Pilots Committee did after its proposal was deemed outside the scope of the arbitrators' authority, the TWA Pilots Committee subsequently changed its proposal

"to advocate a path to an award that is clearly within this Board's jurisdiction to grant." *See* Resp. to APA SMF ¶ 123 (quoting APA Ex. 9-C, Post-Hearing Brief of the TWA Pilots Committee at 27 [ECF No. 111-7]). These changes included a shift away from its date of hire or percentile bidding proposals and towards a "protective fences" approach for the flying assigned to the legacy TWA pilots. *See* APA Ex. 9-C, Post-Hearing Brief of the TWA Pilots Committee at 27-28 [ECF No. 111-7].

In addition to these three substantive areas, the TWA Pilots Committee proposal also contained two procedural provisions for future arbitrations. *See* Resp. to APA SMF ¶ 124. First, the TWA Pilots Committee asked the arbitrators to "[e]stablish a multiparty adjustment board … in which TWA and preacquisition AA pilots have equal representation to raise and resolve disputes arising out of the application [and] interpretation of the Revised Supplement CC." *See* Resp. to APA SMF ¶ 125 (quoting APA Ex. 1-H, APA Response to Proposal at 2 [ECF No. 92-11]). APA considered that proposal to be outside the panel's jurisdiction because LOA 12-05 already specified a dispute resolution mechanism, providing Bloch with continuing jurisdiction. *See* Resp. to APA SMF ¶ 126. [*18] Second, the TWA Pilots Committee asked that the TWA pilots be granted "separate party status … in any AA/US Airways … seniority integration negotiation and/or arbitration in which they may propose an integration of their seniority by TWA [date of hire]." Resp. to APA SMF ¶ 127 (quoting APA Ex. 1-H, APA Response to Proposal at 2 [ECF No. 92-11]). APA responded that this second procedural proposal was

outside the panel's jurisdiction because, among other reasons, it contemplated changing the legacy TWA pilots' seniority as compared to other American Airlines pilots, violating the provision of LOA 12-05 barring such change. *See* Resp. to APA SMF ¶ 128. The TWA Pilots Committee submitted a response to APA's brief, arguing that it should be stricken by the arbitrators. *See* Resp. to APA SMF ¶ 129. The panel did not accept APA's jurisdictional arguments, but also declined to adopt either of the TWA Pilots Committee's procedural proposals. *See* Resp. to APA SMF ¶ 130.

After the arbitrators issued their merits award in July 2013, American and APA drafted contractual language to implement the award, subject to approval by the arbitrators. *See* Resp. to APA SMF ¶ 131-33. The TWA Pilots Committee participated in the development of this contractual language. *See* Resp. to APA SMF ¶ 134. The parties were unable to agree on two issues regarding the contractual language, and the TWA Pilots Committee then submitted a brief to the arbitrators regarding those issues. *See* Resp. to APA SMF ¶ 135. The AA Pilots Committee opposed the TWA Pilots Committee's positions. *See* Resp. to APA SMF ¶ 135. In September 2013, the panel issued an opinion resolving the remaining issues regarding the contractual language. *See* Resp. to APA SMF ¶ 136.

During the arbitration, American advanced its own position on the alternative contractual rights that should be provided to the legacy TWA pilots as it was entitled to under the Protocol Agreement. *See* Resp. to American SMF ¶ 26. There is no evidence that American contributed to the positions of the pilot committees in the arbitration. *See* Resp. to American SMF ¶ 27.

Nor is there evidence that American supported the positions of either of the pilot committees as to the substitute job protections that should be awarded to the legacy TWA pilots by the arbitrators. *See* Resp. to American SMF ¶ 28.[8] Aside from its three-page post-hearing brief regarding the TWA Pilots Committee procedural proposals, there is no evidence that APA took any position on the merits of the parties' substantive proposals or any other substantive issue in the arbitration. *See* Resp. to American SMF ¶ 31. American did not contribute to the APA post-hearing brief on the procedural issues and was unaware of its content until after it was filed. *See* Resp. to American SMF ¶ 31.[9]

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[8] Indeed, American objected to each pilot committees' proposal, arguing that they both contravened the terms of LOA 12-05. *See* Resp. to American SMF ¶ 28. American argued that the proposal made by the AA Pilots Committee would improperly require American to downgrade captains to first officer positions and pay them at captain rates—an economic condition that would impose excessive costs on American in violation of LOA 12-05, and contrary to the purpose of closing the St. Louis base. *See* Resp. to American SMF ¶ 29. With respect to the proposal made by the TWA Pilots Committee, American argued that it improperly substituted a reconfigured seniority list, despite the fact that LOA 12-05 prohibited the arbitrators from modifying the seniority list. *See* Resp. to American SMF ¶ 30.

[9] Most of the sentences in this paragraph are disputed by the Plaintiffs in their response to APA's statement of material facts. But for reasons further discussed below, the Court finds that the Plaintiffs have no basis to dispute these facts.

DISCUSSION

A. Legal Standards

1. *Breach of Fiduciary Duty*

"A union has a duty to represent fairly all employees subject to the collective bargaining agreement." *Vaughn v. Air Line Pilots Ass'n Int'l*, 604 F.3d 703, 709 (2d Cir. 2010) (internal citations and quotations omitted). This duty of fair representation requires that a union represent employees adequately, honestly, and in good faith. *See Krakowski v. American Airlines, Inc., (In re AMR Corp.)*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *3 (Bankr. S.D.N.Y. June 3, 2014) (citing *Air Line Pilots Ass'n, Intern. v. O'Neill*, 499 U.S. 65, 75, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991)). But "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union." *O'Neill*, 499 U.S. at 78. Thus, "[a]ny substantive examination of a union's performance … must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Id*. To prove that a union breached its duty of fair representation, a plaintiff must show that the union's actions or inactions were arbitrary, discriminatory, or in bad faith. *Vaughn*, 604 F.3d at 709. Each of these three concepts has its own standard.

First, a union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Vaughn*, 604 F.3d at 709 (quoting *O'Neill*, 499 U.S. at

67). Courts must review a union's actions "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *O'Neill*, 499 U.S. at 78. While a union's decision may in hindsight "appear to the losing employee to have been erroneous[,] … tactical errors are insufficient to show a breach of the duty of fair representation; even negligence on the union's part does not give rise to a breach." *Barr v. United Parcel Serv., Inc.*, 868 F.2d 36, 43 (2d Cir. 1989).

Second, a union's actions are considered discriminatory if they were "intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of St., Elec., Ry., & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971); *see also Nikci v. Quality Bldg. Services*, 995 F. Supp. 2d 240, 248 n.4 (S.D.N.Y. 2014) (dismissing complaint for failure to allege the *Lockridge* factors). "There is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives." *Vaughn*, 604 F.3d at 712. For instance, the Supreme Court held in *O'Neill* that "discrimination" "in the form of granting one union member seniority over another similarly situated member did not per se violate a union's duty of fair representation." *Krakowski*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *3 (citing *O'Neill*, 499 U.S. at 81). Rather, such treatment is improper "where the union prefers or disparages the union members based upon characteristics that are irrelevant to legitimate union objectives." *Krakowski*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *3 (citing *Jones v. Trans World Airlines*, 495 F.2d 790, 797-98 (2d Cir. 1974)

(union membership alone is not proper ground for union to determine seniority); *Wolf Trap Foundation for the Performing Arts*, 287 N.L.R.B. 1040, 1059 (1988) (finding discrimination where union singled out an employee only because she was female and a non-union member)).

Third, a union has acted in bad faith, where it "engaged in fraud, dishonesty, or other intentionally misleading conduct with an improper intent, purpose, or motive." *Krakowski*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *4 (citing *Vaughn*, 604 F.3d at 709-10).

2. *Causation*

To prove a breach of duty of fair representation, plaintiffs must also "demonstrate a causal connection between the union's wrongful conduct and their injuries." *Vaughn*, 604 F.3d at 709 (internal citations and quotations omitted). In cases alleging a breach of duty of fair representation claim relating to an arbitration award, causation may be assessed in the summary judgment context. *See Mullen v. Bevona*, 1999 U.S. Dist. LEXIS 16434, 1999 WL 974023, at *6 (S.D.N.Y. Oct. 26, 1999) (citing *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1976)); *see also Alen v. U.S. Airways, Inc.*, 526 F. App'x 89, 91 (2d Cir. 2013) ("A union breaches its duty to fairly represent its members if its conduct is arbitrary, discriminatory, or in bad faith, and if there is a causal connection between the union's wrongful conduct and their injuries.") (internal citations and quotations omitted). This is because, to succeed on such a claim, a plaintiff must show "that defendant's conduct 'seriously undermined the arbitral process.'"

Mullen, 1999 U.S. Dist. LEXIS 16434, 1999 WL 974023, at *6 (quoting *Barr*, 868 F.2d at 43). The plaintiff must further establish that "'the unsuccessful result was due to the union's wrongful conduct.'" 1999 U.S. Dist. LEXIS 16434, [WL] at *6 (quoting *Young v. United States Postal Serv.*, 907 F.2d 305, 307 (2d Cir. 1990)).

> [I]t is insufficient to show that the outcome *might* have been different if defendant's conduct had been different. To demonstrate that defendant 'seriously undermined the arbitral process,' the plaintiff must show more than a remote possibility that the outcome would have differed if the defendant had not breached its duty of fair representation.

Id. (emphasis in original).

The Plaintiffs argue that causation should not be evaluated on summary judgment, relying on *Gorwin v. Local 282, I.B.T.*, 1997 U.S. Dist. LEXIS 3822, 1997 WL 151043 (S.D.N.Y. April 1, 1997). But the Court disagrees. The court in *Gorwin* actually assessed causation in the summary judgment context. See 1997 U.S. Dist. LEXIS 3822, [WL] at *11 (The Court … finds that Gorwin has not presented any evidence that the Union's misrepresentation of its progress could have contributed to the erroneous outcome of the arbitration."). While the court ultimately denied summary judgment on the claim in *Gorwin*, it was only because the court concluded that there were disputed factual issues in the case on the related legal questions, including causation. *See id*.

The Plaintiffs also argue for a different—and higher—standard for evaluating causation than set forth above. The Plaintiffs contend that causation is shown only when "there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the proceedings." *Plaintiffs' Memo. in Opp. to APA Renewed Mot. for Summ. J.* [ECF No. 123] ("Pl. Opp. to APA SJM") at 26 (quoting *Hines*, 424 U.S. at 568; citing *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 163 (2d Cir. 1989); *Bacchus v. N.Y.C. Dep't of Educ.*, 137 F. Supp. 3d 214, 251 (E.D.N.Y. 2015); *Tomney v. Int'l Ctr. For the Disabled*, 357 F. Supp. 2d 721, 736 (S.D.N.Y. 2005). But some courts citing this language have also stated that "unless there is some causal connection between the breach and the alleged erroneous outcome, then [the plaintiff] has no action." *Phillips v. Lenox Hill Hospital*, 673 F. Supp. 1207, 1214 (S.D.N.Y. 1987); *see also Bacchus*, 137 F. Supp. 3d at 251 ("'[P]laintiff cannot prevail on [duty of fair representation] claim unless she establishes that further action on the Union's part would have resulted in a favorable outcome.'") (quoting *Yarde v. Good Samaritan Hosp.*, 360 F. Supp. 2d 552, 563 (S.D.N.Y. 2005)). In fact, the case law on causation for a duty of fair representation claim is not extensive in this jurisdiction nor is it consistent as to the standard to be employed.

In any event, the Court has no reason to further parse the standard given that—for the reasons discussed below—the Court finds that the Plaintiffs have failed to put forward evidence demonstrating a causal connection for their various claims under either formula of the causation standard. *See Hellstrom*, 46 Fed.

App'x at 654 (quoting *Celotex*, 477 U.S. at 325) (stating that when the issue is one for which the nonmoving party bears the ultimate burden of proof at trial, the burden on the party moving for summary judgment is to "demonstrate 'that there is an absence of evidence to support the nonmoving party's case.'"). APA raised numerous causation-related issues with respect to the Plaintiffs' arguments about the arbitration process—specifically regarding the selection of arbitrators, committees, and counsel—for which the Plaintiffs do not offer evidence (or even an argument) in response. *See, e.g., Memo. in Support of APA Renewed Mot. for Summ. J.* [ECF No. 111-1] at 15-17, 20, 22, 24-28, 31. While these circumstances are discussed individually below, the Court notes that the Plaintiffs only affirmatively address causation with respect to their arguments on the lack of a "unified position" and "replicate" issues. *See* Pl. Opp. to APA SJM at 27. But, as discussed below, APA's motion is granted on these issues for other reasons beyond causation.

3. *Summary Judgment*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Fed. R. Civ. P. 56(a) (made applicable to the adversary proceeding by Fed. R. Bankr. P. 7056). A material fact is one that "might affect the outcome of the suit under governing law." *McCarthy v. Dun & Bradstreet Corp.*,

482 F.3d 184, 202 (2d Cir. 2007) (internal citations and quotations omitted).

"The moving party bears the initial burden of 'informing the … court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Hellstrom v. U.S. Dep't of Veterans Affairs*, 46 Fed. App'x 651, 654 (2d Cir. 2002) (quoting *Celotex*, 477 U.S. at 322). When the issue is one for which the non-moving party bears the ultimate burden of proof at trial, the burden on the party moving for summary judgment is to "demonstrate 'that there is an absence of evidence to support the nonmoving party's case.'" *Id.* (quoting *Celotex*, 477 U.S. at 325). "'It is ordinarily sufficient for the movant to point to a lack of evidence … on an essential element of the non-movant's claim. …'" *Netherlands Ins. Co. v. United Specialty Ins. Co.*, 276 F. Supp. 3d 94, 105 (S.D.N.Y. 2017) (quoting *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008)). This does not, however, "absolve the movant of the obligation, articulated in *Celotex*, to "'identify[] those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Nick's Garage, Inc. v. Progressive Casualty Ins. Co.*, 875 F.3d 107, 117 n.5 (2d Cir. 2017) (quoting *Celotex*, 477 U.S. at 323).

Once this burden is met, the non-moving party "must come forward with specific facts showing that there is a genuine issue for trial." *Hellstrom*, 46 Fed. App'x at 654 (citing *Celotex*, 477 U.S. at 322). A "dispute about a material fact is 'genuine' … if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). But where "reasonable minds could not differ as to the import of the evidence, then summary judgment is proper." *Hellstrom*, 46 Fed. App'x at 654 (citing *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991)).

The court should "resolve all ambiguities and draw all inferences in favor of [the] party against whom summary judgment is sought." *Hellstrom*, 46 Fed. App'x at 654 (internal citations omitted). But a nonmovant cannot defeat summary judgment merely by raising "a 'metaphysical doubt' concerning the facts" or by simply offering "conjecture or surmise." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Moreover, the "nonmoving party's opposition may not rest on mere allegations or denials of the moving party's pleading, but 'must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting Fed. R. Civ. P. 56(e)).

i. *Facts Disputed by These Plaintiffs*

In applying these summary judgment principles here, the Court notes that the Plaintiffs have broadly denied most facts that the Defendants contend are undisputed regarding the arbitration. These include facts about the most basic questions, such as the positions taken by the parties in the arbitration and who chose the committee members, the arbitrators, and counsel. But an examination of the record demonstrates that the Plaintiffs have not provided a suffi-

cient basis for these sweeping denials and, therefore, the Court considers many of the facts the Plaintiffs oppose to be, in fact, undisputed.

The Plaintiffs offer two grounds for disputing these facts, neither of which has a basis in law or fact.

First, the Plaintiffs contend that the AA Pilots Committee—and in some circumstances the TWA Pilots Committee—were mere creatures of APA, and therefore all actions taken by either committee were under the direction of and should be imputed to APA. However, as the undisputed facts in the record establish—and as will be discussed further below—APA took a neutral position in the arbitration and allowed the two pilot committees to make their own arguments before the arbitrators about the substitute protections that should be afforded to the legacy TWA pilots. *See also* Protocol Agreement ¶ 1 ("APA participation as a party in the Interest Arbitration shall not be for the purposes of advocating a substantive position but to facilitate an orderly process and resolution of the dispute" and that "[w]hile AA and APA are the parties to this Agreement, the Interest Arbitration shall provide for party status and the hearings and for substantive presentations by: (1) American Airlines, Inc.; (2) a representative committee of AA Pilots … and (3) a representative committee of TWA pilots. …"). The Plaintiffs provide no evidence to support their assertions that APA in some way controlled or directed the decisions made by the pilot committees. Indeed, most of the Plaintiffs' denials of the Defendants' proposed undisputed facts are thinly disguised legal argument relating to their position that it was inappropriate for APA to allow two pilots committees to participate in

the arbitration rather than having APA put forward a "unified position" during the arbitration.[10]

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[10] Thus, the Plaintiffs deny numerous facts based on their general view that the AA Pilots Committee and the TWA Pilots Committee were somehow simply carrying out APA's bidding. *See, e.g.*, Resp. to APA SMF ¶ 61 (Plaintiffs deny fact that the TWA Pilots Committee chose Mr. Clarke as their counsel "with no influence whatsoever from APA" because Plaintiffs assert that "the TWA Pilots Committee was formed by APA as an ad hoc of itself, and given 'party status' to the LOA 12-05 arbitration between APA and American."); Resp. to APA SMF ¶ 81 (Plaintiffs admit fact that that arbitrators stated that APA delegated its advocacy position to pilot committees and took no position on the substantive positions submitted by the committees, but deny the truth of those statements because Plaintiffs assert that APA did not and could not outsource its duty of representation and established the committees of itself to present evidence and argument during the arbitration); Resp. to APA SMF ¶ 82 (Plaintiffs admit fact that APA's president informed the union's board members that APA was to remain neutral throughout process, but deny the truth of that statement because Plaintiffs assert that APA did not and could not outsource its duty of representation and established the committees of itself to present evidence and argument during the arbitration); Resp. to APA SMF ¶ 83 (Plaintiffs admit fact that stated role of TWA Pilots Committee in arbitration was to further the interests of the TWA pilot group, but deny that was its true role because Plaintiffs assert that APA established the committee structure to create potential defense in this case); Resp. to APA SMF ¶ 84 (Plaintiffs deny fact that TWA Pilots Committee carried out its role without interference from APA or American because "American and APA's AA Pilots Committee" interfered with the TWA Pilot Committee throughout the arbitration and because during the arbitration American and the AA Pilots Committee objected to the TWA Pilots Committee proposal as a de facto seniority adjustment and the TWA Pilots Committee's replicate argument); Resp. to APA SMF ¶ 85 (Plaintiffs deny fact that the TWA Pilots Committee had the opportunity to present its views without interference from APA or American for same reasons);

Second, the Plaintiffs deny various facts based on their contention that American was supporting APA. The Plaintiffs point out that the positions taken by American were similar to those taken by the AA Pilots Committee, specifically the objections made by American to arguments made by the TWA Pilots Committee during the arbitration relating to (1) the "replicate" issue, and (2) whether the TWA Pilots Committee's proposal was a de facto seniority adjustment for the legacy TWA pilots. *See* Resp. to American SMF ¶ 27.[11]

Resp. to APA SMF ¶ 108 (Plaintiffs deny fact that APA did not take a position in the arbitration on the replicate issue for same reasons); Resp. to APA SMF ¶ 115 (Plaintiffs deny fact that APA did not take position on "non-economic issue' during arbitration because Plaintiffs assert that the pay protection proposal was made by "its Ad Hoc AA Pilots Committee."); Resp. to APA SMF ¶ 135 (Plaintiffs deny fact that TWA Pilots Committee submitted brief to arbitrators regarding contractual language "without interference from APA or American" because Plaintiffs assert that "APA's Ad Hoc American Pilot Committee opposed the TWA Pilot Committee's position.").

[11] Thus, the Plaintiffs deny numerous facts based on their general view that American interfered with the TWA Pilots Committee by taking certain positions during the arbitration, some of which also happened to overlap with the positions taken by the AA Pilots Committee. *See* Resp. to American SMF ¶ 27 (Plaintiffs deny fact that American did not contribute regarding the positions of the pilot committees in the arbitration because Plaintiffs assert that American supported APA's positions regarding replicating and de facto seniority adjustment); Resp. to American SMF ¶ 28 (Plaintiffs deny fact that American did not support the positions of either pilot committee and objected to each committee's position for same reasons); Resp. to American SMF ¶ 31 (Plaintiffs deny fact that APA did not take position on merits of parties' proposals or any other substantive issue at the arbitra-

But there is no evidence to support that the positions taken by American during the arbitration should be attributed to another party or that American somehow interfered with the TWA Pilots Committee ability to present its case. Rather, the undisputed facts—discussed more fully below—demonstrate that APA remained neutral during the arbitration process regarding the substitute job protections to be awarded, and American simply took its own position on the issues, which it was allowed to do by right under the Protocol Agreement. *See* Resp. to American SMF ¶ 26 (noting that in accordance with the Protocol Agreement, American may advance its own position regarding the alternative contractual rights that should be provided to the legacy TWA pilots).[12]

Where the Plaintiffs base their objection to American and APA's proposed statements of undisputed fact on these two arguments, therefore, the Court finds the Plaintiffs' objection to be without merit. It is well established that "[t]he nonmovant … cannot create a genuine issue of fact and defeat summary judgment through 'conclusory allegations, conjecture, and specu-

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tion because Plaintiffs assert that APA and American were the only parties to the arbitration and APA took positions throughout).

[12] For instance, the language of LOA 12-05 provided American with the right to object to anything that imposed costs on them or modified the seniority list. *See* LOA 12-05 at 2, Am. Ex. A [ECF No. 117-1] (under LOA 12-05, the arbitrators were to "decide what non-economic conditions should be provided to TWA Pilots," but "[i]n no event shall the arbitrators have authority to modify the Pilots' System Seniority List … or impose material costs beyond training costs on the Company.").

lation.'" *Mishkin v. Gurian (In re Adler, Coleman Clearing Corp.)*, 399 F. Supp. 2d 486, 490 (S.D.N.Y. 2005) (quoting *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)). "Rather, the nonmoving party must present 'significant probative evidence tending to support the complaint.'" *Smith v. Menifee*, 2002 U.S. Dist. LEXIS 4943, 2002 WL 461514, at *3 (S.D.N.Y. March 26, 2002) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)). A trial court is not required to "wade through improper denials and legal argument in search of a genuinely disputed fact." *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 528-29 (7th Cir. 2000); *see also In re Gutierrez*, 528 B.R. 1, 8 (Bankr. D. Vt. 2014) (noting that "in each instance where the Creditor asserts one of the Debtor's 'undisputed material facts' is disputed, either (1) the fact is not material, (2) the Creditor has failed to present significant probative evidence that any genuine dispute of fact exists, (3) the materials upon which the Creditor relies do not establish a dispute, or (4) the 'disputed fact' is actually a legal argument."). And while a party opposing summary judgment "is entitled to make legal arguments regarding the facts alleged in [the movant's statement of facts], [ ] the Court is not obliged to accept [the nonmovant's] characterization of those facts as facts themselves." *Chaney v. Stewart*, 2015 U.S. Dist. LEXIS 45197, 2015 WL 1538021, at *1 n.2 (D. Vt. Apr. 7, 2015) (noting that nonmovant's statement of disputed facts was deficient, in part, because instead of contradicting the factual statements made in the movant's statement of undisputed facts, it instead "proffers additional facts and makes legal arguments. …"). Indeed, courts have criticized parties for challenging "'disputed'

facts by proffering additional facts for context, without actually contradicting the underlying factual statement" and for using their denial of facts to make "legal argument more appropriately addressed in [a] memorandum." *Milnes v. Blue Cross & Blue Shield of Vt.*, 2013 U.S. Dist. LEXIS 44162, 2013 WL 1314520, at *2 n.1 (D. Vt. Mar. 28, 2013) (noting that each side had "postured considerably in their statements of disputed facts" and that in its "search for genuine factual disputes, the Court [ ] examined the documents in the summary judgment record and not the parties' characterizations of these documents.")[13]

B. Plaintiffs' Claim for Breach of Duty of Fair Representation

The Plaintiffs present a number of arguments in support of their duty of fair representation claim, each of which the Court will address separately.

1. *Unified Position*

The Plaintiffs first argue that APA breached its duty of fair representation in structuring the arbitration to permit two separate pilot committees to submit two competing proposals rather than have APA present one unified pilot position. *See Plaintiffs' Statement of Additional Material Facts Regarding APA* [ECF No.

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[13] The Court has also reviewed the Plaintiffs' affirmative facts [ECF Nos. 122, 124], and finds them to largely be either conclusory or legal argument. In any event, the Court concludes that they would not be material because, for all the reasons discussed below, they would not "affect the outcome of the suit under the governing law." *Mai v. Colvin*, 2015 U.S. Dist. LEXIS 165609, 2015 WL 8484435, at *4 (E.D.N.Y. Dec. 9, 2015) (internal quotations omitted).

124] ("Pl. Add'l Facts re: APA") ¶ 29. The Plaintiffs assert that the lack of a unified position was unprecedented, against industry custom, counter to the advice of APA's own counsel, and was therefore a breach of APA's fiduciary duty.

As a threshold matter, this argument must be rejected because the Plaintiffs improperly raised it for the first time in their response to the Defendants' summary judgment motions. *See Shah v. Helen Hayes Hosp.*, 252 F. App'x 364, 366 (2d Cir. 2007) ("A party may not use his or her opposition to a dispositive motion as a means to amend the complaint.") (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (collecting cases)). The Plaintiffs have known from the outset of the case that APA did not present a unified position at the arbitration and instead appointed separate pilot committees. But the Plaintiffs did not assert this issue as a claim in their initial complaint, amended complaint, or various briefs in response to APA's earlier motions to dismiss or even APA's initial summary judgment motion. The scope of this case is clearly limited to Paragraphs 48(E) through (J) "relating to how the arbitration was conducted," the only claims to survive American's prior motion to dismiss. *Krakowski*, 536 B.R. at 372; Order at 2 [ECF No. 80] (granting in part motion to dismiss). The Plaintiffs very clearly identified their disputes with the arbitration process in Paragraphs 48(E) through (J) of their Complaint, none of which included an argument about the lack of a "unified position." *See* Compl. ¶ 48(E)-(J).

The Plaintiffs nonetheless contend that somehow a reference in the Complaint to the existence of two pilot committees encompasses their "unified position" claim.

See Plaintiffs' Memo. in Support of Mot. for Leave to Amend at 3 [ECF No. 134-1] (citing Compl. ¶ 26). While the Complaint does reference the creation of two committees by APA, the existence of two committees is presented only as factual background. *See* Compl. ¶ 26. Nothing in the Complaint indicates a claim by the Plaintiffs based on the lack of a "unified position." *See* Plaintiffs' Memo. in Support of Mot. for Leave to Amend at 3-4 (citing Compl. ¶ 48(F)). Thus, the Complaint does not provide adequate notice to APA or American of such a claim, and has hampered the Defendants' ability to conduct discovery on this issue. *See* APA Opp. to Pl. Mot. for Leave to Amend at 7-8 (noting that APA's document requests and interrogatories were limited to the claims in Paragraphs 48(E)-(J) of the Complaint and did not include anything about the "unified position," and that APA did not depose any witnesses on this topic); *Malmsteen v. Universal Music Grp., Inc.*, 940 F. Supp. 2d 123, 135 (S.D.N.Y. 2013) (noting that because plaintiff failed to include claim in amended complaint, and instead raised it for the first time in opposition to summary judgment, the claim was waived) (citing *Rojo v. Deutsche Bank*, 487 Fed. App'x 586, 588-89 (2d Cir. 2012)); *see also Lyman v. CSX Transp., Inc.*, 364 Fed. App'x 699, 701-02 (2d Cir. 2010) (holding that claims raised for first time in opposition to summary judgment "need not be considered" and that complaint and interrogatory response were insufficient to put defendant on notice of plaintiff's new claims) (citing *Greenidge v. Allstate Ins. Co.,* 446 F.3d 356, 361 (2d Cir. 2006) ("[T]he central purpose of a complaint is to provide the defendant with notice of the claims asserted against it. …")).

Even if this argument were not waived, however, it would fail because the lack of a unified position was not discriminatory, arbitrary, or in bad faith. A claim of discriminatory conduct could not succeed here, as both the legacy TWA pilots and the American pilots were treated equally within the context of the arbitration and provided with the same resources, procedures, and opportunities to present their position to the arbitrators. *See Bowerman v. Int'l Union*, 646 F.3d 360, 368-71 (6th Cir. 2011) (no evidence of discrimination when contested training opportunities were available to plaintiffs and other groups); *Buford v. Runyon*, 160 F.3d 1199, 1202 (8th Cir. 1998) (no breach of duty of fair representation when two employees' cases that were similarly treated received different outcomes).

Indeed, a claim of discrimination by the same Plaintiffs as to a related arbitration has already been rejected by another court for much the same reason. In *Horner v. American Airlines, Inc.*, 2017 U.S. Dist. LEXIS 202806, 2017 WL 6313943 (N.D. Tex. Dec. 11, 2017), the Texas District Court was presented with a dispute involving an arbitration under Supplement C, which comprised the substitute protections for the legacy TWA pilots that were put in place as a result of the very same LOA 12-05 arbitration now before this Court. *See* 2017 U.S. Dist. LEXIS 202806, [WL] at *1-2. Supplement C provided for a dispute resolution procedure for any grievances arising thereunder. *See* 2017 U.S. Dist. LEXIS 202806, [WL] at *2. Legacy American pilots and legacy TWA pilots both filed grievances. *See id*. The plaintiff legacy TWA pilots asserted, among other things, that APA's failure to enforce a prior agreement regarding Supplement C, as well as the

stated intent of Supplement C, was arbitrary and hostile. *See* 2017 U.S. Dist. LEXIS 202806, [WL] at *7. They asserted that APA's decision to allow the arbitration between the opposing sides and to remain neutral throughout the process was due to hostility against the legacy TWA pilots, and that the grievance process was undermined as a result. *See* 2017 U.S. Dist. LEXIS 202806, [WL] at *7. But the court in Horner ultimately held that "maintaining neutrality and providing two groups of employees the same resources to pursue arbitration could only be found to be reasonable. And because the two groups were provided equal opportunity to assert their cases, the procedure cannot be deemed discriminatory." 2017 U.S. Dist. LEXIS 202806, [WL] at *9 (internal citations and quotations omitted).[14]

Nor can the Plaintiffs show that the conduct of the APA in utilizing two ad hoc pilot committees was arbitrary, that is, "so far outside a wide range of reasonableness … as to be irrational." *O'Neill*, 499 U.S. at 67 (internal citations and quotations omitted). The Plaintiffs complain that APA did not work to develop a unified position to present to the arbitrators. More specifically, they note that the Chairman of the APA Negotiating Committee did not work on crafting a unified position but instead Captain Stephens and Captain Gabel were tasked, on behalf of their respec-

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[14] Perhaps for these reasons, the Plaintiffs appear to concede that the claim does not involve discriminatory conduct on the part of APA. *See* Pl. Opp. to APA SJM at 7 (arguing that lack of a unified position was arbitrary and bad faith, but making no reference to discrimination).

tive pilot groups, with developing an APA position for the arbitration. *See* Pl. Add'l Facts re: APA ¶¶ 33, 34. The Plaintiffs note that Captains Stephens and Gabel had one substantive meeting, which, according to Captain Stephens, "didn't go very long" because it "became clear relatively early that we were conceptually very far apart." Pl. Add'l Facts re: APA ¶ 34 (quoting Pl. Ex. 18, Stephens Depo. Tr., 13-14, 23, June 8, 2016 [ECF No. 124-18]). Rather than making further efforts to develop a unified position, the APA instead entered into the Protocol Agreement with American that created the AA Pilots Committee and the TWA Pilots Committee and gave them each "party status" at the arbitration. *See* Pl. Add'l Facts re: APA ¶¶ 35-36 (explaining that each committee presented competing proposals to the arbitrators).

But as the *Horner* court found, it was reasonable for APA to remain neutral and allow each of the pilot groups an opportunity to present their cases. *Horner*, 2017 U.S. Dist. LEXIS 202806, 2017 WL 6313943, at *9. Indeed, the undisputed facts demonstrate the difficulty of arriving at a unified position that would satisfy both pilot groups. APA's counsel Mr. James testified that though he had once hoped the two groups could come together on a unified position, he later characterized such hopes as "unfounded." APA Ex. 26, James Depo. Tr. 29:9-10, June 14, 2016 [ECF No. 128-7]. That view was echoed by the Chair of the TWA Pilots Committee, Captain Gabel, who characterized the hope of the two sides coming together as "a pipe dream." APA Ex. 9-J, Gabel email [ECF No. 111-14]; Pl. Opp. to APA SJM at 6 (Plaintiffs' conceding that the two sides had been "conceptually very far apart"). Indeed, the

Court cannot help but notice the profound distrust—and lack of agreement—between the legacy TWA and American pilots throughout the record of the years-long litigation in this Court alone, encompassing three adversary proceedings, multiple dispositive motions, and amended complaints in each. *See, e.g., Krakowski v. American Airlines, Inc., (In re AMR Corp.)*, 567 B.R. 247 (Bankr. S.D.N.Y. 2017); *Krakowski v. American Airlines, Inc., (In re AMR Corp.)*, 538 B.R. 213 (Bankr. S.D.N.Y. 2015); *Krakowski v. American Airlines, Inc., (In re AMR Corp.)*, 536 B.R. 360 (Bankr. S.D.N.Y. 2015); *Krakowski v. American Airlines, Inc., (In re AMR Corp.)*, 2015 Bankr. LEXIS 1721, 2015 WL 2414750 (Bankr. S.D.N.Y. May 19, 2015); *Krakowski v. American Airlines, Inc., (In re AMR Corp.)*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729 (Bankr. S.D.N.Y. June 3, 2014).

Moreover, the process of conducting arbitrations with separate presentations from employee sub-groups is an accepted method of balancing competing employee interests. Indeed, the court in *Horner* ruled that a similar arbitration process involving the very same parties did not breach APA's duty of fair representation. *See Horner*, 2017 U.S. Dist. LEXIS 202806, 2017 WL 6313943, at *9. In that case, the Plaintiffs asserted that APA had advanced the parties' grievances to arbitration "in a manner that pitted pilot (Plaintiff Bounds) versus pilots (three legacy American pilots)." 2017 U.S. Dist. LEXIS 202806, [WL] at *7. The plaintiffs argued that "this choice to allow arbitration and remain neutral throughout the arbitration process is due to the new APA President's hostility toward former TWA pilots [and] that the grievance process

was irredeemably undermined as a result." *Id*. But the Horner court found that "given its membership's contentious split over [the protections at issue], a reasonable jury could only find that APA concluded that the circumstances warranted neutrality." 2017 U.S. Dist. LEXIS 202806, [WL] at *8. Furthermore, "when 'faced with two groups of its members with objectives that were directly at odds … [submitting] the impending dispute to arbitration was an equitable and reasonable method of resolving it." *Id*. (quoting *Gvozdenovic v. United Air Lines, Inc.,* 933 F.2d 1100, 1107 (2d Cir. 1991)).[15]

While the Plaintiffs assert that APA has never previously used ad hoc committees in an interest arbitration, this distinction is unavailing. The fact that

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[15] Likely for this reason, arbitrations involving different pilot groups have been utilized to resolve merger-related issues for years. *See, e.g., Oling v. Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir. 1965) (after merger of United and Capital Air Lines, arbitration between representatives of each pilot group, arranged by union representing both groups); *Carr v. Airline Pilots Ass'n, Int'l,* 2016 U.S. Dist. LEXIS 99895, 2016 WL 4061145 (S.D. Tex. July 29, 2016) (after merger of United and Continental, arbitration between representatives of each pilot group, arranged by union representing both groups). Arbitration is also commonly used as a continuing process of dispute resolution to address issues between merged employee groups. *See, e.g., Pilots Representation Org. v. Airline Pilots Ass'n, Int'l*, 2007 U.S. Dist. LEXIS 62881, 2007 WL 2480349, at *1 (D. Minn. Aug. 24, 2007); *Marcucilli v. American Airlines, Inc.*, 2007 U.S. Dist. LEXIS 15962, 2007 WL 713146, at *7 (E.D. Mich. Mar. 7, 2007). Additionally, unions utilize arbitration to resolve other types of intra-union issues, such as disputes relating to the allocation of funds among employees represented by the union. *See, e.g., Barnes v. Air Line Pilots Ass'n, Int'l.*, 141 F. Supp. 3d 836, 839 (N.D. Ill. 2015).

this case involved an interest arbitration does not by itself bar the use of this type of arbitration process. The Plaintiffs do not provide any case authority in support of such a notion or even any logical reason why this would be the case. And while the circumstances here are somewhat unusual—the abrogation of a collective bargaining agreement in bankruptcy—it was nonetheless a circumstance under which APA was faced with an intractable dispute between two pilot groups. *See Horner*, 2017 U.S. Dist. LEXIS 202806, 2017 WL 6313943, at *8.

Turning to the third leg of the duty of fair representation inquiry, the Plaintiffs argue that APA's failure to take a unified position was in bad faith because it was against the advice of APA's own counsel. The Plaintiffs rely upon an early draft of LOA 12-05 that explicitly contemplated participation by both American and TWA pilots, but was changed by Mr. James. *See* Pl. Add'l Facts re: APA ¶ 28. An email of Mr. James explained he was at that time "of the view that it is APA v. AA and we get an institutional position rather than invite the AA pilots to beat up on the TWA pilots without the latter being able to threaten to re-open the seniority list." *See* Pl. Add'l Facts re: APA ¶ 28 (quoting Pl. Ex. 8, James email [ECF No. 124-8]). When appearing before the Court to obtain approval of LOA 12-05, Mr. James also stated that "'we have the legal duty to go in and make the presentation on what ought to happen and the company will make its presentation. …'" Pl. Add'l Facts re: APA ¶ 30 (quoting Pl. Ex. 15, Hr'g Tr. 32:1-3, Dec. 19, 2012 [ECF No. 124-15]). But taking all these facts to be true, APA's failure to present a "unified position" does not qualify as bad faith, which

would require that APA have engaged in "fraud, dishonesty, [or] other intentionally misleading conduct … with an improper intent, purpose, or motive." *See Vaughn*, 604 F.3d at 709-10 (internal citations and quotations omitted).[16] As explained above, the undisputed facts demonstrate the futility of insisting upon a unified pilots position here. Under such circumstances, it cannot be said that APA's actions were in bad faith.

The Plaintiffs also argue that APA's action was in bad faith because it was taken to protect APA. The Plaintiffs cite to an email in which APA general counsel Steven Hoffman observed that APA's potential liability would be diminished by allowing both the legacy TWA pilots and American Pilots to present their proposals directly to the arbitrators. *See* Resp. to APA SMF ¶ 83 (quoting Pl. Ex. 8, Hoffman email [ECF No. 124-8]). But while Mr. Hoffman noted that a "unified position" would be vulnerable to challenge by any pilots dissatisfied with the results of the arbitration, *id.*, such statements do not reflect an "improper intent, purpose, or motive" of APA in how the arbitration was structured. Rather, Mr. Hoffman concluded that this structure protected APA precisely because it fulfilled APA's duty to ensure that all groups, including the legacy TWA pilots, had adequate representation at the arbitration. *See* Pl. Ex. 8, Hoffman email [ECF No. 124-8] ("If

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[16] Mr. James' statements and actions early in the arbitration process are easily explained by Mr. James himself: while he had once hoped the two groups could come together on a unified position, he eventually realized that such a hope was unfounded. *See* APA Ex. 26 (James Depo. Tr. 29:9-24, June 14, 2016) [ECF No. 128-7].

incumbent APA and TWA people did their own presentations to the arbitrator, the decision would be on the arbitrator, not us.");[17] *see also Vaughn*, 604 F.3d at 710; Horner, 2017 U.S. Dist. LEXIS 202806, 2017 WL 6313943, at *9 ("[P]laintiffs do not assert facts that would support a reasonable finding of the 'substantially egregious' conduct required to infer that APA's neutrality was motivated by a desire to harm APA's membership … [w]ithout additional evidence of deceitful, malicious, or improper acts, a reasonable jury could not find that APA's neutrality and submission of grievances breached the duty of fair representation.") (internal citations and quotations omitted).

Last but not least, the Plaintiffs' claim about lack of a unified position fails the causation requirement. This is because—even considering all inferences in favor of the Plaintiffs—a reasonable jury could not conclude that a "unified position" would have achieved a more favorable outcome from the arbitrators. Even if APA had wholly adopted the position that was advocated by the TWA Pilots Committee, that position was ultimately rejected by the arbitrators as violating LOA

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[17] This is also consistent with the public position that APA had taken that the two committee structure ensured full participation of all constituents and fulfilled APA's legal duties. *See* APA Ex. 22-B (APA article regarding Supplement CC Interest Arbitration: Agreement and Procedure, dated Feb. 10, 2013) [ECF 128-3] ("APA has the legal duty to fairly represent all pilots subject to the provisions of the CBA. Consequently, APA is providing both the former TWA pilots and the pre-merger AA pilots with an opportunity to make separate cases regarding proposed modifications to the CBA. APA is also providing both groups with equal union resources to prepare and present those cases.").

12-05 because it did not constitute "preferential flying rights," but rather "effectively modif[ied] the position of the TWA pilots on the system seniority list (at least for some purposes)." Resp. to APA SMF ¶ 122 (quoting APA Ex. 9-H, Arbitrators' Panel Suggestion Regarding Post-Hearing Submissions at 3 [ECF No. 111-12]). Notably, the arbitrators unanimously agreed on this issue with American, an independent participant acting consistent with its rights under LOA 12-05 and the Protocol Agreement. Taking the Plaintiffs' allegations at face value, therefore, their interests were not hampered by having their own separate representation and right to present their views unfiltered at the arbitration, rather than proceeding through a unified pilots position.

2. *Allegation that APA Failed to Enforce LOA 12-05*

The Plaintiffs also allege that APA failed to enforce the intent of LOA 12-05, which the Plaintiffs maintain was to "replicate" the protections of Supplement CC. But this exact same argument was previously presented by the Plaintiffs and rejected in a detailed decision previously issued by this Court in this case. *See Krakowski*, 536 B.R. at 370-71. In ruling, the Court observed that "it would be impossible to make an exact copy or duplicate of those St. Louis protections", *id.* at 371, given that American intended to close the St. Louis base. In a ruling that echoes the thinking of the arbitrators on the same issue, this Court rejected the Plaintiffs' attempt to shoehorn the concept of "repli-

cate" into LOA 12-05. *See id.*[18] Instead, the Court concluded that LOA 12-05 instead provided for an arbitration procedure to arrive at substitute job protections. *See id.* at 370-71 ("The intent of LOA 12-05 was clear from its written terms: 'The Company and the APA agree that a dispute resolution procedure is necessary to determine what alternative contractual rights should be provided to TWA Pilots as a result of the loss of flying opportunities due to termination of Supplement CC and the closing of the STL base.'") (emphasis in original).[19] This ruling is the law of the case and cannot be revisited here. *See Sagendorf–Teal v. County of Rensselaer*, 100 F.3d 270, 277 (2d Cir. 1996) (law of the case doctrine "posits that if a court decides a rule of law, that decision should continue to govern in subse-

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[18] Indeed, when the Plaintiffs subsequently sought discovery on the issue, the Court rejected the request, reiterating that the issue was "off the table." APA Ex. 24 (Hr'g Tr. at 64-66, 69-70, Feb. 16, 2016 [ECF No. 128-5]). The Court considers the Plaintiffs' repeated repackaging of its arguments on this same issue to border on a violation of Fed. R. Civ. P. 11.

[19] The Plaintiffs argue that in its prior decision on the issue, the Court did not explicitly strike Paragraph 48(I) of the Complaint, which uses the word "replicate." But that paragraph of the Complaint also references arguments other than replicate. *See* Compl. ¶ 48(I) (discussing APA taking a position through the AA Pilots Committee that "was designed to take jobs from the former TWA pilots to the benefit of the legacy American pilots …"). It is clear from this Court's prior decision that Paragraph 48(I) was preserved only to the extent that it did not relate to the "replicate" argument. *See Krakowski*, 536 B.R. at 371 ("[T]he Court categorically rejects Plaintiffs' reliance on the term 'replicate' as an independent basis for any rights asserted by the Plaintiffs.").

quent stages of the same case.") (internal citations and quotations omitted); 18B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 4478 (2d ed. April 2018 Update) ("Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.").

The Plaintiffs' position is doomed for another reason: APA took no position on the "replicate" issue at the arbitration, choosing instead to remain neutral and allow both sides to present their positions without interference. As previously discussed, and further expanded on below, APA's neutrality eviscerates any duty of fair representation claim on this issue as the TWA Pilots Committee was given free rein to advocate extensively for the "replicate" standard during the arbitration. *See* Resp. to APA SMF ¶¶ 104-09; *see also* APA Ex. 1-F (LOA 12-05 Merits Opinion at 5 [ECF [*47] No. 92-9]) (arbitrators rejecting TWA Pilots Committee's replicate argument).[20]

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[20] After the parties finished briefing these motions for summary judgment, the Plaintiffs filed a motion to amend the Complaint to add claims relating to APA's lack of a "unified position" and failure to "replicate" Supplement CC. [ECF No. 134]. It appears that the motion was filed in response to the Defendants' argument that the Plaintiffs improperly raised the lack of a unified position and failure to replicate for the first time in opposition to summary judgment. *See* APA Opp. to Plaintiffs' Mot. for Leave to Amend at 1-2, 8-9 [ECF No. 135]; *American's Memo. of Law in Opp. to Plaintiffs' Mot. for Leave to Amend* at 1 [ECF No. 136]. But as the Court today rules in the Defendants' favor on the merits of these two issues, however, leave to amend to add these two issues to the Complaint would be futile. *See Vermont Country Foods, Inc. v. So-Pak-Co., Inc.*, 170 Fed. App'x 756, 759 (2d Cir.

3. *Allegations Relating to Lack of Input from Plaintiffs or Putative Class*

The Plaintiffs next complain that the legacy TWA pilots lacked of input on certain aspects of the arbitration process, specifically with respect to the selection of the arbitrators, the arbitration participants, and the lawyers in the arbitration. *See* Compl. ¶¶ 48(E), (F), (G), (H).

2006); *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110-11 (2d Cir. 2001). Even if that were not the case, it would be improper to allow amendment of the Complaint at this late point in time. The Complaint has already been supplemented and amended by the Plaintiffs several times. *See* ECF Nos. 32-1, 48, 134-2. The Plaintiffs have known from the outset of the case that APA did not present a unified position at the arbitration but instead appointed two separate pilot committees. Yet the request to amend the Complaint came over three years after this case was filed, five months after the close of discovery, and a week after the conclusion of briefing on the Defendants' summary judgment motions. Amendments in such circumstances are prejudicial. *See Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (in affirming denial of leave to amend complaint, noting length of delay, that discovery had been completed and summary judgment motion was pending); *Classicberry Ltd. v. Musicmaker.com, Inc.*, 48 Fed. App'x 360, 362 (2d Cir. 2002) ("[B]ecause defendants made their motion to amend after discovery had closed and plaintiffs had moved for summary judgment, the amendment would have been especially prejudicial.") (internal citations and quotations omitted); *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 88 (2d Cir. 1998) ("A proposed amendment … [is] especially prejudicial … [when] discovery had already been completed and [nonmovant] had already filed a motion for summary judgment.") (internal citations and quotations omitted). For all these reasons, the Plaintiffs' motion to amend is denied.

i. *Selection of Committee Members*

The Plaintiffs first assert that APA improperly selected the members of the TWA Pilots Committee without input from either the Plaintiffs or the putative class members. But this argument is without any basis whatsoever. Two APA Board members from St. Louis who were legacy TWA pilots—Captain Bounds and Captain Spiegel—chose Captain Gabel to chair the TWA Pilots Committee. *See* Resp. to APA SMF ¶ 24. Captain Gabel then chose the other members of the TWA Pilots Committee, all of whom were legacy TWA pilots. *See* Resp. to APA SMF ¶ 25. These included Captain Dave Williams, Captain John Swanson, First Officer Cary Bouchard, and First Officer Thomas Duncan. *See* Resp. to American SMF ¶ 16; Resp. to APA SMF ¶ 25.

Thus, the manner in which the TWA Pilots Committee members were chosen was reasonable because APA received input from members of the putative class, both directly and indirectly, regarding selection of the TWA Pilots Committee. Selection of that committee was entirely delegated to three putative class members—Captains Bounds, Spiegel, and Gabel—all of whom were former TWA pilots. *See* Resp. to American SMF ¶¶ 12, 17. Additionally, all three were representatives of the legacy TWA pilots, as each was currently, or at some point in the immediate past, had been elected to union office by other former TWA pilots in St. Louis.[21] *See* Resp. to APA SMF ¶¶ 11, 12, 17.[22]

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[21] During the relevant time period, nearly all of APA members at the St. Louis base—at least 93%—were former TWA pilots,

Though Captain Gabel's term as an APA Board member expired prior to the arbitration, that fact alone does not support a conclusion that his interest no longer aligned with those of the legacy TWA pilots.

Instead of this procedure, the Plaintiffs argue that APA should have allowed all former TWA pilots to vote on the members of the TWA Pilots Committee. *See* Resp. to American SMF ¶ 31. But selecting the actual composition of a committee through a member election would have been unprecedented, *see* Resp. to American SMF ¶ 32,[23] and such a selection method would have no doubt opened up APA to a legal challenge. The Plaintiffs' position is also fatally flawed given the manner in which the TWA Pilots Committee mirrored the selection method for the AA Pilots Committee. The APA Board members other than Captain Bounds and Captain Spiegel chose Captain Stephens to chair the AA Pilots Committee, and Captain Stephens then

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and nearly all former TWA pilots—approximately 85%—were APA members at St. Louis. *See* Resp. to APA SMF ¶ 11.

[22] In 2012, APA board members elected from the St. Louis base were Captains Bounds and Gabel. *See* Resp. to APA SMF ¶ 12. During 2012, Captain Gabel reached his term limit as an APA board member and the St. Louis base elected Captain Spiegel to replace him. *See* Resp. to APA SMF ¶ 17.

[23] The Plaintiffs deny this statement of fact, averring that the APA polled a distinct pilot group in the past and that the American Independent Cockpit Alliance polled its members regarding the LOA 12-05 process. *See* Resp. to APA SMF ¶ 32. But polling a group on an issue is distinct from having that group directly elect members of a committee, and the Plaintiffs do not offer evidence that this has ever taken place.

chose the other members of that committee. *See* Resp. to American SMF ¶ 15; Resp. to APA SMF ¶ 34. Thus, both pilot groups were treated equally.

In any event, the process a union employs need not be the most representative that is theoretically possible at the expense of being realistically workable. In rejecting the Plaintiffs' member election option, the Court is mindful that it should take a "highly deferential" approach, "recognizing the wide latitude that [unions] need for the effective performance of their … responsibilities." *O'Neill*, 499 U.S. at 78. "[S]imple negligence, ineffectiveness, or poor judgment is insufficient to establish a breach of the union's duty … Rather, the union's conduct must be grossly deficient or in reckless disregard of the member's rights" to support a duty of fair representation claim. *Williams v. Air Wisconsin, Inc.*, 874 F. Supp. 710, 716 (E.D. Va. 1995), *aff'd*, 74 F.3d 1235 (4th Cir. 1996).[24]

The Plaintiffs also challenge the differences in the composition of the TWA Pilots Committee versus the AA Pilots Committee by noting that only the latter had union insiders on it. But by letting each group choose

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[24] Relatedly, Plaintiff Sikes complains that she told one of the TWA Pilots Committee members it would be good to have a non-APA member on the committee because there were many non-APA members in St. Louis that would be affected by the arbitration, but that APA would not allow it. *See* Pl. Add'l Facts re: APA ¶ 74. But there is no dispute that APA has traditionally limited committee participation to union members and that the APA Constitution and Bylaws require that committee members must also be APA members. *See* APA Ex. 25 (Gabel Depo. Tr. 57:21-23, May 27, 2016 [ECF No. 128-6]); *APA Reply Memo. in Support of Mot. for Summ. J.* at 9 [ECF No. 128].

its committee membership independent of one another, APA fulfilled its fiduciary duty to "establish[] neutral and valid processes and procedures for the arbitration." *Carr*, 2016 U.S. Dist. LEXIS 99895, 2016 WL 4061145, at *15. The Plaintiffs argument essentially asserts that a limitation regarding union insiders should have been placed on the AA Pilots Committee when it is undisputed that APA imposed no similar limitation regarding linemen on the TWA Pilots Committee, the chairman of which had recently been on the APA Board, unlike any member of the AA Pilots Committee. *See* Resp. to APA Facts ¶ 37. The Plaintiffs admit that it would not have been fair for the former TWA pilots to participate in selection of the AA Pilots Committee members, just as it would not have been fair for legacy American pilots to participate in selection of the TWA Pilots Committee members. *See* Resp. to APA SMF ¶ 36. Allowing either pilot group to have input or control over the other's process could have been a violation of APA's fiduciary duties. There is also no evidence that the selection process was structured by APA in bad faith. Nor is there evidence of fraud, dishonesty, or other intentionally misleading conduct with an improper intent, purpose, or motive. *See Vaughn*, 604 F.3d at 709-10.

Last but not least, the Plaintiffs have failed to make a causation showing with respect to selection of the TWA Pilots Committee. The Plaintiffs—and indeed all legacy TWA pilots—had the opportunity to rectify any lapses by the TWA Pilots Committee given the ability of individual pilots to directly participate in the arbitration. All pilots were given the opportunity to make written submissions and oral presentations to Arbitra-

tor Bloch in Washington, D.C. and St. Louis on May 14-15, 2013, regarding the impact on them from the loss of Supplement CC and the St. Louis base. *See* Resp. to APA SMF ¶¶ 93, 96; Resp. to American SMF ¶ 25. The Plaintiffs seek to characterize this process as simply a venting session for pilots and note that only one arbitrator attended. *See* Resp. to APA SMF ¶ 99; Pl. Ex. 4 (Horner epo. Tr. 48-49, May 10, 2016 [ECF No. 124-4]). But the Plaintiffs offer no evidence that Arbitrator Bloch did not convey the information obtained at the sessions to his fellow arbitrators, or that the arbitrators failed to consider the information provided during this session. And despite how the Plaintiffs choose to characterize it, there is evidence that this process was fully utilized, with the arbitrators receiving some 270 written submissions from pilots. *See* Resp. to American SMF ¶ 25. Moreover, parties other than the TWA Pilots Committee, the AA Pilots Committee, American, and APA were allowed to make oral presentations to Arbitrator Bloch. Legacy TWA pilots took particular advantage of this process: of the 55 oral presentations made, 43 of these were made by legacy TWA pilots. *See* Resp. to American SMF ¶ 25. Indeed, participants in the process included Plaintiff Sikes, who endorsed the proposal made by the TWA Pilots Committee, and Keith Bounds, a St. Louis representative who presented a statement on behalf of 120 legacy TWA pilots. *See* Resp. to American SMF ¶ 25. Such robust participation undermines the Plaintiffs' position. *See* Santiago v. Nat'l Cleaning Contractors, 1992 U.S. Dist. LEXIS 9620, 1992 WL 168258, at *6 (S.D.N.Y. June 29, 1992) ("Where an employee has had a chance to present is case, despite union lapses in representation, courts have granted summary judg-

ment dismissing fair representation claims."); *Romero v. DHL Express, Inc.*, 2015 U.S. Dist. LEXIS 36974, 2015 WL 1315191, at *9 (S.D.N.Y. Mar. 24, 2015).

The Plaintiffs also do not present any evidence that the individuals that chose the TWA Pilots Committee members were in some way averse to the legacy TWA pilots or that their ability to choose committee members was thwarted by APA. Indeed, Plaintiff Alicia Sikes testified that she had "great respect" for Captain Gabel and "would not object to him being selected to any committee at APA."[25] Resp. to APA SMF ¶ 26 (quoting APA Ex. 12, Sikes Depo. Tr. 20:10-15, May 10, 2016 [ECF No. 111-20]). She further testified that the other members of the TWA Pilots Committee were all "very competent." Resp. to APA SMF ¶ 27 (quoting APA Ex. 12, Sikes Depo. Tr. 22:8-9, May 10, 2016 [ECF No. 111-20]). Additionally, Plaintiff Sikes assisted the TWA Pilots Committee's counsel throughout the LOA 12-05 proceedings. *See* Resp. to APA SMF ¶ 101. Plaintiff John Krakowski could not think of anyone else who would have been a better choice for the TWA Pilots Committee. *See* Resp. to APA SMF ¶ 28. Plaintiff Horner testified that he did not have any objection to

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[25] This is not surprising given that Captain Gabel has been an active participant in this litigation on behalf of the Plaintiffs, serving as the Plaintiffs' principal witness and consulting with Plaintiffs' counsel in his deposition of Edgar James. *See generally* Pl. Ex. 4 (Gabel Decl. in Support of Resp. to APA SMF [ECF No. 97-4]); APA Ex. 15 (James Depo. Tr. at 7-8, June 14, 2016 [ECF No. 111-23]) (Plaintiffs' counsel noting on the record that Captain Gabel, among others, has been assisting in counsel's representation of the class). It is odd then that the Plaintiffs invoke his participation in the arbitration as a basis for relief here.

Captain Gabel or any of the other members of the TWA Pilots Committee. *See* Resp. to APA SMF ¶ 29.[26] Moreover Plaintiff Horner testified that changing the membership of the TWA Pilots Committee would "absolutely not" have improved the situation for the legacy TWA pilots. *See* Resp. to APA SMF ¶ 30 (quot-

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[26] The Plaintiffs deny all of the statements of fact relevant to this issue. See Resp. to APA SMF ¶¶ 26-29. All of the Plaintiffs' denials are based on their legal arguments about the lack of a unified position by APA and the two committee structure. But as discussed above, however, these two legal arguments do not provide a basis for disputing the rather straightforward facts at issue here.

Moreover, the denials are problematic for other reasons. With respect to the statements made by Plaintiff Sikes, for example, the Plaintiffs state that Plaintiff Sikes testified that there should never have been a TWA Pilots Committee and that she had told Captain Gabel this. Resp. to APA SMF ¶ 26. But this does not deny the fact that she made these statements.

With respect to the statements made by Plaintiff Krakowski, the Plaintiffs assert that Plaintiff Krakowski testified that his complaint was to the entire LOA 12-05 process. Resp. to APA SMF ¶ 28. But this does not address the fact in question.

With respect to the statements made by Plaintiff Horner, the Plaintiffs assert that Plaintiff Horner objected to the TWA Pilots Committee because it was the union creating a subclass when the union was instead required to represent the pilots as a whole. Resp. to APA SMF ¶ 29. The Plaintiffs also assert that Plaintiff Horner did not support Captain Gabel's decision to chair the TWA Pilots Committee and told Captain Bounds that he was concerned with their general involvement. Resp. to APA SMF ¶ 29. But Plaintiff Horner's testimony didn't address their fitness for the position. See Pl. Ex. 4 (Horner Depo. Tr. 27:12-15, 32:12-18, May 10, 2016 [ECF No. 124-4]).

ing APA Ex. 11, Horner Depo. Tr. 34:11-14, May 10, 2016 [ECF No. 111-19]).[27]

ii. *Selection of Arbitrators*

For reasons similar to those discussed above as to member selection, the Plaintiffs' claim regarding the selection of the arbitrators also fails. American and APA both agreed that Arbitrator Bloch should serve as the principal arbitrator because he is a prominent Railway Labor Act arbitrator that is familiar to practitioners in the airline industry. *See* Resp. to American SMF ¶ 6. Important for this case, Captains Gabel and Bounds—APA board members from St. Louis who also happened to be legacy TWA pilots—approved the language of LOA 12-05 that identified Arbitrator Bloch as the principal arbitrator. *See* Resp. to APA SMF ¶¶ 20, 39-40; Resp. to American SMF ¶ 8. The Protocol Agreement provided that in addition to Arbitrator Bloch, the members of the arbitration panel would include Stephen Goldberg and Ira Jaffe. *See* Resp. to American SMF ¶ 12. But it was Captain Gabel who had suggested the appointment of Arbitrator Goldberg and Arbitrator Jaffe as the remaining two arbitrators,

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[27] The Plaintiffs also argue that the TWA Pilots Committee should have refused to participate in the arbitration process, *see* Resp. to APA SMF ¶ 90, but they offer no evidence (or even theory) as to how this would have attained a better result for the legacy TWA pilots or why the TWA Pilots Committee's lack of refusal to participate constitutes a breach of duty by APA.

and APA accepted his suggestion. *See* Resp. to APA SMF ¶ 51; Resp. to American SMF ¶ 12.[28]

Moreover, the Plaintiffs do not allege that Captains Gabel and Bounds acted irresponsibly or unfairly in picking the arbitrators and none of them asked APA to replace the arbitrators. *See* Resp. to APA SMF ¶¶ 46, 48-49, 53-55. Indeed, no legacy TWA pilots ever complained to Captain Gabel regarding the selection of Arbitrators Goldberg or Jaffe. *See* Resp. to APA SMF ¶ 53. Additionally, subsequent to entry into LOA 12-05, APA held a large gathering of legacy TWA pilots. *See* Resp. to APA SMF ¶ 43. At that meeting, APA informed the pilots that Arbitrator Bloch had been listed to chair the arbitration panel and none of the pilots present requested that APA replace Arbitrator Bloch. *See* Resp. to APA SMF ¶¶ 43-44.[29]

The Plaintiffs note that Arbitrator Bloch had previously ruled against the legacy TWA pilots in prior arbi-

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[28] APA subsequently asked American to accept Arbitrator Goldberg and Arbitrator Jaffe as arbitrators, which it did. *See* Resp. to American SMF ¶ 12.

[29] Plaintiff Horner did ask why Arbitrator Bloch had been selected, noting that Arbitrator Bloch had ruled against the legacy TWA pilots in a prior arbitration. *See* Resp. to APA SMF ¶¶ 45-46. But Plaintiff Horner never asked Mr. James or any APA officer or board members to replace Arbitrator Bloch, instead raising his concerns with Captain Williams, a member of the TWA Pilots Committee. *See* Resp. to APA SMF ¶ 46. The TWA Pilots Committee did not take action on the complaint or object to the selection of Arbitrator Bloch, but that failure to act cannot be a basis for a breach of duty claim against APA. *See* Resp. to APA SMF ¶¶ 42, 45-47.

trations.[30] But the fact that Arbitrator Bloch had previously ruled against the legacy TWA pilots does

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[30] The Plaintiffs raise a few other objections in their pleadings, none of which have merit. The Plaintiffs object to APA's statement of fact that Plaintiff Horner's only objection to Arbitrator Bloch was that he had ruled against TWA pilots in past arbitrations. *See* Resp. to APA SMF ¶ 47. They also assert that Plaintiff Horner objected to Arbitrator Bloch, along with Arbitrator Goldberg and Arbitrator Jaffe because the entire process was flawed and that as to the selection of arbitrators, the union and the company should have each picked one, and those two arbitrators should have picked a neutral. *See* Resp. to APA SMF ¶¶ 47, 55 (citing Pl. Ex. 4, Horner Depo. Tr. 68, May 10, 2016 [ECF No. 124-4]). But the Plaintiffs have not articulated a theory whereby this proposed process would have been better than allowing the TWA Pilots Committee to exercise more influence over the selection. Such an argument would be counter-intuitive.

The Plaintiffs object to APA's statement of fact that Plaintiff Sikes never raised an objection with anyone regarding the selection of Arbitrator Bloch, asserting that Plaintiff Sikes objected to him on the second day of the arbitration. *See* Resp. to APA SMF ¶ 48 (citing Pl. Ex. 2, Sikes Depo. Tr. 43-44, 48, May 10, 2016 [ECF No. 124-2]). But in her testimony, Plaintiff Sikes raises no specific objection to Arbitrator Bloch himself, rather to the structure of the arbitration, as well as the seat placement of APA and American next to one another and counsel "having chats with the arbitrators" during breaks, though she admits she was unaware of the content of those chats. *Id.*

The Plaintiffs also object to APA's statement of fact that Plaintiff Krakowski never raised an objection with anyone regarding the selection of Arbitrator Bloch. *See* Resp. to APA SMF ¶ 49 (citing Pl. Ex. 3, Krakowski Depo. Tr. 38, May 25, 2016 [ECF No. 124-3]). But in his testimony, Plaintiff Krakowski raises no specific objection with the arbitrators themselves, rather stating that they should have been selected in the manner used under the RLA, an argument rejected above. *See id.*

not make his selection as an arbitrator arbitrary, discriminatory, or in bad faith, and Plaintiffs have not provided evidence that his rulings were so egregious as to make it so. *See Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 330 (6th Cir. 1998) ("An adverse award in and of itself is no evidence of bias absent some evidence of improper motivation."). In fact, Captain Gabel and the TWA Pilots Committee decided that Arbitrator Bloch was a good choice for the LOA 12-05 arbitration, even after considering this criticism of him. *See* Resp. to APA SMF ¶ 41. Given these facts, it cannot be said that APA acted discriminatorily, arbitrarily or in bad faith. *See Demetris v. Transp. Workers Union of Am.*, 2015 U.S. Dist. LEXIS 13514, 2015 WL 474826, at *6 (N.D. Cal. Feb. 4, 2015) (a union does not have to make a "perfect decision or even a particularly good decision," but rather must only act in a rational manner that does not discriminate).

The Plaintiffs also argue that because LOA 12-05 stated that the arbitration was being conducted under Section 7 of the Railway Labor Act ("RLA"), the arbitrators should have been selected in accordance with the RLA. Section 7 of the RLA provides that the union and the company each pick an arbitrator, and those two arbitrators then select a third "neutral" arbitrator. *See* 45 U.S.C. § 157. But parties can waive default procedural requirements of the RLA, and no objection to the selection of the arbitrators was ever presented based on Section 7. *See, e.g., Krieter v. Lufthansa German Airlines, Inc.*, 558 F.2d 966, 968 (9th Cir. 1977). In any event, the procedures adopted by APA were more favorable than those set out in the RLA, as Captain Gabel chose two of the arbitrators and

Captains Gabel and Bounds approved the third. Under the RLA procedures, the legacy TWA pilots would have been consigned to working with the AA Pilots Committee to agree on APA's lone selection, with no influence on the selection of the other two arbitrators.

iii. *Selection of Counsel*

The Plaintiffs argument about selection of counsel for each of the pilot committees in the arbitration fails for similar reasons. Each committee chose its own counsel, with the TWA Pilots Committee choosing John Clarke[31] and the AA Pilots Committee selecting Wesley Kennedy.[32] *See* Resp. to APA SMF ¶¶ 60-61, 68.

In their briefs opposing summary judgment, the Plaintiffs do not raise any issues with respect to the

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[31] Consistent with their general theory in the case, the Plaintiffs assert that APA influenced the TWA Pilots Committee's choice of Mr. Clarke as its counsel because the TWA Pilots Committee was formed by APA and given party status under LOA 12-05. *See* Resp. to APA SMF ¶ 61. But that does not demonstrate in any way that APA made the decision to select Mr. Clarke.

[32] The Plaintiffs deny that the AA Pilots Committee chose Mr. Kennedy and instead assert that Mr. Kennedy was chosen by APA to represent the AA Pilots Committee. *See* Resp. to APA SMF ¶¶ 60, 68. But the Plaintiffs' position is, yet again, without basis. The Plaintiffs cite only to conversations between Mr. James and Mr. Kennedy about billing for his services. *See* Resp. to APA SMF ¶ 60. But despite extensive discovery, nothing presented by the Plaintiffs suggests that APA controlled or otherwise dictated who the AA Pilots Committee should hire as counsel. The Plaintiffs also fail to establish how the selection of Mr. Kennedy—other than the conflict of interest issue discussed and rejected above—could provide a basis for a breach of fiduciary duty claim on behalf of the legacy TWA pilots.

selection of Mr. Clarke as counsel for the TWA Pilots Committee, seemingly dropping their prior claims regarding his selection. In any event, the Court concludes — for the same reasons discussed above regarding selection of the members of the TWA Pilots Committee — that APA acted appropriately in allowing the TWA Pilots Committee to choose its own counsel. Additionally, the Plaintiffs fail to establish that the selection of Mr. Clarke caused them harm. They do not claim that Mr. Clarke was unqualified to represent them, and in fact engaged him in other proceedings both prior and subsequent to the LOA 12-05 arbitration.[33] Indeed, Mr. Clarke had extensive experience, including arguing five cases at the Supreme Court, three of which involved the interpretation of the RLA. *See* Resp. to APA SMF ¶¶ 64, 67. Plaintiffs have not even attempted to show that a different counsel might have produced better results for the former TWA pilots.[34]

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[33] In the year prior to the LOA 12-05 arbitration, Mr. Clarke represented former TWA pilots in this Court, including Plaintiff Sikes. *See* Resp. to APA SMF ¶ 65. Mr. Clarke was also chosen by a group of former TWA pilots—including Plaintiffs Sikes, Horner, and Krakowski—to represent them after the LOA 12-05 arbitration in an internal proceeding at APA related to the unsecured claim obtained by APA in this bankruptcy. *See* Resp. to APA SMF ¶ 66.

[34] The Plaintiffs offered no criticism of Mr. Clarke's performance in the arbitration, other than commentary along the lines of his being too "gentlemanly" and "long-winded." *See* Resp. to APA SMF ¶¶ 91-92. Such comments are clearly an insufficient basis for a duty of fair representation claim against APA. Indeed, even where an employee's representative was not a licensed lawyer, duty of fair representation claims have been rejected absent

Turning to counsel for the AA Pilots Committee, the Plaintiffs argue that APA displayed substantial bias in retaining Mr. Kennedy, noting that Mr. Kennedy is outside counsel to APA and has long represented it, including in the AA/TWA merger and in connection with the AA/U.S. Airways merger. *See* Pl. Add'l Facts re: APA ¶¶ 59-61. Indeed, the TWA Pilots Committee asserted at the time that Mr. Kennedy had an ethical conflict of interest because he served as counsel to the AA Pilots Committee in the LOA 12-05 arbitration, and also as counsel to the committee advocating for all American pilots—including legacy TWA pilots—in the seniority merger with U.S. Airways. *See* Resp. to APA SMF ¶ 72.

But once again, the Plaintiffs' argument falls flat. APA hired an attorney specializing in legal ethics to review whether this "dual representation" would give rise to a conflict. *See* Resp. to APA SMF ¶ 75. The Plaintiffs do not dispute that the legal expert advised APA that there was no conflict of interest. *See* Resp. to APA SMF ¶ 78 (Plaintiffs admitting fact that ethics counsel advised APA there was no conflict because Mr. Kennedy did not represent the TWA Pilots Committee in the US Air integration); *see also* ¶¶ 75-76. Such an admission is fatal to the Plaintiffs' position. *See Bruce v. Local 333, Int'l Longshoremen's Ass'n*, 189 F. Supp. 2d 282, 288-90 (D. Md. 2002) (finding that

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evidence that the representative was incompetent or that a different representative would have produced better results. *See Mullen*, 1999 U.S. Dist. LEXIS 16434, 1999 WL 974023, at *6; *Sales v. YM & YWHA of Washington Heights & Inwood*, 2003 U.S. Dist. LEXIS 839, 2003 WL 164276, at *9 (S.D.N.Y. Jan. 22, 2003).

union did not violate duty of fair representation because it reasonably believed that it was acting appropriately on the advice of counsel); *c.f. Power v. Kaiser Found. Health Plan of Mid-Atl. States Inc.*, 87 F. Supp. 2d 545, 553 n.19 (E.D. Va. 2000).

Furthermore, allegations of an appearance of impropriety do not establish a duty of fair representation claim given the lack of "causal connection between the union's wrongful conduct and [his or her] injuries." *Vaughn*, 604 F.3d at 709; *c.f. Price v. Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am.*, 927 F.2d 88, 94 (2d Cir. 1991) ("appearance of bias" with respect to arbitration procedures does not raise due process concerns and does not support a duty of fair representation claim) (citing *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340-41 (2d Cir. 1987)). The Plaintiffs do not provide evidence that Mr. Kennedy's role in the arbitration undermined the integrity of the process or changed the result, as the TWA Pilots Committee was given a full and fair opportunity to participate and argue their case. *C.f. Carr*, 2016 U.S. Dist. LEXIS 99895, 2016 WL 4061145, at *11 (union failure to prevent witness participation "did not seriously undermine[] the integrity of the arbitral process, which was otherwise fair, and which the neutral arbitrators—not [the union]—controlled, even if the failure violated [the union's] accounting and finance rules.") (internal citations and quotations omitted). Indeed, the arbitrators rejected the proposal made by the AA Pilots Committee, which was presented by Mr. Kennedy. *See* Resp. to APA SMF ¶¶ 113-14, 116.

4. *Allegations Relating to Arguments at Arbitration*

The Plaintiffs also allege APA violated its duty of fair representation based on the positions taken by different parties during the arbitration, specifically the AA Pilots Committee proposal and APA's objection to the TWA Pilots Committee proposal. *See* Compl. ¶¶ 48(I), (J).

i. *Position of the AA Pilots Committee*

The Plaintiffs first argue that APA failed to prevent the AA Pilots Committee from taking a position that was unfair to the legacy TWA pilots. The Plaintiffs appear to suggest that APA should have somehow repudiated the proposal of the AA Pilots Committee and defended the proposal of the TWA Pilots Committee. But the Plaintiffs position represents a misunderstanding of APA's obligations with respect to the LOA 12-05 process. On this issue, the Court finds persuasive the views in *Carr v. Airline Pilots Association, International*, 2016 U.S. Dist. LEXIS 99895, 2016 WL 4061145 (S.D. Tex. July 29, 2016). Carr involved the seniority integration of two adverse pilot groups in the merger of Continental and United Air Lines. *See* 2016 U.S. Dist. LEXIS 99895, [WL] at *1. In Carr, the union representing all of the pilot groups chose to integrate the merging carriers' seniority lists through an arbitration process, pursuant to which each pilot group was represented by its own merger committees. *See* 2016 U.S. Dist. LEXIS 99895, [WL] at *2. The plaintiff, a Continental pilot, challenged the resulting arbitration award, claiming that the union had violated its duty of fair representation for several reasons, including by refusing to intervene when the United pilot group

made improper political arguments during the arbitration. *See* 2016 U.S. Dist. LEXIS 99895, [WL] at *7.

In its decision, the *Carr* court recognized that "[u]nions have discretion when resolving internal disputes between conflicted groups and their actions are judged by a 'wide range of reasonableness.'" 2016 U.S. Dist. LEXIS 99895, [WL] at *9 (quoting *O'Neill*, 939 F.2d 1199, 1204 (5th Cir. 1991)). The district court found that a union satisfies its duty of fair representation in those circumstances by "establishing a 'fair process for determining seniority' … ." *Id.* (quoting *Air Wisconsin Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990)). The court noted that "[o]ne example of a fair process is a process to refer disputes about seniority-list integration after airlines merge to arbitration, under rules that require neutral arbitrators to integrate the seniority lists without intending to favor one pilot group over the other." *Id.* (citing *Air Wisconsin*, 909 F.2d at 216). The court found that "[t]he duty of fair representation does not require a union to ensure a "fair" result in resolving disputes, including disputes over seniority-list integration." *Id.* (citing *O'Neill*, 939 F.2d at 1201). With respect to the union's failure to interrupt the allegedly improper presentation of the United pilot group, the *Carr* court noted that there was no case law to support "the proposition that a union must interject itself in this fashion into an arbitration that has valid processes and procedures in place. Instead the case law appears to support the proposition that a union's duty is satisfied by establishing neutral and valid processes and procedures for the

arbitration." 2016 U.S. Dist. LEXIS 99895, [WL] at *15 (citing *Air Wisconsin*, 909 F.2d at 216).[35]

The ruling in *Carr* accords with the Second Circuit's view that—when a union is "faced with two groups of its members with objectives that [are] directly at odds"—"[s]ubmission of the impending dispute to arbitration [is] an equitable and reasonable method of resolving it." *Gvozdenovic*, 933 F.2d at 1107. In *Gvozdenovic*, the Second Circuit concluded that the union members in question had "fail[ed] to demonstrate that their interests were not fully represented in the arbitration proceeding" and therefore the groups at issue "were treated under the arbitration agreement with perfect parity." *Id*. (citing *Cook v. Pan Am. World Airways, Inc.*, 771 F.2d 635, 645 (2d Cir. 1985)) (finding no violation of a union's duty of fair representation where the evidence demonstrated that the interests of all employee groups were represented vigorously throughout the proceedings).

Applying all these principles here, the Court finds that the process established by APA was reasonable and rejects the Plaintiffs' argument based on the posi-

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[35] The Plaintiffs argue that the *Carr* decision is inapplicable because the plaintiffs in *Carr* did "not attack core aspects of the … process or procedures." *Carr*, 2016 U.S. Dist. LEXIS 99895, 2016 WL 4061145, at *10. But the Plaintiffs' claim with respect to the proposal made by the AA Pilots Committee is also not an attack on the procedures or process of the LOA 12-05 arbitration, but rather an attack on the substantive positions of the parties and the failure of APA to oppose those positions.

tion taken by the AA Pilots Committee.[36] Each side was treated in a neutral manner. Both were given the opportunity to fully represent themselves and state their positions during the arbitration proceedings through a representative empowered to independently advocate on their behalf. *See* Resp. to APA SMF ¶¶ 84-87, 104-07, 110, 111-14, 116-23. Thus, neither side could impose a "non-responsive" or "predatory" proposal, Pl. Opp. to APA SJM at 14, without facing rebuttal from the other. As the TWA Pilots Committee had the full opportunity to counter any arguments made by the AA Pilots Committee, APA had no obligation to interject itself into the process to prevent one group from making its own arguments or to support the arguments of the other side. This neutrality on the part of APA did not prevent the arbitrators from considering the relevant evidence and arguments put forward by both sides.[37]

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[36] Relatedly, the Court rejects as nonsensical the Plaintiffs' argument that APA is somehow responsible for all the actions of the AA Pilots Committee because it was a committee of APA and was created pursuant to APA's Constitution and Bylaws. *See* Pl. Opp. to APA SJM at 15-16.

[37] The Plaintiffs also cannot meet the requirement of causation on this claim, as the Plaintiffs have not shown that APA's failure to oppose the AA Pilots Committee proposal impacted the result of the arbitration, since the arbitrators ultimately rejected the proposal made by the AA Pilots Committee. *See* Resp. to APA SMF ¶ 116.

ii. *APA Objection to Proposals of TWA Pilots Committee*

The Plaintiffs next argue that APA's objection to the proposal submitted by the TWA Pilots Committee constituted a breach of fiduciary duty. But this argument overlooks that APA's objection was a three-page brief objecting to two procedural aspects of the TWA Pilots Committee proposal for future arbitrations, and offered no comment on the substantive proposals of the TWA Pilots Committee regarding substitute job protections for Supplement CC. *See* Resp. to APA SMF ¶¶ 124-30. Indeed, the arbitrators saw APA as neutral in the process, noting that APA had delegated its advocacy position to the two pilot committees and took no position on the substantive positions submitted by those committees. *See* APA Ex. 1-F (12-05 Arbitration Merits Opinion at 6 n.9 [ECF No. 92-9]) ("For purposes of the presentations, and in recognition of starkly differing interests within the bargaining unit, APA delegated its advocacy position in this case to two committees composed of the former TWA pilots and the AA pilots, respectively. APA takes no position on the substantive positions submitted by the respective committees."). The TWA Pilots Committee had the opportunity to respond to APA's submission without interference and indeed did so. *See* Resp. to APA SMF ¶ 86.

In any event, the action of APA in responding to the TWA Pilots Committee's proposal on proceedings for future arbitrations was not arbitrary, discriminatory, or in bad faith. Rather, APA responded to the proposed procedures for future arbitrations in a way that was consistent with the governing text of LOA 12-05. Specifically, the APA brief opposed the proposal of the TWA

Pilots Committee to appoint a "multi-party adjustment board" to resolve future disputes as inconsistent with LOA 12-05 and thus outside the jurisdiction of the arbitrators. *See* APA Ex. 1-H at 2 (APA Response to Proposal [ECF No. 92-11]). APA similarly opposed the TWA Pilots Committee's proposal to appoint a separate committee of legacy TWA pilots in the seniority integration between American and U.S. Airways as conflicting with LOA 12-05, which excluded seniority matters from the LOA 12-05 arbitrators' jurisdiction. *See* APA Ex. 1-H at 2-3 (APA Response to Proposal [ECF No. 92-11]). APA's position was that the latter proposal sought to "bind a future statutory panel," and that this would be "improper." APA Ex. 15 (James Depo. Tr. 104:21-22, June 14, 2016 [ECF No. 111-23]). Notably, the arbitrators rejected both of the procedural proposals made by the TWA Pilots Committee. *See* Resp. to APA SMF ¶ 130. The positions taken by APA —that would only affect future proceedings—were well within the "wide range of reasonableness" granted to unions in such circumstances, *O'Neill*, 499 U.S. at 67, served legitimate union interests, and did not run afoul of its neutrality on the question of what substitute job protections should be imposed by the arbitrators.[38] To rule otherwise would improperly and unfairly handcuff a union's ability to act to enforce the ground rules of arbitrations such as contemplated by LOA 12-05, even

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[38] Once again, the Plaintiffs have failed to show causation here as the arbitrators declined to accept the TWA Pilots Committee's procedural proposals on the merits, despite the TWA Pilots Committee having had the full opportunity to present them. *See* Resp. to APA SMF ¶ 130 (citing APA Ex. 1-F, 12-05 Arbitration Merits Opinion at 19-20 [ECF No. 92-9]).

if the participants took positions that clearly violated those ground rules.

iii. *Arguments Regarding APA Contacts with Arbitrators*

The Plaintiffs also complain that APA failed to disclose a prior personal relationship between APA's general counsel, Edgar James, and Arbitrator Stephen Goldberg. *See* Plaintiffs' Supp. Memo. in Opp. to APA Renewed Mot. for Summ. J. [ECF No. 127] ("Pl. Supp. Opp. to APA SJM") at 1-2. The Plaintiffs assert that this caused unreasonable bias on the part of Arbitrator Goldberg towards Mr. James and APA, and that the failure of APA to disclose these contacts demonstrates bad faith by APA. *See id*.

The Plaintiffs' allegations are based on an email exchange between Mr. James and Arbitrator Goldberg, regarding Arbitrator Goldberg attending a dinner party at the home of Mr. James. *See* Pl. Ex. 27 (James and Goldberg emails [ECF No. 127-2]). The Plaintiffs note that several weeks after the email exchange, Mr. James emailed Arbitrator Goldberg to ask him to participate in the LOA 12-05 arbitration. *See id*. Based upon this evidence, the Plaintiffs assert that the two were "obvious social friends" and had a "personal relationship" that would lead a reasonable person to conclude that Arbitrator Goldberg was biased in favor of Mr. James and would give Mr. James' input during the arbitration—or lack thereof—more weight than others. *See* Pl. Supp. Opp. to APA SJM at 2-3.

To state a claim for a bad faith breach of the duty of fair representation, a plaintiff must allege that the union engaged in fraud, dishonesty, or other intention-

ally misleading conduct with an improper intent, purpose, or motive. *See Vaughn*, 604 F.3d at 709-10. There is no evidence of such an improper purpose, motive, or intent based on the undisputed facts here. Arbitrator Goldberg was not chosen by Mr. James or APA but rather by Captain Gabel, chair of the TWA Pilots Committee. *See* Resp. to APA SMF ¶¶ 51-52. Indeed, Captain Gabel chose Arbitrator Goldberg specifically because he had ruled against American in a prior arbitration with APA. *See* Resp. to APA SMF ¶¶ 51-52. And as discussed extensively above, neither APA—nor Mr. James on its behalf)—took any positions during the arbitration regarding the substantive proposals made by the TWA Pilots Committee or the APA Pilots Committee during the arbitration. Instead, APA formed two committees to advocate their own substantive positions in the arbitration and ultimately the arbitrators rejected the proposals made by both committees. *See* Resp. to APA SMF ¶¶ 116, 122.

Finally, the Court notes that none of the cases relied upon by the Plaintiffs on this issue involve a duty of fair representation claim. Rather, they are based on petitions to vacate an arbitration award based on an arbitrator's bias. *See* Pl. Supp. Opp. to APA SJM at 2 (citing *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2d Cir. 2012); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2d Cir. 1984); *Washburn v. McManus*, 895 F. Supp. 392 (D.

Conn. 1994)).[39] But the case currently before the Court is limited to fair representation claims "relating to how the arbitration was conducted," an issue which is "independent of a request to vacate an arbitration result." *See Krakowski*, 536 B.R. at 372-73. In fact, the Plaintiffs have filed another case in this Court seeking to vacate the arbitration award on exactly this basis, Adv. No. 16-01138 ("*Krakowski III*").[40] Motions to dismiss have been briefed in *Krakowski III* and the Court will address the request to vacate the arbitration award it in that case.[41]

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[39] *See also Washburn v. McManus*, 895 F. Supp. 392, 399 (D. Ct. 1994) (to vacate an arbitration award, the relationship between the arbitrator and the party's principal must be so intimate as to cast doubt on the arbitrator's impartiality); *see also Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 83 (2d Cir. 1984) ("[T]o disqualify any arbitrator who had professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all.").

[40] The Court notes that motions to dismiss have been filed in *Krakowski III*. *Krakowski III* is the third adversary proceeding filed by the Plaintiffs before this Court related to the legacy TWA pilots obtaining alternative job protections. Due to the overlapping nature of these cases, the Court decided not to hear argument on the motions to dismiss in *Krakowski III* until it fully resolved the overlapping issues that were raised in the motions for summary judgment addressed in this current decision. Now that these summary judgment motions have been resolved, the Court directs the parties to contact Chambers to schedule oral argument on the motions to dismiss in *Krakowski III* within 30 days of the date of this decision

[41] The Plaintiffs argue that it is incorrect to parse this case into the six specific allegations listed in the Complaint. They

C. Collusion Claim Against American

The Court also grants American's motion for summary judgment with respect to the Plaintiffs' claims that American colluded with APA in its alleged breach of the duty of fair representation. *See* Compl. ¶¶ 51-57. The union's breach of its duty of fair representation is an essential element to establish a claim of an employer's collusion. *See United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985); *see also Flight Attendants in Reunion v. Am. Airlines, Inc.*, 813 F.3d 468, 475 (2d Cir. 2016). As the Court concludes that the Plaintiffs' claim that APA has breached its duty fails, the Court must also conclude that the Plaintiffs' claim against American for collusion fails as well. *See id.*

Even if there were claims remaining against APA, the Plaintiffs' collusion claims against American suffer from several defects. The majority of the Plaintiffs' claims against American do not assert that American took any action in collusion with APA, but rather simply that American had knowledge of APA's alleged breach of fiduciary duty. But that is not enough under applicable law.

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assert that their duty of fair representation claim against APA is based on a pattern of conduct, and must be evaluated on the whole of the evidence and not any particular incident. *See* Pl. Opp. to APA SJM at 3 (citing Compl. ¶ 49). But the Court has examined each of the Plaintiffs' allegations and has found no basis for the individual claims asserted by the Plaintiff. This assessment does not change whether those allegations are evaluated as a whole or parsed individually.

The Plaintiffs cite cases to support their position that an employer's knowledge of a breach by a union is sufficient for a collusion claim. But these cases all involve a hybrid claim, where a duty of fair representation claim against a union is combined with an allegation that the employer has breached the collective bargaining agreement. *See Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 796, 798 (2d Cir. 1974); *O'Mara v. Erie Lackawanna R.R. Co.*, 407 F.2d 674, 677, 679 (2d Cir. 1969); *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847 (2d Cir. 1961); *N.L.R.B. v. Am. Postal Workers Union*, 618 F.2d 1249 (8th Cir. 1980); *American Postal Workers Union, etc. v. American Postal Workers Union*, 665 F.2d 1096, 214 U.S. App. D.C. 278 (D.C. Cir. 1981); *Sullivan v. Air Transp. Local 501 TWU*, 2004 U.S. Dist. LEXIS 29815, 2004 WL 2851785, at *2-3 (E.D.N.Y. Dec. 6, 2004); *Musto v. Transp. Workers Union of Am., AFL-CIO*, 339 F. Supp. 2d 456, 469-71 (E.D.N.Y. 2004). There is no breach of contract claim in this case, and thus no hybrid claim upon which to anchor a claim of collusion against American based on mere knowledge. Indeed, the Court has already ruled against the Plaintiffs on this exact issue earlier in this case. *See Krakowski*, 567 B.R. at 259-60 (rejecting Plaintiffs' argument that case law in the Second Circuit permits employees to add their employer as a defendant solely by alleging the employer's knowledge of the union's breach).

Absent such a hybrid claim, a plaintiff seeking to hold an employer liable for collusion must allege conduct by the employer evidencing bad faith, discrimination, or hostility towards the plaintiffs in connection with the union's alleged breach of its duty. *See, e.g.,*

Rakestraw v. United Airlines, Inc., 765 F. Supp. 474, 493-94 (N.D. Ill. 1991) (dismissing claim against carrier even though carrier was aware of the animosity between the union and the minority group because there was no evidence that the carrier "acted in bad faith or discriminated against plaintiffs in accepting [the union's] proposal."), *aff'd in relevant part, rev'd in part*, 981 F.2d 1524 (7th Cir. 1992); *Cunningham v. United Airlines, Inc.*, 2014 U.S. Dist. LEXIS 13414, 2014 WL 441610, at *6 (N.D. Ill. Feb. 4, 2014) (holding that potential knowledge of union discrimination against its members is not enough to support a finding of collusion by the carrier, absent extreme factual scenarios).

The Plaintiffs only allege a few affirmative actions by American here, and none satisfy the standard for a collusion claim. For example, American entered into LOA 12-05 and the Protocol Agreement that established the scope of the arbitration. But the Plaintiffs have come forward with nothing to show that these actions were somehow collusive with a breach of fiduciary duty by APA. Turning to the conduct of the arbitration itself, American took no active role in selecting the arbitrators other than Arbitrator Bloch, but simply acquiesced to the decision of others.[42] *See* Resp. to

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[42] The Court finds no evidence of conduct by American that would constitute discrimination, bad faith or hostility towards the Plaintiffs or the legacy TWA pilots with respect to the Protocol Agreement appointing Arbitrator Bloch. For example, American and APA agreed on the choice of Arbitrator Bloch because he was a prominent Railway Labor Act arbitrator who was familiar to practitioners in the airline industry. *See* Resp. to American SMF ¶ 6. There is no evidence that American acted with an improper

American SMF ¶ 12. As discussed earlier, American had no involvement in, or knowledge regarding, the selection of the union committee members or their counsel. *See* Resp. to American SMF ¶¶ 17, 20-21. Nor did American adopt the proposal of either the AA Pilots Committee or the TWA Pilots Committee as to the alternative job protections to be awarded to the legacy TWA pilots. *See* Resp. to American SMF ¶¶ 26-31. In the face of these facts, the Plaintiffs raise two arguments, neither of which have merit.

First, the Plaintiffs rely on the failure of American to police APA's actions. *See* Pl. Resp. to American Mot. for Summ. J. at 14 [ECF No. 121] ("When examined as a whole, it is clear that American had knowledge of and was complicit in APA's breach."). For example, regarding APA's alleged breach of establishing the pilot committees and choosing the participants for the arbitration, the Plaintiffs assert that "American never questioned it" and "did not object to this structure." Pl. Resp. to American Mot. for Summ. J. at 15. Similarly, on the Plaintiffs' allegation that APA acted improperly in the selection of the counsel representing each of the committees, Plaintiffs repeatedly argue that American engaged in collusion simply because "American did nothing." *Id*. at 17.

But this is nothing more than a variation of the Plaintiffs' seeking to hold American liable based on

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purpose or with animus against the legacy TWA pilots in acceding to the other parties' request to use Arbitrator Bloch here. Indeed, the negotiation of an agreement with a union—in and of itself—cannot constitute collusion. *See United Indep. Flight Officers*, 756 F.2d at 1283.

knowledge. It is not "appropriate to impose liability where the employer is charged with nothing more than having acceded to the demands of the [u]nion, even with knowledge of facts from which it might be inferred that the [u]nion was not fulfilling its duty of fair representation to all of its constituents." *Am. Airlines Flow-Thru Pilots Coalition v. Allied Pilots Ass'n*, 2015 U.S. Dist. LEXIS 169657, 2015 WL 9204282, at *3 (N.D. Cal. Dec. 17, 2015). Doing so would require an employer to supervise the actions of the union counterparty and make an independent evaluation of the conduct and decisions of the union prior to entering a collective bargaining agreement. *See Cunningham*, 2014 U.S. Dist. LEXIS 13414, 2014 WL 441610, at *6. Such a requirement is unworkable, as

> [a] union does not automatically breach the duty of fair representation every time it negotiates for contracts in which some of its members are treated differently than others. At least outside contexts such as discrimination against protected classes, the onus should not be on the employer to evaluate and consider whether distinctions a union draws among its members are appropriate. Thus, something more than merely acceding to union demands must be alleged and proven to impose liability on an employer for 'colluding' in a breach of what ultimately remains the union's duty.

Am. Airlines Flow-Thru, 2015 U.S. Dist. LEXIS 169657, 2015 WL 9204282, at *3; *see also Am. Postal Workers Union*, 665 F.2d at 1109 ("The [employer] was required only to bargain in good faith with the employees' exclusive representative, and, in so doing, it was

expected to represent its own interests, not those of the employees."); *Cunningham*, 2014 U.S. Dist. LEXIS 13414, 2014 WL 441610, at *6 ("[T]he employer must in most circumstances be able to rely on the union's disposition' in spite of some employee objections; and it would have a detrimental effect on labor-management relations if an employer were forced to ignore union representations and take the initiative in dealing with employees whenever it suspects a discriminatory union motive.") (internal citations and quotations omitted).

Second, the Plaintiffs claim collusion based on email communications between Arbitrator Goldberg and Mark Burdette, a consultant for American during the time of the LOA 12-05 arbitration. *See Plaintiffs' Statement of Additional Material Facts Regarding American* ("Pl. Add'l Facts re: American") [ECF No. 122] ¶ 6. Mr. Burdette was involved in the selection of arbitrators, the reviewing of proposals, and the development of contract language implemented pursuant to the arbitration opinion, and also testified on behalf of American during the arbitration. *See* Pl. Add'l Facts re: American ¶ 6. From January through July 2013, Mr. Burdette engaged in an email exchange with Arbitrator Goldberg about, among other things, Mr. Burdette's interest in serving as a mediator, and Mr. Burdette's preparation of a mock award for the arbitration that he shared with Arbitrator Goldberg after the arbitrators had issued their decision.[43]

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[43] In January 2013, Mr. Burdette emailed Arbitrator Goldberg to congratulate him on his appointment to the LOA 12-05 panel and inform Arbitrator Goldberg that Mr. Burdette would likely be participating in the case. *See* Pl. Add'l Facts re: American

Based on the email exchange, the Plaintiffs argue that Mr. Burdette and Arbitrator Goldberg had a

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¶ 7. Arbitrator Goldberg responded, "Thx for the note, but I'd rather see you as a member of the arbitration panel than as a witness. One of these days. …" Pl. Add'l Facts re: American ¶ 7 (quoting Goldberg email [ECF No. 122-8]). Arbitrator Goldberg was the founder of Mediation Research and Education Project, Inc. ("MREP"), a non-profit corporation of arbitrators and mediators. *See* Pl. Add'l Facts re: American ¶ 8. In March 2013, Mr. Burdette and Arbitrator Goldberg again emailed one another. *See* Pl. Add'l Facts re: American ¶ 9. During this exchange, Mr. Burdette asked, "You mentioned sometime back about training me and putting me on the MREP panel. Is that still a possibility?" Pl. Add'l Facts re: American ¶ 9 (quoting Burdette email [ECF No. 122-11]). The two then discussed the logistics of Mr. Burdette traveling to Chicago to receive MREP training by Arbitrator Goldberg. *See* Pl. Add'l Facts re: American ¶ 9. In this same email, Mr. Burdette commented to Arbitrator Goldberg that he thought Edgar James, an APA attorney, would recommend Arbitrator Goldberg to a lawyer for U.S. Airways for mediation work. *See* Pl. Add'l Facts re: American ¶ 10. Arbitrator Goldberg responded, in part, "By the way, I know that Ed is a great fan of yours. … He told me he thought you should be Senior V-P, HR (to which I wholeheartedly agreed)." Pl. Add'l Facts re: American ¶ 10 (quoting Goldberg email [ECF No. 122-11]). In April 2013, Mr. Burdette went to Chicago for MREP training and then became a member of MREP. *See* Pl. Add'l Facts re: American ¶ 11. In July 2013, Mr. Burdette and Arbitrator Goldberg had another email exchange, during which Mr. Burdette mentioned that he would be sending a voluntary contribution to MREP. *See* Pl. Add'l Facts re: American ¶ 12. Mr. Burdette also mentioned that he had prepared a mock award that he would share with Arbitrator Goldberg after the real award was released. *See* Pl. Add'l Facts re: American ¶ 13. After the arbitration decision was released, Mr. Burdette shared his mock award with Arbitrator Goldberg. *See* Pl. Add'l Facts re: American ¶ 14. American never disclosed the relationship between Mr. Burdette and Arbitrator Goldberg during the arbitration. *See* Pl. Add'l Facts re: American ¶ 15.

"significant relationship" prior to Arbitrator Goldberg's appointment and that this relationship caused Arbitrator Goldberg to be unreasonably biased towards American. The Plaintiffs argue that by choosing an arbitrator that was biased—and failing to disclose that bias to the other participants—American was complicit in creating a hostile and discriminatory arbitration that was weighted in its favor and against the Plaintiffs.

The question at hand, however, is not whether American itself breached some independent duty owed by American to these legacy TWA pilots, but whether American colluded in a breach of APA's duty of fair representation. Seen in that light, these emails are insufficient. It is undisputed that APA had no knowledge of the communications between Mr. Burdette and Arbitrator Goldberg. *See* APA Ex. 17 (Burdette Depo. Tr. 73:23-85:11 [ECF No. 111-25]). Moreover, the communications took place subsequent to Arbitrator Goldberg being chosen,[44] further attenuating any claim that APA somehow breached its fiduciary duty of fair representation in selecting the arbitrator. Thus, these emails cannot be evidence of APA's breach of duty or American's collusion in such an APA breach. Nor do the communications suggest hostile or discriminatory intent towards the Plaintiffs or the legacy TWA pilots. *See* Pl. Exs. 8, 11-13 [ECF Nos. 122-8, 122-11, 122-12,

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[44] The first email cited by the Plaintiffs is from Mr. Burdette to Arbitrator Goldberg on January 10, 2013, in which Mr. Burdette congratulates Arbitrator Goldberg on having already been appointed to the LOA 12-05 arbitration panel. *See* Plaintiffs' Statement of Additional Material Facts Regarding American [ECF No. 122] ¶ 7 (citing Pl. Ex. 8, Burdette email [ECF No. 122-8]).

122-13]. Rather, they establish that Mr. Burdette was engaged in a severely misguided attempt to further his career by becoming an arbitrator. *See* APA Ex. 17 (Burdette Depo. Tr. 82:15-20 [ECF No. 111-25]) (Mr. Burdette testifying that he was not attempting to influence the arbitration award in any way).

Finally, the Court notes that the Plaintiffs in *Krakowski III* seek to vacate the arbitration award based on this same allegation of bias by Arbitrator Goldberg, and the Court will address any such claim of bias in that lawsuit.[45]

CONCLUSION

For the reasons stated above, the Defendants' motions for summary judgment are granted and the Plaintiffs' motion to amend the Complaint is denied. The Plaintiffs have failed to present an issue for trial with respect to APA because, considering to all the evidence in the Plaintiffs' favor, a reasonable juror could not find a breach of APA's duty of fair representation. The Plaintiffs have also failed to present an issue for trial with respect to their collusion claim against American given the failure of their breach of fiduciary duty against APA and because there is not affirmative action that would constitute collusion by American under applicable law.

The Defendants should settle an order on three days' notice. The proposed order must be submitted by

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[45] The Plaintiffs have raised many arguments in their papers. To the extent that an argument made by the Plaintiffs has not been specifically addressed by the Court in this decision, it is rejected as being insufficient to survive summary judgment.

filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon counsel to the Plaintiffs.

APRIL 2017 BANKRUPTCY COURT DECISION (*Krakowski II*)

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 567 B.R. 247, 2017 Bankr. LEXIS 1035, 64 Bankr. Ct. Dec. 6, Adv. No. 14-01920 (Bankr. S.D.N.Y. April 14, 2017) ("*Krakowski II*").

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: AMR CORP., *et al.*, Reorganized Debtors.	Chapter 11 Case No. 11-15463 (SHL) (Confirmed)
JOHN KRAKOWSKI, *et al.*, individually and on behalf of those similarly situated, Plaintiffs, v. AMERICAN AIRLINES, INC., *et al.*, Defendants.	Adv. No. 14-01920 (SHL)

April 14, 2017

Before Bankruptcy Judge Sean H. Lane

MEMORANDUM OF DECISION

Before the Court are the Defendants' motions to dismiss [ECF Nos. 40, 41][1] the second amended complaint (the "Second Amended Complaint") [ECF No. 33] that was filed by Plaintiffs John Krakowski, Kevin Horner, and M. Alicia Sikes on behalf of themselves and all persons similarly situated against Defendants American Airlines, Inc. ("American") and the Allied Pilots Association (the "APA"), which is the pilots' union at American. The Plaintiffs are former Trans World Airlines ("TWA") pilots now employed by American. For the reasons set forth below, the Court grants the Defendants' motions to dismiss.

BACKGROUND

The factual background of this case is set forth in the Court's most recent decision in this case, familiarity with which is assumed. *See Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, 538 B.R. 213 (Bankr. S.D.N.Y. 2015) (the "September 2015 Decision"). The parties and events involved have been the subject of extensive litigation before this Court in several cases, resulting in numerous other written decisions. *See Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, 536 B.R. 360 (Bankr. S.D.N.Y. 2015); *Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, 2015 Bankr. LEXIS 1721, 2015 WL 2414750 (Bankr. S.D.N.Y. May 19, 2015); *Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729

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[1] Unless otherwise specified, references to the Case Management/Electronic Case Filing ("ECF") docket are to this adversary proceeding.

(Bankr. S.D.N.Y. June 3, 2014). The Court takes judicial notice of these decisions, as they provide much needed context for the motions now before the Court.[2]

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[2] Judicial notice is appropriate even though the parties' litigation spans several different adversary proceedings in this bankruptcy. *See In re E.R. Fegert, Inc.*, 887 F.2d 955, 957-58 (9th Cir. 1989) ("Whether these facts were supported by the record in this adversary proceeding is unclear; however, all of the facts are supported by the record of the underlying bankruptcy matter. … 'The record in an adversary proceeding in bankruptcy presumes and in large measure relies upon the file in the underlying case …'") (quoting *Berge v. Sweet (In re Berge)*, 37 B.R. 705, 708 (W.D. Wis. 1983)); *Mirena IUD Prods. Liab. Litig.*, 29 F. Supp. 3d 345, 350 (S.D.N.Y. 2014) ("The Court may … rely on matters of public record, such as judicial documents and official court records, in deciding whether to dismiss a complaint."); *Ferrari v. Cty. of Suffolk*, 790 F. Supp. 2d 34, 38 n.4 (E.D.N.Y. 2011) ("In the Rule 12(b)(6) context, a court may take judicial notice of prior pleadings, orders, judgments, and other related documents that appear in the court records of prior litigation and that relate to the case *sub judice*."); *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 96 n.17 (S.D.N.Y. 2004) ("The Court can take judicial notice of matters of public record … including filings in related lawsuits. …"); *Messer v. Wei Chu (In re Gao)*, 560 B.R. 50, 55 & n.4 (Bankr. E.D.N.Y. 2016) (taking judicial notice of relevant documents filed in debtor's bankruptcy case and related adversary proceedings) (citing cases); *Citizens Bank v. Leach (In re Leach)*, 35 B.R. 100, 101-02 & n.5 (Bankr. W.D. Ky. 1983) (use of "entire file" is consistent with the Federal Rules of Evidence given connections between a "case" and a "proceeding") (citing *Leather Comfort Corp. v. Chem. Sales and Serv. Co. (In re Saco Local Dev. Corp.)*, 30 B.R. 862, 865 (Bankr. D. Me. 1983) ("[B]ankruptcy judges would be remiss" if they did not take judicial notice of the debtor's bankruptcy case as a whole, including documents filed in the case because of bankruptcy's unique interrelated multiparty nature and a duty to "notice … records and files in [the] cause. …")).

In April 2001, American acquired the assets of TWA. Second Amended Compl. ¶ 16. Shortly thereafter, American and the APA executed Supplement CC, which modified the pilot seniority list at American to include the former TWA pilots, while it stripped them of much of their existing seniority at TWA. *Id.* ¶¶ 17-19. Under Supplement CC, roughly half of these former TWA pilots were placed at the bottom of American's seniority list, while others were integrated into the list but retained only a fraction of the seniority that they held at TWA. Id. ¶¶ 18-19.

To compensate for this loss of seniority, Supplement CC created a "protective fence" in TWA's former hub at St. Louis. *Id.* ¶ 20. The protective fence set aside a minimum number of Captain and First Officer positions in St. Louis for which these former "legacy" TWA pilots were given preferential bidding. *Id.* "Thus, while reducing the seniority of legacy TWA pilots put them at a relative disadvantage for purposes of bidding against a much larger number of American pilots for positions on other routes, the protective fence guaranteed a certain number of desired positions on routes from St. Louis with bidding advantages for legacy TWA pilots." *Krakowski*, 2015 Bankr. LEXIS 1721, 2015 WL 2414750, at *1; *see also* Second Amended Compl. ¶ 20.

In November 2011, American filed for Chapter 11 protection. Second Amended Compl. ¶ 34. American subsequently obtained the Court's permission to abrogate its then-existing collective bargaining agreement (the "Old CBA") with the pilots and their union (the APA) under Section 1113 of the Bankruptcy Code. *Id.* ¶ 36; *see also In re AMR Corp.*, 477 B.R. 384, 454 (Bankr. S.D.N.Y. 2012) (finding that the Debtors estab-

lished that changes were necessary to the collective bargaining agreement and rejecting many of the APA objections, but denying the Debtors' motion under Section 1113 of the Bankruptcy Code without prejudice because the Debtors failed to show that certain proposed changes were justified by either reference to the Debtors' business plan or the practices of the Debtors' competitors); *In re AMR Corp.*, 478 B.R. 599, 602 (Bankr. S.D.N.Y. 2012) (granting the Debtors' renewed motion under Section 1113 of the Bankruptcy Code). The Old CBA was void as of September 5, 2012. Second Amended Compl. ¶ 37.

American and the APA subsequently negotiated a new collective bargaining agreement for its pilots, which took effect on January 1, 2013 (the "New CBA"). *Id*. ¶¶ 39, 44. At the same time, American and the APA entered into a letter agreement to continue using the same pilot seniority list that had been utilized under the Old CBA ("LOA 12-05"). *See* New CBA at LOA 12-05;[3] Second Amended Compl. ¶ 39. LOA 12-05 provided that "[American] and [the] APA agree that the [legacy] TWA pilots' existing seniority placements on the Pilots' System Seniority List are final and shall continue pursuant to Section 13 of the CBA notwithstanding the termination of Supplement CC and any preferential flying rights associated with those seniority placements." *See* New CBA at LOA 12-05-1. Under the New CBA, therefore, American and the APA effectively agreed to use the same seniority list that was utilized under the Old CBA and Supplement CC, which

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[3] The New CBA, including LOA 12-05, is attached as Exhibit 1 to the Plaintiffs' first amended complaint. [ECF No. 1-3].

meant that the Plaintiffs and other former TWA pilots remained at a lower seniority level than their actual years of service at TWA. Second Amended Compl. ¶¶ 39, 40. But the New CBA did not include the protective fence that had existed under Supplement CC. *Id.* ¶ 39. Instead, "[t]he APA and American agreed to appoint an arbitrator to decide how these [legacy TWA] pilots should be compensated for the loss of the 'protective fence' in St. Louis. But the APA and American also agreed that, when awarding relief, the arbitrator would not be allowed to revisit the issue of these pilots' loss of seniority in 2001." *Krakowski*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *1.

In their first amended complaint (the "First Amended Complaint") [ECF No. 1-9], the Plaintiffs raised a variety of claims based on the treatment of these legacy TWA pilots. Count I of the First Amended Complaint asserted that through the continued use of the seniority list under the Old CBA, American breached the terms of the New CBA. *See* First Amended Compl. ¶¶ 38-40. Count II asserted that by agreeing to use the old seniority list, the APA had breached its duty of fair representation to former TWA pilots now at American. *See id.* ¶¶ 49-50. Count III asserted that American had colluded in the APA's breach of its fiduciary duty. *See id.* ¶¶ 52-53.

In the September 2015 Decision, the Court dismissed Counts I and III in their entirety. *See Krakowski*, 538 B.R. at 225. As to Count I, the Court held that American's use of the old seniority list did not breach the terms of the New CBA. *See id.* at 218-21. On Count III, the Court found the Plaintiffs' conclusory allegations insufficient to state a claim for collusion against

American, but ruled that the Plaintiffs could amend their complaint to adequately plead a claim against American for collusion in the APA's alleged breach of its duty of fair representation. *See id*. at 224-25.

As to the remaining claim for breach of the duty of fair representation against the APA, the Court dismissed the portion of Count II that relied upon the breach of contract claim asserted in Count I. *See id*. at 222-23. The Court, however, left open two other theories of liability under Count II. *See id*. at 223-24. These theories alleged that the APA breached its fiduciary duty to the legacy TWA pilots based on two actions:

> Agreeing to a System Seniority List that mirrors the prior list created under Supplement CC and acknowledged by the APA in 2001 to be unfair to the former TWA pilots; and
>
> Agreeing to a System Seniority List that treats the former TWA pilots differently (and worse) than the pilots of other airlines acquired by American.

First Amended Compl. ¶ 49; *see also* Second Amended Compl. ¶ 42.

The Court noted that these claims did not relate to the alleged breach of the New CBA but instead concluded that they could be construed to assert a claim during the discrete period of time after the abrogation of the Old CBA in September 2012 and before the Defendants agreed to enter into the New CBA in December 2012 (the "Post-Abrogation Period"). *Krakowski*, 538 B.R. at 223-24. With respect to these surviving claims, the Court stated,

> [w]hile not expressly set forth in the Complaint, it appears that the Plaintiffs argue that the APA should not have agreed to use the old seniority list for former TWA pilots once the Old CBA was abrogated because the old seniority list was unfair once the corresponding job protections in Supplement CC had been eliminated. … Drawing all reasonable inferences in favor of the Plaintiffs, therefore, the Court finds that the two remaining claims under Count II are distinct from the contract claim and survive independently.

Id. at 223 (emphasis added). The Court characterized these surviving claims as the APA having "violated its duty by agreeing to use the old seniority list immediately after the Old CBA was abrogated even though the job protections of Supplement CC were gone." *Id*. at 224 (emphasis added).

The Court also distinguished the surviving aspects of Count II from the claims asserted in the related case of *Krakowski v. Am. Airlines, Inc., et al.*, Adv. Proceeding No. 13-01283 ("*Krakowski I*"), which involves the same parties. In *Krakowski I*, the Plaintiffs initially alleged that the APA violated its duty of fair representation by entering into an agreement with American to establish an arbitration process to replace the protections for legacy TWA pilots under Supplement CC, but that restricted the arbitrator from modifying the seniority of the legacy TWA pilots. In the September 2015 Decision, the Court noted that the claims in the First Amended Complaint were distinct from those in *Krakowski I*, which focused on (1) the arbitration regarding the substitute job protections that should be

given to former TWA pilots to replace those lost when Supplement CC was terminated; and (2) the agreement between the APA and American that the arbitrator's remedy in that proceeding could not include any change in the seniority of these former TWA pilots. *See Krakowski*, 538 B.R. at 223. The Court noted that the First Amended Complaint cited neither of these events and appeared to be crafted to avoid mention of them. *See id*. at 223-24.

At a subsequent status conference, the Court discussed the scope of its ruling on Count II. In response to a request for clarification on the remaining issues in the case, the Court set forth the surviving claim:

> there's a period when the CBA—the old CBA was abrogated under 1113 and before there was a new CBA there was a decision made to use the existing seniority lists, and that that use of the seniority lists was a breach of the duty there.
>
> Now, I recognize that that's a very small … that's a very discrete statement in the context of many of things that are going on in terms of unions, the airlines, and employees in the aftermath of the 1113, so—but that's the claim I could see construing the complaint on behalf of the plaintiff that I thought would exist as a duty of fair representation claim.

(Hr'g Tr. 28:24-29:10, Oct. 15, 2015). In a later colloquy, the Court further elaborated:

> Mr. James: I think I got it. I think we're talking about that period before—

> The Court: After the 1113 the airline decided to exercise its rights under 1113—
>
> Mr. James: Correct.
>
> The Court: —so the contract ceased to exist before any new contract was agreed upon.
>
> Mr. James: Correct. Thank you, Your Honor.
>
> The Court: Mr. Press, is that how you understand it? I mean that's—
>
> Mr. Press: I think you're correct.

(Hr'g Tr. 30:1-11, Oct. 15, 2015) [ECF No. 50].

On October 20, 2015, the Plaintiffs filed the Second Amended Complaint that is the subject of these motions. Instead of amending their complaint to address the remaining claim under Count II—one for the period after the Old CBA was abrogated and before entry of the New CBA—the Plaintiffs revised the complaint to include a new theory of liability relating to the New CBA. More specifically, the Second Amended Complaint alleges liability based on American offering, and the APA accepting, a new collective bargaining agreement in December 2012 that was free of Supplement CC's protective fences but implemented a seniority list that mirrored the list created by Supplement CC. Second Amended Compl. ¶¶ 39-40. The Defendants contend that this new theory is, in fact, an old one and must be dismissed given the Court's prior rulings. The Court agrees.

DISCUSSION

Federal Rule of Civil Procedure 12(b)(6), made applicable by Bankruptcy Rule 7012, provides that a complaint must be dismissed if it fails to state a claim upon which relief can be granted. In analyzing a motion to dismiss under Rule 12(b)(6), a court looks to whether a plaintiff has pleaded "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A court must proceed "on the assumption that all the allegations in the complaint are true." *Id.* at 555. Taken as true, these facts must establish "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2007). "However, this does not mean that a claim must contain 'detailed factual allegations' to survive a Rule 12(b)(6) motion to dismiss." *Eastman Chem. Co. v. Nestle Waters Mgmt. & Tech.*, 2012 U.S. Dist. LEXIS 141281, 2012 WL 4474587, at *4 (S.D.N.Y. Sept. 28, 2012) (citing *Talley v. Brentwood Union Free Sch. Dist.*, 2009 U.S. Dist. LEXIS 53537, 2009 WL 1797627, at *4 (E.D.N.Y. June 24, 2009)). Rather, the court must determine "whether the well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement to relief." *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (citing *Iqbal*, 556 U.S. at 679). The court must also draw all reasonable inferences in favor of the non-moving party. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir. 2000).

A. Plaintiffs Are Barred From Pursuing Their APA Claims Given the Court's Prior Rulings

Claims dismissed in a prior court decision are barred by the law of the case doctrine. That doctrine provides that "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983); *see also De Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." *In re PCH Assoc.*, 949 F.2d 585, 592 (2d Cir. 1991). "Courts apply the law of the case doctrine when their prior decisions in an ongoing case either expressly resolved an issue or necessarily resolved it by implication." *Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001) (internal citations and quotation marks omitted). It "operates to create efficiency, finality, and obedience within the judicial system." *Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1363 (S.D. Fla. 2005); *see also Liani v. Baker*, 2010 U.S. Dist. LEXIS 64785, 2010 WL 2653392, at *11 (E.D.N.Y. June 28, 2010) ("Law of the case is a doctrine of judicial efficiency that allows a court to avoid time-consuming relitigation of issues already decided. It is not a substantive limit on the power of the court, however, and every court retains the authority to reconsider its prior non-final rulings.") (internal citations and quotations omitted); *McGee v. Dunn*, 940 F. Supp. 2d 93, 100 (S.D.N.Y.

2013) ("The objective of the law of the case doctrine includes promoting efficiency and avoiding endless litigation by allowing each stage of the litigation to build on the last and not afford an opportunity to reargue every previous ruling.") (internal citations and quotations omitted).

Applying the doctrine here, the Court concludes that the claims in the Second Amended Complaint are barred by this Court's prior decisions in *Krakowski I* and in this case.

It is necessary to revisit the procedural background in *Krakowski I* to explain why this is so. In the New CBA, American and the APA settled on a binding arbitration process to replace the job protections lost through the abrogation of Supplement CC, but also agreed to preclude the arbitrator from modifying the legacy TWA pilots' seniority as a possible remedy. *Krakowski*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *2. This arrangement was the basis for the Plaintiffs' claim in *Krakowski I* that the APA had breached its duty of fair representation by agreeing to terminate Supplement CC while precluding the arbitration from altering the seniority of legacy TWA pilots. 2014 Bankr. LEXIS 2610, [WL] at *4, 6. But the Court dismissed the *Krakowski I* complaint in its entirety, ruling that the Plaintiffs failed to show the actions taken by the APA were discriminatory, arbitrary or in bad faith. The Court noted that while the Plaintiffs' claims were rooted in a refusal to improve the seniority of the legacy TWA pilots, the APA's actions did not actually remove the Plaintiffs' seniority, which had been lost over a decade prior through the Old CBA. 2014 Bankr. LEXIS 2610, [WL] at *4.

Instead, the APA agreed to an arbitration process to determine substitute job protections for the protective fence so long as the new protections did not alter seniority. The Court recognized that

> [i]n deciding whether to allow seniority to be reopened … the APA necessarily was required to balance the interests of the Plaintiffs and all the other pilots that the APA represent[ed]. … Courts have recognized that many decisions made by a union require the union to make distinctions among employees, but that these distinctions do not necessarily constitute discrimination.

Id. The Court held that the Plaintiffs had not alleged anything that would allow the Court to conclude that the APA intended to unlawfully discriminate against the legacy TWA pilots or that the APA had made this decision without a legitimate union objective. 2014 Bankr. LEXIS 2610, [WL] at *4-5. The Court also noted that the Plaintiffs had filed their action before the arbitration was completed and thus were essentially arguing that no possible remedy arising out of the arbitration could ever be sufficient. 2014 Bankr. LEXIS 2610, [WL] at *5. Accordingly, the Court observed that the actual harm to the Plaintiffs was speculative at that time. *Id.*

The Plaintiffs subsequently supplemented the complaint in *Krakowski I*, again alleging that the APA breached its duty of fair representation. With numerous breaches asserted, the Court divided the Plaintiffs' claims into three general categories: (1) the APA's failure to bargain about the termination of Supplement

CC and agreement to terminate Supplement CC without securing equivalent job protections; (2) the APA's agreement to preclude the Supplement CC arbitrators from addressing seniority and the APA's failure to pursue something to "replicate" the Supplement CC job protections; and (3) claims that the Supplement CC arbitration was not procedurally appropriate or fair, including alleged deficiencies in the selection of the arbitrators, the participants, and the lawyers. *Krakowski*, 536 B.R. at 369. The Court dismissed all of the Plaintiffs claims, save for the third set of allegations regarding how the arbitration was conducted. *See id.* at 372-74. In so doing, the Court noted that it had previously rejected the Plaintiffs' position that the only satisfactory remedy in the arbitration required a modification of the seniority for the legacy TWA pilots. *See id.* at 372.

The Court concludes that the Plaintiffs' Second Amended Complaint is simply a thinly veiled attempt to make an end run around the prior rulings in *Krakowski I*. The Plaintiffs' allegations in the Second Amended Complaint again revolve around the failure to change the seniority of the legacy TWA pilots. The Plaintiffs now assert that the APA breached its fiduciary duty by agreeing to preserve the seniority list created by Supplement CC without the protective fences. *See* Second Amended Compl. ¶ 42. But this is essentially the same claim dismissed in *Krakowski I*, where these same Plaintiffs alleged that the APA breached its fiduciary duty by agreeing in the New CBA to terminate Supplement CC and to limit any potential relief from altering the seniority of the legacy TWA pilots. The Court has already ruled on those alle-

gations. Specifically, the Court found that the APA's agreement to preserve the pre-existing seniority list did not in and of itself breach the APA's fiduciary duties, given the existence of the arbitration process to create substitute job protections. In reaching that conclusion, the Court was mindful that Supplement CC was part of the pilots' collective bargaining agreement that was swept away by the Court's grant of Section 1113 relief. *Krakowski*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *4; *see also Krakowski*, 536 B.R. at 369-372. Given the rulings in *Krakowski I*, the Court cannot permit the Plaintiffs to once again pursue essentially the same claims in the current litigation. "Since different adversary proceedings in the same main case do not constitute different 'cases,' it [follows] that the law of the case doctrine as articulated in one adversary proceeding would apply in another adversary proceeding filed in the same case." *Bourdeau Bros., Inc. v. Montagne (In re Montagne)*, 2010 Bankr. LEXIS 212, 2010 WL 271347, at *6 (Bankr. D. Vt. Jan. 22, 2010) (citing *Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1990) ("Adversary proceedings in bankruptcy are not distinct pieces of litigation; they are components of a single bankruptcy case," for purposes of the law of the case doctrine.)); *Artra Grp., Inc. v. Salomon Bros. Holding Co.*, 1996 U.S. Dist. LEXIS 16380, 1996 WL 637595 at *5 (N.D. Ill. Oct. 31, 1996) (holding law of the case doctrine covers litigation in main case and adversary proceeding); *see, e.g., Thomas v. N.Y.C. Dep't of Educ.*, 938 F. Supp. 2d 314, 317 (E.D.N.Y. 2013) (dismissing claims in amended complaint when already alleged in the original complaint and dismissed); *Gardner v. Wansart*, 2006 U.S. Dist. LEXIS 69491, 2006 WL 2742043, at *6 (S.D.N.Y. Sept. 26, 2006) (same).

The Plaintiffs assert their claim in the Second Amended Complaint is distinct from the prior litigation. They argue that "once defendants implemented the result of that arbitration, the TWA pilots were … damaged by defendants' agreement at issue in this case to use a seniority list that mirrored the old list, but without Supplement CC's protections." Plaintiffs' Opposition to Defendants' Motions to Dismiss Second Amended Complaint at 10-11 (the "Opposition") [ECF No. 44]. But this argument is just a repackaging of the Plaintiffs' earlier challenge to the Defendants' establishment of an arbitration process that left in place the existing seniority list while seeking a substitute for Supplement CC's job protections. *See Krakowski*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *4-6 (ruling that Plaintiffs failed to state a claim that the APA breached its duty of fair representation by agreeing to terminate Supplement CC and to limit any potential relief in the arbitration from altering the seniority of legacy TWA pilots); *see also Krakowski*, 536 B.R. at 369-72.[4]

Even putting aside *Krakowski I*, the Second Amended Complaint is also at odds with the guidance

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[4] Of course, the Plaintiffs can challenge the results of the arbitration. They have done so in *Krakowski I* by contesting the putative unfairness in how the arbitration was conducted. *See Krakowski*, 536 B.R. at 372-74; *Krakowski I*, September 22, 2015 Order at 2 [Adv. P. No. 13-01283, ECF No. 80]. Moreover, the Plaintiffs recently filed a new adversary proceeding seeking to vacate the arbitration award based upon one or more of the arbitrators allegedly violating the agreement to arbitrate and displaying bias and hostility. *See* Complaint to Vacate Arbitration Award ¶¶ 60-71 [Adv. P. No. 16-01138, ECF No. 1].

provided by the Court in this case about what claims survived dismissal. As the Court made repeatedly clear, the surviving claims covered the Post-Abrogation Period but before the entry of the New CBA. *See Krakowski*, 538 B.R. at 223-24; (Hr'g Tr. 28:25-29:3, Oct. 15, 2015). But the Second Amended Complaint does not allege any conduct by the Defendants during this period. Rather, the Second Amended Complaint focuses on the APA's entry into the New CBA, complaining that it permitted use of the old seniority list without the protections of Supplement CC. *See* Second Amended Compl. ¶¶ 39, 42, 45. The Plaintiffs argue that the Second Amended Complaint should not be limited to the Post-Abrogation Period. *See* Opposition at 3-4, 7-8. They assert that the Court's orders, rulings and remarks did not contain a temporal limitation to the Post-Abrogation Period. But that is incorrect. At the status conference on October 15, 2015, the Court explicitly defined the surviving claims as relating to the period when "the old CBA was abrogated under 1113 and before there was a new CBA." (Hr'g Tr. 28:25-29:1, Oct. 15, 2015). The Court stated that during that period "there was a decision made to use the existing seniority lists and that that use of the seniority lists was a breach of the duty there." (Hr'g Tr. 29:1-3, Oct. 15, 2015); *see U.S. v. Spallone*, 399 F.3d 415, 418 (2d Cir. 2005) (noting a trial court's "inherent authority to interpret ambiguities in its own orders and judgments."). The September 2015 Decision characterized any surviving claims in a similar way:

> While not expressly set forth in the Complaint, it appears that the Plaintiffs argue that the APA should not have agreed to use the old seniority

> list for former TWA pilots once the Old CBA was abrogated because the old seniority list was unfair once the corresponding job protections in Supplement CC had been eliminated. … Drawing all reasonable inferences in favor of the Plaintiffs, therefore, the Court finds that the two remaining claims under Count II are distinct from the contract claim and survive independently.

Krakowski, 538 B.R. at 223 (reference to 49(B) and (C) of the First Amended Complaint) (emphasis added).[5] Indeed, the Court distinguished this case from *Krakowski I*, which challenged the New CBA with its agreement to arbitrate. The Court noted that "*Krakowski I* is distinct from the Plaintiffs' claim here that the APA violated its duty by agreeing to use the old seniority list immediately after the Old CBA was abrogated even though the job protections of Supplement CC were gone." *Id*. at 224 (emphasis added).[6]

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[5] The order entered by the Court on dismissal reflected this distinction. *See* Order, dated Oct. 5, 2015 [ECF No. 28] (granting leave to file an amended complaint for the purpose of alleging collusion against American for the only remaining breach of duty claims left in the case, which were found in 49(B)-(C)).

[6] The Plaintiffs assert that, to the extent the Court meant what it said, the Court should now reconsider its decision. But the Plaintiffs have not filed a motion for this Court to reconsider its decision, and even if such a request were to be made, it would be untimely. *See Fed. R. Civ. P. 59(e); Fed. R. Bankr. P. 9023; Local Rule 9023-1* (14 day time limit). Moreover, such a motion would need to show clear error, newly discovered evidence, or a change in controlling law, none of which is demonstrated in the Plaintiffs' Opposition. *See In re Residential Capital, LLC*, 537 B.R. 161, 169

The Court's rulings about the scope of the surviving claims in this case reflected a concern about the duplication of claims and inefficiency in the litigation of these disputes. The Court attempted to clarify—without success—the remaining claims so as to avoid duplication with Plaintiffs' other cases and other claims that have already been dismissed. Indeed, these disputes about the Plaintiffs' seniority have been pending for an extended period of time but are not much closer to reaching conclusion, despite this Court having issued numerous decisions. This is in large part due to the piecemeal and overlapping nature of the litigation in these adversary proceedings, with numerous amendments and new adversary proceedings being filed after each of the decisions issued by this Court. *C.f. Curtis v. Citibank N.A.*, 226 F.3d 133, 138-39 (2d Cir. 2000) (noting complex problems that can arise from multiple case filings and discussing rule against duplicative litigation to "foster judicial economy and the comprehensive disposition of litigation" and to "protect parties from the vexation of concurrent litigation over the same subject matter.") (internal citations and quotations omitted); *Kanciper v. Suffolk Cty. SPCA, Inc.*, 722 F.3d 88, 92-93 (2d Cir. 2013) (noting that "plaintiffs generally have no right to maintain two separate actions involving the same subject matter at the same

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(Bankr. S.D.N.Y. 2015) HN5[ ] ("Reconsideration is not appropriate unless the movant has demonstrated an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'") (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013)).

time in the same court and against the same defendant.") (internal citations and quotations omitted).[7]

B. Plaintiffs Fail to State a Claim Against American for Collusion

Given the Court's dismissal of the duty of fair representation claims against the APA, the Court must also dismiss the claims of collusion against American. *See United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985) ("If the RLA-based [duty of fair representation] claim against the union is dismissed, the claim against the employer must also be dismissed.") (citing *Graf v. Elgin, Joliet & E. Ry. Co.*, 697 F.2d 771, 781 (7th Cir. 1983)).

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[7] As an alternative to dismissal, the Defendants request that the Court grant summary judgment on their behalf. More specifically, the Defendants assert that the Plaintiffs are unable to make a claim during the Post Abrogation period because the job protections of Supplement CC were maintained throughout the Post-Abrogation Period and until substitute terms were constructed by arbitrators and subsequently implemented. *See* November 10, 2012 Letter from L. Einspanier to N. Roghair, attached as Ex. 2 to Decl. of Keith Wilson [Adv. P. No. 13-01283, ECF No. 36-3] ("Until issuance of an arbitration award, the Company will continue to staff the STL Captain positions at the level that would have satisfied the October 2012 Supplement CC report were it still in effect."). The Plaintiffs do not challenge this assertion, and in fact concede that the protections of Supplement CC remained in place throughout the Post-Abrogation Period. See Opposition at 7 ("As defendants point out, although American terminated Supplement CC as part of the 1113, it maintained the status quo by keeping its protections in place pending the outcome of the LOA 12-05 interest arbitration."). Given the dismissal of the Second Amended Complaint based on the Court's prior rulings, it is unnecessary to consider the Defendants' alternative request for relief.

Dismissal of the collusion claim is also required because the Second Amended Complaint fails to allege any conduct that could constitute collusion on the part of American in any alleged breach of that duty. The Plaintiffs' allegations of collusion here remain as perfunctory and conclusory as those dismissed in the First Amended Complaint. While "a court must accept as true all of the allegations contained in a complaint," that is not true for legal conclusions. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). As the Supreme Court has counseled, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). The Plaintiffs have not alleged facts evidencing bad faith, discrimination, or hostility. The Second Amended Complaint instead only contains two broad but related allegations against American: (1) that "American *offered*, and APA accepted, a new collective bargaining agreement free of Supplement CC's protective fences, and which implemented a seniority list that mirrored the admittedly unfair list created by Supplement CC," and (2) that American "implemented the new seniority list on January 1, 2013 *with knowledge that APA had breached its duty of fair representation* to the former TWA pilots. …" Second Amended Compl. ¶¶ 39, 44 (emphasis added). Neither allegation is sufficient to state a claim for collusion.

As for the Plaintiffs' first assertion, the mere negotiation of a collective bargaining agreement cannot be the basis of a collusion claim against an employer. "[S]imple 'negotiation between [an] employer and union is not evidence of collusion.'" *Cunningham v. United*

Airlines, Inc., 2014 U.S. Dist. LEXIS 13414, 2014 WL 441610, at *5 (N.D. Ill. Feb. 4, 2014) (quoting *Air Wisc. Pilots Prot. Comm. v. Sanderson*, 124 F.R.D. 615, 617 (N.D. Ill. 1988)); *see also United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1282-83 (7th Cir. 1985) (rejecting "patently fallacious" argument that negotiation of a collective bargaining agreement between a carrier and union "necessarily entails collusion"). As the Plaintiffs have not alleged any conduct by American beyond its negotiation of a new agreement with the APA, this first allegation standing alone does not state a claim.

The Plaintiffs' second and related allegation fares no better. The Plaintiffs assert that they have adequately plead knowledge on the part of American of the APA's breach, arguing that case law in the Second Circuit permits employees to add their employer as a defendant merely "by alleging the employer's knowledge of or complicity in the union's breach." Opposition at 11-12 (quoting *Krakowski*, 536 B.R. at 367). But the cases cited by the Plaintiffs apply that standard in a hybrid claim, where a duty of fair representation claim against a union is combined with an allegation that the employer has breached the collective bargaining agreement. *See Long Island City Lodge 2147 v. Ry. Express Agency, Inc.*, 217 F. Supp. 907 (S.D.N.Y. 1963); *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847 (2d Cir. 1961); *N.L.R.B. v. Am. Postal Workers Union*, 618 F.2d 1249 (8th Cir. 1980); *Fruin-Colnon Corp. v. N.L.R.B.*, 571 F.2d 1017 (8th Cir. 1978); *Lummus Co. v. N.L.R.B.*, 339 F.2d 728, 119 U.S. App. D.C. 229 (D.C. Cir. 1964); *Am. Postal Workers Union, Local 6885*, 665 F.2d 1096, 214 U.S. App. D.C. 278 (D.C. Cir. 1981). As no such breach

of contract claim exists here, there is no hybrid claim upon which to anchor a conclusory claim of collusion against American.

Absent such a hybrid claim, a plaintiff seeking to hold an employer liable for collusion in connection with entering a collective bargaining agreement that is alleged to violate a union's duty of fair representation must allege conduct by the employer evidencing bad faith, discrimination, or hostility towards the plaintiffs. *See, e.g., Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474, 493-94 (N.D. Ill. 1991) (dismissing claim against carrier even though carrier was aware of the animosity between the union and the minority group because there was no evidence that the carrier "acted in bad faith or discriminated against plaintiffs in accepting [the union's] proposal."), *aff'd in relevant part, rev'd in part*, 981 F.2d 1524 (7th Cir. 1992); Cunningham, 2014 U.S. Dist. LEXIS 13414, 2014 WL 441610, at *6 (holding that potential knowledge of union discrimination against its members is not enough to support a finding of collusion by the carrier, absent extreme factual scenarios). No such allegations have been made here. It is not "appropriate to impose liability where the employer is charged with nothing more than having acceded to the demands of the [u]nion, even with knowledge of facts from which it might be inferred that the [u]nion was not fulfilling its duty of fair representation to all of its constituents." *Am. Airlines Flow-Thru Pilots Coalition v. Allied Pilots Ass'n*, 2015 U.S. Dist. LEXIS 169657, 2015 WL 9204282, at *3 (N.D. Cal. Dec. 17, 2015). Doing so would require an employer to supervise the actions of the union counterparty and make an independent

evaluation of the conduct and decisions of the union prior to entering a collective bargaining agreement. *See Cunningham*, 2014 U.S. Dist. LEXIS 13414, 2014 WL 441610, at *6. Such a requirement is unworkable, as

> [a] union does not automatically breach the duty of fair representation every time it negotiates for contracts in which some of its members are treated differently than others. At least outside contexts such as discrimination against protected classes, the onus should not be on the employer to evaluate and consider whether distinctions a union draws among its members are appropriate. Thus, something more than merely acceding to union demands must be alleged and proven to impose liability on an employer for 'colluding' in a breach of what ultimately remains the union's duty.

Am. Airlines Flow-Thru, 2015 U.S. Dist. LEXIS 169657, 2015 WL 9204282, at *3; *see also Am. Postal Workers Union, Local 6885*, 665 F.2d at 1108-09 ("The [employer] was required only to bargain in good faith with the employees' exclusive representative, and, in so doing, it was expected to represent its own interests, not those of the employees."); *Cunningham*, 2014 U.S. Dist. LEXIS 13414, 2014 WL 441610, at *6 ("'[T]he employer must in most circumstances be able to rely on the union's disposition' in spite of some employee objections; and it would have a 'detrimental effect on labor-management relations' if an employer were 'forced to ignore union representations and take the initiative in dealing with employees whenever it suspects a discriminatory union motive.'") (quoting *Carroll v. Bhd. of R.R.*

Trainmen, 417 F.2d 1025, 1028 (1st Cir. 1969) (internal quotation marks omitted)).

CONCLUSION

For the reasons stated above, the Court grants the Defendants' motions to dismiss the Second Amended Complaint in its entirety. The Defendants should settle an order on three days' notice. The proposed order must be submitted by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon counsel to the Plaintiffs.

SEPT. 22, 2015 BANKRUPTCY COURT DECISION (*Krakowski II*)

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 538 B.R. 213, 2015 Bankr. LEXIS 3189, Adv. No. 14-01920 (Bankr. S.D.N.Y. Sept. 22, 2015).

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: AMR CORP., *et al.*, Reorganized Debtors.	Chapter 11 Case No. 11-15463 (SHL) (Confirmed)
JOHN KRAKOWSKI, *et al.*, individually and on behalf of those similarly situated, Plaintiffs, v. AMERICAN AIRLINES, INC., *et al.*, Defendants.	Adv. No. 14-01920 (SHL)

September 22, 2015

Before Bankruptcy Judge Sean H. Lane

MEMORANDUM OF DECISION

Before the Court are the Defendants' motions to dismiss the amended complaint (the "Complaint")

(ECF No. 1-9),[1] filed by Plaintiffs John Krakowski, Kevin Horner, and M. Alicia Sikes on behalf of themselves and all persons similarly situated against Defendants American Airlines, Inc. ("American") and the Allied Pilots Association (the "APA"), which is the pilots' union at American. The Plaintiffs are former Trans World Airlines ("TWA") pilots now employed by American.[2]

As part of American's bankruptcy restructuring, it sought and received authority to reject its then-existing collective bargaining agreement with the APA (the "Old CBA"). American subsequently negotiated a new collective bargaining agreement for its pilots (the "New CBA"). At the same time, American and the APA entered into a letter agreement to continue using the same pilot seniority list that had been utilized under the Old CBA. In the three counts of their Complaint, the Plaintiffs allege that through the continued use of this seniority list: (1) American breached the terms of the New CBA, (2) the APA breached its duty of fair representation, and (3) American colluded in the APA's breach of that duty.

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[1] Unless otherwise specified, references to the Case Management/Electronic Case Filing ("ECF") docket are to this adversary proceeding.

[2] The Plaintiffs originally brought this action in the United States District Court for the Eastern District of Missouri. The Missouri District Court transferred the case to this Court on March 19, 2014. *See* Memorandum and Order, Case No. 4:13-cv-00838-JAR (ECF No. 43).

For the reasons set forth below, the Court agrees with the Defendants that the Plaintiffs have failed to state a claim for breach of the New CBA. The Court therefore grants the Defendants' motions to dismiss Count I of the Complaint, as well as the claims within Counts II and III that depend upon the breach of contract claim. The Court, however, denies the motions with respect to the remaining claims in Count II and III, finding that they sufficiently state a claim for a breach of the duty of fair representation and do not rely upon the breach of contract claim. As to the final collusion claim, the Court finds that the Plaintiffs have failed to set forth facts sufficient to allege a plausible claim of collusion.

BACKGROUND

As is the case with any motion to dismiss, the Court accepts the allegations of the Complaint as true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In April 2001, American acquired the assets of TWA. Compl. ¶ 8. Shortly thereafter, American and the APA executed Supplement CC, which modified American's pilot seniority list to include the former TWA pilots, but stripped them of much of their seniority. *Id.* ¶ 10. Under Supplement CC, roughly half of the TWA pilots were moved to the bottom of the seniority list, while others were integrated into the list but retained a fraction of the seniority that they held at TWA. *Id.* ¶¶ 11-12.

In November 2011, American filed for Chapter 11 protection. *Id.* ¶ 14. American subsequently obtained the Court's permission to abrogate the Old CBA under

Section 1113 of the Bankruptcy Code. *Id.* ¶ 15; *see also In re AMR Corp.*, 477 B.R. 384, 401 (Bankr. S.D.N.Y. 2012); *In re AMR Corp.*, 478 B.R. 599 (Bankr. S.D.N.Y. 2012). The Old CBA was void as of September 5, 2012. Compl. ¶ 16. As of September 5, 2012, all American pilots were technically at-will employees not subject to a valid collective bargaining agreement. *Id.* ¶ 17. American and the APA subsequently negotiated the New CBA, which became effective on January 1, 2013. *Id.* ¶ 18.[3]

The New CBA outlined how pilot seniority would be determined. *Id.* ¶¶ 21-24. It also expressly provided "that certain other rules in this Agreement stipulating specific methods and procedures of applying system seniority shall govern such application of system seniority only to the extent of the specific provisions of such rules." *See* New CBA Section 13(D). The New CBA included a letter of agreement numbered 12-05 ("LOA 12-05") that was entered into between American and the APA on January 1, 2013. See New CBA at LOA 12-05-1.[4] LOA 12-05 provided that "[American]

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[3] The New CBA is attached as Exhibit 1 to the Complaint. Compl. ¶ 18.

[4] Section 26(A) of the New CBA provides that:

> Either party hereto may at any time propose, in writing, to the other party any amendment which it may desire to make to this Agreement, and if such amendment is agreed to by both parties hereto, such amendment shall be stated, in writing, signed by both parties and the amendment shall then be deemed to be incorporated in and shall become a part of this Agreement.

and [the] APA agree that the TWA pilots' existing seniority placements on the Pilots' System Seniority List are final and shall continue pursuant to Section 13 of the CBA notwithstanding the termination of Supplement CC and any preferential flying rights associated with those seniority placements." *Id*. While the phrase "preferential flying rights" in Supplement CC is not relevant to the pending motions, these rights were described in a prior decision in a related case between these parties in this Court:

> "To compensate for … loss of seniority, Supplement CC created a 'protective fence' in St Louis, creating minimum Captain and First Officer positions in St. Louis and granting the legacy TWA pilots preferential bidding for these positions. Thus, while reducing the seniority of legacy TWA pilots put them at a relative disadvantage for purposes of bidding against a much larger number of American pilots for positions on other routes, the protective fence guaranteed a certain number of desired positions on routes from St. Louis with bidding advantages for legacy TWA pilots."

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 2015 Bankr. LEXIS 1721, at *3-4 (Bankr. S.D.N.Y. May 19, 2015). In effect, American and the APA agreed to use the same seniority list that was utilized under the Old CBA and Supplement CC, which

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New CBA, Section 26-1. LOA-12-05, which is appended to the New CBA, is by its terms incorporated as part of the New CBA. *See* New CBA table of contents, listing numbered letters of agreement, including LOA 12-05.

meant that the Plaintiffs and other former TWA pilots remained at a lower seniority level than their actual years of service. Compl. ¶ 28.

DISCUSSION

Federal Rule of Civil Procedure 12(b)(6), made applicable by Bankruptcy Rule 7012, provides that a complaint must be dismissed if it fails to state a claim upon which relief can be granted. In analyzing a motion to dismiss under Rule 12(b)(6), a court looks to whether a plaintiff has pleaded "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A court must proceed "on the assumption that all the allegations in the complaint are true." *Id*. at 555. Taken as true, these facts must establish "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2007). "However, this does not mean that a claim must contain 'detailed factual allegations' to survive a Rule 12(b)(6) motion to dismiss." *Eastman Chem. Co. v. Nestlé Waters Mgmt. & Tech.*, No. 11-2589, 2012 U.S. Dist. LEXIS 141281, 2012 WL 4474587, at *4 (S.D.N.Y. Sept. 28, 2012) (citing *Talley v. Brentwood Union Free Sch. Dist.*, 08 Civ. 790, 2009 U.S. Dist. LEXIS 53537, 2009 WL 1797627, at *4 (E.D.N.Y. June 24, 2009)). Rather, the court must determine "whether the well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement to relief." *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (citing *Iqbal*, 556 U.S. at 679). The court must also draw all reasonable inferences in favor of the non-moving party. *Ganino v. Citizens Utils. Co.*, 228 F. 3d 154, 161 (2d Cir. 2000).

A Rule 12(b)(6) motion is addressed to the face of the pleading. *Goldman v. Belden*, 754 F.2d 1059, 1065-66 (2d Cir. 1985). But the parties in this case have asked this Court to consider events and documents that go beyond the pleadings, including the New CBA. As the New CBA is both cited in and attached to the Complaint as an exhibit, it can be considered. *See Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) ("[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."); *Fed. R. Civ. P. 10(c)* ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

The Defendants seek to rely upon a second document, which is an arbitration decision issued on March 12, 2014 by Richard I. Bloch, Esq. (the "Bloch Decision"). This arbitration decision addressed pilot grievances on the very same issues raised in the Complaint. The Plaintiffs acknowledge the arbitration took place and address the merits of it in their opposition. But while the Plaintiffs do not object to the Court taking judicial notice of the decision, the decision is not attached to or mentioned in the Complaint. As such, the Court takes judicial notice only of the existence of the decision, but not of the truth of the facts contained within it. *See Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (HN3[] "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings. … Hence, although the final determination … may be public

records of which a court may take judicial notice, it may do so on a motion to dismiss only to establish the existence of the opinion, not for the truth of the facts asserted in the opinion.").[5]

A. Plaintiffs Fail to State a Claim that American Breached the New CBA

In Count One of the Complaint, the Plaintiffs assert that the pilot seniority list currently used by American violates the terms of the New CBA. *See* Compl. ¶ 38 ("In breach of the New CBA, American has put forth a System Seniority List which does not accord Named Plaintiffs and members of the Class proper placement under the New CBA …") Specifically, the Plaintiffs allege that the seniority level currently assigned by

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[5] The Plaintiffs complain that American has gone beyond the pleadings in arguing about the arbitration. *See* Plaintiffs' Opp. to American MTD, at 4 n.1 [ECF No. 16]. The Plaintiffs request that they also be allowed to go beyond the pleadings in responding to American's argument by submitting the Declaration of Ben Thompson, one of the aggrieved pilots involved in the arbitration. *See id*. Mr. Thompson's Declaration discusses the experiences of both himself and Theodore Case—a similarly situated pilot—during the grievance process with American. *See* Thompson Decl., attached as Exh. 1 to the Plaintiffs' Opp. to American MTD. But the Court cannot consider such evidence on a motion to dismiss. *See Sharette v. Credit Suisse Int'l*, 127 F. Supp. 3d 60, 2015 U.S. Dist. LEXIS 111966, at *25 (S.D.N.Y. August 20, 2015) ("The task of a court in ruling on a motion to dismiss is to 'assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'") (quoting *In re Initial Pub. Offering Sec. Litig.*, 383 F. Supp. 2d 566, 574 (S.D.N.Y. 2005)). In any event, Plaintiffs' request to submit the Thompson Declaration to rebut American's arguments is moot as the Court declines to consider the facts set forth in the Bloch Decision.

American to the former TWA pilots does not correspond to these pilots' "Occupational Date" and "Date of Hire," as those terms are defined by the New CBA and by American's practices. As a result, the Plaintiffs assert that they received a lower seniority placement than they should. But the Plaintiffs' claim is inconsistent with the plain language of the New CBA.

Courts apply traditional rules of contract interpretation to collective bargaining agreements, so long as the rules are consistent with federal labor policies. *Aeronautical Indus. Dist. Lodge 91 of Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Techs. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000). "When provisions in the [collective bargaining agreement] are unambiguous, they must be given effect as written." *Id.* (citations omitted). "Only when provisions are ambiguous may courts look to extrinsic factors—such as bargaining history, past practices, and other provisions in the [collective bargaining agreement]—to interpret the language in question." *Id.* Additionally, courts should attempt to read collective bargaining agreements in such a way that no language is rendered superfluous. *Id.*

Pilot seniority is generally addressed under Section 13 of the New CBA. Section 13(D) provides that:

> Seniority shall govern all pilots in case of promotion, demotion, their retention in case of reduction of force, their recall from furlough, their assignment or reassignment due to expansion or reduction in force or schedules, and their choice of vacancies. … This paragraph shall apply, *provided that certain other rules in this Agree-*

> *ment stipulating specific methods and procedures of applying system seniority shall govern such application of system seniority* only to the extent of the specific provisions of such rules.

New CBA, Section 13(D) (emphasis added). Thus, the New CBA clearly contemplates circumstances in which system seniority will be applied differently from the methods outlined in Section 13. The Defendants assert, and this Court agrees, that LOA 12-05 is one such provision in the New CBA that sets out "specific methods and procedures of applying system seniority."

Under LOA 12-05, which has the same effective date as the New CBA, "[t]he Company and [the] APA agree[d] that the TWA Pilots' existing seniority placements on the Pilots' System Seniority List are final and shall continue pursuant to Section 13 of the CBA notwithstanding the termination of Supplement CC. …" *Id*. By including LOA 12-05, therefore, the New CBA explicitly provides that the Plaintiffs are to have the same placement on the System Seniority List as existed under the Old CBA.

The Plaintiffs dismiss LOA 12-05 as a "red herring." They argue that because the Court granted American authorization to reject the Old CBA effective September 5, 2012, *see In re AMR Corp.*, 2012 Bankr. LEXIS 4168, 2012 WL 3834798 (Bankr. S.D.N.Y. Sept. 5, 2012), the pilots had no seniority rights until the new seniority list was in place. *See* Opp. to APA MTD at 7 (ECF No. 15). The Plaintiffs state that "[t]he pilots' seniority rights, as reflected by the 'Pilots' System Seniority List' referred to in LOA 12-05 were only

established when the New CBA was entered into on January 1, 2013." Id.

But the Plaintiffs' argument misses the point. LOA 12-05 is expressly part of the New CBA. *See* New CBA, Section 1(B)(2) (defining "Agreement" as "this collective bargaining agreement between the [Allied Pilots] Association and the Company *and all supplements and letters of agreement* between the [Allied Pilots] Association and the Company.") (emphasis added); New CBA, Section 26(A) (providing that amendments of the New CBA are "deemed to be incorporated in and … become a part of" the New CBA). As part of the New CBA, LOA 12-05 cannot be read to breach the very agreement of which it is a part. The letter memorializes the agreement of American and the APA to alter the general seniority provisions of the New CBA as they apply to the former TWA pilots. The Plaintiffs' argument would render LOA 12-05 superfluous. Indeed, whether or not the pilots had seniority rights during the period between abrogation of the Old CBA and the effective date of the New CBA is irrelevant to the breach of contract claim, which rests upon the seniority rights that Plaintiffs have under the New CBA.[6] Those senior-

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[6] American and the APA dispute the Plaintiffs' argument that during the abrogation period, the pilots had no seniority rights. Both argue that American never sought to abrogate the pilot seniority list or seniority provisions in Section 13 of the Old CBA and the Court therefore never authorized such action. While the Court need not reach this issue, it notes that American in fact continued to use the preexisting pilot seniority positions throughout the abrogation period. *See* November 10, 2012, Letter from L. Einspanier to N. Roghair, attached as Exhibit 2 to Declaration of Keith Wilson, *Krakowski I*, ECF No. 36-3 at 48-50.

ity rights are squarely addressed by the language of LOA 12-05, which is undisputedly part of the New CBA.

Even without considering LOA 12-05, the Plaintiffs' contract claim would still fail given default language in the New CBA about how seniority is determined. As the Plaintiffs correctly note, a pilot's placement on the System Seniority List is controlled by the "Occupational Date" assigned to the pilot by American. The "Occupational Date" is discussed in Section 2(AA), which states that "[o]ccupational seniority is used for determining placement on the Pilot System Seniority list and for bidding purposes" and that "[a]ny references to seniority in this Agreement are to Occupational Seniority, unless otherwise specified." New CBA, Section 2(AA). That same section goes on to define a pilot's Occupational Date, as the pilot's time with "the Company":

> [g]enerally occupational seniority shall begin to accrue from the date a pilot is first scheduled to complete initial new hire training *with the Company* and shall continue to accrue during such period of duty except as provided in Sections 11 and 12 of this Agreement.

New CBA, Section 2(AA) (emphasis added). The "Company" is defined in the New CBA as American Airlines, Inc. *See* New CBA at Section 1(8); *see also* New CBA at 1 (preamble defining American Airlines, Inc. as the "Company"). Thus, the plain language of the New CBA ties seniority to a pilot's time at American.

The Plaintiffs argue that Section 2(AA) is inapplicable to them since they were experienced pilots at the

time they joined American and therefore had no need to participate in "initial new hire training." The Plaintiffs ask the Court to take judicial notice of this fact based on the record regarding American's acquisition of TWA in these proceedings. But the Plaintiffs cite to nothing that supports this interpretation. *See* Plaintiffs' Opp. to APA MTD at 5 n.4.[7] In any event, the Court rejects the Plaintiffs reading as contrary to the language in the agreement.

The Plaintiffs allege that American's general practice—since the acquisition of TWA and continuing through to the present—has been to construe a pilot's Occupational Date as the pilot's "Date of Hire" at TWA plus a time period of between 45 to 49 days thereafter. Compl. ¶¶ 20, 22. But the Plaintiffs' interpretation flies in the face of the New CBA's explicit language. The New CBA clearly defines a pilot's "Date of Hire" as "[t]he first day *as an AA pilot*." New CBA, Section 2(L) (emphasis added). The language of the New CBA makes no reference whatsoever to service with any other employer, including TWA. Thus, the explicit

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[7] The Plaintiffs have pointed to nothing to support their contention that even a seasoned pilot hired by American would simply be put in the pilot's seat on his or her first day on the job, without going through any training in or testing on American's practices, rules and regulations. Such a matter is not an appropriate subject for judicial notice. See Federal Rule of Evidence 201(c)(2) (HN6 "The court … must take judicial notice if a party requests it *and the court is supplied with the necessary information*.") (emphasis added); *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) (refusing to take judicial notice where, among other things, "plaintiffs made no attempt to specify what 'adjudicable facts' met the requirements of Federal Rule of Evidence 201.").

language of both Section 2(AA) and Section 2(L) explicitly tie a pilot's seniority only to his or her employment with American. This is consistent with language elsewhere in the New CBA. For example, Section 13(A) provides that "seniority as a pilot shall be based upon the length of service as a flight deck operating crew member *with the Company*. …" New CBA, Section 13(A) (emphasis added); see also New CBA, Section 2(MM) (defining "Service" as "the period of time assigned to active duty as a flight deck operating crewmember or supervisor *with the Company*.") (emphasis added).

Moreover, the Plaintiffs' reliance on alleged general practices fails as a matter of law. It is true that "collective-bargaining agreements may include implied, as well as express, terms. … Furthermore, it is well established that the parties' practice, usage and custom is of significance in interpreting their agreement." *Conrail v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 311, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) (internal citations and quotations omitted). But the Plaintiffs here advocate using such alleged practices to negate the express and unambiguous language of the New CBA and LOA 12-05.[8] This is contrary to well-established law for interpreting labor agreements, where "tradi-

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[8] The Plaintiffs also note that as a result of the Section 1113 proceedings in American's bankruptcy case, "the Old CBA and its supplements (including Supplement CC) were null and void as of September 5, 2012." To the extent that the Plaintiffs rely on prior practices that existed under the Old CBA, these arguably would be irrelevant when that CBA was abrogated and subsequently replaced by the specific seniority language in the New CBA, which includes LOA 12-05.

tional rules of contractual interpretation are applied so long as their application is consistent with federal labor policies." *NYS v. UPS*, 198 F. Supp. 2d 188, 196 (N.D.N.Y. 2002) (quoting *Int'l Org. of Masters, Mates & Pilots v. Victory Carriers, Inc.*, 1985 U.S. Dist. LEXIS 20563, at *6 (S.D.N.Y. Apr. 19, 1985)). "Thus, if the agreement is unambiguous, the court is not free to consider the practice, usage and custom applicable to such agreements."[9] *UPS*, 198 F. Supp. 2d at 196-97 (citing *Victory Carriers*, 1985 U.S. Dist. LEXIS 20563 at *7-8 ("The Union argues that the language of the duration clause should be construed in light of industrial practice, usage and custom pertaining to all such agreements … However if the language of the contract is unambiguous the court is not free to look to such factors and summary judgment is appropriate."); *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989)).[10]

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[9] The Plaintiffs' argument regarding American's alleged practices also appears to be inconsistent with the Plaintiffs' litigation position. Specifically, the Plaintiffs state that they were not properly credited for their TWA seniority under Supplement CC and the TWA pilots' integration into American's seniority list. *See* Compl. ¶¶ 11-12. Thus, the Plaintiffs sue here to seek seniority rights consistent with their date of hire at TWA, a system which would give them better seniority than they currently possess. It is hard to see why the Plaintiffs would seek such relief if, in fact, American already provided the Plaintiffs with seniority consistent with their date of hire at TWA.

[10] Putting aside the merits of the contract claim, there are serious questions about the Plaintiffs' ability to pursue this claim in federal court in the first instance. The Railway Labor Act, 45 U.S.C. § 151, *et seq*. imposes a system of arbitration before the Board of Adjustment for minor disputes, which are disputes that

involve the interpretation or application of collective bargaining agreements. *See* 45 U.S.C. §§ 184, 153 First (i); *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1063 (D. Ariz. 2008). The Board of Adjustment provides the exclusive remedy in minor disputes. *See Addington*, 588 F. Supp. 2d at 1063 (citing *Consol. Rail Corp. v. Railway Labor Execs.' Ass'n*, 491 U.S. 299, 310, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989)). When arbitration is mandatory, an employee must at least attempt to exhaust the contractual and administrative remedies before seeking judicial review of his claim. *Atkins v. Louisville & N.R. Co.*, 819 F.2d 644, 649 (6th Cir. 1987) (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965)). This requirement may be excused only if exhaustion would be futile. *See id.*; *see also Addington*, 588 F. Supp. 2d at 1063. The Plaintiffs here concede that their breach of contract claim is a minor dispute but invoke the futility exception, claiming that arbitration by a four or five member board would be "rigged" with two representatives selected by American and two by the APA. Compl. ¶ 45. But the fact that a board is composed of union and company representatives does not by itself render exhaustion futile as a matter of law. *Addington*, 588 F. Supp. 2d at 1063-64 (citing *United Farm Workers of Am., AFL-CIO v. Ariz. Agric. Employment Relations Bd.*, 727 F.2d 1475, 1478-80 (9th Cir. 1984) (en banc); *Haney v. Chesapeake & Ohio R.R.*, 498 F.2d 987, 992, 162 U.S. App. D.C. 254 (D.C. Cir. 1974)). Nor does the use of a single neutral arbitrator such as Richard Bloch. *See Addington*, 588 F. Supp. 2d at 1064. Indeed, the fact that the board is likely to rule against the plaintiff on the merits does not necessarily make the process futile. *See id.* (citing *Everett v. USAir Grp.*, 927 F. Supp. 478, 485 (D. D.C. 1996), *aff'd*, 194 F.3d 173, 338 U.S. App. D.C. 383 (D.C. Cir.); *Atkins*, 819 F.2d at 649-50 (6th Cir. 1987)). But despite the Court's concerns about this issue, the Court does not need to rule on the question of futility given its conclusion that Plaintiffs have not stated a claim for breach of contract.

B. Plaintiffs' Second Claim Fails to the Extent it is a Hybrid Claim

In Count II of the Complaint, the Plaintiffs challenge their existing seniority by claiming that it is a result of the APA's breach of its duty of fair representation to former TWA pilots now at American. Plaintiffs claim the APA breached its duty to them by:

> (A) Agreeing to a System Seniority List which violates the terms of the New CBA, to the severe detriment of its former TWA members;
>
> (B) Agreeing to a System Seniority List that mirrors the prior list created under Supplement CC and acknowledged by the APA in 2001 to be unfair to the former TWA pilots; and
>
> (C) Agreeing to a System Seniority List that treats the former TWA pilots differently (and worse) than the pilots of other airlines acquired by American.

Compl. ¶ 49.

A labor union's duty of fair representation has three distinct aspects: "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). The duty of fair representation applies to all union activity, including contract negotiation. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991).

A union's duty of fair representation extends to the negotiation of seniority rights for union members. "In general, a union owes a duty of fair representation to all members of the bargaining unit in negotiating an integrated seniority list." *Bernard v. Air Line Pilots Ass'n Intern., AFL-CIO*, 873 F.2d 213, 216 (9th Cir. 1989) (citing *Humphrey v. Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964)). "While a union may make seniority decisions within a wide range of reasonableness in serving the interests of the unit it represents, such decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." *Barton Brands Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976). "An essential element, then, necessary to raise a limitation upon a union's discretion in bargaining with respect to seniority rights is a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership." *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182, 185 (9th Cir. 1962).

To state a breach of duty claim, the plaintiff must plausibly allege that the union's wrongful conduct caused his injury. *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010) (citations omitted). In other words, a plaintiff must demonstrate that he actually suffered an injury as a result of the union's alleged misconduct. *Sim v. New York Mailers' Union Number 6*, 166 F.3d 465, 472 (2d Cir. 1999) ("[I]n addition to proving that the Union acted arbitrarily and in bad faith, plaintiffs must demonstrate that any alleged misconduct had an effect on the outcome"); *see Phillips v. Lenox Hill Hosp.*, 673 F. Supp. 1207, 1214 (S.D.N.Y.

1987) (failing to take action that imposed no prejudice on plaintiff does not satisfy the causation test).

"Although formally comprised of two separate causes of action, a suit in which an employee alleges that an employer has breached a [collective bargaining agreement] and that a union has breached its duty of fair representation by failing to enforce the [collective bargaining agreement] is known as a 'hybrid … claim.'" *Acosta v. Potter*, 410 F. Supp. 2d 298, 308 (S.D.N.Y. 2006) (quoting *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164-65, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983)). To establish a hybrid claim, therefore, a plaintiff is required to prove both "(1) that the employer breached a collective bargaining agreement and (2) that the union breached its duty of fair representation vis-à-vis the union members. The plaintiff may sue the union or the employer, or both, but must allege violations on the part of both." *White v. White Rose Food*, 237 F.3d 174, 178-79 (2d Cir. 2001). Given the Court's conclusions regarding the breach of contract claim against American, the Plaintiffs' "hybrid" claim in paragraph 49(A) of the Complaint must also fail. *See Acosta*, 410 F. Supp. 2d at 309 ("[I]n a hybrid claim, if the employer is not liable to the employee, neither is the union.") (citing *DelCostello*, 462 U.S. at 165); *see also Herr v. Cineplex Odeon Corp.*, 1994 U.S. Dist. LEXIS 2539, at *12 (S.D.N.Y. Mar. 4, 1994).

This does not, however, dispose of the Plaintiffs' remaining two theories of liability for breach of the duty of fair representation against the APA in paragraphs 49(B) and (C) of the Complaint. The Plaintiffs there claim that the APA breached its duty of fair representation in (1) agreeing to a seniority list that

mirrored the list under Supplement CC, and (2) agreeing to a seniority list that treats the former TWA pilots differently from others. These claims are not based on an alleged breach of the New CBA. Rather, the premise of these claims is that the seniority agreed to by the APA is unfair to the former TWA pilots. *See* Compl. ¶¶ 10-13, 43-46. While not expressly set forth in the Complaint, it appears that the Plaintiffs argue that the APA should not have agreed to use the old seniority list for former TWA pilots once the Old CBA was abrogated because the old seniority list was unfair once the corresponding job protections in Supplement CC had been eliminated. *See* Compl. ¶ 17 (all pilots at-will employees once Old CBA terminated). Drawing all reasonable inferences in favor of the Plaintiffs, therefore, the Court finds that the two remaining claims under Count II are distinct from the contract claim and survive independently.

The APA's only theory for dismissal of these two claims relies upon arguments made in a related case brought by the same Plaintiffs, *Krakowski v. American Airlines, Inc., et al.*, Adv. Proceeding No. 13-01283 ("*Krakowski I*"). *See* APA MTD at 14-15. The APA argues without elaboration that the Plaintiffs' claims are precluded for the same reasons they seek dismissal of the complaint in *Krakowski I. See Krakowski I* APA MTD and Reply [Adv. No. 13-01283, ECF Nos. 14-1, 25]. But while similar, the facts and arguments in *Krakowski I* are distinct from those in this case. *Krakowski I* focuses on two things: (1) the arbitration regarding the substitute job protections that should be given to former TWA pilots to replace those lost when Supplement CC was terminated; and (2) the agreement

between the APA and American that the arbitrator's remedy in that proceeding could not include any change in the seniority of these former TWA pilots. The Complaint in this case cites neither of these events. Indeed, it appears to be carefully crafted to avoid any mention of either, even though the events in the two cases are obviously related. In any event, *Krakowski I* is distinct from the Plaintiffs' claim here that the APA violated its duty by agreeing to use the old seniority list immediately after the Old CBA was abrogated even though the job protections of Supplement CC were gone.[11]

C. Plaintiff's Third Count of the Complaint Fails to the Extent that it Relies Upon Breach of Contract

In Count III of the Complaint, the Plaintiffs allege that the "APA's agreement with American to implement a System Seniority List—*one which does not follow the formula described in the New CBA*, to the detriment of the former TWA Pilot [sic]—is discriminatory and arbitrary on its face." Compl. ¶ 52 (emphasis added). The Plaintiffs also state that "American colluded with [the] APA in its breach of its duty of represen-

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[11] The Court notes that the Defendants have disputed the merits of these additional allegations against the APA. *See Rakestraw v. Ari Line Pilots Ass'n*, 981 F.2d 1524, 1536 (7th Cir. 1992) ("Employers are free to prefer one group of employees over another. …"); *Krakowski v. American Airlines, Inc. (In re AMR Corp.)*, 2014 Bankr. LEXIS 2610, at *14 (Bankr. S.D.N.Y. June 3, 2014) ("[S]eniority is a zero sum game … if someone's bumped up, someone else goes down."). It is premature, however, for the Court to rule on those issues where there is not an adequate factual record or briefing.

tation in order to secure [the] APA's approval of the new CBA." Compl. ¶ 53. The Court has already ruled that the implementation of the System Seniority List does not constitute a breach of the New CBA. Therefore, to the extent that Count III relies upon this premise, it is dismissed for the reasons set forth above.

The Plaintiffs' remaining allegations with respect to Count III are insufficient to establish a claim. These allegations are the Plaintiffs' conclusory statements that American colluded with the APA in its breach of representation to secure the APA's approval of the New CBA, Compl. ¶ 53, and that American and the APA entered into a facially discriminatory and arbitrary agreement and colluded with one another, Compl. ¶ 54. It is true that when deciding a motion to dismiss, a court must proceed "on the assumption that all the allegations in the complaint are true," *Twombly*, 550 U.S. at 555, and must draw all reasonable inferences in favor of the nonmoving party. *Ganino*, 228 F.3d at 161. But "[t]he same deference does not extend, however, to pleaded legal conclusions." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Iqbal*, 556 U.S. at 678).

Citing *Steffens v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 797 F.2d 442, 445 (7th Cir. 1986), the Plaintiffs allege that the pleading burden in these circumstances is not high. But in Steffens, the court stated that "[t]he complaint alleges facts which, if true, would support a finding that the union had breached its duty of fair representation and that the union and employer had colluded to deprive plaintiffs of their rights under the collective bargaining agreement. ..

This is enough to state a claim for a hybrid duty of fair representation suit." *Id*. But the Plaintiffs do not do this here. The Complaint simply makes statements amounting to the legal conclusion that American colluded with the APA to gain the APA's approval of the New CBA and that the Defendants "entered into a facially discriminatory and arbitrary agreement." These legal conclusions are not supported or tied to facts in the Complaint. So "[w]hile an employer may be jointly and severally liable for a unions' breach of its fiduciary obligations to its members, such liability can only exist where the facts permit a rational inference that the employer has colluded with, and participated in the union's breach." *Kozera v. Int'l Broth. of Elec. Workers AFL-CIO*, 892 F. Supp. 536, 545 (S.D.N.Y. 1995); *see Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1146 (2d Cir. 1994). The Plaintiffs are free to make such allegations in an amended complaint. *See Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 91 (2d Cir. 2003) ("[A] court granting a 12(b)(6) motion should consider a dismissal without prejudice when a liberal reading of the complaint gives any indication that a valid claim might be stated.") (internal citations and quotations omitted).

CONCLUSION

For the reasons stated above, the Court grants the Defendants' Motions in part and dismisses Count I of the Complaint. The Court also dismisses the hybrid claim contained in Count II of the complaint to the extent such claim is based upon an alleged breach of the New CBA. Finally, the Court dismisses Count III of the Complaint. The Defendants should settle an order on three days' notice. The proposed order must be

submitted by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon counsel to the Plaintiffs.

SEPT. 3, 2015 BANKRUPTCY COURT DECISION (*Krakowski I*)

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 536 B.R. 360, 2015 Bankr. LEXIS 3038, 61 Bankr. Ct. Dec. 138, Adv. No. 13-01283 (Bankr. S.D.N.Y. Sept. 3, 2015) ("*Krakowski I*").

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: AMR CORP., *et al.*, Reorganized Debtors.	Chapter 11 Case No. 11-15463 (SHL) (Confirmed)
JOHN KRAKOWSKI, *et al.*, individually and on behalf of those similarly situated, Plaintiffs, v. AMERICAN AIRLINES, INC., *et al.*, Defendants.	Adv. No. 13-01283 (SHL)

September 3, 2015

Before Bankruptcy Judge Sean H. Lane

MEMORANDUM OF DECISION

Before the Court is the motion of Defendant American Airlines, Inc. seeking to dismiss the modified

supplemental class action complaint in the above-captioned adversary proceeding. Plaintiffs are American Airlines' pilots who previously worked at TWA. At American, Plaintiffs enjoyed special job opportunities at the St. Louis hub until those opportunities ended when the pilots' collective bargaining agreement was abrogated in American's bankruptcy. Plaintiffs allege that their union—the APA—breached its duty of fair representation in ten ways regarding Plaintiffs' loss of those special opportunities, including failing to bargain for Plaintiffs in connection with the lost opportunities, failing to replicate the lost opportunities, and failing to fairly represent Plaintiffs in an arbitration to provide substitute job protections. Unhappy with the results of that arbitration, they seek a declaration voiding the arbitrators' award, among other things.

For the reasons set forth below, the Court dismisses the first four claims in light of the prior proceedings before this Court to abrogate the pilots' collective bargaining agreement under Section 1113 of the Bankruptcy Code and the Court's subsequent approval of a new agreement. But the Court denies the rest of the motion, finding that Plaintiffs have stated claims regarding the conduct of the arbitration, the merits of which require further factual development.

BACKGROUND

As it must on a motion to dismiss, the Court assumes to be true all the facts in the complaint. In April 2001, American acquired the assets of former airline TWA, including its unionized employees. Plaintiffs' Modified Supplemental Class Action Complaint [ECF No. 48] ("MSCompl.") ¶ 1. Given the acquisition,

American and the APA negotiated and executed an addendum to their collective bargaining agreement entitled "Supplement CC," which provided terms for integrating legacy TWA pilots into American's pilot seniority list. MSCompl. ¶ 8. Supplement CC completely subordinated the seniority of about 1,200 legacy TWA pilots to that of all American pilots. MSCompl. ¶ 9. The seniority of the remaining 1,100 legacy TWA pilots was reduced by Supplement CC, and they were reintegrated into American's seniority list at their reduced seniority level. MSCompl. ¶ 9. But to compensate for this loss of seniority, Supplement CC constructed a "protective 'fence' in St. Louis," which created a minimum number of Captain and First Officer positions in St. Louis and granted the legacy TWA pilots preferential bidding for these positions. MSCompl. ¶ 10. So, while reducing the seniority of legacy TWA pilots put them at a relative disadvantage for purposes of bidding against 8,000 American pilots for positions on other routes, the protective fence guaranteed a certain number of desired positions on routes from St. Louis. MSCompl. ¶¶ 10-11. The protective fence in St. Louis was the only consideration the legacy TWA pilots received for their reduced seniority. MSCompl. ¶ 14.

The APA has "long desired to terminate Supplement CC, and the protective fence in St. Louis it provided" for the legacy TWA pilots. MSCompl. ¶ 46. American knew of the APA's hostility toward legacy TWA pilots after May 2012. MSCompl. ¶ 52. A former APA president promised as part of his election platform to remove the St. Louis fence without restoring seniority to the legacy TWA pilots. MSCompl. ¶ 46.

After American filed for Chapter 11 bankruptcy protection in November 2011, it represented that it would "close its St. Louis base and eliminate the protective fence by the end of 2012." MSCompl. ¶¶ 12-13. The legacy TWA pilots contended that either their pre-integration seniority should be restored or the protective fence maintained. MSCompl. ¶ 15.

At some point, American proposed sending this issue to arbitration, and "initially proposed a seemingly fair dispute resolution mechanism as to the [legacy] TWA pilots[‘] issue that did not limit the arbitrators' remedy." MSCompl. ¶ 53. But American and the APA later agreed that the arbitrators would be powerless to restore the legacy TWA pilots' seniority. MSCompl. ¶ 53. Thus, the "APA, in collusion with American, agreed that American [could] close the St. Louis base, and that … an arbitrator [would] decide what if any protection should be afforded" to the legacy TWA pilots. MSCompl. ¶ 15. But "under no circumstance [could] the arbitrator modify the [legacy] TWA pilots' seniority at American." MSCompl. ¶ 15. This agreement would be implemented later through the collective bargaining agreement process. MSCompl. ¶ 16.

Plaintiffs' original complaint in this case alleged that the APA breached its duty of fair representation by agreeing with American to take seniority off the table as a possible remedy in the arbitration, regardless of the ultimate result of that arbitration. *See Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *1 (Bankr. S.D.N.Y. June 3, 2014). In June 2014, however, this Court granted the APA and American's motions to dismiss the original complaint. 2014 Bankr. LEXIS

2610, [WL] at *6. In the June decision, the Court concluded that the Plaintiffs had not alleged sufficient facts to plausibly show that the seniority restriction on the Supplement CC arbitration—in and of itself—fell outside the APA's legitimate union objectives. 2014 Bankr. LEXIS 2610, [WL] at *4. In reaching its June decision, the Court observed that the Plaintiffs' seniority had been lost more than a decade before when American acquired TWA and that the results of the arbitration were unknown. 2014 Bankr. LEXIS 2610, [WL] at *4-5.

The parties refer to events in the main bankruptcy case.[1] The Court takes judicial notice of the proceedings in this bankruptcy case which are relevant to this motion.[2] These are the Section 1113 proceedings—

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[1] *See, e.g.*, Plaintiffs Opp. at 1 ("The lengthy set of facts underlying this case have been briefed several times in this and the related case. Plaintiffs will not repeat them here. …"); Motion to Dismiss, at 2 ("This motion … is based on the facts alleged … and matters of which this Court may take judicial notice, including prior decisions. The Court can take notice of its own docket and the decisions already rendered."); Motion to Dismiss, at 3-4 ("During the bankruptcy reorganization proceedings, American sought to negotiate a new collective bargaining agreement with APA. … American petitioned the Court for authority to reject. … American and the APA continued to negotiate and eventually agreed to a new collective bargaining agreement.").

[2] *See In re E.R. Fegert, Inc.*, 887 F.2d 955, 957-58 (9th Cir. 1989) ("Whether these facts were supported by the record in this adversary proceeding is unclear; however, all of the facts are supported by the record of the underlying bankruptcy matter. … 'The record in an adversary proceeding in bankruptcy presumes and in large measure relies upon the file in the underlying case …'") (quoting *Berge v. Sweet (In re Berge)*, 37 B.R. 705, 708 (W.D.

discussed in Plaintiffs' Modified Supplemental Complaint—that granted authority to the Debtors to reject the collective bargaining agreement with the APA and ultimately led to a new agreement. *See, e.g.*, MSCompl. ¶ 17 ("American's contract impasse with APA led it to seek authority from the Bankruptcy Court to reject its then existing collective bargaining agreement pursuant to [Section] 1113. Its [Section] 1113 motion was granted on September 12, 2012, and American rejected its collective bargaining agreement with APA."). In the Section 1113 proceedings, Debtor American Airlines sought permission to abrogate its collective bargaining agreement with the APA. *See*11 U.S.C. § 1113 (permitting a debtor to reject a collective bargaining agreement if it demonstrates, among other things, that it has made a proposal for modifications

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Wis. 1983)); *Citizens Bank v. Leach (In re Leach)*, 35 B.R. 100, 101-02 & n.5 (Bankr. W.D. Ky. 1983) (bankruptcy judge's use of "entire file" is consistent with the Federal Rules of Evidence given connections between a "case" and a "proceeding") (citing *Leather Comfort Corp. v. Chem. Sales and Serv. Co. (In re Saco)*, 30 B.R. 862, 865 (Bankr. D. Me. 1983) ("[B]ankruptcy judges would be remiss" if they did not take judicial notice of the debtor's bankruptcy case as a whole, including the documents filed in the case because of bankruptcy's unique interrelated multi-part nature and duty to "notice … records and files in [the] cause. …"); *cf Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001) ("The doctrine of the law of the case posits that if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case. Courts apply the law of the case doctrine when their prior decisions in an ongoing case either expressly resolved an issue or necessarily resolved it by implication.") (internal citations and quotation marks omitted). None of the parties have objected to the Court taking judicial notice of the prior proceedings before it in this bankruptcy case.

that are necessary for reorganization). The APA opposed the request, as did representatives of the Supplement CC pilots. *In re AMR*, 477 B.R. 384, 411-12, 450-54 (Bankr. S.D.N.Y. 2012). After a three-week trial, the Court issued a decision denying the Debtors' motion, largely agreeing with the need for Section 1113 relief but identifying two flaws in American's proposal for a new collective bargaining agreement. *Id*. at 454. In that decision, the Court rejected the contention that the rights provided under Supplement CC could not be rejected under Section 1113. *Id*. at 451-54 (noting that "nothing in Section 1113 itself … supports the notion that a collective bargaining right can exist in perpetuity. Indeed, the case law says otherwise."). After revising their proposal, American once again sought relief under Section 1113, relief that was once again opposed by the APA. *In re AMR*, 478 B.R. 599, 604 (Bankr. S.D.N.Y. 2012). This time the Court granted the motion. *Id*. at 609-10. That decision was affirmed by the District Court. *See In re AMR*, 523 B.R. 415 (S.D.N.Y. 2014). In its decision, the District Court concluded that the old collective bargaining agreement, and the supplements to it, were rejected under Section 1113. *Id*. at 423.[3]

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[3] In the appeal, a group of pilots were relying on rights that they claimed still existed under another supplement to the collective bargaining agreement—Supplement B—which contained "a guarantee that American would 'take no action, at any time, by way of notice, negotiations or otherwise, to diminish the pay or the retirement programs' to which those pilots had agreed." *Id*. at 419. The district court rejected the pilots' reliance on this guarantee, concluding that "the old CBA, including [S]upplement B, was rejected" under Section 1113. *Id*.

After American abrogated its then-existing collective bargaining agreement with the APA, MSCompl. ¶ 17, American and the APA negotiated a new collective bargaining agreement and multiple related side letter agreements, including letter agreement 12-05 ("LOA 12-05"). *See* LOA 12-05 [Case No. 11-15463, ECF No. 5626, at 527-29]. LOA 12-05 "confirms [the] agreement concerning the termination of Supplement CC, the planned closure of the STL base, interest arbitration related to that action, and the schedule of any other base closures." *Id*. During a hearing where American sought authority to enter into a new collective bargaining agreement and approve related side letters, including LOA 12-05, the "APA and American represented to the Bankruptcy Court that while LOA 12-05 precluded the arbitrators from modifying the seniority list, [the APA and American's] intent was that the arbitrators would 'replicate' the job protections for former [legacy] TWA pilots created by Supplement CC." MSCompl. ¶ 22.

In its motion, American seeks dismissal on a variety of grounds. It argues that some of Plaintiffs' claims are precluded by the Section 1113 process before this Court or already rejected by a prior decision issued in this adversary proceeding. American also contends that Plaintiffs cannot challenge the results of the arbitration by filing a duty of fair representation claim but must instead seek to directly vacate the arbitration award.

DISCUSSION

I. Applicable Legal Standards

A. *Motion to Dismiss*

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must plead "enough facts to state a claim to relief that is plausible on its face."[4] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). These facts must establish "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2007). "However, this does not mean that a claim must contain 'detailed factual allegations' to survive a Rule 12(b)(6) motion to dismiss." *Eastman Chem. Co. v. Nestlé Waters Mgmt. & Tech.*, 2012 U.S. Dist. LEXIS 141281, at *14 (S.D.N.Y. Sept. 28, 2012). In ruling on such a motion, a court must "assum[e] that all the allegations in the complaint are true." *Id.* at 555. But courts need not "credit conclusory allegations or legal conclusions couched as factual allegations." *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2014). Ultimately, the court must determine "whether the well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement to relief." *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (citing *Iqbal*, 556 U.S. at 679) (emphasis added); *see also Eatz v. DME Unit of Local Union No. 3*, 794 F.2d 29, 34 (2d Cir. 1986) ("[W]hen an action involves a union's duty of fair representation,

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[4] Federal Rule of Civil Procedure 12(b)(6) is made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b).

the Supreme Court advises the lower courts, as guardians of this duty, to construe complaints … to avoid dismissals and to give plaintiffs the opportunity to file supplemental pleadings unless … beyond doubt … a good cause of action cannot be stated.") (citing *Czosek*, 397 U.S. at 27); *Kavowras v. New York Times Co.*, 328 F.3d 50, 53 (2d Cir. 2003).[5]

B. *The Duty of Fair Representation*

"A union 'has a duty to represent fairly all employees subject to the collective bargaining agreement.'" *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010) (quoting *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998)). This duty requires adequate, honest, and good faith representation. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 75, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991) (citing *Restatement (Second) of Trusts* § 174 (1959) (trustee's duty of care) (additional citations omitted)). It applies across many contexts, including when challenges are leveled at a union's contract administration, contract enforcement, negotiation efforts, or "instances in which a union is acting in its representative role, such as when the union operates a hiring hall." *O'Neill*, 499 U.S. at 77 (citing *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 87-89, 110 S. Ct. 424, 107 L. Ed. 2d 388 (1989) (additional internal citations and quotations omitted)). It has been referred to as the "statutory duty

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[5] The APA has vigorously contested Plaintiffs' allegations about the conduct of the arbitration in other pleadings filed before this Court. *See* Decl. of Edgar James ¶¶ 2-22 [ECF No. 36-2]; Decl. of Keith Wilson ¶¶ 11-18 [ECF No. 36-3]. But such factual issues are not before the Court on this motion to dismiss.

of fair representation," but the "doctrine was judicially developed in *Steele [v. Louisville & Nashville R. Co.]* and its progeny," and is more precisely described as "grounded in federal statutes." *See Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967) ("The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination. …") (citing *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 204, 65 S. Ct. 226, 89 L. Ed. 173 (1944)); *see also O'Neill*, 499 U.S. at 76 ("This description of the 'duty grounded in federal statutes' has been accepted without question by Congress and in a line of our decisions spanning almost a quarter of a century.") (citations omitted); *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47, 99 S. Ct. 2121, 60 L. Ed. 2d 698 (1979) ("The right to bring unfair representation actions is judicially implied from the statute and the policy. … Our function, therefore, is to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act. …") (citations and quotation marks omitted); *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 79, 110 S. Ct. 424, 107 L. Ed. 2d 388 (1989) (explaining an unfair representation claim is a "creature of labor law" and "part of federal labor policy").

To prove a breach of the duty of fair representation, plaintiff must satisfy two elements. *Nikci v. Quality Bldg. Servs.*, 995 F. Supp. 2d. 240, 246 (S.D.N.Y. 2014) (quoting *White v. White Rose Food*, 237 F.3d 174, 179 (2d Cir. 2001)); *Vaughn*, 604 F.3d at 709. First, the plaintiff must show "that the union's 'conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.'" *Id.* (quoting *White Rose Food*,

237 F.3d at 179); *Vaughn*, 604 F.3d at 709 (conduct consists of action or inaction). A union's conduct is arbitrary if "'in light of the factual and legal landscape at the time of the union's actions [or inactions], the union's behavior is so far outside a wide range of reasonableness as to be irrational.'" *Vaughn*, 604 F.3d at 709 (quoting *O'Neill*, 499 U.S. at 67). It is discriminatory if "'substantial evidence'" indicates that the union engaged in discrimination that "'was intentional, severe, and unrelated to legitimate union objectives.'" *Vaughn*, 604 F.3d at 709 (quoting *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971)). And a union's conduct is in bad faith if there is proof that the union acted with "an improper intent, purpose, or motive" and that action "encompasses fraud, dishonesty and other intentionally misleading conduct." *Vaughn*, 604 F.3d at 709-10 (quoting *Spellacy*, 156 F.3d at 126). A union's good faith "[t]actical errors" or "mere negligence" will not give rise to a breach of the duty of fair representation, because "'[a]s long as the union acts in good faith, the courts cannot intercede on behalf of employees who may be prejudiced by rationally founded decisions which operate to their particular disadvantage.'" *Barr v. United Parcel Serv., Inc.*, 868 F.2d 36, 43-44 (2d Cir. 1989) (quoting *Cook v. Pan Am. World Airways, Inc.,* 771 F.2d 635, 645 (2d Cir. 1985)).

Second, the plaintiff must show "'a causal connection between the union's wrongful conduct and [the plaintiff's] injuries.'" *Barr*, 868 F.2d at 43-44 (quoting *White Rose Food*, 237 F.3d at 179); *Vaughn*, 604 F.3d at 709.

Duty of fair representation cases "are matters to be decided by the courts in the first instance." *See, e.g., Ferro v. Ry. Exp. Agency, Inc.*, 296 F.2d 847, 851 (citing *Conley v. Gibson,* 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)); *Boivin v. Cent. Vermont Ry., Inc.*, 1982 U.S. Dist. LEXIS 9994, 1982 WL 177535, at *8 (D. Vt. Feb. 16, 1982) ("It is clear that a federal district court has subject matter jurisdiction over an employee['s] claim against a union for breach of duty of fair representation.") (citing *O'Mara v. Erie Lackawan R.R. Co.*, 407 F.2d 674 (2d Cir. 1969) *aff'd sub nom, Czosek v. O'Mara*, 397 U.S. 25, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970)). Thus, an employee does not need to exhaust other administrative remedies prior to bringing a duty of fair representation claim. *Czosek*, 397 U.S. at 28 ("And surely it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. …") (citations and footnotes omitted)).

An employee bringing a breach of duty of fair representation claim against his union can add his employer as a defendant by alleging the employer's knowledge of or complicity in the union's breach. *See Long Island City Lodge 2147 etc. v. Ry. Express Agency, Inc.*, 217 F. Supp. 907, 910 (S.D.N.Y. 1963) (National Railroad Adjustment Board lacks primary jurisdiction over employees' hostile discrimination claim against union and employer). This approach bypasses a fruitless arbitration process in which two collusive parties, the employer and union, could strike a bargain at the

employee's expense. *See Sullivan v. Air Transp. Local 501 TWU*, 2004 U.S. Dist. LEXIS 29815, 2004 WL 2851785, at *2 (E.D.N.Y. Dec. 6, 2004) (citing *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324, 328-29, 89 S. Ct. 548, 21 L. Ed. 2d 519 (1969) (additional citations omitted)); *see also Boivin*, 1982 U.S. Dist. LEXIS 9994, 1982 WL 177535, at *4 (citing *O'Mara*, 407 F.2d at 674).

C. *Judicial Review Under the Railway Labor Act*

The Railway Labor Act (the "RLA") separately addresses finality and judicial review of awards issued by "any division of the [National Railroad] Adjustment Board," and awards issued by "a board of arbitration." *Compare* 45 U.S.C. §§ 153 First (q), (m) & Second with 45 U.S.C. § 159 Third. Section 159 provides that an award of a board of arbitration is "conclusive on the parties as to the merits and facts of the controversy" unless a petition to impeach the award is properly filed on fairly limited grounds:

> (a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;
>
> (b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or
>
> (c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or

> corruption affected the result of the arbitration. … Provided further, that an award contested as herein provided shall be construed liberally by the court, with a view to favorite its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

45 U.S.C. § 159 Third.

As a general matter, if an employee disagrees with a "final and binding" arbitration award and can show that his union breached its duty of fair representation in a way that "seriously undermine[d] the integrity of the arbitral process," then that arbitration award is no longer final or binding. *United Parcel Service, Inc., v. Mitchell*, 451 U.S. 56, 61, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1976)) ("[I]f it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of finality"). Such a tainted award may be vacated. *See Hines*, 424 U.S. at 572 (quoting *Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974)) ("'To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed … or follows the arbitration trail to the end, but in so doing subverts the arbitration process. … In neither case, does the employee receive fair representation.'").

While the *Hines* decision involved the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.*, the duty of fair representation exception to finality and remedy of vacatur of a tainted final and binding arbitration award is similarly available under the RLA.

See, e.g., Barnett v. United Air Lines, Inc., 738 F.2d 358, 362 (10th Cir. 1984) ("If an employee can establish that his union breached its implied duty of fair representation, then even a binding decision of the board can be set aside if the breach seriously undermined the integrity of the arbitral process.") (citing *Hines*, 424 U.S. at 567); *Del Casal v. E. Airlines, Inc.*, 634 F.2d 295, 299 (5th Cir. 1981) (applying *Hines*, but declining to vacate the System Board's final and binding conclusions because the facts did not show that the union's breach of its duty of fair representation seriously undermined the integrity of the arbitral process). Indeed, many courts assume the application of this duty of fair representation exception to final and binding awards under the RLA without discussion. *See, e.g., Del Casal*, 634 F.2d at 299 (citing *Hines* for existence of duty of fair representation exception and, without further discussion, applying it to determine that "[h]ere, the union's breach … did not 'seriously undermine' the integrity of the arbitral process.").

II. The Plaintiffs' Alleged Breaches of the Duty of Fair Representation

The Plaintiffs allege that the "APA violated its duty to fairly represent the plaintiffs and the putative Class" in ten ways. MSCompl. ¶ 48(A)-(J). These alleged breaches cover three general categories: 1) failing to bargain about the termination of Supplement CC and agreeing to terminate Supplement CC without securing equivalent job protections, MSCompl. ¶¶ 48(A)-(B); 2) precluding the Supplement CC arbitrators from addressing seniority and failing to pursue something to "replicate" the Supplement CC job protections, MSCompl. ¶¶ 48(C)-(D); and 3) claims that the

Supplement CC arbitration was not procedurally appropriate or fair, including problems with the selection of the arbitrators, the participants, and the lawyers, MSCompl. ¶¶ 48(E)-(J). Plaintiffs further allege that American knew of and colluded with the APA in these breaches. MSCompl. ¶¶ 52-53.

A. *Plaintiffs' First Two Claims Fail to Allege a Breach of the APA's Duty of Fair Representation Because They Ignore the Section 1113 Proceedings in This Bankruptcy*

In its first two claims, Plaintiffs complain that the APA failed to bargain on their behalf as to the termination of Supplement CC and that APA agreed with American to terminate Supplement CC without securing equivalent job protections. MSCompl. ¶¶ 48(A)-(B). But these claims cannot survive given the Section 1113 proceedings in American's bankruptcy. As those proceedings make clear, the APA collective bargaining agreement—including Supplement CC—remained in effect until American received Court approval to reject the collective bargaining agreement, including Supplement CC. APA opposed the termination of the collective bargaining agreement at every turn, as did the Supplement CC Pilots.[6] Ultimately, American rejected

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[6] The APA made many attempts to prevent American from rejecting its collective bargaining agreements, which included Supplement CC. *See, e.g.*, Brief of APA for American's Proposals Pursuant to Section 1113 [Case No. 11-15463, ECF No. 2577]; APA's Memorandum in Opp'n to Motion to Reject Pursuant to Section 1113 [ECF No. 2722]; APA's Objection to Debtors' Motion in Limine [ECF No. 2794]; APA's Supplemental Authority in Opposition to Debtors' Motion to Reject Pursuant to Section 1113

its collective bargaining agreement with the APA after contentious Section 1113 proceedings. Until it was rejected, former TWA pilots had—and exercised—rights under Supplement CC, which was part of the underlying collective bargaining agreement between American and the APA. But the former TWA pilots' Supplement CC rights ceased to exist when American rejected the underlying APA collective bargaining agreement. Hr'g Tr. 76:14-22, Dec. 19, 2012 [Case No. 11-15463, ECF No. 6282].

Plaintiffs seek to avoid the consequences of the Section 1113 proceedings by arguing that the APA breached its duty of fair representation before the Section 1113 proceedings began. More specifically, they allege that before American was even authorized to reject Supplement CC, the APA had agreed—without bargaining on Plaintiffs' behalf—that American can close the St. Louis base and that an arbitrator will decide what protections, if any, should be afforded the former TWA pilots. MSCompl. ¶¶ 15-16. But Plaintiffs concede that this "agreement" before the Section 1113 proceeding was only a piece of the negotiations between American and the APA, which ultimately were unsuccessful. *See* MSCompl. ¶ 17 (discussing impasse in negotiation caused American to seek Section 1113 relief). As this Court previously recognized in the Section 1113 proceeding:

[ECF No. 2895]; APA's Appeal for Rejection Pursuant to Section 1113 [ECF No. 4232]; APA's Objection to Motion to Reject [ECF No. 4251]; APA's Amended Declaration in Opposition to Section 1113 Rejection [ECF No. 4285].

> Because of the complicated nature of these collective bargaining agreements, the parties negotiate on an issue-by-issue basis with each issue subject to the normal tradeoffs inherent in collective bargaining. Notwithstanding any meeting of the minds on a particular issue, the parties have no agreement on a collective bargaining agreement until such time as a union sends out a specific proposed agreement for a vote and it is ratified by the union membership. So while the parties at Trial made repeated references to agreements on specific issues reached during negotiations, those reflect only progress towards an agreement, not a binding agreement itself.

In re AMR Corp., 477 B.R. at 403 n.9.[7] And when negotiations hit an impasse, American sought and received authority to reject the collective bargaining agreement with the APA, causing the former TWA pilots to lose their rights to the special job protections in Supplement CC. Hr'g Tr. 76:14-22, Dec. 19, 2012; *see Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (In re Nw. Airlines Corp.)*, 483 F. 3d 160, 173 (2d Cir. 2007) (a debtor's abrogation of its collective bargaining

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[7] The record reflects that the APA and American engaged in some negotiations about Supplement CC. *See, e.g.*, Memo. in Support of 1113, Part Two: APA-Pilots, at 49-50 [Case No. 11-15463, ECF No. 2042] ("American originally proposed to eliminate these [minimum staffing] provisions [in St. Louis created by Supplement CC] and close its base in St. Louis. However, after negotiations with APA, the Company has accepted APA's proposal to solve the issue of any new protections for former TWA pilots through interest arbitration.").

agreement under Section 1113 terminates the parties' agreed-to working conditions and absolves them of status quo duties under the RLA); *In re AMR Corp.*, 477 B.R. at 453. Given that rejection of Supplement CC only occurred as a result of this Court's grant of American's Section 1113 request, the Court concludes that Plaintiffs have not plausibly plead a fair representation claim in paragraphs 48 (A)-(B).

B. *Plaintiffs' Third and Fourth Claims are Dismissed*

In claims three and four, Plaintiffs complain that the APA falsely represented to the Bankruptcy Court that the intent of the LOA 12-05 arbitration was to "replicate" Supplement CC's job protections and that the APA wrongly agreed with American to preclude the LOA 12-05 arbitrators from modifying the former TWA pilots' seniority. MSCompl. ¶ 48(C) & (D).

Turning to the first allegation, the Court concludes that the representation about "replicate" is not a basis for a duty of fair representation claim. The actual terms of LOA 12-05 were presented to the Court as part of the request to approve the new collective bargaining agreement. *See* Mot. for Order Authorizing Entry into Collective Bargaining Agreement and Settlement Letter and Approving Settlements in Connection Therewith ("Mot. Authorizing New CBA"), Ex. B, at 527-28 [ECF No. 5626]. The intent of LOA 12-05 was clear from its written terms: "The Company and the APA agree that a dispute resolution procedure is necessary to determine what *alternative* contractual rights should be provided to TWA Pilots as a result of the loss of flying opportunities due to termination of

Supplement CC and the closing of the STL base." LOA 12-05, at 1 [ECF No. 5626, page 527 of 529] (emphasis added); *id.* (parties will engage in binding arbitration "to establish certain terms of the CBA as a *substitute* for the loss of Supplement CC preferential flying opportunities … ") (emphasis added).

The word "replicate" is not used anywhere in LOA 12-05. Rather, it was used by counsel in a court hearing as a short-hand description of the terms of the agreement. This informal description does not trump the written terms of the agreement, which was provided to all interested parties at the time of the hearing. *See* LOA 12-05, filed Dec. 7, 2012; Hr'g Tr., Dec. 19, 2012 [Case No. 11-15463, ECF No. 6282] (hearing on Motion Authorizing New CBA); *cf. White v. Wash. Pub. Power Supply Sys.*, 692 F.2d 1286, 1289 n.1 (9th Cir. 1982) ("It is settled that to the extent a trial court's oral decision is inconsistent with a formal written order, the formal order controls"); *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 774 n.9 (9th Cir. 2006) ("[A] judgment is rendered only when it is set forth in writing, not when it is orally pronounced in court.") (quoting 11 Fed. Prac. & Proc. Civ. 2D Section). Indeed, it was clear at the hearing that the term "replicate" could not to be taken literally as the parties represented that American intended to close the St. Louis base and, therefore, the job protections for TWA Pilots at that base would no longer exist. Hr'g Tr. 31:8-33:10, Dec. 19, 2012 [Case No. 11-15463, ECF No. 6282] (Mr. James: "[T]he company is closing St. Louise [sic] as a result of the abrogation of Sup[plement] CC and we said there was protected flying that we promised those pilots back in 2001 and so we're going

to … let … three respected neutrals decide how to replicate those [p]rotections."); *see also* LOA 12-05 ("This letter confirms … the planned closure of the STL base …"). Given that fact, it would be impossible to make an exact copy or duplicate of those St. Louis protections. *See American Heritage Dictionary*, 1480 (4th ed. 2000) (defining "replicate" as "to repeat, duplicate, or reproduce"); *Random House Dictionary*, 1634 (2d ed. 1987) (defining "replicate" as "[t]o duplicate, copy, reproduce, or repeat").

Taking judicial notice of the proceedings before this Court that are part of this bankruptcy case, the Court categorically rejects Plaintiffs' reliance on the term "replicate" as an independent basis for any rights asserted by the Plaintiffs. *Cf. In re Applin*, 108 B.R. 253, 258 (Bankr. E.D. Ca. 1989) ("[T]o be given conclusive effect, the putative admission would have to be deemed a judicial admission. … Some degree of formality is entailed. The court has discretion to accept or reject the … admission. Judicial admissions are not made upon ambiguous … comments by counsel and are not made upon inconsistent pleas.") (citations and quotation marks omitted); *see id.* at 259 ("An inadvertent statement by counsel is more likely to be treated as an evidentiary admission … [which is] mere evidence … not conclusive, and may be contradicted by other evidence.").[8]

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[8] It is unclear whether the term "replicate" would create any additional rights for the TWA pilots beyond those that exist by virtue of the terms of LOA 12-05. But to the extent that Plaintiffs cite to the word "replicate" as a separate basis for relief in paragraph 48(C)-(D) of the Modified Supplemental Complaint, the

For different reasons, the Court also dismisses the claim in paragraph 48(D) of the Modified Supplemental Complaint. This claim complains about the agreement to preclude the arbitrators from modifying the seniority of the former TWA pilots. That issue was squarely presented to this Court and resolved in the Court's decision in June 2014 dismissing the original complaint in this action. In the original Complaint, Plaintiffs alleged:

> 28. APA is violating its duty of fair representation in agreeing with American to terminate Supplement CC's protective fence and that an arbitrator can fashion some "remedy" for the former TWA pilots, which "remedy" cannot modify the former TWA pilots' seniority. This agreement is the product of APA's hostility toward the former TWA pilots, is facially discriminatory against them, and is so unreasonable as to be arbitrary.

Original Complaint ¶ 28. The June decision dismissed this claim. In that decision, the Court rejected the Plaintiffs' position that the only satisfactory remedy in the arbitration required modifying the seniority of the legacy TWA pilots. *In re AMR Corp.*, 2014 Bankr. LEXIS 2610, 2014 WL 2508729, at *4 (Bankr. S.D.N.Y. June 3, 2014). The Court recognized that "[r]eopening seniority affects all pilots at American that are represented by the APA, not just the Plaintiffs," which required the APA necessarily to balance the interests

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Court rejects that argument and thus dismisses this as an independent claim.

of the Plaintiffs and all the other pilots that the APA represents. *Id*. The Court concluded that the Plaintiffs had not alleged anything to infer that the APA's exercise of its discretion on that issue was discriminatory. 2014 Bankr. LEXIS 2610, [WL] at *4-5. As this issue has already been ruled upon, the Court dismisses this claim. *See Aramony*, 254 F.3d at 410 (discussing the doctrine of law of the case).

C. *Plaintiffs' Remaining Claims Survive*

In its remaining claims, Plaintiffs raise duty of fair representation claims relating to how the arbitration was conducted. The allegations range from complaints about how the arbitrators, lawyers, and participants in the arbitration were selected to the positions taken by the APA during the arbitration. MSCompl. ¶¶ 48(E)-(J). American lumps these claims together as "allegations concerning the conduct of the interest arbitration proceeding within the parameters of LOA 12-05," and asserts that "as a result of those allegations what Plaintiffs are seeking is to vacate the [interest arbitration] award." Hr'g Tr. 86:17-87:2, Sept. 4, 2014 (Counsel for American, Mr. Fritts). American argues that the "Railway Labor Act prescribes the only way to" impeach an arbitration award, which is enumerated in Section 159 Third. *See* Motion to Dismiss, at 13; *see also* 45 U.S.C. § 159 Third. As Plaintiffs did not seek relief under Section 159 Third, American contends that these claims must be dismissed.[9] American categor

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[9] American reasons that Plaintiffs elected not to file a claim seeking to vacate the interest arbitration awards because Plaintiffs could not satisfy those standards, which are "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439

ically asserts that there "is no [duty of fair representation] exception" to RLA arbitration awards. Hr'g Tr. 131:10-13, Sept. 24, 2014. More specifically, American contends that where "plaintiffs elected not to file a petition to vacate or modify the arbitration award, they could not 'now collaterally attack the … award in the context of [a] hybrid claim for breach of the duty of fair representation.'" Motion to Dismiss, at 14 (citing *Musto v. Transp. Workers Union of Am.*, 818 F. Supp. 2d 621, 640 (E.D.N.Y. 2011)).

The Court disagrees. In fact, the case law recognizes that a duty of fair representation claim can be brought independent of a request to vacate an arbitration result. *See Schum v. South Buffalo Ry. Co.*, 496 F.2d 328, 332-33 (2d Cir. 1974) (plaintiff brought breach of fair duty of representation claim where reliance on union and union's failure to timely act caused employer's adverse decision in wrongful discharge grievance proceeding to become final and binding, but plaintiff did not seek to vacate employer's decision); *Childs v. Penn. Federation Bhd. of Maint. Way Emps.*, 831 F.2d 429, 432, 441 (3d Cir. 1987) (plaintiff sued for breach of the duty of fair representation where union agreed with defendant that plaintiff would not raise new contentions in arbitration, but plaintiff did not move to vacate NRAB's adverse decision); *Peters v. Burlington N. R. Co.*, 914 F.2d 1294, 1300-02 (9th Cir. 1990), *reh'g denied*, 931 F.2d 534 (1991) (plaintiff claimed that union breached the duty of fair representation by inexplicably failing to present a strong substantive argument at arbitration survived defendant's

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U.S. 89, 93, 99 S. Ct. 399, 58 L. Ed. 2d 354 (1978).

motion for summary judgment, but plaintiff did not request to vacate adverse decision); *cf. Williams v. Air Wisconsin*, 874 F. Supp. 710, 712-14 (E.D. Va. 1995), *aff'd*, 74 F.3d 1235 (4th Cir. 1996) (court evaluated evidence in granting summary judgment to defendant where plaintiff claimed the union breached its duty of fair representation by failing to emphasize plaintiff's case theory and call particular witnesses at an arbitration proceeding but plaintiff never sought to vacate arbitration decision); *see also* The Railway Labor Act, Ch. 5.v.A-F (Chris A. Hollinger, ed., 3rd ed. 2012) (discussing a union's duty of fair representation).

American contends that Plaintiffs' fair representation claim must be dismissed given the participation of former TWA pilots in the arbitration. *See* AMR's Letter Response [ECF No. 63] (citing, among other things, *Del Casal v. E. Airlines, Inc.*, 465 F. Supp. 1254 (S.D. Fla. 1979), aff'd, 634 F.2d 295 (5th Cir. 1981)). But the *Del Casal* case is distinguishable. In *Del Casal*, the plaintiff had a union-provided attorney assist with his initial grievance process and the attorney later submitted plaintiff's grievance to the System Board of Adjustment. *Id.* at 1256. But after discovering the plaintiff was not a member of the union, the attorney stopped working with plaintiff and recommended that he retain a private attorney to assist with the upcoming System Board hearings. *Id.* at 1256. The plaintiff pursued a duty of fair representation claim against the union for discontinuing his representation, and the *Del Casal* court agreed the union breached the duty of fair representation. *Id.* at 1259. But the plaintiff decided to continue with the System Board hearings after retaining new non-union counsel of his choosing. *Id.* Because the

plaintiff failed to allege the union attorney "could have adduced additional evidence in appellant's favor" beyond that found by his privately retained attorney, his complaints about the integrity of the Board's process based on his legal representation were "mere conjecture and invalid." *Del Casal*, 634 F.2d at 300. Having litigated his position, therefore, the court rejected his wrongful discharge claim that was based on the allegedly defective arbitration process. By contrast, the Plaintiffs here allege they were effectively shut out of the arbitration, including the selection of the Pilots Committees who participated in the arbitration and the retention of counsel for those committees. *See* MSCompl. ¶¶ 26-36.[10]

Finally, American complains that the Plaintiffs have not set forth the results of the arbitration. *See* AMR's Letter Response at 3-4 [ECF No. 63] (raising concerns regarding the Court's ability to evaluate the results of the interest arbitration); *see also Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 163 (2d Cir. 1989) (finding results of arbitration relevant to duty of fair representation claim as court should not have to speculate on the outcome of an arbitration where alleg-

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[10] Indeed, unlike cases relied upon by American, it is unclear whether Plaintiffs had the right to move to vacate the arbitration award as they were not participants in the proceeding. *See Air Wisconsin Pilots Protection Comm. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990); *see also Musto v. Transp. Workers Union of Am. AFL-CIO*, 818 F. Supp. 2d 621, 640 (E.D.N.Y. 2011) (noting that a "party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding.") (quoting *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324, 92 S. Ct. 1562, 32 L. Ed. 2d 95 (1972)).

ed injury presumes harm from same); *Kavowras v. New York Times Co.*, 328 F.3d 50, 56 (2d Cir. 2003) (noting plaintiff could not have been expected to bring suit before outcome of arbitration and court should not be compelled to adjudicate the same where efficacy of union's representation turned on arbitration outcome) (citing *Ghartey*, 869 F.2d at 163). But it is enough to remove the bar of finality here for Plaintiffs to allege a breach of the duty of fair representation that "seriously undermine[d] the integrity of the arbitral process" and caused harm to the Plaintiffs.[11] *See Hines*, 424 U.S. at 567; *see also Kavowras*, 328 F.3d at 53. Of course, such claims are subject to the same strict standards as any other duty of fair representation claims. *See Williams*, 874 F. Supp. at 716 (evidence must tend to establish severely deficient union conduct required for breach); *Ash v. U.P.S., Inc.*, 800 F.2d 409, 411 (4th Cir. 1986).[12]

CONCLUSION

For the reasons stated above, the Court grants the Motion in part, and denies it in part, dismissing the allegations in ¶ 48 (A)-(D) from the Modified Supplemental Complaint without prejudice. The Defendants shall settle an order on three days' notice. The

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[11] *See* MSCompl. ¶ 36 (alleging that as a result of the proposal adopted by the LOA 12-05 arbitrators, "the majority of former TWA pilots lost their jobs in St. Louis, and because of their lack of seniority, most of them are unable to hold equivalent jobs at any of American's other bases.").

[12] Given the conclusions reached in this decision, it is not necessary for the Court to address the other arguments raised in American's motion, including American's reliance on the *Noerr-Pennington* doctrine.

proposed order must be submitted by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon opposing counsel.

JUNE 2014 BANKRUPTCY COURT DECISION (*Krakowski I*)

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 2014 Bankr. LEXIS 2610, 199 L.R.R.M. 3584, 164 Lab. Cas. (CCH) P10,695, Adv. No. 13-01283 (Bankr. S.D.N.Y. June 3, 2014) ("*Krakowski I*").

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: AMR CORP., *et al.*, Reorganized Debtors.	Chapter 11 Case No. 11-15463 (SHL) (Confirmed)
JOHN KRAKOWSKI, *et al.*, individually and on behalf of those similarly situated, Plaintiffs, v. AMERICAN AIRLINES, INC., *et al.*, Defendants.	Adv. No. 13-01283 (SHL)

June 3, 2014

Before Bankruptcy Judge Sean H. Lane

MEMORANDUM OF DECISION

Before the Court are two motions (the "Motions") to dismiss the complaint in the above-captioned advers-

ary proceeding (the "Complaint"). Plaintiffs John Krakowski, Kevin Horner, and M. Alicia Sikes bring this action on behalf of themselves and all persons similarly situated. They allege that their union, the Allied Pilots Association (the "APA"), breached its duty of fair representation in representing them and other pilots who joined American Airlines, Inc. ("American") when it acquired Trans World Airlines, Inc. ("TWA") in 2001. The Plaintiffs further claim that American colluded with the APA in breaching this duty.

The APA is the collective bargaining representative for all pilots at American, of which the legacy TWA pilots are a relatively small number. When joining American in 2001, these legacy TWA pilots lost all or much of their seniority in the integration of the two work forces. To compensate for this loss, these pilots were given special job opportunities at the St. Louis hub of American. This so-called "protective fence" at St. Louis was eliminated when American decided to close the St. Louis hub as part of its bankruptcy restructuring. The APA and American agreed to appoint an arbitrator to decide how these pilots should be compensated for the loss of the "protective fence" in St. Louis. But the APA and American also agreed that, when awarding relief, the arbitrator would not be allowed to revisit the issue of these pilots' loss of seniority in 2001. The Plaintiffs contend that the APA violated its duty of fair representation by taking seniority off the table as a possible remedy in the arbitration. The Defendants APA and American, together with the Official Committee of Unsecured Creditors as Intervenor, move to dismiss the Complaint for failure to state a claim, contending that the APA's act cannot

be arbitrary or discriminatory given the APA's duty to take into account the interests of all APA members. The APA also argues that the Plaintiffs' claims are precluded by collateral estoppel because of prior litigation on these issues. For the reasons stated below, the Court grants the Motions and dismisses the Complaint.[1]

BACKGROUND

As it must on a motion to dismiss, the Court assumes all the facts in the Complaint to be true. In January 2001, American acquired the assets of TWA. Complaint ("Compl.") ¶ 7.[2] Given this acquisition, American and the APA negotiated how to integrate legacy TWA pilots into the seniority lists for American's pilots. *Id.* ¶ 8.[3] The parties memorialized their

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[1] After the filings of these Motions, the Plaintiffs sought to amend the Complaint to add additional allegations regarding the arbitration, which was not complete when the Motions were filed. *See* Motion for Leave to File Supplemental Complaint (ECF No. 32). For reasons explained at the hearing on these Motions, this decision addresses only the Motions to dismiss the original Complaint. *See* Hr'g Tr., June 13, 2013, 71:15-21 (ECF No. 30).

[2] The Plaintiffs initially filed this case in the United States District Court for the Eastern District of Missouri on May 24, 2012. The case was transferred to this Court in March 2013. The Complaint can be found on the docket of the Missouri court under Case Number 4:12-cv-00954 (JAR).

[3] To understand the instant dispute, it is important to note that seniority "has become one of the cornerstones of American unionism … It is one of the chief protections a worker has from management's vagaries, and it preserves the self-esteem and financial security of workers. …" *In re Royal Composing Room,*

agreement on the new seniority terms in Supplement CC, an addendum to the collective bargaining agreement between American and the APA. *Id*. Supplement CC completely subordinated the seniority of about 1,200 legacy TWA pilots to that of all American pilots. *Id*. ¶ 9. For the remaining 1,100 legacy TWA pilots, Supplement CC reduced and reintegrated their seniority with the American pilot seniority list. *Id*. To compensate for this loss of seniority, Supplement CC created a protective "fence" for these legacy TWA pilots around the St. Louis airport, the former hub of TWA's operations. *Id*. ¶ 10. This fence created a minimum number of Captain and First Officer positions at the St. Louis airport and gave legacy TWA pilots preferential bidding for these positions. *Id*. This was beneficial to the legacy TWA pilots because they would face difficulty bidding against American pilots with higher seniority at other airports bases, where TWA Captains could be demoted to First Officer positions, and First Officers would be forced to stand "on call" for several days in a row. Compl. ¶ 11.

The APA has "long desired to terminate Supplement CC." Compl. ¶ 26. A former APA president made promises as part of his election platform to remove the St. Louis fence without restoring seniority to the legacy TWA pilots. Compl. ¶ 26. Despite the perceived hostility against it, Supplement CC remained in effect until

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Inc., 848 F.2d 345, 356 (2d Cir. 1988); *see also Naugler v. Air Line Pilots Ass'n, Int'l*, 2008 U.S. Dist. LEXIS 25173, at *44 ("[S]eniority affect[s] virtually every aspect of the pilots' careers, including determining who goes on furlough and who has rights to bid for flying awards.").

American's Chapter 11 bankruptcy in 2011. As part of their efforts to reorganize, the Debtors sought permission to abrogate American's collective bargaining agreement with the APA pursuant to Section 1113 of the Bankruptcy Code. *See* 11 U.S.C. § 1113 (permitting a debtor in possession to reject a CBA if, among other things, it makes a proposal with modifications necessary for reorganization). Ultimately, the Court granted Debtors' application to reject their collective bargaining agreement with the APA. *See In re AMR Corp.*, 477 B.R. 384, 401 (Bankr. S.D.N.Y. 2012); *In re AMR Corp.*, 478 B.R. 599 (Bankr. S.D.N.Y. 2012). In the course of negotiations for a new collective bargaining agreement, the Debtors disclosed their intentions to close the St. Louis hub and eliminate the protective fence created by Supplement CC. Compl. ¶ 13.

During those negotiations, American initially offered to ask an arbitrator to decide a remedy for the legacy TWA pilots with no limit on the arbitrator's authority. Compl. ¶ 29. At the APA's request, however, American removed this from the proposed term sheet. *Id*. Ultimately, the APA and American agreed to submit the question of relief for the legacy TWA pilots to binding arbitration, but to restrict the arbitrator from modifying the legacy TWA pilots' seniority. Compl. ¶ 31.

There has been prior litigation regarding Supplement CC and the protective fence at the St. Louis hub. Shortly after the execution of Supplement CC in 2002, a class action was filed on behalf of legacy TWA pilots against the APA and American, among others. *See Bensel v. Allied Pilots Association*, 271 F. Supp. 2d 616

(D.N.J. 2003).[4] In *Bensel*, the pilots alleged that the APA breached its duty of fair representation by negotiating and executing Supplement CC's seniority integration. *See* Bensel Compl. ¶ 120 (ECF No. 14-2). They alleged that the APA further breached the duty by failing to "negotiate a fair and equitable integration of the TWA pilots" after the National Mediation Board certified the APA as the bargaining representative of the combined American pilots, including the former TWA pilots. Bensel Compl. ¶ 125. The district court granted summary judgment in favor of the APA with respect to the duty of fair representation claim. The court in *Bensel* found that the APA owed no duty to the TWA pilots at the time of negotiation because the APA was not yet the certified bargaining representative for the legacy TWA pilots, and once the APA was their representative, there was "nothing to negotiate" because Supplement CC was already in effect. *Bensel*, 271 F. Supp. 2d at 625, *aff'd in relevant part by* 387 F.3d 298, 312-17.

DISCUSSION

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must plead "enough facts to

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[4] The legacy TWA pilots also brought suit against their former union, the Air Line Pilots Association ("ALPA"), which represented them until American's purchase of TWA. The district court granted summary judgment in favor of the ALPA, but the Third Circuit reversed and remanded with respect to that claim. *See Bensel v. Allied Pilots Association* ("*Bensel II*"), 387 F.3d 298, 304 (3d Cir. 2004). The ultimate resolution of that lawsuit is not relevant to this decision.

state a claim to relief that is plausible on its face."[5] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). These facts must establish "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2007). "However, this does not mean that a claim must contain 'detailed factual allegations' to survive a Rule 12(b)(6) motion to dismiss." *Eastman Chem. Co. v. Nestlé Waters Mgmt. & Tech.*, 2012 U.S. Dist. LEXIS 141281, at *14 (S.D.N.Y. Sept. 28, 2012). In ruling on the motion, a court must "assum[e] that all the allegations in the complaint are true." *Id.* at 555. But courts need not "credit conclusory allegations or legal conclusions couched as factual allegations." *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013). Ultimately, the court must determine "whether the well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement to relief." *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (citing *Iqbal*, 556 U.S. at 679) (emphasis added).

In addition to the facts alleged in the Complaint, the Defendants request that the Court take judicial notice of certain documents referenced in the Complaint. More specifically, the Defendants request that the Court take judicial notice of the filings in the *Bensel* case and the record in this Chapter 11 case. *See* Motion at 2, 8 (ECF No. 14); Hr'g Tr., June 13, 2013, 16:20-17:15 (ECF No. 30). Federal Rule of Evidence

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[5] Federal Rule of Bankruptcy Procedure 7012(b) incorporates Federal Rule of Civil Procedure 12(b)(6) into adversary proceedings in bankruptcy.

201(b) allows a court to take judicial notice of a fact that is not subject to reasonable dispute. Judicial notice is appropriate where a fact "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*; *cf. Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) ("Where [the respondent] has actual notice of all the information in the movant's papers and has relied upon [outside] documents in framing the complaint," the court may rely upon those outside documents in deciding the motion to dismiss without converting the Rule 12(b)(6) motion to a Rule 56 motion). As these documents are of a type appropriate for judicial notice and the Plaintiffs have not opposed this request, Hr'g Tr. 49:13-50:18, the Court will take judicial notice of these documents and consider them in reviewing the Motions.

A. The Duty of Fair Representation

Under the duty of fair representation, a union must represent employees adequately, honestly, and in good faith. *Air Line Pilots Ass'n, Intern. v. O'Neill*, 499 U.S. 65, 75, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991). While the duty of fair representation extends to negotiations between the union and the employer, a court cannot substitute its own views of a proper negotiating strategy for the judgment of the union. *O'Neill*, 499 U.S. at 78. Judicial review of a union's negotiations with the employer must therefore defer to the judgment of the union. *Id*. (the deferential standard "recogniz[es] the wide latitude that negotiators need for the effective performance of their bargaining responsibilities."). But evidence of discrimination, arbitrariness, or bad faith

serves to prove that a union violated its duty. *See Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). A plaintiff must also establish that such wrongful conduct caused him or her harm. *Vaughn*, 604 F.3d at 709.

A union's actions are discriminatory if they were "intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of St., Elec., Ry., and Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971); *see also Nikci v. Quality Bldg. Servs.*, 995 F. Supp. 2d 240, 2014 U.S. Dist. LEXIS 10323, at *17 n.4 (S.D.N.Y. Jan. 27, 2014) (dismissing complaint for failure to allege the *Lockridge* factors). "There is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives." *Vaughn v. Air Line Pilots Ass'n Int'l*, 604 F.3d 703, 712 (2d Cir. 2010). The Supreme Court in *O'Neill* found that discrimination in the form of granting one union member seniority over another similarly situated member did not *per se* violate a union's duty of fair representation. *O'Neill*, 499 U.S. at 81. Rather, discrimination is improper where the union prefers or disparages the union members based upon characteristics that are irrelevant to legitimate union objectives. *See Jones v. Trans World Airlines*, 495 F.2d 790, 797-98 (2d Cir. 1974) (union membership alone is not proper ground for union to determine seniority); *Wolf Trap Foundation for the Performing Arts*, 287 N.L.R.B. 1040, 1059 (1988) (finding discrimination where union singled out an employee only because she was female and a non-union member).

A union acts in an improperly arbitrary way "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Vaughn*, 604 F.3d at 708 (quoting *O'Neill*, 499 U.S. at 67). Courts must review a union's actions "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *Id.* In hindsight, a union's decision may "appear to the losing employee to have been erroneous," but "tactical errors are insufficient to show a breach of the duty of fair representation." *Barr v. United Parcel Serv., Inc.*, 868 F.2d 36, 43 (2d Cir. 1989).

To state a claim for bad faith, a plaintiff must allege that the union engaged in fraud, dishonesty, or other intentionally misleading conduct with an improper intent, purpose, or motive. *See Vaughn*, 604 F.3d at 709-10 (cited in Summary Order, *Bejjani v. Manhattan Sheraton Corp.*, No. 13-2860, 567 Fed. Appx. 60, 2014 U.S. App. LEXIS 9684 (ECF No. 69) (2d Cir. May 27, 2014)).

B. Counts 1 and 2 Fail to State a Claim

In Count 1, the Plaintiffs allege that the APA breached its duty of fair representation by agreeing to terminate Supplement CC and to limit any potential relief from altering the seniority of legacy TWA pilots. Compl. ¶ 28. The Plaintiffs contend in Count 1 that "the agreement is the product of APA's hostility toward the former TWA pilots, is facially discriminatory against them, and is so unreasonable as to be arbitrary." Compl. ¶ 28. At the hearing, the Plaintiffs' counsel confirmed their position that, regardless of the

result of the arbitration, the agreement itself violated the APA's duty because it precluded restoring seniority as a possible remedy. *See* Hr'g Tr. 44:16-20 (ECF No. 30) ("The Court: Let me ask what the crux of the alleged discrimination is … the interest arbitration is problematic before it ever occurs, because it takes [the seniority issue] off the table / Mr. Press: That's true. You've characterized it properly."). Thus, the Plaintiffs' position is that the only satisfactory remedy in arbitration requires modifying the seniority of the legacy TWA pilots. But the Court does not agree.

Reopening seniority affects all pilots at American that are represented by the APA, not just the Plaintiffs. *See* Hr'g Tr. 36:4-6, 36:13-18 ("[S]eniority is a zero sum game … if someone's bumped up, someone else goes down."). In deciding whether to allow seniority to be reopened, therefore, the APA necessarily was required to balance the interests of the Plaintiffs and all the other pilots that the APA represents. Based on the allegations in the Complaint, however, it is unclear how the APA's exercise of its discretion on that issue was discriminatory. Courts have recognized that many decisions made by a union require the union to make distinctions among employees, but that these distinctions do not necessarily constitute discrimination. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-39, 73 S. Ct. 681, 97 L. Ed. 1048 (1953) ("Variations acceptable in the discretion of bargaining representatives … may well include differences based upon such matters as the unit within which seniority is to be computed, the nature of the work, the time at which it is done. …"); *see also Vaughn*, 604 F.3d at 712 ("Without additional evidence that the union intended to discriminate

against plaintiffs, the mere fact that older pilots were disproportionally affected is not sufficient to show that the [union] acted in a discriminatory manner."); *Bejjani v. Manhattan Sheraton Corp.*, 2013 U.S.Dist. LEXIS 90467, at *21-22 (S.D.N.Y. June 27, 2013) ("[U]nion actions that reveal good faith trade-offs among employee constituencies do not give rise to [duty of fair representation] claims.").

The Plaintiffs' case is further weakened because they complain of a refusal to disturb existing seniority. Here, the APA agreed to arbitration to determine a remedy for TWA pilots who lost the Supplement CC protections, but limited that remedy so as not to reopen seniority issues resolved in 2001. Thus, the APA's actions that are the subject of this lawsuit did not remove the seniority of the legacy TWA pilots; that seniority was lost more than a decade ago. Rather, the APA decided to replicate the job protections of the St. Louis protective fence through an arbitration that does not address seniority. The Plaintiffs have not alleged anything that would allow the Court to infer that the APA intended to unlawfully discriminate against the legacy TWA pilots or that the APA made this decision without some legitimate union objective.

The timing of this case also highlights another problem with the Plaintiffs' claim. The Plaintiffs filed the Complaint before completing arbitration, so there was no result in that process at the time of filing. Prior to completing arbitration, though, the actual harm to the Plaintiffs is speculative, as conceded at the hearing:

> Mr. Press: If my clients go out into the American Airlines' system, to a different base and try to

> bid for work, they will not be—existing captains won't be able to fly captain; senior first officers will be on reserve.
>
> The Court: Well, how do we know any of this, if the interest arbitration hasn't reached a result yet?
>
> Mr. Press: It's an excellent point, Judge, and I can only say we don't. …
>
> The Court: So the only thing we have thus far is the notion that seniority's been taken off the table, right?
>
> Mr. Press: True.

Hr'g Tr. 46:15-47:2. For purposes of these Motions therefore, the Plaintiffs are arguing that none of the possible remedies in that process—remedies that presumably include all manner of job protections—could ever be sufficient. Absent more, however, the Court has no basis to conclude that the parameters of the arbitration are a sufficient basis for a claim for unlawful discrimination. Aside from the Plaintiffs' conclusory statements about the APA's acts being discriminatory, therefore, the Complaint lacks factual allegations sufficient to state a claim as to why the APA's position was unrelated to legitimate union objectives or so far outside the range of reasonableness as to be irrational. *See Rothstein*, 708 F.3d at 94 (conclusory allegations are insufficient for proper pleadings); *see also Lockridge*, 403 U.S. at 301.[6]6Link to the text of the note

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[6] The Complaint's only allegation in this regard is that the APA's was hostile to Supplement CC. But that does not suffice, in

For these same reasons, the Complaint also fails to sufficiently allege why the APA's actions were arbitrary or in bad faith. Once again, the Complaint's allegations are very general. *See* Compl. ¶ 28 ("This agreement … is so unreasonable as to be arbitrary"). The Complaint says only that the arbitration was the product of negotiations between the APA and American. *See* Compl. ¶ 16 (the legacy TWA pilot seniority was one of "dozens of contract items being negotiated by American and APA"); *see also* Compl. ¶¶ 29-32. But the Court must extend "the wide latitude that negotiators need" to all of the items that the APA addressed during the collective bargaining negotiations with American, including the arbitration. *O'Neill*, 499 U.S. at 78. The Complaint here does not allege facts that would plausibly state a claim given the broad latitude that the Court must extend to such collective bargaining negotiations. The Plaintiffs fail to allege any facts that plausibly show that the arbitration, as part of the APA's negotiation strategy, falls "so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal citation omitted).

Indeed, the Second Circuit has recognized that sending a contentious seniority dispute to arbitration was "an equitable and reasonable method of resolving [the dispute]." *See Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1107 (2d Cir. 1991) (affirming

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and of itself, to state of claim that the APA's actions here were discriminatory—that is, unrelated to any legitimate union objective—given that the decision to close the St. Louis hub and end Supplement CC was made by American, not the APA. *See* Compl. ¶¶ 24-26, 28.

district court's finding that union fairly represented employees under arbitration agreement). The Plaintiffs have not alleged anything from which the Court can infer that the APA's decision was arbitrary given the factual and legal landscape surrounding that decision. *See Spellacy v. Airline Pilots Association-International*, 156 F.3d 120, 129 (2d Cir. 1998) ("A union's reasoned decision to support the interests of one group of employees over the competing interests of another group does not constitute arbitrary conduct."); *Bejjani*, 2013 U.S. Dist. LEXIS 90467, at *21 ("[U]nion actions that reveal good faith trade-offs among employee constituencies do not give rise to [duty of fair representation] claims.").

The Complaint is also deficient with respect any claim of bad faith. It does not allege facts that suggest the APA engaged in fraud, dishonesty, or misleading conduct, nor that it was acting with an improper intent, purpose, or motive. *See, e.g., Lindsay v. Ass'n of Prof'l Flight Attendants*, 581 F.3d 47, 62 (2d Cir. N.Y. 2009) (finding no evidence to infer union acted in bad faith when it chose telephonic voting procedures because the vote was time-sensitive); *Mullen v. Bevona*, 1999 U.S. Dist. LEXIS 16434, at *9 (S.D.N.Y. Oct. 26, 1999) ("Plaintiff has offered the Court no reason to believe that defendant targeted him for inferior treatment, nor that it sought … to benefit itself at the expense of its members by providing unlicensed attorneys at grievance hearings.").

Turning to Count 2, the Plaintiffs allege that American colluded with the APA to produce a breach in the union's duty of fair representation. Where a union fails to fulfill its duty of fair representation, an employer

may also be liable if the employee can show "that the employer's conduct somehow contributed to the union's breach." *Steffens v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees*, 797 F.2d 442, 445 (7th Cir. 1986); *O'Mara v. Erie Lackawanna R. Co.*, 407 F.2d 674, 679 (2d Cir. 1969) (if union "acted from a motive to discriminate or with knowledge that the (union) was discriminating," then the plaintiff may hold the employer liable for damages suffered by the plaintiff) (internal citations omitted), *aff'd sub nom, Czosek v. O'Mara*, 397 U.S. 25, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970). But the union's breach of its duty of fair representation is an essential element to establish a claim of an employer's collusion. *See United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985). As the Court concludes that the Plaintiffs have failed to state a claim that the APA has breached its duty, the Court must also conclude that no claim has been stated against American for collusion. *Id*.

C. The Court Declines to Rehear the Issue of Collateral Estoppel

The APA argues that the Complaint's allegations are barred under the doctrine of collateral estoppel. But given the Court's conclusion above, the Court does not need to decide this issue. The Court does note, however, that this collateral estoppel argument has previously been invoked—and rejected—by the Missouri Court that transferred these proceedings here. Before transferring this dispute to this Court, the District Court for the Eastern District of Missouri heard arguments on this issue and ruled that the action was not barred by collateral estoppel. *See*

Memorandum and Order of Judge Ross, Mar. 4, 2013 (ECF No. 1). Given this decision of the Missouri Court, the "law of the case" doctrine would appear to preclude a rehearing of this issue because "when a court decides upon a rule of law, that decision should continue to govern the same issues in the subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983); *Lillbask ex rel. Mauclaire v. State of Conn. Dept. of Educ.*, 397 F.3d 77, 94 (2d Cir. 2005) (a court may, within its discretion, refrain from reopening a ruling previously made by another judge or another court in the same case).

CONCLUSION

For the reasons stated above, the Court grants the Defendants' Motions and dismisses the Complaint. The Defendants shall settle an order on three days' notice. The parties are directed to confer regarding the proper way to proceed on the pending motion to amend the Complaint. After conferring, the parties shall be prepared to discuss further proceedings at the conference currently scheduled on June 5, 2014 at 2:00PM.

DENIAL OF REHEARING AND REHEARING EN BANC

Krakowski v. Allied Pilots Association, Docket Nos. 19-3506 (L), 19-4378 (Con.), Case 19-3506 Document 156 (March 24, 2021)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE: AMR CORP., Debtor,	No. 19-3506(L) No. 19-4378(CON)
JOHN KRAKOWSKI, *et al.*, Plaintiffs-Appellants	D.C. No. 17-CV-03237 (KMW)
v.	D.C. No. 18-cv-06187 (LAK)
ALLIED PILOTS ASSOC., AMERICAN AIRLINES, INC. Defendants-Appellees.	UNPUBLISHED OPINION

Appeal from the United States District Court for the Southern District of New York District Judges Kimba Wood and Lewis A. Kaplan

March 24, 2021

On Petition for Rehearing or Rehearing En Banc

ORDER

Appellants, Kevin Horner, John Krakowshi, and M. Alicia Sikes, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

45 U.S.C. § 152

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designa-

tion by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its

employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this chapter shall be construed to

supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to

certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. In any such election for which there are 3 or more options (including the option of not being represented by any labor organization) on the ballot and no such option receives a majority of the valid votes cast, the Mediation Board shall arrange for a second election between the options receiving the largest and the second largest number of votes. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agree-

ment shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing

his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

Twelfth. Showing of interest for representation elections

The Mediation Board, upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Mediation Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.

(May 20, 1926, ch. 347, § 2, 44 Stat. 577; June 21, 1934, ch. 691, § 2, 48 Stat. 1186; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Jan. 10, 1951, ch. 1220, 64 Stat. 1238; Pub. L. 112–95, title X, §§ 1002, 1003, Feb. 14, 2012, 126 Stat. 146, 147.)

11 U.S.C. § 1113
Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in

subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for

such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any

provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

(Added Pub. L. 98–353, title III, § 541(a), July 10, 1984, 98 Stat. 390.)