APPENDIX

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SUPREME COURT OF TEXAS

No. 22-0631

The Boeing Company,

Petitioner,

v.

Southwest Airlines Pilots Association (SWAPA) on behalf of itself and its members,

Respondent

On Petition for Review from the
Court of Appeals for the Fifth District

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Fifth District, and having considered the appellate record, briefs, and arguments of counsel, concludes that the court of appeals' judgment should be affirmed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is affirmed;

2) The case is remanded to the trial court for further proceedings; and

3) Each party shall bear its own Court costs.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Fifth District and to the 16th District Court of Dallas County, Texas, for observance.

Opinion of the Court delivered by Justice Boyd.

June 20, 2025

SUPREME COURT OF TEXAS

No. 22-0631

The Boeing Company,

Petitioner,

v.

Southwest Airlines Pilots Association (SWAPA) on behalf of itself and its members,

Respondent

On Petition for Review from the
Court of Appeals for the Fifth District

Argued March 19, 2025

JUSTICE BOYD delivered the opinion of the Court, in which Chief Justice Blacklock, Justice Lehrmann, Justice Devine, Justice Busby, Justice Young, and Justice Sullivan joined.

JUSTICE BLAND filed an opinion dissenting in part, in which Justice Huddle joined.

Originally introduced in the mid-1960s, The Boeing Company's 737 model of jetliners has become

the best-selling aircraft in aviation history.[1] In 2011, Boeing introduced its latest variant, the "737 MAX." Boeing presented the MAX as being more fuel-efficient than the previous 737 models but similar enough that pilots could fly it with no additional training. In October 2018 and March 2019, however, two MAXs crashed in Indonesia and Ethiopia, killing all 346 people on the two planes. Both crashes reportedly resulted, at least in part, from a new flight-stabilizing feature[2] on which the pilots had not been trained. After the second crash, the Federal Aviation Administration grounded the MAX.

Not long before the crashes, the Southwest Airlines Pilots Association (SWAPA) agreed on its members' behalf that they would fly MAX aircrafts that Southwest had recently purchased. After the MAX was grounded, SWAPA sued Boeing on behalf of itself and its members, asserting that Boeing

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[1] THE BOEING 737 TECHNICAL SITE, *History, Development & Variants of the Boeing 737*, http://www.b737.org.uk/history.htm; *see* Kristen Stephenson, *Boeing celebrates its 10,000th 737 aircraft with a new record*, GUINNESS WORLD RECORDS (Mar. 20, 2018), https://www.guinnessworldrecords.com/news/commercial/2018/3/boeing-celebrates-its-10-000th-737-aircraft-with-a-new-record-518888.

[2] Reportedly, Boeing implemented the Maneuvering Characteristics Augmentation System (MCAS) to account for the 737 MAX's larger engine, which sits more forward on the wing than in earlier 737 variants. *See* Dominic Gates, *Flawed analysis, failed oversight: How Boeing, FAA certified the suspect 737 MAX flight control system*, SEATTLE TIMES (Mar. 17, 2019), https://www.seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash/.

interfered with SWAPA's business relationship with Southwest and fraudulently induced the pilots to agree to fly the MAX. Boeing argued that the federal Railway Labor Act preempts the claims and, in any event, SWAPA lacks standing to assert the claims on its members' behalf. We conclude that the Act does not preempt the claims and that SWAPA has standing to assert the claims of its members who assigned their claims to SWAPA. We do not address whether those individual claims can or must be joined, consolidated, severed, or set for separate trials, as those issues are not currently before us. We affirm the court of appeals' judgment and remand the case to the trial court.

I.
Background

SWAPA is a nonprofit labor organization and employee association that represents roughly 11,000 Southwest pilots and negotiates collective bargaining agreements (CBAs) on their behalf.[3] When Boeing launched the 737 MAX in 2011, Southwest and SWAPA were operating under a CBA they had negotiated and agreed to in 2006. The 2006 CBA listed the types of aircrafts SWAPA pilots would fly, but the list naturally did not explicitly include the yet-to-be-introduced MAX. After Boeing introduced the MAX in 2011, Southwest purchased 150 of the planes, apparently believing the 2006 CBA's list was broad enough to include the new MAX. SWAPA

[3] SWAPA, *About Us*, https://www.swapa.org/about-us/.

disagreed, and its pilots refused to fly the new planes.

By its terms, the 2006 CBA became "amendable"—that is, "open for further negotiation"—in 2012. *See Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 943 F.3d 568, 573 (2d Cir. 2019). A CBA "hardly ever expires." *In re Nw. Airlines Corp.*, 483 F.3d 160, 167 (2d Cir. 2007). Instead, once a CBA becomes amendable, the Railway Labor Act requires the parties to renegotiate their agreement and to "maintain the status quo" until they agree to a new CBA. *Id.* (quoting *Consol. Rail Corp. v. Ry. Lab. Execs.' Ass'n*, 491 U.S. 299, 302 (1989)).[4] Southwest and SWAPA opened negotiations when their 2006 CBA became amendable in 2012, but their disputes over whether the status quo under the 2006 CBA required them to fly the MAX and whether the new CBA would require them to fly it dragged on for years, quite publicly.[5]

In 2016, SWAPA sued Southwest in federal court, asserting that the status quo under the 2006

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[4] *See generally Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 152 (1969) (discussing the Act's provisions that form an "integrated, harmonious scheme for preserving the status quo" pending completion of negotiations and resolution of disputes).

[5] *See, e.g.*, Mary Schlangenstein, *Southwest pilots sue carrier to block flying of Boeing's Max*, CHI. TRIBUNE (June 12, 2018), https://www.chicagotribune.com/2016/05/16/southwest-pilots-sue-carrier-to-block-flying-of-boeings-max/ (noting pilots "picketing at airports").

CBA did not require the pilots to fly the MAX.[6] SWAPA alleges that Boeing inserted itself into SWAPA's settlement negotiations with Southwest and falsely assured SWAPA that the MAX was "essentially a more fuel efficient" version of the 737 variant they were then flying and that pilots could fly the MAX without additional training. SWAPA alleges that it relied on Boeing's misrepresentations when it agreed to a new CBA in 2016, which explicitly required the pilots to fly the MAX. After agreeing to the 2016 CBA, SWAPA dismissed its federal suit against Southwest,[7] and Southwest put its first MAX into service in August 2017. After the crashes in 2018 and 2019 and the subsequent grounding of the MAX, Southwest cancelled hundreds of flights and the SWAPA pilots were left without planes to fly.[8]

SWAPA then filed this suit against Boeing in state court, asserting state-law claims for fraudulent and negligent misrepresentation, tortious interference with SWAPA's contractual rights and business relationship with Southwest, negligence, and fraud by non-disclosure. SWAPA sought damages both on its own behalf (for loss of

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[6] *See* Plaintiffs' First Amended Complaint for Damages & Jury Demand, *Sw. Airlines Pilots Ass'n v. Sw. Airlines Co.*, No. 3:16-cv-01346-O (N.D. Tex. May 19, 2016), ECF No. 6.

[7] *See* Joint Stipulation of Dismissal, *Sw. Airlines Pilots Ass'n v. Sw. Airlines Co.*, No. 3:16-cv-01346-O (N.D. Tex. Nov. 11, 2016), ECF No. 29.

[8] *See* Chris Isidore, *The 737 Max grounding cost Southwest $828 million in 2019*, CNN (Jan. 23, 2020), https://www.cnn.com/2020/01/23/business/ southwest-american-airlines- earnings/.

membership dues and for legal fees) and on behalf of its individual members (for lost wages). Boeing removed the case to federal court, arguing that the Railway Labor Act "completely preempts"[9] SWAPA's state-law claims because the claims require interpretation of the CBAs between Southwest and SWAPA. The federal district court disagreed and remanded the case to state court, holding that, although the resolution of SWAPA's claims "will require interpretation of the CBA," the Act does not wholly displace state-law claims and thus does not support complete preemption. *Sw. Airlines Pilots Ass'n v. Boeing Co.*, 613 F. Supp. 3d 975, 982 (N.D. Tex. 2020).

Back in state court, Boeing filed a plea to the jurisdiction arguing that (1) the Railway Labor Act

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[9] The "complete preemption" doctrine authorizes removal of a state-law claim from state court to federal court if a federal statute "completely preempts" the state-law claim. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); *see also Horton v. Kan. City S. Ry. Co.*, 692 S.W.3d 112, 124 n.4 (Tex. 2024) ("Under the 'complete preemption doctrine,' a state-law claim arises under federal law and can be removed to federal court if a federal statute wholly displaces the state-law claim." (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003))). Complete preemption exists when "the pre-emptive force of a [federal] statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987)). Although a state-law claim "may *not* be removed to federal court on the basis of a federal defense, including the defense of [ordinary] pre-emption," a claim based on a "completely pre-empted" state law "is considered, from its inception, a federal claim, and therefore arises under federal law" and is removable to federal court. *Id.*

preempts SWAPA's claims and (2) SWAPA lacks "associational standing"[10] to pursue the claims on the individual pilots' behalf. In response to Boeing's standing challenge, 8,794 of SWAPA's members executed documents assigning their claims against Boeing to SWAPA, and SWAPA filed the assignments with the court. Boeing then amended its plea to argue that the assignments are void as against public policy because they attempt to circumvent Texas law's associational-standing and class-action requirements. The trial court granted the plea without explanation and dismissed SWAPA's claims with prejudice.

SWAPA filed a post-judgment motion requesting that the court modify the judgment to dismiss its claims *without* prejudice so it could pursue the same claims in its capacity as assignee of the 8,794 pilots in a separate suit, which it filed in the same trial court.[11] The trial court denied the motion, and SWAPA appealed.

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[10] We have held that "an association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The Texas Legislature has codified this holding, permitting a "nonprofit association" to "assert a claim in its name on behalf of [its] members" when these elements are met. *See* TEX. BUS. ORGS. CODE § 252.007(b).

[11] After denying SWAPA's motion to modify the judgment in this suit, the trial court dismissed the second suit on res judicata grounds. SWAPA appealed, and the court of appeals

The court of appeals affirmed in part and reversed in part. 704 S.W.3d 832, 845 (Tex. App.—Dallas 2022). It held that (1) the Railway Labor Act does not preempt SWAPA's claims, (2) SWAPA lacks associational standing to pursue the claims on its members' behalf, (3) SWAPA has standing to assert the claims on its own behalf, and (4) the assignments are not void but do not retroactively give SWAPA standing to assert its members' claims in *this* suit.[12] Based on these holdings, the court affirmed the portion of the trial court's judgment that dismissed the claims SWAPA asserted on its members' behalf but modified that portion of the judgment to dismiss those claims *without* prejudice, reversed the portion of the judgment dismissing the claims SWAPA asserted on its own behalf, and remanded the case to the trial court. *Id.* at 848–49. Boeing petitioned for review, arguing that the Act preempts SWAPA's claims and that the trial court properly dismissed SWAPA's claims on behalf of the pilots with prejudice

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reversed, concluding that "SWAPA's petition provides no factual allegations supporting Boeing's res judicata defense." *See Sw. Airlines Pilots Ass'n. v. Boeing Co.*, No. 05-21-00598-CV, 2022 WL 16735379, at *1, *8 (Tex. App.—Dallas Nov. 7, 2022). Boeing filed a petition for review of that judgment in this Court, which we deny today.

[12] *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446 n.9 ("Standing is determined at the time suit is filed in the trial court.").

because the assignments are void.[13] We granted Boeing's petition for review.[14]

II.
Preemption under the Railway Labor Act

Boeing argues that the court of appeals erred by holding that the Railway Labor Act does not preempt SWAPA's state-law claims. We agree with the court of appeals, but for a different reason.

Under the federal Constitution's Supremacy Clause, *see* U.S. CONST. art. VI, cl. 2, federal statutes may expressly or impliedly preempt state laws "and render them ineffective." *Horton*, 692 S.W.3d at 120. "Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). To determine whether a federal statute preempts a state-law claim, we must "focus first on the statutory language, 'which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Boeing argues that the Railway Labor Act expressly preempts SWAPA's state-law claims because the resolution of those claims requires

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[13] Boeing does not appeal the portion of the court of appeals' judgment remanding the case for further proceedings on the claims SWAPA asserts on its own behalf.

[14] We originally denied Boeing's petition for review but later granted it on rehearing.

interpretation of the parties' 2006 and 2016 CBAs. We disagree.

Congress passed the Railway Labor Act in 1926 "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo*, 396 U.S. at 148. The Act seeks to "promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes" by, among other things, establishing "a mandatory arbitral mechanism for 'the prompt and orderly settlement'" of both "major" and "minor" disputes[15] between railroad carriers and their employees. *Norris*, 512 U.S. at 252.[16] The Act

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[15] "Major" disputes relate to the "formation" of CBAs "or efforts to secure them," while "minor" disputes involve employee grievances and "the interpretation or application of [CBAs]." *Norris*, 512 U.S. at 252–53 (quoting 45 U.S.C. § 151a). In other words, "major disputes seek to create contractual rights, minor disputes to enforce them." *Id.* at 253 (quoting *Consol. Rail Corp.*, 491 U.S. at 302).

[16] *See also Burlington N. R.R. v. Bd. of Maint. of Way Employes*, 481 U.S. 429, 451 (1987) ("[T]he primary goal of the [Railway Labor Act] is to settle strikes and avoid interruptions to commerce."). The Act's express purposes are:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and

grants a carrier's employees the right to "organize and bargain collectively" with their employers, 45 U.S.C. § 152 Fourth, but requires that all minor disputes be resolved through arbitration before an "adjustment board," *id.* § 153 First (i).[17] The U.S. Supreme Court has held that, because the Act requires that minor disputes be resolved through arbitration, and because minor disputes are those that involve "the interpretation or application of existing labor agreements," the Act preempts a state-law claim if its resolution "depends on an interpretation of [a] CBA." *Norris*, 512 U.S. at 256, 261.

In this sense, the Supreme Court has construed the Act's preemptive effect to be "virtually identical" to that of the federal Labor Management Relations Act. *See id.* at 260–63 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988) (construing the Labor Management Relations Act to preempt claims that require interpretation of a

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> orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a.

[17] *See Norris*, 512 U.S. at 253 ("[Minor disputes] must be resolved only through the [Railway Labor Act] mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions.").

CBA)). Both Acts, the Court has held, preempt state-law claims that require interpretation of a CBA because the "possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Loc. 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). The Acts thus preempt such state-law claims to avoid "inconsistent results" in the interpretation of CBAs and thereby promote "uniform" labor-law principles throughout the country. *Lingle*, 486 U.S. at 406; *see Int'l Ass'n of Machinists v. Cent. Airlines, Inc.*, 372 U.S. 682, 691–92 (1963) ("The needs of the subject matter manifestly call for uniformity.").

SWAPA argues, however, that the Railway Labor Act does not preempt its claims because they do not depend on the interpretation of any CBA.[18] We

[18] SWAPA also argues that the Act does not preempt its claims because the Act—including its preemptive provisions—applies only to disputes between a carrier and its employees, not to disputes between a union like SWAPA and a third party like Boeing. The court of appeals agreed with this argument, 704 S.W.3d at 852–53, and the Act's text provides some support for its conclusion. *See* 45 U.S.C. § 181 (stating that the Act's provisions, including the preemption provisions, "are extended to and shall cover *every common carrier by air* . . . and every . . . person who performs any work as an *employee or subordinate official* of such carrier or carriers" (emphases added)); *see also id.* §§ 184 (requiring that all minor "disputes *between an employee or group of employees and a carrier or carriers by air*" be resolved through arbitration by an adjustment board" (emphasis added)), 185 (providing for a "permanent national board of adjustment in order to provide for the prompt and

orderly settlement of disputes *between said carriers by air, or any of them, and its or their employees*" (emphasis added))).

But the vast majority of courts that have addressed the issue have concluded that the Act preempts all state-law claims that require interpretation of a CBA between air carriers and their employees, even if the dispute involves only one or neither of them. *See, e.g.*, *Healy v. Metro. Pier & Exposition Auth.*, 804 F.3d 836, 841–42 (7th Cir. 2015) (holding Labor Management Relations Act preempted employees' tortious-interference claims against third party because resolution of the claims required interpretation of the relevant CBA); *Anderson v. Aset Corp.*, 416 F.3d 170, 171–72 (2d Cir. 2005) (same); *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 200 (5th Cir. 2001) (holding Railway Labor Act preempted airline customers' claims against employees' union for damages resulting from "work slowdown" in violation of court order); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000) (holding Labor Management Relations Act preempted state-law tortious-interference claims against third parties because claims required interpretation of CBA); *Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 896–97 (4th Cir. 1992) (same); *Bhd. Ry. Carmen v. Mo. Pac. R.R.*, 944 F.2d 1422, 1429–30 (8th Cir. 1991) (holding Railway Labor Act preempted union's tortious-interference claims against third party because resolution required interpretation of CBA); *Baylis v. Marriott Corp.*, 906 F.2d 874, 877 (2d Cir. 1990) (holding Railway Labor Act preempted airline employees' claims against third party for tortious inducement of breach of their CBA because resolution required interpretation of CBA). Relying on these decisions, Boeing contends that the Act preempts all such claims, even if the adjustment boards—which can resolve disputes only between carriers and employees—lack jurisdiction to resolve the claims and, as a result, the claimant is left with no legal remedy at all. *See Kimbro*, 215 F.3d at 726–27 (discussing "remedial gap" that results when Labor Management Relations Act preempts state-law claim and provides no remedy through a federal claim); *Sears v. Newkirk*, No. 2:09-CV-241, 2010 WL 3522578, at *5–6 (N.D. Ind. Sept. 2, 2010) (concluding that a "remedial gap" resulting in the "loss of a remedy" due to preemption under the Railway Labor Act "isn't enough to overcome preemption and dismissal"). This result, Boeing contends, is necessary to eliminate the risk that allowing various

agree. The Act "says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [a CBA]." *Lingle*, 486 U.S. at 409. As a result, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). Under the Supreme Court's precedent, a state-law claim is not preempted if it can be resolved "independent of any negotiated labor agreement," such that the CBA is not the "only source" of the right the claimant asserts. *Norris*, 512 U.S. at 256, 258. Instead, preemption applies only "when resolution of a state-law claim is substantially dependent upon analysis of the terms of" a CBA. *Lueck*, 471 U.S. at 220.

Boeing argues that the resolution of SWAPA's claims necessarily depends on the meaning of the 2006 and 2016 CBAs. According to Boeing, SWAPA cannot prevail on its claims unless the court determines what the pilots' CBA obligations were and are and particularly whether the 2006 CBA required them to fly the MAX before they explicitly agreed to fly it in the 2016 CBA. We disagree.

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state courts to construe the same CBA would cause the very "uncertainty and instability that the [Railway Labor Act] was meant to avoid."

We need not resolve this issue to decide this case, however, because we do not agree that the resolution of SWAPA's state-law claims against Boeing requires interpretation of the parties' CBA.

To determine whether the resolution of a state-law claim requires interpretation of a CBA, the Supreme Court has considered the proof required to establish the claim's elements. *Lingle*, 486 U.S. at 407. Here, SWAPA asserts claims for fraudulent and negligent misrepresentation[19] and for tortious interference with SWAPA's business relationship with Southwest.[20] SWAPA's overarching complaint is

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[19] The elements of a fraudulent misrepresentation claim are (1) a material misrepresentation, (2) which was either known to be false when made or was asserted without knowledge of its truth, (3) which was intended to be acted upon, (4) which was in fact relied upon, and (5) which caused injury. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47–48 (Tex. 1998) (citing *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990)). The elements of negligent misrepresentation are (1) a representation made by the defendant in the course of its business or in a transaction in which it has a pecuniary interest that (2) conveyed "false information" for the guidance of others in their business, (3) was made without reasonable care or competence in obtaining or communicating the information, (4) was relied upon by the plaintiff, and (5) caused pecuniary loss. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P.*, 546 S.W.3d 648, 653–54 (Tex. 2018).

[20] Texas law recognizes two types of tortious-interference claims: "one based on interference with an existing contract and one based on interference with a prospective business relationship." *El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 421 (Tex. 2017). SWAPA disavows any claim for tortious interference with the then-existing 2006 CBA and instead asserts only that Boeing tortiously interfered with SWAPA's prospective relationship as detailed in the 2016 CBA. That claim requires proof that (1) there was a reasonable probability that SWAPA would have entered into a new CBA with Southwest, (2) Boeing either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a

that Boeing made misrepresentations about the MAX with the intent to induce SWAPA and the pilots to agree in the 2016 CBA to fly the MAX. SWAPA does not dispute that it agreed in the 2016 CBA to fly the MAX, and Boeing has identified no other provisions of the 2016 CBA that a court would have to interpret to resolve SWAPA's claims.

Boeing argues, however, that the courts must interpret the 2006 CBA to resolve SWAPA's claims because SWAPA cannot establish that any misrepresentation caused SWAPA to suffer losses if the 2006 CBA already required the pilots to fly the MAX. But SWAPA pilots never flew the MAX under the 2006 CBA. Instead, they steadfastly insisted that the 2006 CBA did not permit Southwest to require them to fly the MAX, and they sued Southwest to enforce that position. More importantly, as noted, the 2006 CBA became amendable in 2012, and the Act required the parties to begin negotiating for a new CBA at that time. SWAPA contends that *regardless* of whether the 2006 CBA required the pilots to fly the MAX, it would not have agreed to fly the MAX *in the 2016 CBA* but for Boeing's misrepresentations. In other words, *even if* the 2006 CBA required the pilots to fly the MAX, SWAPA had no obligation to agree to fly it in the 2016 CBA, and SWAPA asserts that it would not have agreed to fly the MAX in the 2016 CBA but for Boeing's alleged misrepresentations. In

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result of the conduct, (3) Boeing's conduct was independently tortious or unlawful, (4) the interference proximately caused SWAPA injury, and (5) SWAPA suffered actual damage or loss as a result. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013).

light of these assertions, we conclude that the resolution of SWAPA's claims is not "substantially dependent upon analysis of the terms of" the 2006 CBA. *Lueck*, 471 U.S. at 220. Because the 2006 CBA is not the "only source" of the right SWAPA asserts and SWAPA's claims can be resolved "independent of" that agreement, we conclude that resolution of SWAPA's claims does not require interpretation of the 2006 CBA. *Norris*, 512 U.S. at 256, 258.

We need not and do not decide here whether SWAPA's contentions are true. We explicitly do not decide whether SWAPA can establish that Boeing made misrepresentations or that the alleged misrepresentations in fact induced SWAPA or the pilots to agree in the 2016 CBA to fly the MAX and thereby caused SWAPA and the pilots to incur financial losses. Those are factual issues regarding SWAPA's and its members' mindsets and motives that are yet to be decided. But such "purely factual questions" do not "requir[e] a court to interpret any term of a collective-bargaining agreement." *Lingle*, 486 U.S. at 407. "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for . . . pre-emption purposes." *Id.* at 409–10.

Boeing notes, however, that the federal court to which it attempted to remove this case has already ruled that SWAPA's claims "require interpretation of

the CBA." *See Sw. Airlines Pilots Ass'n*, 613 F. Supp. 3d at 982. We are not bound by this statement. The federal court itself explained—and expressly noted that both parties agreed—that whether it would have to interpret the CBA to resolve SWAPA's claims was irrelevant to its conclusion that it lacked removal jurisdiction under the complete-preemption doctrine. *Id.* at 981. Its decision to remand the case for lack of removal jurisdiction was based on its conclusion that the Railway Labor Act does not "completely preempt" any state law; whether the claims require interpretation of the CBA was wholly irrelevant to that decision. *Id.*

Because the resolution of SWAPA's claims against Boeing is not "substantially dependent" upon an interpretation of either of the parties' CBAs, we conclude that the Railway Labor Act does not preempt SWAPA's claims.

III.
Assignments

In its second issue, Boeing argues that the court of appeals erred by modifying the trial court's judgment to dismiss SWAPA's representative claims *without* prejudice.[21] As explained, the court of

[21] In a short section of its response brief, SWAPA argues that it has associational standing to assert its members' claims in addition to standing based on the assignments. But SWAPA did not file a petition for review to challenge the court of appeals' judgment affirming the trial court's dismissal of the claims SWAPA asserted on its members' behalf. To the contrary, SWAPA asserted in its response to Boeing's petition for review that the statutory elements for associational standing are

appeals held that SWAPA lacks associational standing but concluded that its claims should be dismissed without prejudice because SWAPA has standing to assert the claims of its members who assigned their claims to SWAPA in another lawsuit. 704 S.W.3d at 848. Boeing challenges this aspect of the court's judgment, arguing that the members'

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irrelevant here because "SWAPA[is] not suing as a representative" of its members and instead is asserting only "its own claim, along with those of its pilot members as their assignee."

"A party who seeks to alter the court of appeals' judgment must file a petition for review." TEX. R. APP. P. 53.1. SWAPA's argument that it has associational standing is not merely "an alternative basis to support [the court of appeals'] judgment." *Dall./Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 366 n.9 (Tex. 2019); *see also Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 566 n.4 (Tex. 2016) ("[Respondents] may raise their evidentiary arguments (as an alternative to their primary argument . . .), without filing a cross-petition because they do not seek to 'alter the court of appeals' judgment' on those claims." (citing TEX. R. APP. P. 53.1)). To the contrary, if we agreed that SWAPA had associational standing (an issue we do not reach or decide), we would have to reverse the portion of the court of appeals' judgment affirming the trial court's dismissal of the claims SWAPA asserted on its members' behalf. *See First Bank v. Brumitt*, 519 S.W.3d 95, 112 (Tex. 2017) (holding respondent was required to file cross-petition for review because he sought by his argument "to alter the court's judgment, asking us to reverse the part of the court of appeals' judgment that reversed the trial court's judgment in [respondent's] favor"). Because SWAPA's associational-standing argument seeks to alter the court of appeals' judgment affirming the trial court's dismissal of SWAPA's representative claims, SWAPA waived that argument by failing to file a petition for review.

assignments are void as against public policy.[22] We disagree.

Causes of actions are generally assignable unless they violate public policy. *See Henry S. Miller Com. Co. v. Newsom, Terry & Newsom, LLP*, 709 S.W.3d 562, 571 (Tex. 2024) (quoting *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 707 (Tex.

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[22] The assignments read:

> . . . SWAPA has agreed to take all actions necessary to recover My Damages from Boeing, including, but not limited to, negotiating with and commencing a civil action against Boeing arising from the MAX Crisis . . . .
>
> [] Damages recovered from Boeing in the Litigation or a settlement will be distributed in an equitable manner in proportion to gross W-2 earnings per pilot . . . .
>
> . . . .
>
> a. I hereby assign and transfer to SWAPA all rights, title, and interest to any and all claims, demands, and/or causes of action for My Damages that I have or may have against Boeing arising out of the MAX Crisis.
>
> b. I hereby grant SWAPA the right and authorize SWAPA to take any and all actions to prosecute, settle, and/or compromise any and all claims, demands, and/or causes of action for My Damages that I have or may have against Boeing arising out of the MAX Crisis.
>
> c. I hereby authorize SWAPA to collect, receive, and distribute My Damages from Boeing arising out of the MAX Crisis . . . .
>
> d. I understand that in making this Assignment, I am waiving my right to individually pursue any and all claims, demands, and/or causes of action for My Damages that I have or may have against Boeing arising out of the MAX crisis.

1996)). We have held that assignments of legal claims that "tend to increase and distort litigation" violate public policy. *Gandy*, 925 S.W.2d at 711. These types of assignments are void, we explained, because they "mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment." *Id.* at 705 (quoting *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992)). Boeing urges us to declare that assignments of legal claims by association members to their association also violate public policy when their "sole purpose" is "to circumvent the Legislature's" associational-standing requirements as set forth in the Business Organizations Code.[23]

We see no reason to conclude that the pilots' assignments run afoul of public policy. The assignments do not inherently or necessarily make the "litigation more protracted and complex," *id.*, 925 S.W.2d at 715, especially when the alternative could be as many as 10,000 individual lawsuits based on

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[23] Boeing refers to the assignments as "pass-through" assignments, insinuating that there is something untoward about the agreement that SWAPA would not retain a monetary judgment on behalf of its members. No public policy, however, prohibits "passing through" pecuniary awards procured in a lawsuit. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275–85 (2008) (discussing the history of suits by assignees "when that assignee had promised to give all litigation proceeds back to the assignor" from 17th century English law to present-day American law and holding that such suits are "'amenable to, and resolved by, the judicial process'" (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777–78 (2000))).

the same facts.[24] The claims and damages that SWAPA seeks are "property-based and remedial," as opposed to the kind of "personal and punitive" claims that are generally unassignable in Texas. *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424, 439 (Tex. 2023) (holding unfair-settlement claims are unassignable); *see PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 87 (Tex. 2004) (same, for DTPA claims). And SWAPA is in a unique position as the party that actually negotiated the CBA on its members' behalf and allegedly relied on Boeing's misrepresentations. *See Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 917–18 (Tex. 2010) (holding that assignments to third party were appropriate, in part, because the third party was not "a 'stranger/entrepreneur'" to the underlying action). We decline to extend our *Gandy* line of cases to conclude that the assignments in this case violate public policy.

But we do not decide today whether and how SWAPA can pursue and try the thousands of individual claims its members assigned to SWAPA. As assignee of the claims, SWAPA has received "the full rights of the" pilot assignors. *Jackson v. Thweatt*, 883 S.W.2d 171, 174 (Tex. 1994). SWAPA "steps into the shoes of the [pilots] and is considered under the law to have suffered the same injury as the [pilots] and have the same ability to pursue the claims." *Sw.*

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[24] Nor are the SWAPA pilots required to file a class action. *See Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 450 (Tex. 2007) ("[N]othing mandates that a plaintiff pursue a remedy through the procedures of [Texas Rule of Civil Procedure] 42.").

Bell, 308 S.W.3d at 916. But to prevail on any individual pilot's claim, SWAPA must establish that the pilot suffered an "injury in fact" as a result of Boeing's alleged wrongful conduct. *Vt. Agency of Nat. Res.*, 529 U.S. at 773. An assignment of a legal claim does not relieve the assignee from the burden of proving what the assignor would have to prove to recover on the claim because the assignee acquires no greater rights than his assignor had. *See York's Adm'r v. McNutt*, 16 Tex. 13, 17 (1856). The assignee of a claim "owns [the claim], controls its prosecution, and is entitled to any recovery," *Henry S. Miller*, 709 S.W.3d at 572, but may only prevail by proving the defendant's liability to the assignor and the damages the assignor sustained. To recover damages on a pilot's claim for tortious interference or misrepresentations, for example, SWAPA must establish that each individual pilot relied on alleged misrepresentations and suffered a particular amount of damages as a result. *See supr*a notes 19–20.

This requirement that SWAPA establish each assigning pilot's claim, however, is simply inherent in the nature of an assignment; it does not provide a basis on which we should declare the assignments void as against public policy under the *Gandy* line of cases. The Legislature has directed that SWAPA cannot have associational standing to sue on behalf of its members if the claim or relief requires the individual members' participation in the suit, *see* TEX. BUS. ORGS. CODE § 252.007(b), but it has not imposed the same prohibition against a member's assignment of his claim to an association, although it certainly could have done so, *see Sw. Bell*, 308 S.W.3d

at 915–16 (upholding assignments when anti-assignments clause could have but did not prohibit specific assignments at issue).

Nor do we agree that the assignments are void because they permit SWAPA to "circumvent" the requirements for associational standing or class actions. *See post* at 3 (BLAND, J., dissenting). Associational standing, class-action standing, and standing based on an assignment provide alternative means for obtaining standing, *see Warth v. Seldin*, 422 U.S. 490, 515 (1975), and, because of their distinct requirements, neither circumvents the other, *see Sw. Bell*, 308 S.W.3d at 918 (noting that issues relate to claimant's "adequacy as the class representative, . . . not the validity of the assignments it holds").

Because SWAPA has waived any assertion of associational standing and has not sought class certification, it must individually establish each of its assigning members' claims, which presents challenges for how they may be tried and resolved. Several of our procedural rules permit and govern the joinder, consolidation, severance, and separate trials of both claims and parties, as necessary to promote the efficient and just resolution of legal disputes.[25] These procedural options exist so that

[25] *See, e.g.*, TEX. R. CIV. P. 39 (addressing joinder of necessary and indispensable parties), 40 (addressing permissive joinder of parties and separate trials to "prevent a party from being embarrassed, delayed, or put to expense"), 41 (addressing consolidation and severance of claims "on such terms as are just"), 174 (addressing consolidation "to avoid unnecessary costs

trial courts can "avoid prejudice, do justice, and increase convenience" when resolving the claims that come before them. *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Managers of Am., L.L.C.*, 685 S.W.3d 816, 822 (Tex. 2024) (citing *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007)).[26] "Procedural matters, such as joinder and the consolidation of claims, are left to the discretion of the trial court, whose rulings will not be overturned absent an abuse of discretion." *Bennett v. Grant*, 525 S.W.3d 642, 653 (Tex. 2017).[27] "But the court is not vested with unlimited discretion, and is required to exercise a sound and legal discretion within limits created by the circumstances of the particular case." *Womack*, 291 S.W.2d at 683.

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or delays" and separate trials "in furtherance of convenience or to avoid prejudice").

[26] *See Long v. Castle Tex. Prod. Ltd. P'ship*, 426 S.W.3d 73, 82 n.15 (Tex. 2014) ("Avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to sever."); *In re State*, 355 S.W.3d 611, 613 (Tex. 2011) ("Courts permit severance principally to avoid prejudice, do justice, and increase convenience."); *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) ("The express purpose of Rule 174(b) was to further convenience, to avoid prejudice, and to promote the ends of justice.").

[27] *See Sealy*, 685 S.W.3d at 822 ("When a severance order is challenged, an appellate court reviews it for abuse of discretion."); *F.F.P. Operating Partners*, 237 S.W.3d at 693 ("We will not reverse a trial court's order severing a claim unless the trial court abused its discretion."); *Womack v. Berry*, 291 S.W.2d 677, 682 (Tex. 1956) ("The Rules of Civil Procedure bestow upon trial courts broad discretion in the matter of consolidation and severance of causes, and the trial court's action in such procedural matters will not be disturbed on appeal except for abuse of discretion.").

As explained, the claims SWAPA asserts based on its members' assignments are currently pending not in this suit but in a second suit that SWAPA filed after Boeing challenged SWAPA's associational standing. *See supra* note 11. Whether those claims may or must be joined, consolidated, severed, or set for separate trials is not before us today. In determining how to resolve those claims, the trial court must consider prejudice, justice, and convenience in accordance with the rules' requirements and must ensure that SWAPA pursues the claims as an assignee and not as a representative association. Although generally "[t]he assignee of a claim owns it, controls its prosecution, and is entitled to any recovery," *Henry S. Miller*, 709 S.W.3d at 572, SWAPA may only prevail on an assigned claim by proving Boeing's liability to the individual member who assigned it and the damages that member sustained. In short, SWAPA may not rely on the assignments as a means to circumvent the statutory and procedural requirements for associational standing.

Today, however, we hold only that the assignments are not void as against public policy and thus give SWAPA standing to pursue its assigning members' individual claims. We therefore conclude that the court of appeals did not abuse its discretion by modifying the trial court's judgment to dismiss the claims SWAPA asserted on its members' behalf without prejudice.

IV.
Conclusion

We conclude that the Railway Labor Act does not preempt SWAPA's claims because the resolution of those claims does not substantially depend upon interpretation of the parties' CBA. We also conclude that the court of appeals did not abuse its discretion by dismissing SWAPA's representative claims without prejudice because SWAPA's members' assignments of their claims to SWAPA are not void as against public policy and gave SWAPA standing to pursue those claims as assignee. And Boeing does not challenge the court of appeals' holding that SWAPA has standing to pursue its claims on its own behalf. We thus affirm the court of appeals' judgment remanding the case to the trial court for further proceedings on the claims SWAPA asserts on its own behalf.

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Jeffrey S. Boyd
Justice

OPINION DELIVERED: June 20, 2025

SUPREME COURT OF TEXAS

No. 22-0631

The Boeing Company,

Petitioner,

v.

Southwest Airlines Pilots Association (SWAPA) on behalf of itself and its members,

Respondent

On Petition for Review from the
Court of Appeals for the Fifth District

JUSTICE BLAND, joined by Justice Huddle, dissenting in part.

Our Court carefully scrutinizes assignments of legal causes of action because such assignments uncouple the damages suffered from the party seeking recompense in court.[1] And in other ways,

[1] *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 706–07 (Tex. 1996) (explaining that this original concern of assignability—that a "claim or cause of action was part of a right of redress that was personal to the holder by virtue of the injury suffered and thus incapable of transfer"—remains today); *PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners L.P.*, 146 S.W.3d

assignments skew litigation incentives and outcomes. This case involves the assignment of more than 8,000 individual claims to one nonprofit association, something unheard of in Texas law.

For good reason. Business Organizations Code Section 252.007 does not grant nonprofit associations the right to pursue claims on behalf of their individual members if the lawsuit requires the members' participation. The statute thus precludes the Southwest Airlines Pilots Association from pursuing claims to recover its pilots' individual damages resulting from the 737 MAX's grounding. Today, however, the Court permits an association to seek individual damages if the association—which cannot bring such claims by statute—gathers assignments from its members and, still contrary to statute, sues on their behalf. To permit assignments such as these hollows out the Legislature's careful limits as to the types of claims associations can bring.

Our assignment jurisprudence should cohere with the statute that governs the assignee. I join the Court's opinion as it pertains to preemption—even though the Court's assignment holding jeopardizes its preemption holding by permitting a party to a collective bargaining agreement governed by the Railway Labor Act to sue for compensatory damages allegedly sustained under that agreement. The Court should reinstate the trial court's dismissal with

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79, 89 (Tex. 2004) ("If consumers can assign their DTPA claims, they may still have to testify at trial about the nature, duration, and severity of their mental anguish, but someone else will keep the money.").

prejudice of SWAPA's claims for money damages sought on behalf of its members. Accordingly, I do not join Part III of the Court's opinion and respectfully dissent from the portion of its judgment remanding those claims to the trial court.

I

Following the grounding of the 737 MAX aircraft, SWAPA sued Boeing, asserting claims on behalf of itself and its member pilots. SWAPA sought damages for the pilots for lost compensation resulting from the grounding. Boeing filed a plea to the jurisdiction, arguing in part that SWAPA lacked associational standing to bring claims on behalf of its members. In response, over 8,000 SWAPA members executed assignments of their claims against Boeing to SWAPA. Boeing then amended its plea to argue that the assignments are void because they circumvent the statute prohibiting associations from asserting claims on behalf of their members if such claims require their members' individual participation.

The trial court granted Boeing's jurisdictional plea and dismissed the suit. On interlocutory appeal, the court of appeals held that the assignments are not void as against public policy.[2] While the assignments did not cure the jurisdictional issues in this suit because they occurred after it was filed, the court of appeals modified the trial court's dismissal to be without prejudice so that SWAPA could assert the

[2] 704 S.W.3d 832, 848 (Tex. App.—Dallas 2022).

claims of its members by assignment in a future suit.[3]

A

Under the Business Organizations Code, a nonprofit association has standing to assert a claim on behalf of its members if: "(1) one or more of the nonprofit association's members have standing to assert a claim in their own right; (2) the interests the nonprofit association seeks to protect are germane to its purposes; and (3) neither the claim asserted nor the relief requests requires the participation of a member."[4]

At issue here in the third requirement; whether the claim asserted, or the relief requested, requires individual participation.[5] This requirement "depends in substantial measure on the nature of the relief sought."[6] Prospective relief will ordinarily not require individual participation as "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured."[7] However, when an association

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[3] *Id.*

[4] Tex. Bus. Orgs. Code § 252.007(b).

[5] *Id.* § 252.007(b)(3).

[6] *Tex. Ass'n of Bus. V. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993) (quoting *Hunt v. Wash. State Apple. Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

[7] *Id.* (quoting *Hunt*, 432 U.S. at 343); *see also Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("Indeed, in all cases in which we have expressly

seeks damages for its members that are "not common to the entire membership, nor shared by all in equal degree," individualized proof is required, and the third requirement cannot be met.[8] Notably, the statute does not limit its prohibition to any particular kind of standing-it does not parse standing by association or standing by assignment. It simply does not authorize an association to sue for damages that require individual member participation.

SWAPA's petition in this case seeks such damages. It requests "millions of dollars in lost compensation" on behalf of its member pilots stemming from the grounding of the 737 MAX. Pilots are paid via a formula, according to SWAPA's expert, who claimed that he could compute the total amount of lost compensation before and after the grounding by comparing differences in Southwest's flight schedules. Each pilot would then be entitled to "the share of damages that is equal to his or her share of total pilot compensation." To calculate this share, the expert would rely on each pilot's individual tax records. Even though pilot compensation would be wholly dependent on individual tax and employment records, he claimed no individual participation would be required because his *calculations* did not require pilot assistance.[9]

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recognized standing in associations to represent their members, the relief sought has been of this kind.").

[8] *Warth*, 422 U.S. at 515.

[9] Courts of appeals faced with similar damages claims have held that expert testimony does not obviate the need for member participation. In *Big Rock Investors Ass'n v. Big Rock*

But the numbers the expert planned to use as a basis for these calculations absolutely would: in the form of individual flight schedules, individual salaries, and individual tax records. SWAPA must prove these varying amounts of lost compensation resulting from the MAX's grounding for each of its member pilots to obtain its requested relief. It proposes to do so by combing through the tax records of each of its over 8,000 members, which presumably provide salary and flight–time information for each individual member. As the court of appeals correctly observed, numerous other variations among individual members remain: "individual assignments, whether they were reassigned to other aircraft, seniority, experience, level of compensation, retirement, military reserve duty, and disability."[10]

The process would thus be a "fact-intensive-individual inquiry," requiring proof of each member's individual circumstances.[11] The

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Petroleum, Inc., an association sought varying damages for each of its members but argued that their participation was not necessary because an expert could testify as to individual amounts. 409 S.W.3d 845, 851–52 (Tex. App.—Fort Worth 2013, pet. denied). The court held the no- participation requirement was not satisfied because the expert's proposed testimony "is no less fact-intensive than simply permitting each individual member to provide such testimony concerning his profits and losses." *Id.* at 852.

[10] 704 S.W.3d at 845.

[11] *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.* 627 F.3d 547, 552 (5th Cir. 2010).

assignments themselves prove this point. Paragraph four provides:

> Damages recovered from Boeing in the Litigation or a settlement will be distributed in an equitable manner *in proportion to gross W-2 earnings per pilot for the period* of May 1, 2019 through the date that Southwest returns the 737 MAX into revenue service, *less [a member's] proportional share* of all fees, expenses and financing costs associated with the Litigation.[12]

In these circumstances, Section 252.007(b) does not authorize SWAPA to seek money damages because it must provide evidence of the members' individual damages to prevail.

B

The court of appeals held that SWAPA lacked associational standing because its damages claims required individual participation, and I agree with the Court that SWAPA waived that issue by not filing a cross-petition for review of the court of appeals' judgment.[13] The Court further holds, however, that SWAPA can pursue these same claims as an assignee of its members' claims. Such a holding guts the limited standing authorization the

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[12] Emphasis supplied.

[13] *Ante* at 15–16 n.21.

Legislature has granted to SWAPA. The Court's holding permits SWAPA to proceed when the statute says it cannot. While assignment of legal causes of action is permitted, "the common law's reservations to alienability . . . [and] the role of equity or policy in shaping the rule" remain.[14] Prohibited assignments include those "that tend to increase or prolong litigation unnecessarily, tend to distort the litigation process, or are otherwise inconsistent with the purpose of a statutory cause of action."[15] It remains the prerogative of the courts to determine whether equity and public policy require invalidation of assignments in circumstances that have not been recognized.[16]

This case presents such a circumstance. Statutes express the public policy of Texas.[17] Section 252.007, by its plain text, grants associations the authority to pursue claims "on behalf of" their members in limited circumstances only—whether by association or by assignment. SWAPA's claims for money damages for individual lost wages do not fall within these limited circumstances. The assignments do not change the fundamental fact that SWAPA's

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[14] *Gandy*, 925 S.W.2d at 707.

[15] *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 916 (Tex. 2010).

[16] *See PPG Indus., Inc.*, 146 S.W.3d at 87 (But the assignability of *most* claims does not mean *all* are assignable; exceptions may be required due to equity and public policy." (internal citation omitted)).

[17] *Town of Flower Mound v. Stafford Ests. L.P.*, 135 S.W.3d 620, 628 (Tex. 2004).

suit requires individual participation, with claims of varying amounts of individual damages. Moreover, these assignments require payments to each pilot based on the pilot's income should SWAPA obtain a recovery in the suit. The assignments are nothing more than an attempt to circumvent the statute's limits.

We invalidated assignments that similarly would have frustrated the intent of the Legislature in *PPG Industries, Inc. v. JMB/Houston Centers Partners L.P.*[18] That case involved the Deceptive Trade Practices Act, which limited its causes of action to "consumers."[19] In holding that such claims were not assignable, we reasoned that allowing assignment could allow "a party excluded by the statute . . . [to] nevertheless assert DTPA claims by stepping into the shoes of a qualifying assignor."[20] We also raised the concern that the Act's treble damages provisions, intended to motivate affected consumers, could instead motivate those "considering litigation for commercial profit."[21] Together, assignment would "defeat the very purposes for which the DTPA was enacted."[22] Permitting SWAPA to proceed as an assignee of claims brought on behalf of individual pilots would also "defeat the very

[18] 146 S.W.3d at 82.

[19] *Id.* at 85 (quoting Tex. Bus. & Com. Code § 17.45(4)).

[20] *Id.*

[21] *Id.*

[22] *Id*. at 87.

purposes" for which the Legislature enacted limits on the claims associations can bring.

The Court seems to share this concern.[23] But it nonetheless states that SWAPA may prevail on the assigned claims by "proving Boeing's liability to the individual member who assigned it and the damages that member sustained."[24] In other words, SWAPA may assert and prevail on claims that require individual participation—just what Section 252.007 prevents it from doing. The Court justifies this inconsistency by asserting that standing by assignment and associational standing are equally permissible alternatives for associations seeking to recover damages its members individually sustained.[25] While an assignee ordinarily "steps into the shoes" of an assignor and can pursue claims the assignor holds, the assignments in this case obligate SWAPA to remit the proceeds of its lawsuit back to its assignor members.[26] Associations are now free to

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[23] *See ante* at 23 ("In determining how to resolve those claims, the trial court . . . must ensure that SWAPA pursues the claims as an assignee and not as a representative association."). The statute does not differentiate between claims that SWAPA brings as an association or as an assignee. Particularly in this case, in which SWAPA's intent is to remit damages back to individual members—whether by associational standing or by assignment—the distinction is one without a difference.

[24] *Id.*

[25] *Id.*at 21.

[26] *Sw. Bell Tel. Co.*, 308 S.W.3d at 916. Such provisions call into question whether the association has a sufficient stake in the litigation to even claim standing by assignment. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 300

bring claims requiring member participation. Our proper focus should be on the substance of the claims, not the presentment of them.

Perhaps recognizing the fallacy of considering two avenues for standing as "alternative[s]"—with one permitting claims the other prohibits—the Court states that the Legislature should have prohibited assignments if it so intended.[27] It is entirely superfluous to expect the Legislature to codify that associations cannot circumvent the statute's limited grant of authority to bring suits on behalf of their members.

The Court does not grapple with these concerns, relying instead on a sentence fragment from the United States Supreme Court and observing that assignment and associational standing have "distinct requirements."[28] Important to the question presented in this case, however, is whether such distinctions make a difference. They do not in this case. Either way, SWAPA must prove the individual circumstances of its members. Our historic aversion to assignment counsels toward subordinating

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(2008) (Roberts, C.J., dissenting) ("An assignee who has acquired the bare legal right to prosecute a claim but no right to the substantive recovery cannot show that he has a personal stake in the litigation.").

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assignments to the statutory limits placed on nonprofit associations instead of elevating them over the expressed public policy of our state.[29]

The Court cites no case before today permitting a nonprofit association to act as the assignee of thousands of its members' damages claims. With the Court's opinion in hand, nonprofit organizations are free to become clearinghouses for mass torts—with none of the protections that other mass-action vehicles afford.[30] New associations could form to bring such claims and ensure the assignment agreements reserve a portion of each member's damages to the association. That is assuming, of course, that the association diligently pursues such claims, which it

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[29] *See Gandy*, 925 S.W.2d at 707 ("Practicalities of the modern world have made free alienation of choses in action the general rule, but they have not entirely dispelled the common law's reservations to alienability, or displaced the role of equity or policy in shaping the rule. Even today, the general rule is that a contractual assignment may be inoperative on grounds of public policy." (internal quotations omitted)).

[30] *E.g.*, Tex. R. Civ. P. 42(a)(4) (permitting class actions only if "the representative parties will fairly and adequately protect the interests of the class"). These protections are not limited to plaintiffs. Defendants, for example, can challenge a trial court's order certifying a class under Rule 42. *Id.* R. 42(c)(1)(A); *see also* Tex. Civ. Prac. & Rem. Code § 51.014(a)(3) (permitting interlocutory appeal of class–certification orders). No similar vehicle exists if a well-financed nonprofit unilaterally decides to bring a mass action of assigned claims as SWAPA does here.

has no obligation to do as an assignee. As in this case, nonprofits will become vehicles for third-party litigation financing, the costs of which the assignment requires SWAPA's individual members to bear.

The Court is nevertheless content to ground its holding in the fact that the assignments do not violate public policy because—in an optimistically omniscient view—a labor association's involvement will not protract the litigation or drive up its costs.[31]

Finally, claims for individual damages that arise out of compensation provided in a collective bargaining agreement disrupt the relationship between common carriers and their equipment providers. When brought by a plaintiff that is also a party to that bargaining agreement, such a suit comes closer to conflicting with the Railway Labor Act's express purpose to govern all claims relating to collective bargaining agreements and the compensation derived therefrom.[32] State laws must be careful not to unduly intrude into the interstate railway and air travel systems. Given its limits, our state law does not conflict with the Act—

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[31] *Ante* at 19.

[32] *See* 45 U.S.C. § 151a ("The purposes of the chapter are . . . to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.").

an expansive interpretation of that law allowing for money damages based on the collective bargaining agreement, less so.

* * *

The Southwest Airlines Pilots Association lacks the authority to pursue individual damages claims that involve their members. We therefore should uphold the trial court's dismissal of SWAPA's claims for its pilots' individual damages. As the Court permits SWAPA to bring such claims despite the statutory limit on its authority to do so, I do not join Part III of its opinion and respectfully dissent from its judgment remanding those claims to the trial court.[33]

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Jane N. Bland
Justice

OPINION FILED: June 20, 2025

[33] For these reasons, I would also grant the petition for review in the companion case (No. 22-1124) that SWAPA filed as an assignee. We should reinstate the trial court's judgment granting Boeing's motion to dismiss in that case.

THE SUPREME COURT OF TEXAS
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Friday, January 10, 2025

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RE: Case Number: 22-0631

Court of Appeals Number: 05-20-01067-CV Trial Court Number: DC-19-16290

Style: THE BOEING COMPANY

v.

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) ON BEHALF OF ITSELF AND ITS MEMBERS

Dear Counsel:

Today the Supreme Court of Texas granted the motion for rehearing and withdrew the denial of the petition for review on May 31, 2024 in the above-referenced case. The Court reinstated the petition for review and granted the petition for review in the above-referenced case. This cause is not set for submission at this time. The date of oral submission will be announced at a later date.

Sincerely,

_____

Blake A. Hawthorne, Clerk

By Claudia Jenks, Chief Deputy Clerk

cc:
Ms. Anne M. Johnson (DELIVERED VIA E-MAIL)
Ms. Courtney Perez (DELIVERED VIA E-MAIL)
Mr. Ruben Morin (DELIVERED VIA E-MAIL)
Mr. Christopher Knight (DELIVERED VIA E-MAIL)
Catherine L. Eschbach (DELIVERED VIA E-MAIL)
Ms. Kelli Bills (DELIVERED VIA E-MAIL)
Mr. Jeffrey W. Hellberg Jr. (DELIVERED VIA EMAIL)
Mr. William R. Peterson (DELIVERED VIA E-MAIL)
Mr. Rusty O'Kane (DELIVERED VIA E-MAIL)
Craig S. Primis (DELIVERED VIA E-MAIL)
Mr. E. Leon Carter (DELIVERED VIA E-MAIL)
District Clerk Dallas County (DELIVERED VIA E-MAIL)
Ms. Mary Dow (DELIVERED VIA E-MAIL)
Mr. Anthony U. Battista (DELIVERED VIA E-MAIL)

Order entered July 5, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-01067-CV

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) ON BEHALF OF ITSELF AND ITS MEMBERS, Appellant

v.

THE BOEING COMPANY, Appellee

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-16290

ORDER
Before the Court En Banc

Before the Court is appellee's May 16, 2022 motion for en banc reconsideration. Appellee's motion is **DENIED**.

/s/ ROBERT D. BURNS, III
CHIEF JUSTICE

Schenck, J., dissenting.
Goldstein, J., would request a response.

Dissent; Opinion Filed July 5, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-01067-CV

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) ON BEHALF OF ITSELF AND ITS MEMBERS, Appellant

v.

THE BOEING COMPANY, Appellee

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-16290

OPINION DISSENTING FROM DENIAL OF EN BANC RECONSIDERATION

Before the Court Sitting En Banc
Opinion by Justice Schenck

This case presents substantial, recurring questions relating to the application of the federal Railway Labor Act to a claim for money damages filed in state court. According to the petition for en

banc reconsideration, our panel opinion conflicts with (1) multiple federal appellate courts' reading of that statute to preempt any state law claim requiring interpretation of a collective bargaining agreement; and (2) the well-reasoned decision of the Chief Judge of the Northern District of Texas finding the claims at issue here to require just such an interpretation. Under these circumstances, I believe that a response to the petition for reconsideration is warranted, at a minimum. In the absence of that response,[1] I agree with the decisions of the federal courts and therefore dissent from this Court's denial of appellant's request.

I.

In 2016, appellant Southwest Airline Pilots Association ("SWAPA") entered into a collective bargaining agreement ("CBA") with Southwest Airlines, ending a dispute over whether the prior 2006 CBA included appellee The Boeing Company ("Boeing")'s 737 MAX aircraft as a variant of the 737 aircraft enumerated in the CBA. The 2016 CBA provided that SWAPA's members would operate Boeing's 737 MAX aircraft.

Subsequent to several catastrophic crashes involving the 737 MAX aircraft and the resulting grounding of that fleet, SWAPA, on behalf of itself and its members, initiated suit against Boeing, alleging state law claims for fraud, tortious

[1] Goldstein, J., agrees that a response to this motion is warranted.

interference with a contract, and negligence. According to SWAPA, Boeing's misrepresentations and omissions regarding the 737 MAX, including withholding critical safety information, caused SWAPA to agree to include in the 2016 CBA that its pilots would fly the 737 MAX. Boeing removed the case to federal court, asserting SWAPA's state-law claims to be completely preempted by the Railway Labor Act ("RLA"), thus supporting federal subject matter jurisdiction. SWAPA filed a motion to remand the claims back to state court, which the federal court granted. In state court, Boeing filed a plea to the jurisdiction, again arguing SWAPA's state-law claims are completely preempted by the RLA, which the trial court granted.[22] This appeal followed.

II.

Congress' purpose in passing the RLA was to promote stability in labor– management relations by providing a comprehensive framework for resolving labor disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *see also* 45 U.S.C. § 151a. To realize this goal, the RLA establishes a

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[2] Federal preemption is not just a matter of federal subject matter jurisdiction, but is also properly brought as a plea to the jurisdiction because the issue here is one of forum preemption rather than "choice of law" preemption. *See Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545–46 (Tex. 1991) (distinguishing between forum preemption, which implicates court's subject matter jurisdiction, and "choice of law" preemption, which instead operates as affirmative defense and does not impact subject matter jurisdiction).

mandatory arbitral mechanism for "the prompt and orderly settlement" of two distinct classes of disputes. *See* 45 U.S.C. § 151a. The first class, those directly concerning "rates of pay, rules or working conditions," are deemed "major" disputes. *See Norris*, 512 U.S. at 252. Major disputes relate to "'the formation of collective [bargaining] agreements or efforts to secure them.'" *See id.* (quoting *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723 (1945)). The second class of disputes, known as "minor" disputes, "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *See id.* at 252–53 (quoting 45 U.S.C. § 151a). These disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *See id.* at 253 (quoting *Trainmen v. Chi. R. & I.R. Co.*, 353 U.S. 30, 33 (1957)). Thus, "major disputes seek to create contractual rights, minor disputes to enforce them." *See id.* (quoting *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 302 (1989)).

Federal precedent requires preemption of state-law claims where resolution of those claims depends on an interpretation of a CBA.[3] *See id.* at 261; *see*

[3] This form of defensive, conflict preemption is distinct from so-called field preemption whereby the federal law is so integral to the plaintiff's well-pleaded complaint that the claim itself can fairly be said to "arise under" federal law. In that rare circumstance, the state-law claim may be directly removed to federal court, as Boeing sought here. *E.g.*, *Sullivan v. Am. Airlines*, 424 F.3d 267, 272 (2d Cir. 2005). In all other instances, the preemption question is a matter to be proven by the

also Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405 (1988); *Wis. Cent., Ltd. v. Shannon*, 529 F.3d 751, 757 (7th Cir. 2008); *Baylis v. Marriott Corp.*, 906 F.2d 874, 877 (2d Cir. 1990) ("Since plaintiffs cannot establish that Marriott tortiously induced Pan Am to breach without establishing the meaning of the collective bargaining agreement and its breach by Pan Am, their claims of tortious inducement of breach are preempted by the RLA."). The general purposes of the RLA include "to provide for the prompt and orderly settlement of all disputes growing out of . . . the interpretation or application of agreements covering rates of pay, rules, or working conditions." *See* 45 U.S.C. § 151a. Indeed, the Supreme Court looked to this section to define the types of disputes covered by the RLA as those involving interpretation of a CBA rather than as those disputes between a carrier and its employees. *See Norris*, 512 U.S. at 252–53. Thus, the focus is on what the dispute affects—uniform interpretation and application of CBAs—and not on who is involved in those disputes. And, in fact, in remanding this case to the district court, the learned Chief Judge of the Northern District of Texas determined the claims were not completely preempted for federal jurisdiction purposes and also concluded "the case will require interpretation of the CBA." *See Sw. Airlines Pilots Ass'n v. Boeing Co.*, No. 3:19- CV-2680-M, 2020 WL 2549748, at *5 (N.D. Tex. Apr. 29, 2020) (order granting motion to remand) ("Thus, the Court finds that it does not have federal question jurisdiction

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defendant on the merits. *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 7 (1983).

under the complete preemption doctrine, even though the case will require interpretation of the CBA.").

III.

In our panel opinion, this Court held SWAPA's claims are not preempted by the RLA, *see* 45 U.S.C. §§ 151 et. seq., because the RLA applies to disputes between an air carrier and its employees, and Boeing is not a carrier, nor is SWAPA an employee.[4]

The panel opinion concludes that, regardless of whether the dispute involves the interpretation or application of a CBA, the dispute here is exempted from the RLA by its sections 152, 153, 181, and 184

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[4] The panel opinion also states the dispute here "is not a 'minor dispute' to which the mandatory arbitral provisions of the RLA apply." *Norris*' definition of such disputes is simple—and not tied in any way to the activities of the adjustment board—namely, whether the dispute "grows out of . . . the interpretation or application of agreements covering rates of pay, rules, or working conditions." I agree with Chief Judge Lynn's understanding of the claim in this case and with the various federal circuit decisions holding that such claims are preempted by the RLA. The dispute appears to require interpretation of the 2006 CBA and involve the working conditions of the SWAPA members because SWAPA claims it entered into the 2016 CBA after disputing with Southwest Airlines over whether it had the right to insist that SWAPA's members operate the 737 MAX under the 2006 CBA and after Boeing's misrepresentations and interference with that dispute. Additionally, the calculation of claimed damages in "lost compensation due to the grounding of the 737 MAX" would certainly involve wages and rates of pay calculated under the 2016 CBA. Therefore, I would conclude this to be a "minor dispute."

because it is not one between a carrier and its employee. Section 152 discusses the general duties of "all carriers, their officers, agents, and employees" to "settle disputes . . . between the carrier and the employees thereof," and section 153 establishes the National Railroad Adjustment Board and sets forth its composition, powers and duties, as well as permitting establishment by agreement of regional adjustment boards. *See* 45 U.S.C. §§ 152, 153. Section 181 extends the provisions of the RLA—except section 153—to air carriers, and section 184 permits establishment of adjustment boards to handle disputes involving employees and air carriers. *See id.* §§ 181, 184. The panel opinion relies on the fact that these sections address "disputes" and describe them as being between "carriers" and "employees" to conclude only disputes between those categories of parties could be preempted by the RLA. I disagree.

Section 151a, the preemption provision, applies to "***all disputes growing out of*** . . . the interpretation or application of agreements covering rates of pay, rules, or working conditions." *See id.* § 151a (emphasis added). Nothing in this text or the federal caselaw applying it limits its reach to the activities of adjustment boards. Instead, section 151a broadly encompasses claims involving non-carrier, non- employer third-parties ranging from manufacturers (as here) to hotel chains, so long as the claim, like this one, would require application and interpretation of the CBA in order for the claimant to prevail. *E.g.*, *Baylis*, 906 F.2d at 877–78. The reason for this breadth of coverage is embraced in the text and purposes of section 151a and its broad

sweep, i.e., to include all claims that could affect the interpretation of CBAs and thus invite different, conflicting results. Permitting claims involving third parties to be excluded from the RLA, as the panel opinion argues is necessary, would increase the potential for inconsistent outcomes and give rise to troubling collateral estoppel implications *Norris* and its progeny foreclose. Collateral estoppel (issue preclusion) operates without regard to mutuality of party, but operates only as a one- way street. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (upholding estoppel but only as against litigants who appeared in the prior action).

In a case such as this, where the association asserts claims for recovery of lost wages arising out of a collective bargaining agreement, the lost wages will often (if not invariably) overlap with claims of lost income to the carrier from which those wages would have been paid. While the association's claims against its employers may be broader or narrower, allowing the claim to proceed against the third party to judgment on issues that would overlap with the carrier's own claims creates the obvious prospect of inconsistent readings of the CBA and the same operative facts. And, while the issues may overlap, the parties would not. Thus, if SWAPA were unsuccessful in its claims against Boeing—that, as all agree, must involve the interpretation of a CBA—then Southwest Airlines would be to free to raise the same or similar claims against Boeing in hopes of

obtaining exactly the opposite result despite the objectives of section 151a. *Id.*[5]

This is not just a matter of conflict with federal decisional authority from the U.S. Supreme Court and circuit courts of appeal. As a textual matter, the majority's reliance on sections 152, 153, 181 and 184 as somehow limiting the preemptive reach of section 151a is misplaced, as none purport to so limit its text. The analysis ignores the definition of "carrier" in the RLA, which broadly includes companies that "perform[] any service . . . in connection with . . . transportation," or federal precedent preempting state claims litigated with third parties, and thus restricts "disputes" more narrowly than the text of the statute and its interpretation by federal courts. *See* 45 U.S.C. § 151; *see also Baylis*, 906 F.2d at 875, 877 (holding RLA preempted state-law claims from airline employees that hotel tortiously induced the airline to breach its contract with employees); *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 317 (7th Cir. 1994) ("The RLA governs relations between employers that are rail or air carriers ***or that engaged in other related activities and their union employees.***") (emphasis added).

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[5] Of course, if SWAPA were to prevail, Southwest Airlines would urge that the issue was settled subject only to the untangling of the claims under the single recovery rule, assuming this would even be possible. I presume this form of claim splitting was not the intention of this action or even a natural potential result here. It would nevertheless be one made possible in this or other cases under the panel's reading of section 151a and *Norris*.

In all events, given the magnitude of the panel opinion's holding, I would conclude the issue of federal preemption presented here is suited for en banc reconsideration.[6] *Chakrabarty v. Ganguly*, 573 S.W.3d 413, 415–16 (Tex. App.— Dallas 2019, no pet.) (en banc) ("We will rehear a case en banc where it is necessary to secure uniformity of the Court's decisions and in other extraordinary circumstances, as we deem necessary."). Accordingly, I dissent.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

201067F.P05

[6] I do not express any opinion regarding the panel's analysis of the standing issue and would pretermit it following a conclusion the state law claims here are preempted under the RLA.

REVERSE; AFFIRMED as MODIFIED and Opinion Filed March 30, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-01067-CV

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) ON BEHALF OF ITSELF AND ITS MEMBERS, Appellant

v.

THE BOEING COMPANY, Appellee

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-16290

MEMORANDUM OPINION

Before Justices Carlyle, Smith, and Garcia
Opinion by Justice Garcia

In this interlocutory appeal from a plea to the jurisdiction, Southwest Airlines Pilots Association ("SWAPA") challenges the trial court's final order dismissing with prejudice its common law tort claims

against the Boeing Company ("Boeing"). SWAPA argues that it has standing to assert claims on its own behalf and associational standing to assert claims on behalf of its members, and even if it does not, the trial court should have allowed a pleading amendment and should not have dismissed the suit with prejudice. SWAPA further argues that the Railway Labor Act ("RLA")[1] does not preempt its state law tort claims against Boeing.

As discussed below, we conclude that SWAPA has standing to assert claims on its own behalf, but at the time the suit was filed, lacked standing to assert claims on behalf of its members. Although SWAPA's subsequently acquired assignments of member interests do not cure the jurisdictional defects in the present case, the assignments might confer standing on SWAPA to file suit in the future. Thus, while the trial court properly dismissed the suit without providing SWAPA an opportunity to amend its pleadings, the dismissal should have been without prejudice. We further conclude that the RLA does not preempt SWAPA's state law claims.

Accordingly, we reverse the trial court's order granting Boeing's plea to the jurisdiction on the claims SWAPA asserted on its own behalf. We modify the trial court's order to reflect that the claims SWAPA asserted on behalf of its members are dismissed without prejudice. As modified, the remainder of the trial court's order is affirmed.

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[1] 45 U.S.C. §§ 151 et. seq.

I. BACKGROUND

SWAPA is an unincorporated non-profit labor organization and employee association that represents over 9,000 Southwest Airlines Pilots. Acting in its representative capacity, SWAPA enters into collective bargaining agreements ("CBAs") with Southwest Airlines. The CBAs define employment terms, including pay, benefits, working conditions, and the approved aircraft that the pilots agree to fly. Southwest pilots pay SWAPA a percentage of their wages as dues.

In 2016, SWAPA entered a CBA in which SWAPA agreed that its members would operate Boeing's 737 MAX aircraft. In 2018 and 2019, the 737 MAX was involved in catastrophic crashes and as a result, the 737 MAX fleet was grounded worldwide.

SWAPA subsequently initiated this suit against Boeing on behalf of itself and its members. The petition alleges that SWAPA seeks damages on behalf of itself and its pilots "who have collectively lost, and are continuing to lose, millions of dollars in compensation as a result of Boeing's false representations concerning its 737 MAX aircraft, namely that the 737 MAX was safe, airworthy, and was essentially the same as the time-tested 737 aircraft that SWAPA pilots were already flying." To this end, SWAPA asserts Texas common law claims for fraudulent and negligent misrepresentation, tortious interference with contract and with an existing business relationship, negligence, and fraud

by nondisclosure. SWAPA seeks compensation for pilots in connection with cancelled or reduced flights following the grounding of the 737 MAX, in addition to its own lost dues and legal fees incurred in connection with government investigations.

Boeing removed the case to federal court, asserting that SWAPA's state law claims are completely preempted by the RLA and that the "mass action" provision of the Class Action Fairness Act creates original federal jurisdiction. SWAPA moved to remand.

While SWAPA's remand motion was pending, 8,794 SWAPA pilots executed assignments in which they assigned and transferred to SWAPA "all rights, title, and interest to any and all claims, demands, and/or causes of action . . . against Boeing arising out of the Max Crisis" (the "Assignments"). The Assignments acknowledge that SWAPA's agreement to pursue the assignor-member's damage claims is "[c]onsistent with SWAPA's Constitution and the ordinary business it conducts in representing the interests of Southwest pilots."

The federal court concluded that it lacked subject matter jurisdiction and remanded the case to state court. Boeing filed an answer and a plea to the jurisdiction. The plea asserted that SWAPA lacks associational standing, and its claims are preempted by the RLA.

SWAPA filed a notice of assignment requesting that the Assignments be recorded in

accordance with the Texas Property Code, but it did not amend or seek to amend its petition.

Boeing amended its plea to the jurisdiction. The amended plea argues that SWAPA lacks associational standing to pursue claims on behalf of its members, the Assignments do not confer standing because they violate Texas public policy relating to standing and class actions, and the RLA preempts SWAPA's state law claims.

After full briefing and some limited discovery, the trial court conducted a hearing. After the hearing, the court signed an order granting Boeing's plea and dismissing SWAPA's claims with prejudice. SWAPA moved to modify the judgment and to amend its petition and the trial court denied the motion.[22] SWAPA now appeals the trial court's orders granting the plea to the jurisdiction and denying its motion to modify the judgment.

II. ANALYSIS

A. Standard of Review and Dilatory Pleas

A plea to the jurisdiction is a dilatory plea that challenges the trial court's subject matter jurisdiction without regard to whether the asserted claims have merit. *Bland Independent School*

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[2] After the court denied SWAPA's motion to modify the judgment, SWAPA filed a new lawsuit in its capacity as assignee of the Assignments. That case is not at issue in this appeal, but rather is a separately filed appeal pending as *Southwest Airline Pilots Assoc. v. Boeing*, No. 05-21-00598-CV.

District v. Blue, 34 S.W.3d 547, 554 (Tex. 2000); *see also City of San Antonio v. Maspero*, ___ S.W.3d ___, 2022 WL 495190, at *4 (Tex. 2022) (proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims that plaintiffs are required to put on their case to establish jurisdiction).

We review a trial court's ruling on a plea to the jurisdiction de novo. *See Hous. Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016). A jurisdictional plea may challenge the pleadings, the existence of jurisdictional facts, or both. *Tex. Dep't of Criminal Justice v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018)).

The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). In reviewing a plea to the jurisdiction, we begin with the plaintiff's live pleadings and determine if the plaintiff has alleged facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In making this assessment, we construe the plaintiff's pleadings liberally, taking all assertions as true, and look to the plaintiff's intent. *Id.* If a plea to the jurisdiction challenges the existence of jurisdictional facts, we may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id.* at 227. That is, we review the evidence in the light most favorable to

the nonmovant to determine whether a genuine issue of material fact exists. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) (citing *Miranda*, 133 S.W.3d at 221, 227–28). "Our ultimate inquiry is whether the plaintiff's pleaded and unnegated facts, taken as true and liberally construed with an eye to the pleader's intent, would affirmatively demonstrate a claim or claims within the trial court's jurisdiction." *Brantley v. Texas Youth Comm'n*, 365 S.W.3d 89, 94 (Tex. App.—Austin 2011, no pet.).

When a plaintiff fails to plead facts that establish jurisdiction, but the petition does not affirmatively demonstrate incurable defects, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *see also Miranda*, 133 S.W.3d at 226–27. If, however, the pleadings affirmatively negate the existence of jurisdiction, then the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to replead. *Cty. of Cameron*, 80 S.W.3d at 555.

The plea in this case was premised on the alleged absence of standing and federal preemption. "Standing is a constitutional prerequisite to suit." *Heckman*, 369 S.W.3d at 150 (citing *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 915 (Tex. 2010)). Standing "requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Id.* at 154 (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304, 307 (Tex. 2008)). "If a plaintiff lacks standing to

assert a claim, then a court has no jurisdiction to hear it." *Heckman*, 369 S.W.3d at 150; *Inman*, 252 S.W.3d at 304).

Preemption can be jurisdictional or defensive. *See Gruber v. Fuqua*, 279 S.W.3d 608, 624 n.2 (Tex. 2009); *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545–546 (Tex. 1991) (forum preemption implicates a court's subject matter jurisdiction). When it is the former, it is sometimes raised in a plea to the jurisdiction. *See De Los Santos v. Heldenfels Enters, Inc.*, 632 S.W.3d 584, 589 (Tex. App.—El Paso 2020) (considering preemption raised in plea to the jurisdiction). We begin with standing.

B. Does SWAPA have associational standing?

SWAPA argues that it has standing to assert its members' claims because it meets the requirements for associational standing and by virtue of the Assignments. Because the Assignments occurred after the suit was filed and because there was no pleading based on the Assignments at the time the court considered the plea, we divide our analysis to consider the effect of the Assignments before and after they were executed.

1. Before the Assignments

SWAPA insists that it has direct standing as the assignee of its members' claims and "common sense" suggests that we should not require a

"meaningless dismissal and subsequent refiling." Guided by the long-standing principle that standing must exist at the inception of the suit, we disagree. As this court has explained:

> Standing must exist at the time a plaintiff files suit and must continue to exist between the parties at every stage of the legal proceedings, including the appeal; if the plaintiff lacks standing at the time suit is filed, the case must be dismissed, even if the plaintiff later acquires an interest sufficient to support standing.

Martin v. Clinical Pathology Labs., Inc., 343 S.W.3d 885, 888 (Tex. App.—Dallas 2011, pet. denied); *see also Kilpatrick v. Kilpatrick*, 205 S.W.3d 690, 703 (Tex. App.—Fort Worth 2006, pet. denied), *overruled on other grounds by Revell v. Morrison Supply Co., LLC*, 501 S.W.3d 255 (Tex. App.—Fort Worth 2016, no pet.). "A trial court determines its jurisdiction at the time a suit is filed. At that time, the court either has jurisdiction or it does not. Jurisdiction cannot subsequently be acquired while the suit is pending." *Bell v. Moores,* 832 S.W.2d 749, 754 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 n.9 (Tex. 1993) ("Our concern is with a party's right to initiate a lawsuit and the trial court's corresponding power to hear the case ab initio. Standing is determined at the time suit is filed in the trial court . . ."); *McMillan v. Aycock*, No. 03-18-00278-CV, 2019 WL 1461427, at *2 (Tex. App.—Austin Apr. 3, 2019, no pet.) (mem. op.).

Courts consistently hold that "a later-acquired interest does not retroactively confer standing." *La Tierra de Simmons Familia Ltd. v. Main Event Enter., LP.*, No. 03-10-00503-CV, 2012 WL 753184, at *5 (Tex. App.—Austin Mar. 9, 2012, pet. denied) (mem. op.) (*citing Martin*, 343 S.W.3d at 888; *Kilpatrick*, 205 S.W.3d at 703); *see also McMillan*, 2019 WL 1461427, at *3; *Doran v. Clubcorp USA, Inc.*, No. 05-06-01511-CV, 2008 WL 451879, at *2 (Tex. App.—Dallas Feb. 21, 2008, no pet.) (mem. op.); *Bell*, 832 S.W.2d at 754. Accordingly, we cannot conclude that the Assignments retroactively conferred jurisdiction on SWAPA in this suit.

SWAPA argues that even without the Assignments, it meets the statutory requirements for associational standing. *See* TEX. BUS. ORGS. CODE ANN. § 252.007(b). Boeing disagrees and maintains that SWAPA cannot assert members' claims because the participation of each individual member is necessary to determine both liability and damages.

When, as here, the legislature has conferred standing through statute, judge- made criteria regarding standing do not apply and "the analysis is a straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing." *Texas Ass'n of Bus. v. City of Austin,* 565 S.W.3d 425, 433 (Tex. App.—Austin 2018, pet. denied). "Statutory construction presents a question of law that we determine de novo under well-established principles." *Paxton v. City of Dallas*, 509 S.W.3d 247, 256 (Tex. 2017)

(citing *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016)).

We begin, as we must, with the language of the statute by which the legislature provides associational standing for nonprofit associations. *See Texas Ass'n of Bus.*, 565 S.W.3d at 433. Section 252.007(b) of the Texas Business Organizations Code provides:

> (b) A nonprofit association may assert a claim in its name on behalf of members of the nonprofit association if:
>
> (1) one or more of the nonprofit association's members have standing to assert a claim in their own right;
>
> (2) the interests the nonprofit association seeks to protect are germane to its purposes; and
>
> (3) neither the claim asserted nor the relief requested requires the participation of a member.

TEX. BUS. ORGS. CODE ANN. § 252.007(b); *accord Tx Ass'n of Bus v. Texas Air Control Bd.*, 852 S.W.2d 440, 447, (Tex. 1993) (adopting three-part test as articulated in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)); *Wyly v. Pres. Dallas*, 165 S.W.3d 460, 463–464 (Tex. App.—Dallas 2005, no pet.).

The third prong of the associational standing test is at issue here. This prong focuses on administrative convenience, efficiency, and judicial

economy concerns. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556–57 (1996). Texas courts have recognized that determining whether claims and relief would or would not advance these "prudential concerns" is "somewhat tricky." *See Big Rock Investors Ass'n v. Big Rock Petroleum, Inc.*, 409 S.W.3d 845, 849 (Tex. App.—Fort Worth 2013, pet. denied); *City of Fredericksburg v. E. 290 Owners' Coalition*, No. 04-20-00339-CV, 2021 WL 2445621, at *3 (Tex. App.—San Antonio Jun. 16, 2021, pet. denied) (mem. op.).

The Texas Supreme Court has held that whether an association has standing to invoke the court's remedial powers on behalf of its individual members depends substantially on the nature of the relief sought. *Tex. Ass'n of Bus.*, 852 S.W.2d at 448; *Tex. Mun. League*, 209 S.W.3d at 815; *see also Hunt*, 432 U.S. at 343. If the association seeks a declaration, injunction, or some other form of prospective relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured," and the third prong of this test is satisfied. *Tex. Ass'n of Bus.*, 852 S.W.2d at 448 (holding that association satisfied third prong because it sought only prospective relief, raised only issues of law, and did not need to prove the individual circumstances of its members to obtain that relief); *see also Hunt*, 432 U.S. at 344 (recognizing that commission's claims did not require individualized proof and were thus properly resolved in a group context); *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 931–32 (Tex. App.—Austin 2010, no

pet.) (holding claims did not require participation of individual members because plaintiff sought only prospective declaratory and injunctive relief, raised only questions of law, and was not required to prove the individual circumstances of its members to obtain relief); *City of Bedford v. Apt. Ass'n of Tarrant Co.*, No. 02-16-00356-CV, 2017 WL 3429143, at *3 (Tex. App.— Fort Worth Aug. 10, 2017, pet. denied) (mem. op.) (association pleaded declaratory and injunctive relief that benefitted members and did not seek monetary damages on members' behalf); *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552, 561 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (holding homeowners' association not required to prove individual circumstances of its members because it sought declaratory relief to collectively and equally benefit injured members); *Concerned Owners of Thistle Hill Estates Phase I, LLC v. Ryan Road Mgmt., LLC*, 02-12-00483-CV, 2014 WL 1389541, at *6 (Tex. App.—Fort Worth Apr. 10, 2014, no pet.) (mem. op.) (association bringing declaratory judgment seeking recoupment of damages for itself satisfied third prong of standing test because proof of individual members' entitlement to damages not required). Under such circumstances, prudential concerns are satisfied because the court can assume that the remedy sought, if granted, will inure to the benefit of those members of the association actually injured. *Tex. Ass'n of Bus.*, 852 S.W.2d at 448; *see also Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("[I]n all cases in which we have expressly recognized standing in

associations to represent their members, the relief sought has been of this kind.").

Conversely, if an association seeks damages on behalf of its members or must otherwise prove the members' individual circumstances in order to obtain relief, participation of the individual members is required, and the third prong is not satisfied. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446–47 (organization should not be allowed to sue on behalf of its members when the members seek to recover money damages and the amount of damages varies with each member); *Burns*, 209 S.W.3d at 815; *Warth*, 422 U.S. at 515–16 (holding that association of construction firms lacked standing to sue for damages for lost profits of its members because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof").

Here, SWAPA seeks damages rather than declaratory or injunctive relief. We thus consider whether proof of such damages requires "the participation of a member" as that term has been interpreted by the courts. *See Big Rock*, 409 S.W.3d at 850.

SWAPA argues that §252.007(b)(3)'s use of the word "member" (singular) should be interpreted to mean "members" (plural) because the first reference in the statute is to "members." The "participation of a member" prong, however, does not turn on whether one or several members must participate, but rather whether the damages are

individualized and vary across members. *See Texas Ass'n of Bus.*, 852 S.W.2d at 446–47. Thus, even if we read the statutory text as SWAPA suggests, our analysis does not change.

SWAPA's petition seeks damages on its own behalf for legal fees and lost member dues. The petition, as well as the declaration of Samuel Engel, submitted by SWAPA in response to the plea, states that SWAPA also seeks damages on behalf of its members for compensation the pilots were unable to earn because of the 737 MAX grounding. According to SWAPA, these damages can be proved through objective criteria using data in SWAPA records, including payroll records, operational flight schedules, and fleet plans. The Engel declaration details this analysis.

According to Engel, the total lost compensation consists of the difference between what the pilots earned and what they would have earned with the 737 MAX in operation. Calculating damages for each individual pilot is also formulaic, with each pilot to receive his or her share of total pilot compensation.

Engel states that once the total damages are established, he could use "the W- 2 records of the entire Southwest Airlines pilot population before and during the period of MAX grounding" to calculate the share of damages that could be apportioned to each member. Engel opines that exceptions for "a small number of identifiable categories . . . such as pilots on long term disability" could be treated separately with other formulaic

calculations using SWAPA data. Engel does not require assistance from any SWAPA members to explain these formulas to the jury.

But even though a SWAPA member may not be required to testify, individualized proof will be required, and damages will vary across members. Not all of the aircraft in Southwest's fleet were grounded—only the 737 MAX. Thus, there may have been pilots who were able to continue flying or who were only marginally affected by schedule changes occasioned by the grounding. Damages for pilots who were scheduled to fly the 737 MAX would vary based on individual assignments, whether they were reassigned to other aircraft, seniority, experience, level of compensation, retirement, military reserve duty, and disability. "[T]he mere fact that the damages calculation formula may produce the same compensatory damages calculation for each of [an] association's members, is insufficient to satisfy section 257.007(b)'s third prong that 'neither the claim asserted nor the relief requested requires the participation of a member.'" *RCCC Social Members Ass'n v. Barton Creek Resort, LLC*, No. 03-18-00708-CV, 2020 WL 2990577 at *5, (Tex. App.—Austin June 3, 2020 pet. denied) (mem. op.); *see also City of Fredericksburg*, 2021 WL 2445621 at *5 (third prong of standing test not met where proof of members' individual circumstances would be required to determine damages accruing to each property).

Our sister court addressed a similar situation. *See Big Rock*, 409 S.W.3d at 851–852. In

Big Rock, BRIA, a nonprofit association comprised of investors in oil and gas drilling projects sued Big Rock Petroleum on behalf of its investors alleging that Big Rock participated in a Ponzi scheme causing financial damage to its members. *Id.* at 847. Big Rock filed a plea to the jurisdiction alleging that BRIA could not pursue its members' claims because the claims and the relief requested required participation of individual members. *Id.*

BRIA argued that individual member participation would be very minimal because a receiver could testify about the financial losses suffered by the individual members. *Id.* at 852. The court rejected this argument, holding that "[t]his is not the type of minimal participation envisioned by the third prong of the associational standing test; the evidence is not duplicative, redundant, or elicited from representative injured members." *Id.* The court further held that:

> Substituting the testimony of one person (the receiver) concerning the individual profits and losses of each of BRIA's 226 individual members is no less fact-intensive than simply permitting each individual member to provide such testimony concerning his profits or losses. This type of fact-intensive analysis, even if performed through one witness, raises the type of real and substantial concerns found to thwart a determination of associational standing under the third prong of the associational standing test.

Id.

The damage analysis is even more fact intensive in the present case. SWAPA has over nine hundred members with unique circumstances. Applying formulaic criteria to address these individual circumstances through the testimony of one witness does not alleviate the problem. Thus, this is not a case where the requested relief does not require the "participation of a member." *See* TEX. BUS. ORGS. CODE ANN. § 252.007(b). The trial court did not err in concluding that SWAPA lacked associational standing based on the petition before the court at the time of the plea.[3]

Although it filed notice of the Assignments, SWAPA did not amend its pleading or seek a pleading amendment until after the court granted Boeing's plea. SWAPA insists that even if the record did not affirmatively demonstrate jurisdiction, the court should have allowed a pleading amendment.

Amendment of pleadings is permitted if the plaintiff's pleadings do not contain sufficient facts to affirmatively demonstrate jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction. *Miranda*, 133 S.W.3d at 226. Here, however, the issue is not one of pleading sufficiency. SWAPA did not have associational standing when the suit was filed, *see Bell*, 832 S.W.2d at 754, and

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[3] The parties also argue about whether the claims asserted require individualized proof of reliance and causation. But we need not address these additional arguments. *See* TEX. R. APP. P. 47.1.

pleading additional facts describing events occurring after suit was filed would not cure this jurisdictional defect. *See Harris Cnty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). SWAPA was not entitled to replead based on its later-acquired interest. *See McMillan*, 2019 WL 1461427, at *3 (acquiring rights to claim after suit and plea filed would not cure jurisdictional defect in the pending case). Likewise, an amended pleading would not overcome the statutory barrier to establishing associational standing. *See Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 846 (Tex. 2007) (when amending pleadings would serve no legitimate purpose dismissal without affording opportunity to amend is proper). The trial court did not err in dismissing SWAPA's case without affording it the opportunity to replead.

2. After the Assignments

A plea to the jurisdiction does not challenge the merits of a claim, but simply challenges the trial court's subject matter jurisdiction without regard to the merits. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). Accordingly, a dismissal with prejudice is generally improper when the plaintiff is capable of remedying the jurisdictional defect. *Id.*[4]

[4] The dismissal of a case with prejudice operates as an adjudication on the merits as if the case had been tried and decided. *Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam).

Although there was no pleading based on the Assignments at the time of the plea, the parties argue here about the effect of the assignments, as they did in the court below. We consider these arguments in the context of whether the suit should have been dismissed with prejudice—that is, whether dismissal with prejudice was appropriate because SWAPA could never cure the current jurisdictional defects.

Boeing maintains that the Assignments are void as against public policy because they distort the litigation process and would allow SWAPA to create a *de facto* class action suit without satisfying the requirements of Rule 42. *See* TEX. R. CIV. P. 42. SWAPA argues that the Assignments in this case present no different policy considerations than any other contract case involving assignee rights. We agree with SWAPA.

Absent specific circumstances, causes of action in Texas are freely assignable. *See State Farm Fire & Cas. Co., v. Gandy*, 925 S.W.2d 696, 705–07 (Tex. 1996). When a cause of action is assigned or transferred, the assignee becomes the real party in interest with the authority to prosecute the suit to judgment. *See Tex. Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co.*, 442 S.W.2d 315, 317 (Tex. 1969).

Nonetheless, in certain limited circumstances the Texas Supreme Court has invalidated otherwise contractually valid assignments on public policy grounds when the assignment (i) tends to increase or prolong litigation unnecessarily; (ii) tends to

distort the litigation process; and (iii) is otherwise inconsistent with the purpose of a statutory cause of action. *See Sw. Bell Tel. Co.*, 308 S.W.3d at 916. Applying these guidelines, the high court has concluded that the following types of assignments are invalid because they violate public policy: (1) an assignment of a cause of action that works to collude against an insurance carrier; (2) an assignment of a legal malpractice claim; (3) an assignment that creates a Mary Carter agreement; (4) an assignment of the plaintiff's cause of action to a joint tortfeasor of the defendant; (5) an assignment of interests in an estate that distorts the true positions of the beneficiaries; and (6) an assignment of a DTPA cause of action. *See PPG Indus. Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 87 n.31 (Tex. 2004). The Assignments at issue here are not among these categories.

Expanding the categories of assignments recognized by the supreme court as contrary to public policy is beyond the province of this court, particularly when the Assignments do not implicate the general concerns the court identified as the impetus for such exceptions. *See Sw. Bell*, 308 S.W.3d at 916 (assignments have been invalidated when they increase or prolong litigation, distort the litigation process or are inconsistent with the purpose of a statutory cause of action); *see also Robinson v. Homeowners Mgmt. Enters.*, 590 S.W.3d 518, 528 n. 45 (Tex. 2019) (only the Supreme Court can abrogate or modify existing precedent).

SWAPA is not a "stranger/entrepreneur whose actions . . . distort the judicial process." *Id*. at 917–918. Indeed, as the sole collective bargaining unit for its members, SWAPA "had a preexisting relationship with the assignors that was directly related to the subject of the claims." *See id.* As the Texas Supreme Court has explained, distortion of the legal process occurs when an assignment skews the trial process, confuses or misleads the jury, promotes collusion among nominal adversaries, or misdirects damages from more culpable to less culpable defendants. *See PPG*, 146 S.W.3d at 90. No indicia of distortion is present here.

In addition, the Assignments are not inconsistent with the associational standing statute. *See* TEX. BUS. ORGS. CODE ANN. § 252.007(b). The statute addresses when an association may assert claims on behalf of its members; that is, an association's rights without an assignment. An assignment, however, involves first-party rights, not the assertion of rights on behalf of others. *See Sprint Commc'ns Co., L.P. v. APCC Servs,. Inc*., 554 U.S. 269, 290 (2008). The United States Supreme Court, considering the associational standing test codified in the Texas statute, has recognized this distinction. *See Warth,* 422 U.S. at 516. Specifically, the court held that where claims for damages *have not been assigned* to an association and when the alleged damages are not common to the entire membership nor shared to an equal degree, the association has no standing to assert members' claims. (Emphasis added). *Id.*

Moreover, TEX. BUS. ORGS. CODE ANN. § 252.004(b) provides that "a nonprofit association may be a beneficiary of a trust, contract, or will." This statutory confirmation of an association's right to receive the benefits of a contract forecloses the conclusion that an association may not be a party to an assignment. And nothing in the statute precludes suit by an association as an assignee of such assignments.

We are similarly unpersuaded by Boeing's argument that "allowing SWAPA's suit will mean that no court will assess the class actions requirements." As the supreme court has held, "nothing mandates that a plaintiff pursue a remedy through the procedures of Rule 42. It is the plaintiff who chooses to resolve a claim through the class action mechanism." *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 450 (Tex. 2007). "Class actions are permissive, not mandatory," and "constitute but one of several methods for bringing about aggregation of claims." *Sprint*, 554 U.S. at 290 (rejecting argument that circumvention of class action rule could constitute a basis for denying assignee standing). We therefore find no basis to conclude that a plaintiff electing to proceed as the assignee of claims rather than through a class action renders the assigned claims void as against public policy.

We are further guided by the precept that, in examining an agreement to determine if it is contrary to public policy, courts look to whether the agreement has a tendency to injure the public good. *See Johnson v. Structured Asset Svs., LLC*, 148

S.W.3d 711, 726 (Tex. App.—Dallas 2004, no pet.). Court review of a claim that a contract is against public policy should be applied with caution and only in cases involving dominant public interests. *Id.* Boeing has identified no such interests here.

Under these circumstances, we cannot conclude that the Assignments are void as against public policy. Although the Assignments cannot cure the jurisdictional impediments in the present case, the Assignments might confer standing on SWAPA in the future. *See BCCC*, 2020 WL 2990577, at *6; *Mcmillan*, 2019 WL 1461427, at *3. Therefore, the court erred by dismissing the case with prejudice.

C. Does SWAPA have standing to pursue its own claims?

SWAPA also sued Boeing on its own behalf, seeking damages for lost member dues and legal fees. According to SWAPA's petition, Boeing misrepresented the truth about the 737 MAX, and had SWAPA known the truth, it would have "demanded that Boeing rectify the aircraft's fatal flaws before agreeing to include the aircraft in the CBA and to provide its pilots . . . with the information and training needed to respond to the circumstances [encountered in the fatal crashes]." SWAPA contends that Boeing is liable for damages resulting from false representations concerning the 737 MAX, interference with SWAPA's contract and business relationship with Southwest Airlines, and negligence in certifying the aircraft. Boeing does not

challenge SWAPA's standing to sue on its own behalf.[5]

A nonprofit is entitled to "institute, defend, intervene, or participate in a judicial . . . proceeding in its own name. *See* TEX. BUS. ORGS. CODE ANN. § 252.007(a). The standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties to be resolved by the court. *Hickman*, 369 S.W.3d at 154–55. These requirements are met, and SWAPA's petition alleges facts that affirmatively demonstrate the court's jurisdiction to hear SWAPA's claims. *See Texas Ass'n of Bus*., 852 S.W.2d at 446. Therefore, the trial court erred by granting the plea and dismissing the claims SWAPA asserted on its own behalf.

D. Does the RLA preempt SWAPA's state law tort claims?

Boeing argues that SWAPA's claims are preempted by the RLA because resolving SWAPA's claims will require interpretation of the current and former CBAs between Southwest and its pilots.[6]

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[5] Instead, Boeing argues that SWAPA's claims are preempted

[6] This case involves defensive RLA preemption rather than "complete preemption." Complete preemption is a federal removal doctrine relating to whether a case may be removed from state to federal court because it is considered a federal claim arising under federal law from its inception. *Caterpillar v. Williams*, 482 U.S. 386, 393 (1987). The federal court's remand was premised on the conclusion that there is no complete preemption here.

SWAPA argues that its claims are not preempted because the plain terms of the RLA limit its mandatory arbitration provisions to disputes between carriers and their employees. SWAPA further argues that if the RLA applies, SWAPA's references to the CBAs do not require interpretation of the agreements, and the state law tort claims are not conducive to adjustment board resolution.

The origins of the statute shape our analysis. "[R]elations between railroads and their workers have often been stormy." *Burlington N. & Santa Fe Ry. Co. v. Bhd. of Maint. of Way Emps.*, 143 F. Supp. 2d 672, 678 (N.D. Tex. 2001). As other courts have noted, "the origins of this matter (as well as many other disputes) can probably be traced back prior to 1894, when Eugene V. Debs led members of the American Railway Union in a turbulent strike against the Pullman Palace Car Company of Illinois." *Id.* (quoting *Alton & S. Ry. Co. v. Bhd. of Maint. of Way Emps.*, 883 F. Supp. 755, 756 (D.D.C. 1995)).

Accordingly, the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes'" in order to "safeguard the vital interests of the country" in uninterrupted rail service. *Texas & N. O. R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930); *see also* 45 U.S.C. § 151a. The RLA was later extended to include the air transportation industry. *See Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 685–89 (1963); 45 U.S.C. §§ 181–88.

The purpose of the RLA is "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *see also Brown v. Illinois Central R.R. Co.*, 254 F.3d 654, 658 (7th Cir. 2001); *Russell v. Nat'l Mediation Bd.*, 714 F.2d 1332, 1342 (5th Cir. 1983) (purpose is to make and maintain agreements between carriers and employees concerning working conditions, rules, and rates of pay to avoid disruption of commerce). Accordingly, at the "heart of the [RLA]," is the "duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . between the carrier and the employees thereof." *Atlanta & W. Point Ry. Co. v. United Transp. Union*, 439 F.2d 73, 77 (5th Cir. 1971); 45 U.S.C. § 152.

To that end, the RLA sets out a mandatory and "virtually endless" process of "negotiation, mediation, voluntary arbitration, and conciliation." *Burlington N. R.R. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 444 (1987). Specifically, the RLA establishes mandatory processes for two separate classes of disputes: major disputes and minor disputes. *Norris*, 512 U.S. at 252–253.[7] The statute grants federal courts jurisdiction to resolve major disputes, while minor disputes must be submitted to

[7] Although the terms "major dispute" and "minor dispute" are not found in the statute, RLA jurisprudence has adopted these phrases as terms of art. *Bhd. Of Locomotive Eng'rs & Trainmen v. Union Pacific R.R. Co.*, 879 F.3d 754, 757 (7th Cir. 2017).

arbitration. *Am. Train Dispatchers Ass'n v. Nat'l Ry. Labor Conference*, 525 F.Supp.3d 107, 111 (D.D.C. 2021) (citing *Ass'n of Flight Attendants, AFL-CIO v. United Airlines, Inc.*, 71 F.3d 915, 917 (D.C. Cir. 1995); *Cons. Rail Corp. v. Railway Executives Ass'n*, 491 U.S. 299, 302–03 (1989)).

A major dispute concerns "rates of pay, rules or working conditions" involved in the formation or modification of collective bargaining agreements. *Id.*; *see also Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945) (stating that a major dispute arises where there either is no CBA or where changes to an existing CBA are sought; major disputes "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."). On the other hand, minor disputes grow out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions when there is an existing collective bargaining agreement. *Norris*, 512 U.S. at 252–253. "Major disputes seek to create contractual rights, minor disputes to enforce them." *Id.* at 253. "All minor disputes must be adjudicated under RLA mechanisms, which include an employer's internal dispute-resolution procedures and an adjustment board established by the unions and the employer." *Brown*, 254 F.3d at 658.

Whether federal law preempts state law is a question of Congressional intent *Norris*, 512 U.S. at 252–253; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (Congressional intent is "ultimate touchstone" in preemption analysis). In determining

Congressional intent, a court must "begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1982).; *see also Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1907 (2019) (plurality op.) (evidence of congressional intent in the text and structure of the statute).

A seminal preemption case, *Lucas v. Flour Co.*, 369 U.S. 95, 103–104 (1962), explains the rationale for labor dispute preemption. In *Lucas*, the court held that federal labor law must be paramount under the supremacy clause in areas covered by federal statute to avoid inconsistent state law interpretations of collective bargaining agreements.[8] *Id*. Guided by the rationale for preemption and the purpose of the statute, we examine the language of the statute to assess its application in this case.

As relevant here, the authority of an adjustment board includes "disputes between carriers by air and its or their employees." 45 U.S.C. §§ 184, 185. The statute defines a "carrier" to include

> any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of Title 49 . . . .

[8] *Lucas* was decided under the labor Management Relations Act, 29 U.S.C. §185 ("LRMA"). *See id. Norris* instructs that the RLA preemption standard is identical that applied in LMRA cases. *See Norris*, 512 U.S. at 260.

45 U.S.C. §151 (First).

The statute further provides that:

> All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every *common carrier by air* engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. §181 (emphasis added).

The statute does not define the term "common carrier by air." *Thibodeaux v. Exec. Jet Int'l, Inc.*, 328 F.3d 742, 749 (5th Circ. 2003). But federal courts that have considered the issue apply a test similar to a test employed by the National Mediation Board, the agency that administers the RLA. Under this test, "the crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or a definable segment of the public as being willing to transport for hire, indiscriminately." *Id.* at 750. The "test is an objective one, relying on what the carrier actually does rather than the label the carrier attaches to its activity or the purpose which motivates it." *Id.*

(quoting *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 523 (5th Cir. 1993)); *see also Riegelsberger v. Air Evac. EMS, Inc.*, 369 F.Supp.3d 901, 906 (E.D. Mo. 2019).

The petition alleges that Boeing manufactures and sells 737 aircraft, and Boeing does not dispute these allegations. There is nothing in the record to suggest that Boeing holds itself out as being willing to transport for hire. Moreover, there is no indication that Boeing has been licensed as a common carrier. *See Med-Trans. Corp. v. Benton*, 581 F.Supp.2d 721, 733 (E.D.N.C. 2008) (that an entity is licensed by the government as a common carrier supports that it is a common law common carrier). Boeing makes and sells aircraft; it does not operate the aircraft commercially for hire. Under these circumstances, there is no basis to conclude that Boeing is a "common carrier by air."

Even when an employer is not a "common carrier by air," the RLA may still apply if the employer is sufficiently controlled by a carrier.[9] *See e.g., Frisby v. Sky Chefs, Inc.*, No. 19C7989, 2020 WL 4437805, at *4 (N.D. Ill. Aug. 3, 2020) (mem. op.)

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[9] The test applied to determine such control is referred to as the "function and control test," and asks

(1) whether the nature of the work is that traditionally performed by employees of rail or air carriers," and

(2) "whether the employer is actively or indirectly owned or controlled by or under common control with a carrier or carriers." *See Allied Aviation Serv. Co. of N.J. v. NLRB*, 854 F.3d 55, 61 (D.C. Cir. 2017).

(catering company owned by air carrier subject to RLA). Nothing in the record supports or even suggests that Boeing is controlled by an air carrier, so we do not consider this expanded application of the statute.

In addition, SWAPA is not an employee as defined by the statute. The RLA applies to disputes between an air carrier and its employees. 45 U.S.C. §184; *In re Continental Airlines*, 484 F.3d 173, 183 (3rd Cir. 2007). An "employee" includes:

> [E]very person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official . . . .

45 U.S.C §151 (Fifth). We have concluded that Boeing is not a carrier. And it is undisputed that neither SWAPA nor its member pilots perform employment- related work for Boeing or are otherwise in its service. SWAPA is not an employee.

The parties vehemently disagree about whether this dispute requires interpretation and application of the CBAs. *See Norris*, 512 U.S. at 252 (discussing state law claim based on interpretation of a CBA); *Adames v. Executive Airlines, Inc.*, 258 F.3d 7, 11 (1st Cir. 2001) (if state law claim plausibly depends on one or more provisions within the collective bargaining agreement, federal law preempts the claim); *Careflite v. Office and Prof'l Employees Int'l Union*, 612 F.3d 314, 320– 22 (5th

Cir. 2010) (the assertion of any right that is not created by a CBA is not subject to binding arbitration under the statute). But this aspect of the inquiry presupposes that the parties involved are those to whom the statute applies.

Significantly, most of the cited cases considering whether state law claims are preempted because interpretation of a CBA is required involve disputes between a carrier by air and its employees. *See, e.g.*, *Gore v. Transworld Airlines*, 210 F.3d 944, 949 (8th Cir. 2000) (state claims preempted in suit between carrier and employees); *Sullivan v. American Airlines*, 424 F.3d 267, 273 (2d Cir. 2005) (considering preemption in employee action against carrier); *Wilburn v. Missouri- Kansas-Texas R. Co.*, 268 S.W.2d 726, 730 (Tex. App.—Dallas 1954, no writ) (noting exclusive jurisdiction of adjustment board over CBA in wrongful discharge suit between employee and railroad); *Adames*, 258 F.3d at 11 (in suit by employees against airline, holding that federal law preempts state law claims that plausibly depend on one or more sections of a CBA).

Nonetheless, Boeing categorically states that RLA preemption means that "no court (state or federal) can address the merits of a case requiring the interpretation of a CBA." To the extent that some authority outside this jurisdiction can be read to suggest that RLA preemption is triggered anytime a CBA is referenced—even when the dispute does not involve a carrier and its employees—we are not persuaded. Simply considering whether a state law claim is dependent upon interpretation or

application of a CBA in isolation fails to frame the inquiry in the appropriate statutory context. In other words, a conclusion that a claim is preempted must necessarily be predicated on a threshold determination that the RLA applies to the dispute. *See Norris*, 512 U.S. at 266 (noting that prior decision said nothing about the threshold question of whether the dispute was subject to the RLA in the first place.).

Moreover, even in those cases lacking discussion of the threshold determination that the RLA applies, use of the phrase "interpretation or application of a CBA" is significant. This talismanic language has its origin in the RLA's mandatory arbitral mechanism for "minor disputes," which "grow out of grievances or out of the interpretation and application of agreements concerning pay rates, rules, or working conditions." *See* 45 U.S.C. §184. Therefore, it is reasonable to conclude that determination of whether a state law is preempted because the dispute turns on the interpretation or application of a CBA is only appropriately undertaken in the context of a "minor dispute" under the RLA. *See, e.g., Norris*, 512 U.S. at 246 (discussing preemption of state law claim in the context of minor disputes, which are those grounded in a CBA).

The RLA vests the adjustment board with exclusive jurisdiction over minor disputes. *Brown v. Am. Airlines, Inc.*, 593 F.2d 652, 654 (5th Cir. 1979). A determination that a worker's complaint is a minor dispute preempts a private cause of action. *Id.* The RLA is clear, however, that "minor disputes,"

(and the adjustment board's authority over such suits) are limited to disputes concerning a CBA that arise between a carrier by air and its employees.

Minor disputes are based on §152 Sixth and §153. Section 152 Sixth refers to:

> A dispute between a carrier or carriers and its or their employees arising *out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions* . . . .

45 U.S.C. §152 Sixth (Emphasis added). Section 153 includes identical verbiage.

See 45 U.S.C. §153.

Section 184, requiring arbitration before the adjustment board, similarly refers to

> disputes between an employee or group of employees and a carrier or carriers by air *growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions* . . . .

45 U.S.C. § 184 (Emphasis added).

The statutory text makes clear that the RLA does not apply to this case. This case does not involve a dispute between a carrier by air and its employee(s). *See* 45 U.S.C. §181. Likewise, it is not a "minor dispute" to which the mandatory arbitral

provisions of the RLA apply. *See* 45 U.S.C. §§ 152 Sixth, 153. Rather, it is a suit involving state law tort claims asserted by a labor organization against an aircraft manufacturer. Such a suit does not implicate the statutory purpose of facilitating stability in labor-management relations, nor does it have the potential to affect national commerce. Absent support from the statutory text or other controlling authority, we cannot conclude that the state law claims between the parties here are within the purview of the RLA. Accordingly, the claims are not preempted. To conclude otherwise would judicially legislate expansion of the RLA far beyond the purpose Congress sought to advance. This we decline to do.

III. CONCLUSION

We reverse the trial court's order granting Boeing's plea to the jurisdiction on the claims SWAPA asserted on its own behalf. We modify the trial court's order to reflect that the claims SWAPA asserts on behalf of its members are dismissed without prejudice. As modified, the remainder of the trial court's order is affirmed.

/Dennis Garcia/
DENNIS GARCIA
JUSTICE

201067F.P05

DISTRICT COURT OF TEXAS
160th JUDICIAL DISTRICT
DALLAS COUNTY

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) on behalf of itself and its members,

Plaintiff,

v.

THE BOEING COMPANY, Defendant.

No. DC-19-16290.
November 6, 2020.

Order on Plea to the Jurisdiction

Aiesha Redmond, Judge.

On ~~this day~~ the 23rd day of October, 2020 came to be heard, Defendant The Boeing Company's Plea to the Jurisdiction ("Plea to the Jurisdiction"). The Court, having considered Defendant's Plea to the Jurisdiction, response and arguments of counsel, finds that it should be **GRANTED.**

It is therefore ordered, adjudged, and decreed that Defendant's Plea to the Jurisdiction is **GRANTED**, and SWAPA's claims and those asserted by SWAPA on behalf of its members are are hereby **DISMISSED** with prejudice. Costs shall be borne against the party incurring the same.

Signed on November 6th, 2020

District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Southwest Airline Pilots Association, on behalf of itself and its members,
Plaintiff,

v.

The Boeing Company,
Defendant.

Case No 3:19-cv-2680-M

ORDER

BARBARA M. G. LYNN, CHIEF JUDGE

Before the Court is the Motion to Remand (ECF No. 15), filed by Plaintiff Southwest Airlines Pilots Association ("SWAPA"). On April 14, 2020, the Court held oral argument on the Motion. For the reasons stated on the record at the hearing and below, the Motion is GRANTED, and this case is remanded to state court.

I. Background

SWAPA seeks damages on behalf of itself and its approximately 10,000 pilot members, resulting from alleged false representations and omissions by Defendant the Boeing Company regarding its 737 MAX aircraft.

Boeing announced the launch of the 737 MAX in August 2011. Southwest Airlines ("Southwest"), SWAPA's employer, flies only Boeing 737s, and was one of the first airlines to order the 737 MAX. In 2012, SWAPA's collective bargaining agreement ("CBA") with Southwest, which was executed in 2006, was reopened and actively negotiated for several years. SWAPA and Southwest could not agree to a new CBA, and, in 2016, SWAPA brought a lawsuit against Southwest. *See Sw. Airlines Pilots Ass'n v. Sw. Airlines Co.*, Case No. 3:16-cv-1346-O, 2016 WL 3098097 (N.D. Tex. 2016). SWAPA alleges that the primary dispute between SWAPA and Southwest in that case was "whether the 737 MAX was a sufficiently different aircraft from prior generations of 737 aircraft, which were enumerated in the CBA, such that SWAPA pilots were not required to operate 737 MAX aircraft[s] under the then-existing CBA." (ECF No. 1-1 ¶ 192). According to SWAPA, Southwest "claimed that it had the right to insist that SWAPA pilots operate the 737 MAX under the then-existing CBA, because it was not a distinct aircraft type but merely a variant of the already-enumerated 737." (*Id.* ¶ 185). Later in 2016, SWAPA and Southwest agreed on a new CBA, which SWAPA states included "economic advantages [that SWAPA's pilots] believed they would gain by agreeing to fly the 737 MAX." (*Id.* ¶¶ 197, 199, 202). After fatal crashes of two 737 MAX aircraft in October 2018 and March 2019, all 737 MAXs were grounded and remain so.

SWAPA alleges here that Boeing's misrepresentations and omissions regarding the 737

MAX, including withholding critical safety information, caused SWAPA to agree to include in the 2016 CBA that its pilots would fly the 737 MAX. SWAPA alleges that Boeing purposefully interfered in the CBA dispute between SWAPA and Southwest to ensure that SWAPA pilots would agree, as a term of the 2016 CBA, to operate the 737 MAX. SWAPA asserts that, in agreeing to execute the 2016 CBA, it relied on Boeing's misrepresentations that the 737 MAX was safe and more fuel efficient.

SWAPA, headquartered in Dallas, Texas, filed this action in Texas state court against Boeing, which is headquartered in Illinois and incorporated in Delaware, alleging the following six causes of action: (1) fraudulent misrepresentation, (2) negligent misrepresentation, (3) tortious interference with contractual rights and relationship, (4) tortious interference with an existing business relationship, (5) negligence, and (6) fraud by non-disclosure. SWAPA requests millions of dollars in lost compensation due to the grounding of the 737 MAX. (ECF No. 1-1 ¶ 283). SWAPA also asks for damages connected to its participation in the DOJ's investigation of the 737 MAX, including costs related to subpoenas, document production, and interviews.

On November 8, 2019, Boeing filed a timely Notice of Removal. On December 4, 2019, SWAPA filed its Motion to Remand. The Motion is ripe for review.

II. Analysis

In its Notice of Removal, Boeing argued that this Court has subject matter jurisdiction over this case

on three different grounds: (1) federal question jurisdiction under 28 U.S.C. § 1331, because SWAPA's state law claims are completely preempted by the Railway Labor Act ("RLA");[11] (2) diversity jurisdiction under the Class Action Fairness Act ("CAFA"); and (3) diversity jurisdiction under 28 U.S.C. § 1332(a). The Court will address each ground in reverse order.

A. § 1332(a) Diversity Jurisdiction

After SWAPA filed a declaration attesting to the citizenship of its members, Boeing conceded that the Court does not have diversity jurisdiction under 28 U.S.C. § 1332(a). The Court agrees that it does not have § 1332(a) diversity jurisdiction.

B. CAFA

At the hearing on this matter, the Court ruled that it does not have diversity jurisdiction under CAFA. CAFA grants district courts broad jurisdiction over

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[1] Boeing also briefly argued that this Court has federal question jurisdiction under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). In *Grable*, the Supreme Court stated that, although federal question jurisdiction typically exists because the plaintiff pleads "a cause of action created by federal law," it may also exist where the plaintiff's "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 312–14, 125 S.Ct. 2363. The Court finds that SWAPA's claims do not raise a stated federal issue, and, therefore, will not base jurisdiction on *Grable*.

two types of cases: "class actions" and "mass actions." 28 U.S.C. § 1332(d). Under CAFA, "class action" means "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure ...." § 1332(d)(1)(B). A "mass action" is defined as "any civil action ... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." § 1332(d)(11)(B)(i).

The Supreme Court has stated that, "[a]ccording to CAFA's plain text, a 'mass action' must involve monetary claims brought by 100 or more persons who propose to try those claims jointly as named plaintiffs." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 164, 134 S.Ct. 736, 187 L.Ed.2d 654 (2014) (noting that "the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest' "); *see also Thompson v. Louisiana Regional Landfill Co.*, 365 F. Supp. 3d 725 (E.D. La. 2019) (determining the court had jurisdiction under CAFA over a putative class action, but noting the case was not a mass action because there was only one named plaintiff); *Boulanger v. Devlar Energy Mktg., LLC*, 3:15-CV-3032-B, 2015 WL 7076475, at *7 (N.D. Tex. Nov. 13, 2015) (finding the "100 or more persons" requirement of a mass action under CAFA was met where the plaintiffs' petition named 111 actual parties seeking recovery).

As stated on the record at the hearing, the Court finds that this case is not a class action, nor is it a mass action, as defined by CAFA, because there is

only one named plaintiff—SWAPA. The Court therefore finds that it does not have diversity jurisdiction under CAFA.

C. Preemption

After considering the briefing, the relevant case law, and the parties' arguments at the hearing, the Court determines that the RLA does not support complete preemption, and therefore, the Court does not have federal question jurisdiction.

1. The Well-Pleaded Complaint Rule

Under 28 U.S.C. § 1441, a defendant may remove an action filed in state court to federal court if the federal court would have original subject matter jurisdiction over the action. Federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. To determine whether the claim arises under federal law, courts apply the "well-pleaded complaint rule." Under the rule, "[a] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (internal quotation and citation omitted).

2. Complete Preemption v. Ordinary Preemption

Courts have drawn a distinction between "complete preemption" and "ordinary preemption" in the context of removal. Ordinary preemption is a defense, which does not appear on the face of a well-pleaded complaint, and therefore does not provide a basis for removal. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) ("It is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption.").

In contrast, under the complete preemption doctrine, the Supreme Court has concluded that the preemptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* (internal citation omitted).

3. Preemption and the RLA

Courts agree that "[o]rdinary preemption is plainly a viable defense under the RLA: pursuant to 45 U.S.C. §§ 153 (governing railroads) and 184 (governing airlines), minor disputes must be heard in the first instance before arbitral panels, not courts, and state-law claims that are disguised minor disputes are therefore preempted by the RLA." *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 273 (2d Cir. 2005). The test for finding ordinary preemption under the RLA is the same as the test established by *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877,

100 L.Ed.2d 410 (1988), with respect to § 301 of the Labor Management Relation Act ("LMRA"). *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 262–63, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) (holding that *Lingle* "provides an appropriate framework for addressing pre-emption under the RLA" and "adopt[ing] the *Lingle* standard to resolve claims of RLA pre-emption").

In *Lingle*, the Supreme Court held that the LMRA preempts state law only if a state law claim is dependent on the interpretation of a CBA. 486 U.S. at 413, 108 S.Ct. 1877; *see also Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993) ("In *Lingle* the Court explained that the LMRA only pre-empts state law claims whose resolution turns on the meaning of a collective bargaining agreement: '[I]f the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law ... is pre-empted and federal labor law principles ... must be employed to resolve the dispute.' "). The Supreme Court has held that § 301 of the LMRA is one of the few statutes that has the requisite extraordinary preemptive force to support complete preemption. *See Avco Corp. v. Machinists*, 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968).

Courts are split on the question of whether the RLA gives rise to complete preemption. In other words, courts disagree about whether the holding in *Hawaiian Airlines* means that the analysis of the LMRA's complete preemption also applies to the RLA, or if it means that the RLA provides only

ordinary preemption. *See Sullivan*, 424 F.3d at 273–74 ("The key question, however, is whether the analogy drawn by the Court between RLA and LMRA preemption as to *ordinary* preemption also extends to *complete* preemption.") (emphasis in original).

The Second Circuit has held that the RLA does not support complete preemption. *Id.* at 273. In *Sullivan*, the Second Circuit determined that, in light of the Supreme Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003), *Hawaiian Airlines*' analogy between the RLA and LMRA does not extend to complete preemption. *Id.* at 275. In *Beneficial National Bank*, the Supreme Court stated that it had previously found complete preemption under only the LMRA and ERISA: "In the two categories of cases where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." 539 U.S. at 8, 123 S.Ct. 2058.[2] The Second Circuit reasoned that if *Hawaiian Airlines* had established that the RLA completely preempted state law causes of action within its scope, the Supreme Court in *Beneficial National Bank* would have listed the RLA as a third category of complete preemption. 424 F.3d at 275.

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[2] Later in the *Beneficial National Bank* opinion, the Court determined that the National Bank Act also gave rise to complete preemption. 539 U.S. at 10–11, 123 S.Ct. 2058.

The Second Circuit summarized the test that the *Beneficial National Bank* Court laid out to determine whether a statute gives rise to complete preemption: "removal of state-law claims based on complete preemption becomes possible not solely by virtue of the preemptive force of a substantive federal statute such as the LMRA, ERISA, or the National Bank Act, but rather because a federal statute with completely preemptive force also gives rise to original federal jurisdiction, and as a consequence allows removal under 28 U.S.C. § 1441." *Sullivan*, 424 F.3d at 276. The Second Circuit determined that because "a state-law-based RLA minor dispute cannot be brought within the original jurisdiction of the federal courts and is thus not removable under § 1441," the RLA does not give rise to complete preemption. *Id.*

The Third, Sixth, Seventh, Ninth, and Eleventh Circuits have determined the issue consistently with the Second Circuit's conclusion in *Sullivan. See Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936, 942–43 (3d Cir. 1988) (finding no complete preemption under the RLA); *Roddy v. Grand Trunk W. R. Inc.*, 395 F.3d 318, 326 (6th Cir. 2005) (same); *Hughes v. United Air Lines, Inc.*, 634 F.3d 391, 395 (7th Cir. 2011) (same); *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241 (9th Cir. 2009) (same); *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1357 (11th Cir. 2003) (same).

In contrast, the Eighth Circuit has found complete preemption under the RLA. *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1085 (8th Cir. 1989).

The Fifth Circuit has not expressly stated whether the RLA supports complete preemption. In *Kollar v. United Transportation Union*, the Fifth Circuit held that the district court did not err in failing to remand the case, because the plaintiffs' complaint "clearly requires reference to and interpretation of the CBA ...," and therefore, plaintiffs' claim "is preempted by the RLA." 83 F.3d 124, 126 (5th Cir. 1996). In reaching this conclusion, the Fifth Circuit relied on *Hawaiian Airlines*' holding that "a claim is preempted by the RLA only if it relies on the interpretation of a provision of the CBA; if the claim is brought under state law without any reference to the CBA, then it is not preempted." *Kollar*, 83 F.3d at 126 (internal citation and quotation omitted). The Fifth Circuit did not discuss, analyze, or make an express holding as to whether the RLA supports complete preemption. If it were the case that the need for the Court to interpret the CBA were definitive on the issue of complete preemption, as *Kollar* seems to suggest, this Court would sustain the removal here, because the Court believes that it would have to determine whether the 2006 CBA required SWAPA pilots to fly the 737 MAX. But at oral argument, both counsel conceded that this Court only has federal question jurisdiction if the RLA provides complete preemption:

> [JUDGE LYNN]: If I hold that I have to construe the Collective Bargaining Agreement but I find that there is not complete preemption, are you saying that a state court judge would be construing the Collective Bargaining Agreement?

> [SWAPA COUNSEL]: That is correct. The case would need to be remanded because there's no federal jurisdiction.
>
> [...]
>
> [JUDGE LYNN]: Do you agree that if I found that there was not complete preemption, that whether or not I have to construe the Collective Bargaining Agreement would be irrelevant?
>
> [BOEING COUNSEL]: Your Honor, if you find that there's not complete preemption, ... then it would -- that answers the question as to whether there would be federal question jurisdiction. I do agree with [SWAPA counsel] on that ....

(ECF No. 33, Hr'g Tr. 9:6–10:2).

In 2006, Judge Godbey determined that *Kollar* supported the conclusion that the RLA provides complete preemption. *Sw. Airlines Employees Ass'n v. Sw. Airlines Co.*, 3:05-CV-1192-N, 2006 WL 8437550, at *2 (N.D. Tex. Feb. 1, 2006) (Godbey, J.). He stated, "[b]y finding jurisdiction in *Kollar*, the Fifth Circuit necessarily implied complete preemption, even though *Kollar* did not expressly address the complete/ordinary preemption distinction." While Judge Godbey acknowledged that the *Beneficial National Bank* decision "may cast doubt" as to such a conclusion, he declined to find that *Beneficial National Bank* rose to "the level of a clear conflict [with] or implicit overruling" of *Kollar*. *Sw. Airlines Employees Ass'n*, 2006 WL 8437550, at *2–3.

This Court respectfully disagrees with Judge Godbey's conclusion, and finds that *Beneficial National Bank* overrules any implicit holding in *Kollar* that the RLA supports complete preemption. In *Beneficial National Bank*, the Supreme Court stated that it had previously found complete preemption only under the LMRA and ERISA. 539 U.S. at 8, 123 S.Ct. 2058. As the Second Circuit concluded in *Sullivan*, "[h]ad *Hawaiian Airlines* established that § 184 of the RLA, like § 301 of the LMRA, completely preempted state-law causes of action within its scope, the Court in *Beneficial National Bank* would have discussed three, not two, categories of cases involving complete preemption." *Sullivan*, 424 F.3d at 275.[3]

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[3] After Judge Godbey's decision, the Fifth Circuit addressed complete preemption of another statute in *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011). In *Elam*, the Fifth Circuit held that the district court had removal jurisdiction because the Interstate Commerce Commission Termination Act ("ICCTA") supported complete preemption. The plaintiffs in that case referenced *Sullivan* and asked the Fifth Circuit to find that the ICCTA does not support complete preemption. While the Fifth Circuit ultimately found complete preemption, it distinguished *Sullivan*, the RLA case, because it was holding that the district court would have had original jurisdiction over the plaintiffs' claims under the ICCTA. Importantly, the Court was contrasting the ICCTA with the RLA. This analysis further convinces this Court that, post-*Beneficial National Bank*, the Fifth Circuit would agree with the circuits that have found that the RLA does not support complete preemption.

Further, this Court agrees with the Second Circuit's determination that applying *Beneficial National Bank*'s test for complete preemption leads to the conclusion that the RLA does not support complete preemption, because a minor dispute under the RLA cannot be brought within the original jurisdiction of a federal court. *See* 45 U.S.C. § 184 (primary jurisdiction over RLA minor disputes exists with the adjustment boards); *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 304, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989) ("The Board (as we shall refer to any adjustment board under the RLA) has exclusive jurisdiction over minor disputes."). Thus, the Court finds that it does not have federal question jurisdiction under the complete preemption doctrine, even though the case will require interpretation of the CBA.

III. Conclusion

Because this Court does not have subject matter jurisdiction, it must remand the case to the state court. Therefore,

IT IS ORDERED that the Motion to Remand (ECF No. 15) is GRANTED. This case is REMANDED to the 160th Judicial District Court, Dallas County, Texas. SWAPA's request for costs and expenses under 28 U.S.C. § 1447(c) is DENIED, because Boeing had "an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005).

SO ORDERED.

IN THE DISTRICT COURT
160TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Cause No. DC-19-16290

SOUTHWEST AIRLINE PILOTS ASSOCIATION (SWAPA) on behalf of itself and its members,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

PLAINTIFF'S ORIGINAL PETITION

1. Plaintiff Southwest Airlines Pilots Association ("SWAPA"), on behalf of itself and its members, by and through its attorneys, for its Petition against The Boeing Company (hereinafter "Boeing" or "Defendant"), respectfully alleges as follows:

DISCOVERY CONTROL PLAN

2. Plaintiff intends that discovery be conducted under Discovery Level 3 in accordance with Texas Rule of Civil Procedure 190.4, and requests that the court enter a discovery control plan order tailored to the circumstances of this suit.

INTRODUCTION

3. This Petition seeks damages on behalf of SWAPA and almost 10,000 SWAPA pilots who have collectively lost, and are continuing to lose, millions of dollars in compensation as a result of Boeing's false representations concerning its 737 MAX aircraft-namely, that the 737 MAX aircraft was safe, airworthy, and was essentially the same as the time-tested 737 aircraft that SWAPA pilots already were flying.

4. Boeing made a calculated decision to rush a re-engined aircraft to market to secure its single-aisle market share and prioritize its bottom line. In doing so, Boeing abandoned sound design and engineering practices, withheld safety critical information from regulators and deliberately mislead its customers, pilots and the public about the true scope of design changes to the 737 MAX.

5. Boeing's misrepresentations caused SWAPA to believe that the 737 MAX aircraft was safe, and that it was to SWAPA pilots' economic advantage to agree to fly the 737 MAX aircraft for their employer, Southwest Airlines ("Southwest").

6. Those representations proved to be false. The 737 MAX now is grounded worldwide because it is unsafe, unairworthy, and contrary to Boeing's representations, distinct from the 737 family of aircraft that preceded it, which SWAPA pilots have flown for years.

7. Boeing's false representations, made directly to SWAPA, caused SWAPA to agree, despite its initial reluctance, to include the 737 MAX as a term in its collective bargaining agreement ("CBA") with Southwest. The aircraft's grounding is now

causing SWAPA pilots to lose millions of dollars each month because the 737 MAX was removed from Southwest's flight schedule, and from SWAPA pilots' paychecks as well.

8. Tragically, the economic losses sustained by SWAPA and its pilots are not the only results of Boeing's misrepresentations about the 737 MAX aircraft. Boeing's rushed certification and introduction of the 737 MAX aircraft into the hands of trusting pilots who, like SWAPA pilots, believed that Boeing carefully designed a safe and airworthy aircraft, and had disclosed all of the information needed to safely operate the aircraft, caused two fatal crashes within a five-month period: the Lion Air Flight 610 crash on October 29, 2018 that killed 189 individuals; and, the Ethiopian Airlines Flight 302 crash on March 10, 2019 that killed 154 individuals.

9. Since those tragic and preventable accidents it has become clear that Boeing's representations concerning the 737 MAX aircraft were false and that, contrary to what Boeing told SWAPA pilots prior to SWAPA agreeing to fly the 737 MAX aircraft in 2016, Boeing concealed the fact that the 737 MAX aircraft was not airworthy because, *inter alia*, it incorporated a single-point failure condition—a software/flight control logic called the Maneuvering Characteristics Augmentation System ("MCAS")—that, if fed erroneous data from a single angle-of-attack sensor, would command the aircraft nose-down and into an unrecoverable dive without pilot input or knowledge.

10. After the 737 MAX aircraft crashed for the second time within a five-month period and the

death toll attributable to Boeing's defective design of MCAS nearly doubled, the world could no longer trust Boeing's representations that the 737 MAX aircraft was safe. On March 13, 2019, the Federal Aviation Administration ("FAA") grounded the 737 MAX aircraft for an indefinite period. In light of the FAA's grounding order, Southwest, the largest operator of the 737 MAX aircraft with thirty four (34) 737 MAX aircraft in scheduled flight, and more than twenty (20) additional scheduled to be delivered and incorporated into scheduled flight by the end of 2019, has had to cancel thousands of flights, thus limiting SWAPA pilots' ability to fly and terminating the economic benefit that SWAPA believed its pilots would gain by agreeing to add the 737 MAX aircraft as a term of the pilots' CBA with Southwest in 2016, and operating the aircraft.

11. Had SWAPA known the truth about the 737 MAX aircraft in 2016, it never would have approved the inclusion of the 737 MAX aircraft as a term in its CBA, and agreed to operate the aircraft for Southwest. Worse still, had SWAPA known the truth about the 737 MAX aircraft in 2016, it would have demanded that Boeing rectify the aircraft's fatal flaws before agreeing to include the aircraft in its CBA, and to provide its pilots, and all pilots, with the necessary information and training needed to respond to the circumstances that the Lion Air Flight 610 and Ethiopian Airlines Flight 302 pilots encountered nearly three years later.

12. Boeing is liable to SWAPA for the damages it and its pilots have sustained, and continue to sustain, as the result of: Boeing's false representations concerning the 737 MAX aircraft;

Boeing's interference in SWAPA's contract and business relationship with Southwest that led to SWAPA agreeing to include the 737 MAX aircraft as a term of the CBA and to operate the aircraft; and Boeing's negligence in self-certifying an aircraft that Boeing knew would be subject to a grounding order if the truth were discovered because it did not meet—and, to this day, does not meet—federal airworthiness requirements.

PARTIES

13. Plaintiff SWAPA was at all relevant times referenced herein, and still is, a non- profit labor organization and employee association representing the pilots of Southwest. SWAPA is headquartered in Dallas, Texas. Formed in 1978, SWAPA has acted as the sole bargaining unit for pilots employed by Southwest, currently numbering nearly 10,000 pilots, and has negotiated nine CBAs that govern the pilots' employment with Southwest.

14. Upon information and belief, and at all times referenced herein, Defendant Boeing was, and still is, a corporation organized and existing under the laws of Delaware. Boeing maintains its corporate headquarters in Chicago, Illinois, and its principal places of business in Chicago, Illinois, and Washington State. Boeing is an aerospace company involved in the design, manufacture, and sale of commercial aircraft and business jets. Boeing may be served by its registered agent in Texas at Corporation Service Company, 211 East 7th Street Suite 620, Austin, Texas 78701.

JURISDICTION AND VENUE

15. The subject matter in controversy is within the jurisdictional limits of this Court pursuant to Texas Rule of Civil Procedure 47 as Plaintiff SWAPA seeks monetary relief over $1,000,000.

16. This Court has *in personam* jurisdiction over Defendant Boeing pursuant to Texas' long-arm statute Tex. Civ. Prac. & Rem. Code § 17.041 *et seq* (WEST). Boeing conducts business in the State of Texas, communicated with SWAPA in Texas and committed torts in Texas. Boeing made most of the misrepresentations at issue in this action in Texas, fraudulently concealed the information at issue in this action in Texas, and aimed its communications to Texas.

17. Venue is proper in this Judicial District pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.002 (WEST) because a substantial part of the events and omissions giving rise to the claims asserted herein took place within Dallas County. Boeing made the communications at issue in part in this County, made the misrepresentations at issue in this action in this County, and fraudulently concealed the information at issue in this action in this County.

18. At all relevant times, Defendant Boeing has conducted business within this County.

FACTUAL ALLEGATIONS

19. Plaintiff repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 18 above with the same force and effect as if

set forth herein in full.

20. At all times mentioned herein, Boeing, and each of its employees, agents, and servants named herein were operating and acting within the scope of their employment, agency and service, and Boeing was aware of, and ratified and approved the acts of and statements made by each named employee, agent or servant. Each act or statement made by each named employee, agent or servant of Boeing was done in furtherance of Boeing's interest and substantially assisted Boeing's commission and omission of the wrongful acts alleged herein.

I. THE DEVELOPMENT OF THE 737 MAX AND ITS INHERENT, UNDISCLOSED RISKS

A. The Boeing 737 MAX Aircraft is Introduced to the Public

21. Boeing has been manufacturing and selling the 737, a narrow-body single aisle aircraft, for over 60 years.

22. Boeing's main competitor in the narrow-body market is, and at all relevant times herein has been, Airbus. Airbus manufactures the A320 family of narrow-body aircraft.

23. In 2010, Airbus announced the introduction of the Airbus A320 NEO ("A320 NEO") aircraft, a new engine variant of its popular A320 aircraft, which offered greater fuel efficiency than Airbus's prior generations of A320 aircraft and Boeing's 737 Next Generation ("NG") aircraft, which was Boeing's most recent 737 iteration at the time.

24. Following Airbus's announcement,

Boeing considered but rejected the idea of introducing a new engine variant of its 737, and believed that it could wait to produce an aircraft to compete with the A320 NEO.

25. At a meeting in January 2011, Jim Albaugh, then the president of Boeing Commercial Airplanes, told Boeing employees that Boeing could wait until the end of the decade to produce a new plane from scratch rather than refit the most recent 737 NG with new engines. He further explained that the A320 NEO's use of a bigger, more fuel-efficient engine would be a "design change that will ripple through the airplane."[1]

26. Subsequently, Boeing learned that American Airlines, which was an exclusive Boeing customer for more than a decade, was considering the purchase of 200 Airbus A320 NEOs.

27. Rather than designing a new aircraft, Boeing immediately reversed course and launched its own new engine variant of the existing, widely flown and time-tested 737 NG. To make the new 737 more fuel efficient, and therefore competitive with the new A320 NEO, the 737 NG's engines were to be replaced with the larger, more fuel-efficient CFM International LEAPl-B (the "LEAPl-B") engine.[2]

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[1] David Gelles et al., *Boeing Was 'Go, Go, Go' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.htrnl.

[2] *Id.; see also* Andy Pasztor, et al., *How Boeing's 737 MAX Failed,* The Wall Street Journal, March 27, 2019, https://www.wsj.com/articles/how-boeings-737-max-failed-l1553699239; Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street

28. A former senior Boeing official stated that the company opted to mount the new LEAPl-B engines on Boeing's existing 737 NG airframe rather than an entirely new airframe because it would be "far quicker, easier and cheaper than starting from scratch, and would provide almost as much fuel savings for airlines."[3]

29. In August 2011, Boeing's Board of Directors authorized the launch of a new

iteration of 737 aircraft to compete with the A320 NEO-the "MAX" Series.

30. On August 30, 2011, Boeing announced the launch of the 737 MAX family of aircraft.[44] In its launch announcement, Boeing emphasized the 737 MAX's connection to the 737 product line's service history explaining that "[w]e call it the 737 MAX

Journal, August 16, 2019, https://www.wsj.com/articles/the-four-second-catastrophe- how-boeing-doomed-the-737-max-11565966629.

[3] David Gelles et al., *Boeing Was 'Go, Go, Go' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html; *see also How Boeing's 737 MAX Failed,* The Wall Street Journal, March 27, 2019, https://www.wsj.com/articles/how-boeings-737-max-failed-11553699239; Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street Journal, August 16, 2019, https://www.wsj.corn/articles/the-four-second-catastrophe-how-boeing- doomed-the-737-max-l1565966629.

[4] The Boeing Company, *Boeing Introduces 737 MAX With Launch of New Aircraft Family,* August 30, 2011, https://boeing.mediaroom.com/2011-08-30-Boeing-Introduces-737-MAX- With-Launch-of-New-Aircraft-Family.

because it optimizes everything we and our customers have learned about designing, building, maintaining and operating the world's best single-aisle airplane."[5]

31. In its launch announcement Boeing asserted, *inter alia,* that: [6]

a. "The 737 MAX will deliver big fuel savings that airlines will need to successfully compete in the future. Airlines will benefit from a 7 percent advantage in operating costs over future competing airplanes as a result of optimized CFM International LEAP-lB engines, more efficient structural design and lower maintenance requirements"; and

b. "Airlines will continue to benefit from maximum reliability. The 737 MAX will build upon the Next-Generation 737's highest reliability performance of any airplane in the world- 99.7 percent on-time departure rate."

32. Boeing's 737 MAX launch announcement did not disclose that as compared to the most recent 737 NG, the addition of the LEAPl-B engines would, *inter alia:*

a. Change the aircraft's center of gravity;

b. Decrease aircraft stability;

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[5] *Id.*

[6] *Id.*

c. Negatively affect flight handling characteristics to make the aircraft more susceptible to the catastrophic risk of aerodynamic stall; and

d. Create inherent safety risks.

33. When an airframe is designed, engineers consider the specifications of the engine that will be used, take that engine's weight and size into account, and determine the ideal mounting point and placement to assure that the aircraft has a stable aerodynamic center of gravity.

34. But Boeing's announcement did not mention the inherent risks created by adding the LEAPl-B engines to an existing airframe designed to accommodate smaller, less powerful engines.

35. Here, Boeing eschewed the opportunity to properly engineer the 737 MAX and instead found a way to fit the new, larger engine on an existing airframe, thereby creating inherent risks that Boeing would later attempt and fail to mitigate.

B. Boeing Marketed the 737 MAX Based on the 737 Family Legacy

36. From its inception, Boeing marketed the 737 MAX family as the newest variant of its 737 family of aircraft, specifically a new version of what was then the latest 737 model, the 737 NG.

37. Boeing's website featured a page marketing the 737 MAX entitled "The Legacy and Strength of the Boeing 737 Family," which boasted that reliability, safety, and simplicity of design had

been the hallmarks of the 737 family since its inception in 1967 and would continue with the 737 MAX.[7]

38. Boeing presented the following infographic to highlight the 737's extensive in-service history: [8]

39. In other words, Boeing was specifically marketing the 737 MAX based on the 737 family's long track-record for safety without disclosing the safety critical changes that made the MAX a fundamentally different aircraft from prior generations of the 737 family.

40. Boeing's 737 family legacy messaging appeared throughout Boeing's press releases and public statements upon which existing and potential future 737 MAX operators, as well as the public, relied.

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[7] The Boeing Company, *737 MAX Updates,* https://www.boeing.com/commercial/737max/737max-1egacy.page.

[8] *See id.*

41. For example, a November 3, 2011 Boeing press release announcing 737 MAX design changes described the MAX as a "new-engine variant" and reminded the public and potential customers and operators that "[t]he Boeing 737 is the world's most popular and reliable commercial jet transport."[9]

42. A February 12, 2012 press release discussing the final phase of 737 MAX wind tunnel testing described the MAX as "a new engine variant of the world's best-selling airplane [that] builds on the strengths of today's NEXT-Generation 737."[10]

43. An April 11, 2012 press release disclosed the changes from the 737 NG to the 737 MAX, including an extension of the tail cone; integration of the LEAPl-B engines with the wing; a new pylon and strut, nose gear extension; and flight control and system updates such as fly-by-wire spoilers and an electronic bleed air system.[11]

44. In this same statement, Boeing's 737 MAX Chief Project Engineer characterized the

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[9] The Boeing Company, *Boeing Updates 737 MAX Engine Configuration Status and Customer Commitments,* November 3, 2011, https://boeing.mediaroom.com/2011-11-03-Boeing-Updates- 737-MAX-Engine-Configuration-Status-and-Customer-Commitments.

[10] The Boeing Company, *Boeing to Begin Final Phase of737 MAX Wind Tunnel Testing,* February 12, 2012, https://hoeing.mediaroom.com/2012-02-12-Boeing-to-Begin-Final-Phase-of- 737-MAX-Wind-Tunnel-Testing.

[11] The Boeing Company, *Boeing Makes 737 MAX Design Decisions,* April 11, 2012, https://boeing.mediaroom.com/2012-04-11-Boeing-Makes-737-MAX-Design-Decisions.

allegedly limited changes to the MAX, and assured the public that "[a]ny new technology incorporated into the MAX design must offer substantial benefit to our customers with minimal risk for the team to pursue it."[12]

45. But in disclosing the minor differences, Boeing concealed that the use of LEAPl- B engines, and their placement on the airframe rendered the 737 MAX distinct from its 737 predecessors, and that the design changes advertised did not disclose the full scope of differences between the 737 NG and the 737 MAX.

46. In an October 29, 2013 press release, Boeing echoed its prior marketing efforts, stating "we are being very deliberate about any changes we make to airplane systems on the 737 MAX to make the airplane even easier to operate."[13]

47. Yet again, Boeing concealed the truth.

C. Boeing Purposefully Downplayed Changes to the 737 MAX as Compared to the 737 NG to Maximize its Profit and Ensure Speedy Certification

48. Boeing purported to ensure that the disclosed changes from the 737 NG to the 737 MAX were minor, would not drive additional costs, and

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[12] *Id.*

[13] The Boeing Company, *Boeing Continues to Improve 737 MAX Performance,* October 29, 2013, https://boeing.mediaroom.com/2013-10-29-Boeing-Continues-to-Improve-737-MAX- Performance.

would not require additional pilot training.

49. Rick Ludtke, an employee at Boeing for 19 years and an engineer who helped design the 737 MAX cockpit, explained that "[a]ny designs we created could not drive any new [pilot] training that required a simulator."[14]

50. As Ludtke described: "The company was trying to avoid costs and trying to contain the level of change. They wanted the minimum change to simplify the training differences, minimum change to reduce costs, and to get it done quickly."[15]

51. He described this difficult process, based on an existing airframe, to be "such a kludge," that he and other engineers working on the MAX wondered during the design process whether it was

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[14] David Gelles et al., *Boeing Was 'Go, Go, Go' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html; *see also* Andy Pasztor, et al., *How Boeing's 737 MAX Failed,* The Wall Street Journal, March 27, 2019, Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street Journal, August 16, 2019, https://www.wsj.com/articles/the-four-second- catastrophe-how-boeing-doomed-the-737-max-l 1565966629.

[15] David Gelles et al., *Boeing Was 'Go, Go, Go' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html; *see also* Andrew Tangel, et al. *Prosecutors, Transportation Department Scrutinize Development of Boeing's 737 MAX,* The Wall Street Journal, March 18, 2019, Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street Journal, August 16, 2019, https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing-doomed-the- 737-max-11565966629.

safe to create the 737 MAX.[16]

52. He further wondered whether the 737 MAX, with its new engine but existing airframe was "a bridge too far."[17]

53. The need to downplay the design changes made to the 737 MAX served at least two important business needs for Boeing.

54. First, Boeing was able to convince regulators and airline customers that costly and time-consuming training was not required because the 737 MAX was merely an update to the familiar 737 NG. This would make the 737 MAX more competitive relative to the Airbus A320 NEO, more profitable for Boeing and cheaper for customers to operate.

55. Indeed, according to Ludtke, Boeing agreed to rebate Southwest $1 million per 737 MAX aircraft if the FAA required simulator training for the 737 MAX that airlines themselves typically pay for when introducing new models of aircraft.[18]

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[16] Mike Baker & Dominic Gates, *Lack of Redundancies on Boeing 737 MAX System Baffles Some Involved in Developing the Jet,* The Seattle Times, March 26, 2019, https://www.seattletimes.com/business/boeing-aerospace/a-lack-of-redundancies-on-737-max- system-has-baffled-even-those-who-worked-on-the-jet/.

[17] *Id.*

[18] Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

56. With Southwest's eventual order of over 100 737 MAX aircraft, any new simulator training could have cost Boeing $100 million from Southwest alone.

57. Second, presenting the 737 MAX merely as an update to the 737 NG made it possible for Boeing to pursue an amendment to its FAA Type Certificate No. A16WE for the 737, which was issued in 1967. Applying for a new type certificate would have taken years longer than amending the original 737 type certificate, would have cost Boeing far more, and would have garnered more intense FAA scrutiny.

58. Thus, on January 27, 2012, Boeing petitioned the FAA for certification of the 737 MAX as an amendment to Type Certificate No. A16WE.[19]

59. The FAA reviewed Boeing's application in February 2012, and based on the now known to be false representations in Boeing's application - namely that the 737 MAX would be sufficiently similar to prior generations of 737 aircraft already included on the same type certificate - determined that the MAX project qualified for an amended type certificate rather than a new type certificate.

60. The FAA also determined that the 737 MAX certification could be managed by Boeing under the FAA's Organization Designation Authorization ("ODA") program, which delegates certification authority from the FAA to the manufacturer, in this

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[19] The Boeing Company, Models 737-700, -700C, -800, -900ER, -7, -8, and-9 Series Airplanes; Airplane Electronic Systems Security Protection From Unauthorized External Access. 79 Fed. Reg. 32,640 (proposed June 6, 2014).

case, Boeing.

61. From the FAA's then-mistaken point of view, and Boeing's widely disseminated point of view, the 737 MAX design "had minor changes to the 737 Next Generation design,"[20] meaning that the use of a type certificate amendment and the ODA program were appropriate given the purported similarities between the 737 NG and 737 MAX. Boeing had misrepresented to the FAA (and thereby to the public as a whole) that the 737 MAX was a variant of the prior versions of the 737 family of aircraft, including the 737 NG, when in fact it was a different aircraft altogether.

D. Boeing's Efforts to Rush the 737 MAX Launch Created Catastrophic, Undisclosed Risks

62. Boeing claims that it is "committed to being the leader in commercial aviation by offering airplanes and services that deliver superior design, efficiency and value to customers around the world."[21]

63. However, in the rush to get the 737 MAX certified and to market on a timeline that could compete with the A320 NEO, Boeing leadership placed exceptional pressure on its engineers to

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[20] *Airworthiness Certification,* https://www.faa.gov/licenses certificates/aircraft certification/airworthiness certification/.

[21] The Boeing Company, *Our Company,* https://www.boeing.com/company/.

produce a finished product quickly.

64. Several of the engineers and designers working on the 737 MAX later described the artificially accelerated pace of the MAX's development, stating that it was "was extremely compressed ... It was go, go, go."[22]

65. A former designer working on the 737 MAX's flight controls described how the design team had at times produced 16 technical drawings a week, double the normal rate. The designer understood the message from management to be: "We need something now."[23]

66. A technician who assembled wiring on the 737 MAX stated that he received sloppy blueprints in the first few months of development and was told that the instructions for the wiring would be corrected later. He disclosed that internal assembly designs for the MAX included omissions. [24]

67. This process was different from standard procedures because normally such

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[22] David Gelles et al., *Boeing Was 'Go, Go, Go' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html; *see also* Andrew Tangel, et al. *Prosecutors, Transportation Department Scrutinize Development of Boeing's 737 MAX,* The Wall Street Journal, March 18, 2019, https://www.wsj.com/articles/faas-737-max-approval-is-probed-11552868400.

[23] David Gelles et al., *Boeing Was 'Go, Go, Go' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html.

[24] *Id.*

blueprints include intricate instructions.[2525]

68. Upon information and belief, the unreasonable expectations placed on engineers and designers by Boeing's corporate business leadership created an environment ripe for mistakes, and one wherein employees were reluctant to raise concerns that could have delayed certification and production of the 737 MAX.

69. Boeing's rushed time frame and its use of the FAA's ODA program authority enabled Boeing to hide from the FAA, operators, the public, and potential customers the safety critical design changes on the 737 MAX that did not exist in prior 737 generations.

70. One of these safety critical design changes, MCAS, did not come to light until the aircraft entered passenger service, and caused the Lion Air 610 crash on October 29, 2018.

71. Other safety critical design changes may remain hidden until tested in service after potential re-certification.

E. Boeing Employed a Novel, Undisclosed Flight Control Logic to Mitigate the Catastrophic Risk of Stall

72. As set forth above, to compete with the A320 NEO, Boeing decided to add the new LEAPl-B engine to its existing 737 NG airframe.

73. Adding these larger, heavier engines triggered design and engineering changes for the aircraft, the same ripple effect that James Albaugh,

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[25] *Id.*

Boeing's then commercial airplanes chief executive, had predicted back in 2011, when criticizing Airbus' A320 NEO.

74. Unlike with Airbus' addition of a new, more fuel efficient engine on the A320 NEO, Boeing was not able to mount the new, larger LEAPl-B engines in the same location as the 737 NG engines because the airframe was too close to the ground.

75. To accommodate the new, larger engines Boeing mounted them higher up and farther forward on the wing than the existing 737 NG engines. The weight and placement of the new engines, *inter alia:*

a. Changed the 737 MAX's aerodynamic center of gravity;

b. Decreased aircraft stability;

c. Created a greater pitch-up tendency at elevated angles of attack; and

d. Negatively affected the flight handling characteristics, making the 737 MAX more susceptible to the catastrophic risk of stall.

76. When the 737 MAX is in full thrust, such as during takeoff, the aircraft nose tends to point too far upward, which creates a risk of aerodynamic stall.

77. An aerodynamic stall occurs when an aircraft experiences a sudden reduction in lift as the pilot increases the wing's angle of attack and exceeds its critical angle of attack. If not quickly corrected, a stall can lead to a loss of controlled flight and crash of the aircraft.

78. The 737 NG did not have the same risk of aerodynamic stall.

79. Boeing started to become aware of the 737 MAX's new handling characteristics, and the problems they created, in early 2012.

80. The center of gravity change and the red flags it raised were first noticed on a model 737 MAX that was the size of an eagle and was being tested in a wind tunnel.[26]

81. Boeing's Chief Test Pilot, Ray Craig, also discovered an issue with the 737 MAX's high-speed handling qualities while conducting FAA-required evasive maneuvers in a simulator.

82. In other words, Boeing knew years ago, at the infancy of 737 MAX development, that the aircraft was not going to work as intended.[27]

83. To address the issue, Boeing developed a software solution, MCAS, which is a flight control logic unique to the 737 MAX aircraft.[28]

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[26] Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

[27] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 737 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytimes.com/2019/06/01/business/boeing-737-max-crash.html.

[28] *Id.; see also* Andrew Tangel & Andy Pasztor, *Regulators Found High Risk of Emergency After First Boeing MAX Crash,* The Wall Street Journal, July 31, 2019, https://www.wsj.com/articles/regulators-found-high-risk-of-

84. According to the New York Times, Mr. Craig disliked automatic systems such as MCAS that take control from pilots and would have preferred a structural aerodynamic fix. But Craig relented because the need for such high-speed maneuvers was so rare that he believed that MCAS would rarely engage.[29]

85. The problems with Boeing's use of a software rather than structural fix became exacerbated when later, as described below, the software could not sufficiently correct for the problems the changes to the aircraft's center of gravity caused.

86. In the meantime, Boeing kept MCAS a secret.

87. Indeed, Boeing did not disclose its addition of MCAS to the 737 MAX to anyone, including existing 737 operators, those with 737 MAX aircraft on order, potential customers or the public until 2018, after the crash of Lion Air Flight

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emergency-after-first-boeing-max- crash-11564565521; Douglas MacMillan & Aaron Gregg, *Boeing's 737 Max Design Contains Fingerprints of Hundreds of Suppliers,* The Washington Post, April 5, 2019, https://www.washingtonpost.com/steps-for-disabling-firefoxs-native-adblocker/20l 8/05/2l/fb95bf4e-5d37- l l e8-b2b808a538d9dbd6 story.html?utm term=.8c5fedae8660; Anurag Kotoky & Kyunghee Park, *When Will Boeing 737 Max Fly Again and More Questions,* Bloomberg, June 16, 2019, https://www.bloomberg.com/news/articles/2019-06-17/boeing-s-grounded-737-max-the-story- so-far-quicktake.

[29] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 737 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytimes.com/2019/06/01/business/boeing-737-max-crash.html.

610.

88. With MCAS in place, the 737 MAX program forged ahead toward its design milestones:

a. Boeing began final wind tunnel testing in February 2012;

b. Boeing achieved firm concept in October 2012;

c. Boeing achieved firm configuration in July 2013;

d. Boeing initiated ground testing of the LEAPl-B engine in June 2014;

e. Boeing began engine flight testing in May 2015;

f. Boeing debuted the first assembled 737 MAX in December 2015; and

g. Boeing began the flight next testing phase in January 2016.

89. During this time, Boeing continued to market the 737 MAX as if it was but a more fuel efficient version of the 737 NG, as opposed to the different aircraft it really is, and it continued to conceal the existence of MCAS.

90. On December 8, 2015, following the assembly of the first 737 MAX aircraft, Boeing Commercial Airplanes Vice President and General Manager Keith Leverkuhn stated " ... our team is upholding an incredible legacy while taking the 737

to the next level of performance."[30]

91. After a successful first flight, Boeing's Chief Production Pilot, Ed Wilson, stated, "[t]he 737 Max just felt right in flight giving us complete confidence that this airplane will meet our customers' expectations."[31]

92. But as flight testing continued, Mr. Wilson and his co-pilot, Craig Bomben, began to notice that the 737 MAX was not handling like the 737 NG when nearing aerodynamic stalls at low air speeds.

93. Specifically, the control forces required to pull the column (yoke) back were too low and could cause the airplane to stall, and the forces required to push the column forward to increase speed and recover from a stall were too high.[32]

94. In other words, the 737 MAX did not handle like, and was dissimilar to, prior 737

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[30] The Boeing Company, *Boeing Debuts First 737 MAX 8,* December 8, 2015, https://boeing.mediaroom.com/Boeing-Debuts-First-737-MAX-8.

[31] The Boeing Company, *Boeing Completes Successful 737 MAX First Flight,* January 29, 2016, https://hoeing.mediaroom.com/2016-01-29-Boeing-Completes-Successful-737-MAX-First- Flight.

[32] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 737 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytirnes.com/2019/06/01/business/boeing-737-rnax-crash.htrnl; *see* Scott McCartney, *Inside the Effort to Fix the Troubled Boeing 737 MAX,* The Wall Street Journal, June 5, 2019, https://www.wsj.com/articles/testing-the-fix-for-the-troubled-737-max-11559772634.

generations, including the 737 NG, despite what Boeing was telling its operators, customers, potential customers, and the public, and despite what Boeing had told the FAA since 2012 in order to certify the 737 MAX as a new variant of the 737 rather than seek a new type certificate as would be required for a new aircraft.

95. The 737 MAX was more susceptible to an aerodynamic stall at low speeds than prior generations of 737s.

96. However, the technology on the older generations of 737 aircraft that enabled pilots to manually control the aircraft by pulling back on the control column was disabled in the 737 MAX when MCAS activated.

97. Notwithstanding its growing awareness of the inherent risks introduced by its design of the 737 MAX, Boeing continued to conceal this necessary safety information from everyone. For example, on July 26, 2016, Boeing presented a flight demonstration video at an Air Show in Oshkosh, Wisconsin. In connection with that demonstration, Boeing again touted the MAX's LEAPl-B engines without mentioning their unintended side-effects, stating "The 737 MAX incorporates the latest technology CFM International LEAP-lB engines ... to deliver the highest efficiency, reliability and passenger comfort in the single-aisle market."[33]

98. Meanwhile, Boeing engineers scrambled

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[33] The Boeing Company, *Boeing Debuts 737 MAX Flight Demonstration Video at Oshkosh Air Show,* July 26, 2016, https://boeing.mediaroom.com/news-releases-statements?item=129746.

to find a fix for the 737 MAX's dangerous low-speed handling characteristics.[34]

99. By March 2016, Boeing settled on a revision of the MCAS flight control logic.

100. However, Boeing chose to omit key safeguards that had previously been included in earlier iterations of MCAS used on the Boeing KC-46A Pegasus, a military tanker derivative of the Boeing 767 aircraft.[35]

101. The engineers who created MCAS for the military tanker designed the system to rely on inputs from multiple sensors and with limited power to move the tanker's nose. These deliberate checks sought to ensure that the system could not act erroneously or cause a pilot to lose control. Those familiar with the tanker's design explained that these checks were incorporated because "[y]ou don't want the solution to be worse than the initial problem."[36]

102. The 737 MAX version of MCAS abandoned the safeguards previously relied upon. As discussed below, the 737 MAX MCAS had greater control authority than its predecessor, activated

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[34] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 737 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytimes.com/2019/06/01/business/hoeing-737-max-crash.html.

[35] Alison Sider et al., *Before 737 MAX, Boeing's Flight-Control System Included Key Safeguards,* The Wall Street Journal, September 29, 2019, https://www.wsj.com/articles/before-737-rnax-boeings-flight-control-systern-included-key- safeguards-11569754800.

[36] *Id.*

repeatedly upon activation, and relied on input from just one of the plane's two sensors that measure the angle of the plane's nose.

103. While the single-sensor version of MCAS was being developed, Boeing's Chief Test Pilot, Ray Craig and other engineers urged the company to study a backup system known as synthetic airspeed.[37] The synthetic airspeed system is used on Boeing's 787 Dreamliner and draws on several data sources to measure how fast an aircraft is flying. In doing so, it can detect when an angle of attack sensors is malfunctioning and prevent other systems, such as MCAS, from relying on that faulty information.

104. Curtis Ewbank, an engineer who worked on the development of the 737 MAX explained that Boeing decided not to look into the use of a synthetic airspeed system because of its potential cost and effect on training requirements for pilots.[38]

105. Boeing's failure to implement a structural fix to the 737 MAX four years prior when the aircraft's instability was first discovered began to exacerbate the problem.

106. In its second iteration of MCAS, Boeing gave MCAS enough authority to autonomously move the aircraft tail's horizontal stabilizer to the full

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[37] Natalie Kitroeff et al., *Boeing Engineer, in Official Complaint, Cites Focus on Profit Over Safety on 737 Max,* The New York Times, October 2, 2019, https://www.nytimes.com/2019/10/02/business/boeing-737-max-crashes.html.

[38] *Id.*

nose-down limit if MCAS determined a stall may be oncoming. [39]

107. Although this fix was intended to conform the 737 MAX's handling characteristics to the 737 NG, it introduced the risk that the stabilizer would overpower the pilots' ability to counter MCAS' nose-down command with nose-up movement to stop an uncontrollable dive toward the ground. The graphic below demonstrates the problem.[40]

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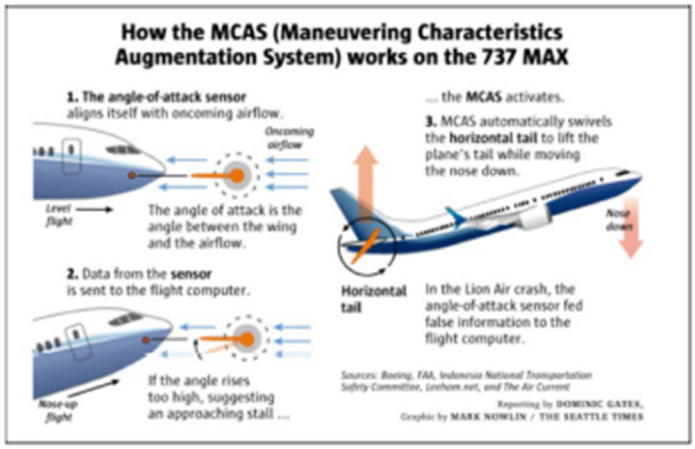
[39] Dominic Gates, *Flawed analysis, failed oversight: How Boeing, FAA certified the suspect 737 MAXflight control system,* The Seattle Times, March 17, 2019, https://www.seattletimes.com/business/boeing-aerospace/fai1ed-certification-faa-missed-safety- issues-in-the-737-max-system-implicated-in-the-lion-air-crash/; *see also* Andy Pasztor & Andrew Tangel, *Boeing's Latest 737 MAX Concern: Pilots' Physical Strength,* The Wall Street Journal, June 19, 2019, https://www.wsj.com/articles/physical-strength-of-pilots-emerges-as- issue-in-returning-737-max-to-flight-11560937879.

[40] Dominic Gates, *Flawed analysis, failed oversight: How Boeing, FAA certified the suspect 737 MAX flight control system,* The Seattle Times, March 17, 2019, https://www.seattletimes.com/business/hoeing-aerospace/failed-certification-faa-missed-safety- issues-in-the-737-max-system-implicated-in-the-lion-air-crash/.



108. Further compounding its mistakes, Boeing submitted documentation to the FAA indicating that MCAS could move the horizontal tail a maximum of 0.6 degrees, which described the first iteration of MCAS.

109. However, at the time of certification in 2017, when Boeing was presenting the aircraft that would actually be delivered to customers, MCAS actually was capable of moving the tail 2.5 degrees, more than four times the 0.6 degrees stated in the initial safety analysis provided to the FAA.

110. Because Boeing had ODA authority to self-certify this aspect of the 737 MAX, Boeing was able to conceal this change from the FAA and never updated its documentation on this point.

111. Boeing's FAA-mandated System Safety Analysis for MCAS also failed to account for how MCAS could reset itself after each time a pilot responded to its nose-down command. This means that when MCAS malfunctioned, it would not just cause a single downward movement of 2.5 degrees, but would nose-down command the aircraft 2.5

degrees lower several times in succession as the pilot tried to regain control. Without correction, two cycles of MCAS at the 2.5 degree limit could cause the aircraft to reach its maximum nose-down trim position, which could cause the pilot to lose control of the aircraft, and a crash into the ground.

112. Peter Lemme, a former Boeing flight controls engmeer, explained that smce MCAS can reset each time it is used, "it effectively has unlimited authority."[41]

113. Based on the false representation that MCAS's maximum authority was .6 degrees, Boeing's System Safety Analysis submitted to the FAA incorrectly classified the MCAS as a "major failure" risk in normal flight and a "hazardous failure" risk in the event of an extreme maneuver, such as a banked descending spiral.

114. A "major failure" indicates that the system's failure could cause physical distress to passengers, but not death. A "hazardous failure" could cause serious or fatal injuries to a small number of passengers. By contrast, a "catastrophic failure" risk, which is what MCAS really is, represents the potential for loss of the plane with multiple fatalities.

115. The fact that MCAS is a catastrophic failure risk was tragically demonstrated when both Lion Air Flight 610 and Ethiopian Airlines Flight 302 crashed, killing scores of people.

116. Yet Boeing's website, press releases, annual reports, public statements and statements to operators and customers, submissions to the FAA

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[41] *Id.*

and other civil aviation authorities, and 737 MAX flight manuals made no mention of the increased stall hazard or MCAS itself.

117. In fact, Boeing 737 Chief Technical Pilot, Mark Forkner asked the FAA to delete any mention of MCAS from the pilot manual so as to further hide its existence from the public and pilots.[42]

118. Further, Boeing did not inform the FAA that a second iteration of MCAS existed.

119. Accordingly, Boeing failed to inform the FAA that, unlike the first iteration of MCAS, which likely only would operate in the event of a rare high-speed maneuver, the second iteration would operate to prevent potential low altitude, low speed stalls, which could occur far more frequently.

120. The risk profile and required risk assessment of the second iteration of MCAS was completely different from the first, and yet Boeing neither assessed that increased risk nor even attempted to mitigate it. Instead, Boeing used its ODA authority to hide this information. [43]

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[42] Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

[43] Troy Wolverton, *Boeing reportedly kept the FAA in the dark about big changes it made to the 737 Max's.flight-control software late in its development,* Business Insider, July 27, 2019, https://www.businessinsider.com/boeing-737-max-flight-system-faa-oversight-2019-7.

121. No such system existed in the 737 NG to which Boeing had so frequently compared the 737 MAX.

122. Further, Boeing designed MCAS to rely on data from only one angle of attack sensor instead of two or more. If data from that single angle of attack sensor was wrong, it could activate MCAS and force the aircraft into a dive when one is unnecessary, and potentially at altitudes that could - and did - result in a catastrophic crash.[44]

123. The reason for using only one angle of attack sensor is obvious: using two angle of attack sensors may have created a disagree alert when one sensor was feeding false data, a problem which may have required the additional pilot training Boeing so desperately was seeking to avoid.[45]

124. The problem with using only one angle of attack sensor was compounded by the fact that the angle of attack sensor was mounted on the aircraft fuselage, just behind the nose, where it is vulnerable to damage from jetbridges, ground equipment and birds.

125. According to a review by Bloomberg,

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[44] Dominic Gates, *FAA Cautions Airlines on Maintenance of Sensors that were Key to 737 Max Crashes,* The Seattle Times, August 20, 2019, https://www.seattletimes.com/business/boeing-aerospace/faa-cautions-air1ines-on-maintenance-of-sensors-that-were-key-to-737-max-crashes/.

[45] Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution

there have been at least 140 instances over the past 30 years wherein angle of attack sensors mounted in the same area were damaged.[46] By relying on data from only one angle of attack sensor, Boeing unreasonably risked a data feed from a damaged sensor.

126. Boeing's implementation of MCAS - a new flight control logic with a single input that takes control away from the pilot, and had no in-service history to address a potentially deadly stall hazard stem - marked a profound departure from the time-tested 737 family of aircraft.

127. Notwithstanding Boeing's failure to disclose MCAS to the FAA, operators, the public, customers and potential customers or correctly describe MCAS's nose-down trim command to the FAA, the MAX was added to Boeing's FAA 737 type certificate and approved for operations on March 9, 2017.

128. Despite its knowledge concerning the 737 MAX's stall risk, and of the risks associated with the incorporation of MCAS, when Boeing announced the 737 MAX's FAA certification on the same date, it again stated that "The 737 MAX incorporates the latest technology CFM International LEAP-lB engines ... to deliver the highest efficiency, reliability and passenger comfort in the single-aisle market."[47]

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[46] Alan Levin & Ryan Beene, *Sensors Linked to Boeing 737 Crashes Vulnerable to Failure,* Bloomberg, April 10, 2019, https://www.bloomberg.com/news/articles/2019-04-11/sensors-linked-to-737-crashes-vulnerable-to-failure-data-show

[47] The Boeing Company, *Boeing 737 MAX 8 Earns FAA Certification,* March 9, 2017,

129. Boeing failed to note any of the problems associated with the addition of the new engines.

130. Specifically, Boeing failed to note, *inter alia,* the:

a. Change in the aircraft's aerodynamic center of gravity;

b. Decrease in aircraft stability;

c. Greater pitch-up tendency at elevated angles of attack;

d. Negative change in aircraft handling characteristics;

e. Increase in susceptibility to the risk of catastrophic stall; and

f. Reliance on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

131. In fact, it was so important to Boeing that the public and customers believe that the 737 MAX was the same as prior generations of 737s that Boeing provided only a two-hour iPad training course to pilots before they entered the 737 MAX cockpit for the first time.[48]

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https://boeing.mediaroom.com/2017-03-09-Boeing-737-MAX-8-Earns-FAA-Certification

[48] Natalie Kitroeff et al., *After 2 Crashes of New Boeing Jet, Pilot Training Now a Focus,* The New York Times, March 16,

132. But as the spokesperson for the American Airlines' pilots union noted after the first MCAS-caused crash noted, MCAS created a "huge difference" between the 737 MAX and prior generations of 737s.[49]

133. This was Boeing's strategy with its other customers. Brian Lesko, the Chair of the Air Safety Organization Aircraft Design/Operations Group for the Air Line Pilots Association International, another pilots union, who also is a pilot for United Airlines, repeatedly asked Boeing if there were any new major systems on the 737 MAX in connection with an article that he was writing on changes between the 737 NG and the 737 MAX. Boeing repeatedly told him that there were no maJor changes.[50] Boeing's misrepresentations and concealments of MCAS thus were repeated throughout the industry.

F. Boeing's Misrepresentations Continued After it Launched the 737 Max

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2019, https://www.nytimes.com/2019/03/16/business/boeing-max-flight-simulator-ethiopia-lion-air.html.

[49] Jack Nicas, David Gelles & James Glanz, *Changes to Flight Software on 737 Max Escaped FA.A. Scrutiny,* The New York Times, April 11, 2019, https://www.nytimes.com/2019/04/11/business/boeing-faa-mcas.html.

[50] Andy Pasztor, et al., *How Boeing's 737 MAX Failed,* The Wall Street Journal, March 27, 2019, https://www.wsj.com/articles/how-boeings-737-max-failed-11553699239.

134. After Boeing delivered the first 737 MAX in May 2017, its misrepresentations concerning the 737 MAX continued.

135. On its website, Boeing represented that "millions of dollars will be saved because of [the 737 MAX's] commonality with the Next Generation 737."[51] Boeing's website failed to mention, *inter alia,* the 737 MAX's:

a. Change in the aircraft's aerodynamic center of gravity;

b. Decrease in aircraft stability;

c. Greater pitch-up tendency at elevated angles of attack;

d. Negative change in handling characteristics;

e. Increase in susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

136. None of these problems existed on prior 737 generation aircraft.

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[51] The Boeing Company, *737 MAX By Design,* https://www.boeing.com/commercial/737max/by-design/#/operational-commonality.

II. BOEING'S SPECIFIC RELATIONSHIP WITH, AND REPRESENTATIONS TO, SOUTHWEST AND SWAPA

A. SWAPA and its Relationship with Southwest

137. SWAPA is a non-profit employee association authorized under federal law to represent the approximately 9,900 Southwest pilots members.

138. Formed in 1978, part of SWAPA's mission is "to provide a secure and rewarding career for [Southwest] pilots and their families by equitably enhancing compensation and quality of life issues through contract negotiations, faithfully defending individual and collective contractual rights via administration and enforcement procedures, and actively promoting professionalism and safety through effective organizational communications."

139. In its representative capacity, SWAPA has entered into nine CBAs with Southwest, which govern the terms of SWAPA pilots' employment. The CBA between SWAPA and Southwest sets forth, among other things, the list of approved aircraft that the pilots agree to fly.

140. SWAPA has represented Southwest's pilots for over 40 years, and its existence, as well as its CBAs with Southwest, are known to Boeing, and are common knowledge in the aviation industry.

B. SWAPA's Reliance on Boeing's Public Representations Regarding the 737 MAX

141. Southwest flies only Boeing 737 aircraft.[52]

142. In 2011, almost all of Southwest's fleet was 737 NGs or 737 "Classics," the generation that preceded the NG.

143. SWAPA learned of Southwest's intent to revitalize its 737 fleet with 737 MAX aircraft in late 2011.

144. Boeing announced that Southwest would be a 737 MAX launch customer and had placed an order for 150 737 MAX aircraft.[53]

145. Southwest was the first airline to place a firm 737 MAX order.[54]

146. From that point forward, SWAPA followed Boeing's public statements regarding the development, design and certification of the 737 MAX.

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[52] The Economist, *The Secrets of Southwest's Continued Success,* June 18, 2012, https://www.economist.com/gulliver/2012/06/18/the-secrets-of-southwests-continued-success; *see also* Southwest Airlines Newsroom, https://www.swamedia.com/pages/corporate-fact-sheet#fleet.

[53] The Boeing Company, *Boeing 737 MAX Logs First Firm Order from Launch Customer Southwest Airlines,* December 13, 2011, https://boeing.mediaroom.com/2011-12-13-Boeing-737-MAX-Logs-First-Finn-Order-from-Launch-Customer-Southwest-Airlines.

[54] *Id.*

147. As described above, those statements consistently:

a. Emphasized the 737 MAX's connection to the 737 family of aircraft;

b. Touted its increased efficiency;

c. Articulated only limited design changes;

d. Made no mention of the aerodynamic changes associated with the addition of larger, more powerful engines; and

e. Failed to disclose the existence or implementation of MCAS.

148. Boeing's public statements thus failed to disclose the aircraft's:

a. Decrease in aircraft stability;

b. Greater pitch-up tendency at elevated angles of attack;

c. Negative change in handling characteristics;

d. Increase in susceptibility to the risk of catastrophic stall; and

e. Reliance on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

149. Boeing's misleading messaging also informed Southwest's statements to SWAPA, Southwest pilots and to the public regarding the 737 MAX.[55]

150. As an example, Southwest presented the below slide when discussing the benefits of the 737 MAX at the March 8, 2016 J.P. Morgan Aviation, Transportation and Industrials Conference.

151. SWAPA responded to the above statement by acknowledging the stated 737 MAX benefits and raising the issue that Southwest's fleet modernization required re-negotiating the terms of the then-existing CBA.

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[55] *See, e.g.*, Southwest 2011 Form 10-K, https://www.sec.gov/Archives/edgar/data/92380/000119312512049647/d293991dl 0k.htm.

C. SWAPA's Role With Boeing in the 737 MAX Development

152. As a launch customer, Southwest, and by extension SWAPA pilots participating in Southwest's 737 MAX Development Committee, played an important role in evaluating the training procedures and manuals that Boeing was developing for the 737 MAX before it was put into service.

153. As Mr. Albaugh explained in a December 13, 2011 press release, "Southwest is a special Boeing customer and has been a true partner in the evolution of the 737."[56]

154. Boeing consistently noted that Southwest would be its launch customer and also consistently noted that (with what we now know was its improperly compressed timeframe) it was on track to deliver the first 737 MAX to Southwest in the third quarter of 2017.

155. For example, at the Paris Airshow in June 2013, Boeing announced that it had accelerated the delivery of Southwest's first 737 MAX from the fourth quarter 2017 to the third quarter 2017.[57]

156. Boeing repeated that it was on track for a Q3 2017 delivery of the 737 MAX to Southwest in

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[56] The Boeing Company, *Boeing 737 MAX Logs First Firm Order from Launch Customer Southwest Airlines,* December 13, 2011, https://boeing.mediaroom.com/2011-12-13-Boeing-737-MAX-Logs-First-Firm-Order-from-Launch-Customer-Southwest-Airlines.

[57] The Boeing Company, *Boeing Accelerates First Delivery of 737 MAX,* June 19, 2013, https://boeing.mediaroom.com/2013-06-19-Boeing-Accelerates-First-Delivery-of-737-MAX.

May 2014,[58] July 2014,[59] September 2015,[60] December 2015,[61] in its January 2016 annual report for 2015,[62] its January 2017 annual report for 2016,[63] and again in March 2017.[64]

157. In the course of these communications

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[58] The Boeing Company, *Boeing 737 MAX Surpasses 2,000 Orders,* May 20, 2014, https://boeing.mediaroom.com/2014-05-20-Boeing-737-MAX-Surpasses-2-000-Orders.

[59] The Boeing Company, *Boeing Selects Supplier for 737 MAX Full-Flight Simulator,* July 11, 2014, https://boeing.mediaroom.com/2014-07-11-Boeing-Selects-Supplier-for-737-MAX-Full- Flight-Simulator.

[60] The Boeing Company, *Boeing Begins Final Assembly of First 727 MAX,* September 15, 2015, https://boeing.mediaroom.com/news-releases-statements?item=129519.

[61] The Boeing Company, *Boeing Debuts First 737 MAX 8,* December 8, 2015, https://boeing.mediaroom.com/Boeing-Debuts-First-737-MAX-8.

[62] The Boeing Company, Launching Our Second Century The Boeing Company 2015 Annual Report 3 (2015) http://s2.q4cdn.com/66l 678649/files/doc financials/annual/2015/2015-Annual- Report.pdf

[63] The Boeing Company, Creating Breakthroughs, Expanding Opportunities, The Boeing Company 2016 Annual Report 4 (2016) http://s2.q4cdn.com/661678649/files/docfinancials/annual/2016/2016-Annual-Report.pdf.

[64] The Boeing Company, *Boeing 737 MAX 8 Earns FAA Certification,* March 9, 2017, https://boeing.mediaroom.com/2017-03-09-Boeing-737-MAX-8-Earns-FAA-Certification.

concerning the Southwest delivery, Boeing failed to disclose to Southwest and SWAPA the 737 MAX's rushed delivery schedule had left the aircraft with a:

a. Decrease in aircraft stability;

b. Greater pitch-up tendency at elevated angles of attack;

c. Negative change in handling characteristics;

d. Increase in susceptibility to the risk of catastrophic stall; and

e. Reliance on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

158. Further, in the course of Boeing's partnership and collaboration with SWAPA and Southwest, which took place along the same timeline, Boeing made direct misrepresentations concerning the 737 MAX to Southwest and SWAPA.

159. Although the differences between the 737 MAX and the 737 NG were discussed when SWAPA pilots participated in Boeing-organized 737 MAX testing and development events, Boeing actively concealed the true differences between the aircraft, including MCAS and its effects, from SWAPA.

160. From 2014 through 2015, Boeing worked with Southwest's training curriculum

developers, including SWAPA pilots, to establish a training program for the 737 MAX.

161. During these meetings, Boeing provided Southwest with its draft Flight Crew Operations Manual for the 737 MAX to serve as a basis for the training program in development.

162. SWAPA Committee members provided input throughout the process and attended meetings with Southwest and Boeing in the fall of 2014, and later, during which the 737 MAX performance, operation and systems were discussed.

163. Although the need for training to handle MCAS was or should have been obvious to Boeing, Boeing never discussed or even revealed the existence of MCAS during its meetings with Southwest and SWAPA. Rather, during this time, Boeing continued its pattern of misrepresenting the similarities between the 737 NG and the 737 MAX and misrepresenting and concealing the differences and design shortcuts that Boeing was taking to avoid a lengthy certification process.

164. In the midst of SWAPA's contractual dispute with Southwest about 737 MAX in 2016 (discussed in greater detail below), Boeing made a concerted effort to persuade SWAPA pilots to agree to fly the 737 MAX.

165. In July 2016, Boeing's 737 Chief Technical Pilot, Mark Forkner, invited Southwest and SWAPA pilots to participate in 737 MAX differences training and validation exercises.

166. Boeing 737 Technical Pilot, Patrick Gustavsson, Boeing 737 Procedures Coordinator, Ross Chamberlain, and approximately 50 Southwest and SWAPA pilots participated in the exercises

including SWAPA Safety Committee Chairman, David Eiser, and SWAPA Training and Standards Committee member, Greg Bowen.

167. David Eiser was invited to evaluate the 737 MAX pilot differences training, consisting of a two-hour computer-based course that Boeing was developing. Boeing's differences training did not include instructions on MCAS and at no point during Boeing's presentation did Boeing disclose the existence of MCAS or its associated risks. In fact, based on Boeing's representations, Captain Eiser reported back to SWAPA members that the 737 MAX handled similarly to the 737 NG.

168. As before, Boeing continued its pattern of misrepresenting and concealing the similarities and differences between the 737 NG and the 737 MAX.

169. Around September 23-27, 2016, Boeing ferried a 737 MAX to Dallas's Love Field, and Southwest employees, including SWAPA pilots, were given the opportunity to tour and learn about the aircraft.

170. Boeing Vice-President and General Manager of 737 Programs, Keith Leverkuhn, was on hand and provided comments to the media.[65]

171. In Leverkuhn's words: "We're gonna be putting this aircraft through its paces just as if an airline were gonna be operating it. We are going to be taking it to the airplane ports they fly into. We are going to be turning the airplane like they would if they were carrymg passengers we are going to be

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[65] *See* https://www.youtube.com/watch?v=l9bDH-gb9m4.

using the equipment they do at their airports."[66]

172. He further stated: "There have been times when the reliability of an aircraft going into service has not been what the airline has expected. Our mission here is to make sure that there are no surprises, no secrets. And that we know exactly how this airplane is going to operate."

173. Moreover, Southwest itself was so convinced by Boeing that the 737 MAX was so similar to the 737 NG that its Director of Compliance & Operations instructed SWAPA to call the 737 MAX the 737-8 because it allegedly was just another variant of the rest of Southwest's 737s, without enough of a difference to distinguish between the MAX and any other 737.

174. In short, Boeing had wrongfully persuaded SWAPA and Southwest that the 737 MAX was just another 737. That was not the case.

175. Despite Boeing's representations that: (1) the 737 MAX had no surprises; (2) that SWAPA pilots would know exactly how the MAX would operate; (3) the 737 MAX was the latest iteration of the time-tested, well-known 737 that SWAPA was then piloting; and (4) operating the 737 MAX required no additional training; Boeing was actively misrepresenting and concealing key differences, including MCAS, that made the 737 MAX distinct from its 737 predecessors.

176. Indeed, Boeing's public statements reinforced the misrepresentations that Boeing made to SWAPA in each of the foregoing specific encounters.

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[66] *Id.*

177. Accordingly, SWAPA pilots believed Boeing's 737 MAX representations, and were unaware of the significant safety and grounding risks introduced by Boeing's design choices, and Boeing's dire need to adhere to a compressed development and certification schedule.

178. The SWAPA pilots to whom these representations were made relayed Boeing's claims to the negotiating team and other relevant portions of SWAPA's membership. Further, because Boeing omitted key information from its discussions with a subset of SWAPA pilots, such omissions filtered down to the membership and their decisions. Boeing knew or should have known that its representations would filter down to the SWAPA membership and affect their decisions.

D. Boeing's Interference in SWAPA's Collective Bargaining Agreement

179. SWAPA has successfully negotiated nine labor contracts or CBAs on behalf of Southwest pilots, including the most recent contract in November 2016, in which SWAPA ultimately agreed to operate the 737 MAX.

180. When Southwest's 2011 firm order of 737 MAX aircraft was announced, Southwest and SWAPA were parties to a CBA negotiated for the period September 1, 2006 – August 31, 2012.

181. Under federal law, pilot contracts do not expire, but rather become amendable on a certain date.

182. In this case, as Boeing was aware, the CBA was reopened in 2012 and actively negotiated without resolution for several years.

183. Southwest's and SWAPA's inability to reach a consensus on the CBA came to a head in 2016 when Boeing advanced Southwest's 737 MAX delivery date, and Southwest asserted that SWAPA's pilots had to fly the 737 MAX under the terms of the then-current CBA.

184. SWAPA sought assurance that Southwest would continue to operate under the "status quo," as required by federal law, which, in SWAPA's opinion, precluded Southwest's ability to force SWAPA pilots to fly the 737 MAX because the 737 MAX was not enumerated in the then-existing CBA list of aircraft types.

185. Based on Boeing's systematic marketing of the 737 MAX as an extension of the 737 family of aircraft with minimal design changes, Southwest claimed that it had the right to insist that SWAPA pilots operate the 737 MAX under the then-existing CBA because it was not a distinct aircraft type but merely a variant of the already-enumerated 737.

186. The dispute played out publicly and over social media as seen below.

187. As the dispute intensified, approximately 800 SWAPA pilots picketed Southwest's 2016 shareholder meeting to make clear that they would not fly the 737 MAX without mutual agreement on the CBA as seen below.[67]

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[67] Conor Shine, *Southwest Airlines bumps dividend and share buyback while union pickets over contracts,* The Dallas Morning News, May 18, 2016, https://www.dallasnews.com/business/airlines/2016/05/18/southwest-airlines-bumps-dividend-and-share-buyback-while-unions-picket-over-contracts/.

188. Boeing was aware of the dispute and the parties' differing positions concerning whether the 737 MAX was distinct from other 737s.[68]

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[68] Gregolry Polek, *Boeing, Southwest, Engage in 737 MAX Trials,* AINonline, September 26, 2016, https://www.ainonline.com/aviation-news/air-trnnsport/2016-09-26/boeing-southwest- engage-737-max-trials.

189. Upon information and belief, there would have been catastrophic consequences to Boeing if Southwest, its launch customer, could not deploy the 737 MAX because of a labor dispute.

190. SWAPA and Southwest's CBA dispute continued as delivery of Southwest's 737 MAX approached.

191. SWAPA then filed a lawsuit in May 2016 seeking declaratory judgment. [69]

192. As can be discerned from the 2016 SWAPA complaint, the primary dispute between SWAPA and Southwest was whether the 737 MAX was a sufficiently different aircraft from prior generations of 737 aircraft, which were enumerated in the CBA, such that SWAPA pilots were not required to operate 737 MAX aircraft under the then-existing CBA.[70]

193. Consistent with its prior position, SWAPA contended in its complaint that the 737 MAX was distinct from prior generations of 737 aircraft that SWAPA pilots were flying at that time, and which were addressed by the then-existing CBA.[71]

194. As discussed above, shortly after SWAPA filed its complaint, Boeing invited 50 Southwest and SWAPA pilots, including David Eiser and Greg Bowen, to participate in 737 MAX training validation exercises and to evaluate Boeing's

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[69] Plaintiffs' First Amended Complaint for Damages and Jury Demand, Case No. 3:16-cv-01346- 0, Dkt. No. 6 (N.D. Tex. May 19, 2016)

[70] *See id.* at ¶¶ 8; 10.e; 13 15; 34; 36; 41; p 17, ¶(e).

[71] *See id.*

differences training in July 2016. Based on Boeing's representations about the 737 MAX, Captain Eiser reported back to SWAPA members that the 737 MAX handled similarly to the 737 NG.

195. Upon information and belief, Boeing purposefully continued to interfere in the dispute to ensure that SWAPA pilots would agree to operate the 737 MAX and include it as a term of the new CBA.

196. Doing so would ensure a smooth 737 MAX rollout from Boeing's 737 MAX launch customer.

197. More pointed negotiations between SWAPA and Southwest followed over the next six months, and a new CBA, which added 737 MAX as a term, was executed by November 2016.

198. In agreeing to execute the CBA, SWAPA relied on Boeing's public representations and private assurances - including a formal differences training program with SWAPA pilots - that the 737 MAX was designed and certified to be safe and airworthy, and that the 737 MAX was essentially a more fuel efficient 737 NG as opposed to the distinct aircraft that it really is.

199. Based on Boeing's direct representations and assurances to SWAPA (which later proved to be false and include material omissions), SWAPA altered its bargaining position from what is set forth in its complaint against Southwest, and which it advocated during negotiations with Southwest, *i.e.,* that the 737 MAX was distinct from prior generations of 737 aircraft.

200. As SWAPA and the public later learned after the Ethiopian Airlines Flight 302 accident on March 10, 2019, Boeing's deliberate 737 MAX design

shortcuts and questionable decisions resulted in a different aircraft that was not safe and should not have been certified as airworthy.[72]

201. Boeing's systematic and concerted efforts to minimize the differences between the 737 NG and 737 MAX thus deprived SWAPA of information critical to the contract negotiation process.

202. Indeed, as set forth below, the material differences between the 737 MAX and prior generations of 737 aircraft resulted in the grounding of all 737 MAX aircraft, and inhibited SWAPA pilots' ability to receive the economic advantages they believed they would gain by agreeing to fly the 737 MAX.

203. Had SWAPA been aware of MCAS and the true extent of differences between the 737 NG and the 737 MAX, it never would have agreed to pilot the 737 MAX and include it as a term in its CBA with Southwest.

204. Upon information and belief, Boeing knew or should have known that SWAPA was altering its contract negotiating position based on Boeing's representations and omissions concerning the 737 MAX.

E. Boeing Set SWAPA Pilots Up to Fail

205. As SWAPA President Jon Weaks,

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[72] Sinead Baker, *Airlines Have Been Flying Empty Boeing 737 Max Planes Around the World as They Scramble to Get Ready for its Return to Service,* Business Insider, August 30, 2019, https://www.businessinsider.com/hoeing-737-max-scattered-airlines-wait-grounding-end-2019-8.

publicly stated, SWAPA pilots "were kept in the dark" by Boeing. [7373]

206. Boeing did not tell SWAPA pilots that MCAS existed and there was no description or mention of MCAS in the Boeing Flight Crew Operations Manual.

207. There was therefore no way for commercial airline pilots, including SWAPA pilots, to know that MCAS would work in the background to override pilot inputs.

208. There was no way for them to know that MCAS drew on only one of two angle of attack sensors on the aircraft.

209. And there was no way for them to know of the terrifying consequences that would follow from a malfunction.

210. When asked why Boeing did not alert pilots to the existence of the MCAS, Boeing responded that the company decided against disclosing more details due to concerns about "inundate[ing] average pilots with too much information-and significantly more technical data-than [they] needed or could realistically digest."[74]

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[73] Dominic Gates, *US. Pilots Flying 737 MAX Weren't Told About New Automatic Systems Change Linked to Lion Air Crash,* The Seattle Times, November 13, 2018, https://www.seattletimes.com/business/boeing-aerospace/u-s-pilots-flying-737-max-werent-told- about-new-automatic-systems-change-linked-to-lion-air-crash/.

[74] Andy Pasztor, et al., *How Boeing's 737 MAX Failed,* The Wall Street Journal, March 27, 2019, https://www.wsj.com/articles/how-boeings-737-max-failed-11553699239.

211. SWAPA's pilots, like their counterparts all over the world, were set up for failure.

III. THE 737 MAX'S ENTRY INTO SERVICE REVEALED A CRITICAL DESIGN DEFECT THAT TOOK 346 LIVES AND LEAD TO A WORLDWIDE GROUNDING AND LOSS OF CONFIDENCE IN THE 737 MAX

A. The Lion Air Crash

212. After just one year of in-service history, on October 29, 2018, a 737 MAX, operated as Lion Air Flight 610, crashed into the Java Sea killing all 189 people onboard.[75]

213. A preliminary report issued by Indonesia's National Transportation Safety Committee indicated that erroneous angle of attack data caused the MCAS system to repeatedly command automatic nose-down trim. [76] This was the first time that Boeing disclosed the existence of

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[75] Hannah Beech & Muktita Suhartono, *Confusion, Then Prayer, in Cockpit of Doomed Lion Air Jet,* The New York Times, March 20, 2019, https://www.nytimes.com/2019/03/20/world/asia/lion-air-crash-boeing.html; *see also* Ben Otto & Gaurav Raghuvanshi, *Indonesian Plane With 189 People on Board Crashes Near Jakarta,* The Wall Street Journal, October 29, 2018, https://www.wsj.com/articles/plane-with-188-people- on-board-crashes-off-indonesia-1540784983.

[76] *Preliminary Aircrap Accident Investigation Report* (2018), https://wwwaviation24be-q41r3jh.stackpathdns.com/wp-content/uploads/2018/11/2018-035-PK-LQP-Preliminary-Report.pdf

MCAS to the public, SWAPA, or to other pilots.

214. Like SWAPA pilots prior to the Lion Air crash, the Lion Air pilots were not aware of the presence of MCAS, did not understand how it operated, and had no training on how to manage an MCAS activation caused by erroneous data.[7777]

215. After the crash, pilots all over the world were outraged by Boeing's failure to disclose the presence of MCAS before the Lion Air crash.

216. At that time, Boeing maintained that the 737 MAX was a safe aircraft and instead focused on alleged pilot error and maintenance issues rather than the flight safety hazard posed by the activation of MCAS at low altitude, and the 737 MAX's need for MCAS in the first place.

217. On November 20, 2018, Boeing conducted a conference call with 737 MAX operators, including SWAPA.

218. During that conference call, Boeing insisted that the cause of the Lion Air crash was pilot error, and that MCAS problems already were covered and could be remedied by the ordinary runaway stabilizer correction procedure described in paragraph 227, *infra.*

219. Three days later, Boeing conducted a separate individual meeting with SWAPA, attended by its President Jon Weaks, SWAPA's Training and Standards Chair Greg Bowen, SWAPA Safety Committee Chair Matthew Cain, and incoming Second Vice President Brian Fitting. From Boeing, Michael Sinnett, Craig Bottom, and John Maloney attended.

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[77] *Id.*

220. During this meeting SWAPA thought that Boeing finally was being honest and forthright. It was mistaken.

221. During the meeting, Boeing continued to maintain that the 737 MAX was airworthy and safe.

222. Boeing continued to maintain that the Lion Air crash was caused by pilot error, and that the circumstances that lead to the crash would not repeat.

223. Boeing misleadingly and incorrectly continued to mm1m1ze the differences between the 737 MAX and prior generations of 737 aircraft.

224. Boeing's representatives knew or should have known that the unintended activation ofMCAS by faulty data coming from a single angle of attack sensor a was responsible for the Lion Air crash.

225. In fact, in the week after the Lion Air crash, Boeing published a flight crew operations manual update warning of a possible fault in the angle of attack system.

226. Then, on November 7, 2018, the FAA issued an "Emergency Airworthiness Directive (AD) 2018-23-51," warning that an unsafe condition likely could exist or develop on 737 MAX aircraft.[78]

227. Relying on Boeing's description of the problem, the AD directed that in the event of un-commanded nose-down stabilizer trim such as what

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[78] Federal Aviation Administration, *Emergency Airworthiness Directive 2018-53-21,* November 7, 2018, https://rgl.faa.gov/Regulatory and Guidance Library/rgad.nsf/0/83ec7f95f3e5bfbd8625833e0070a070/$FILE/2018-23-51 Emergency.pdf.

happened during the Lion Air crash, the flight crew should comply with the Runaway Stabilizer procedure in the Operating Procedures of the 737 MAX manual.

228. But the AD did not provide a complete description of MCAS or the problem in 737 MAX aircraft that led to the Lion Air crash, and would lead to another crash and the 737 MAX's grounding just months later.

229. An MCAS failure is not like a runaway stabilizer. A runaway stabilizer has continuous un-commanded movement of the tail, whereas MCAS is not continuous and pilots (theoretically) can counter the nose-down movement, after which MCAS would move the aircraft tail down again.

230. Moreover, unlike runaway stabilizer, MCAS disables the control column response that 737 pilots have grown accustomed to and relied upon in earlier generations of 737 aircraft.

231. Even after the Lion Air crash, Boeing's description of MCAS was still insufficient to put correct its lack of disclosure as demonstrated by a second MCAS-caused crash.

B. The Ethiopian Airlines Crash

232. On March 10, 2019, a second 737 MAX, this one operated as Ethiopian Airlines Flight 302, crashed near Addis Ababa killing all 157 people onboard. [79]

233. According to a Preliminary Report, one minute into the flight, the pilots noticed flight-control problems. MCAS activated and pushed the nose of the aircraft down. The pilots fought to pull the nose of the plane up, and were briefly able to resume climbing. Then MCAS pushed the nose down again. The pilots then flipped two switches and temporarily disconnected MCAS, then tried to regain control. They asked to return to the airport but were continuing to struggle gaining altitude. MCAS engaged again, pushing the plane into a dive. Thirty seconds later the aircraft crashed. [80]

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[79] Hadra Ahmed, *et al. Ethiopian Airlines Plane Is the 2nd Boeing Max 8 to Crash in Months,* The New York Times, March 10, 2019, https://www.nytimes.com/2019/03/10/world/africa/ethiopian-airlines-plane-crash.html; *see also* Matina Stevis-Gridneff, *Ethiopian Airlines Jet Crashes En Route to Nairobi,* The Wall Street Journal, March 11, 2019, https://www.wsj.com/articles/ethiopian-airlines-flight-crashes-en- route-to-nairobi-11552207841?mod=hp lead posl&mod=article inline.

[80] Aircraft Accident Investigation Bureau, https://flightsafety.org/wp- content/uploads/2019/04/Preliminary-Report-B737-800MAX-ET-AVJ.pdf; https://flightsafety.org/wp-content/uploads/2019/04/Preliminary-Report-B737-800MAX-ET-AVJ.pdf (2019).

C. The 737 MAX is Grounded Because it is Unsafe

234. On March 11, 2019, Boeing finally acknowledged MCAS and its effects to the public in a press release stating, "[a] pitch augmentation control law (MCAS) was implemented on the 737 MAX to improve aircraft handling characteristics and decrease pitch-up tendency at elevated angles of attack."[81]

235. In the days following the Ethiopian Airlines crash, aviation authorities in China, Indonesia, Australia, Honk Kong, Oman, the United Arab Emirates, Vietnam, the United Kingdom, South Korea, Singapore, Argentina, the European Union, Mexico, Brazil, Canada, India, Fiji, New Zealand, and Malaysia suspended 737 MAX operations.[82]

236. The U.S. Federal Aviation Administration did so as well.[83]

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[81] The Boeing Company, *Boeing Statement on 737 MAX Software Enhancement,* March **11,** 2019, https://boeing.mediaroom.corn/news-releases-statements?item=130402

[82] *Which countries have grounded the Boeing 737 MAX jets,* PBS, March 14, 2019, https://www.pbs.org/newshour/world/which-countries-have-grounded-the-boeing-737-max-jets; *see also* Nigel Chiwaya & Jiachuan Wu, *MAP: These are the countries that have grounded the Boeing 737 MAX 8,* NBC NEWS, March 13, 2019, https://www.nbcnews.com/news/world/country-banned-boeing-737-max-airplanes-list-n982776.

[83] Emergency Order of Prohibition (2019), https://www.faa.gov/news/updates/media/Emergency Order.pdf.

237. Airlines operating the 737 MAX including *9* Air, Aeromexico, Air China, Cayman Airways, China Eastern Airlines, China Southern Airlines, Comair, Easter Jet, Ethiopian Airlines, Fozhou Airlines, Garuda, GOL Airlines, Hainan Airlines, Kumming Airlines, Lucky Air, MIAT Mongolian Airlines, Okay Airways, Royal Air Marne, Shandong Airlines, Shanghai Airlines and Xiamen Airlines also voluntarily suspended MAX operations.[84]

238. As of the date of this Petition, the 737 MAX fleet remains grounded worldwide and the National Transportation Safety Board ("NTSB") has identified numerous errors that Boeing made during the design and certification process for the 737 MAX.

239. The Ethiopian Airlines crash demonstrated conclusively that even after the Lion Air crash, Boeing continued its pattern of misrepresentations by telling SWAPA and the public that the 737 MAX was safe and similar to prior generations of 737 aircraft. That was untrue.

240. As a result, SWAPA learned for the first time in late 2018 the truth of the matter.

241. As compared to the 737 NG, Boeing's use of the new LEAP1-B engines on 737 MAX aircraft, the primary selling point for MAX aircraft:

a. Changed the aircraft's aerodynamic center of gravity;

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[84] Nigel Chiwaya & Jiachuan Wu, *MAP: These are the countries that have grounded the Boeing 737 MAX 8,* NBC NEWS, March 13, 2019, https://www.nbcnews.com/news/world/country-banned-boeing-737-max-airplanes-list-n982776.

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

IV. BOEING'S RESPONSE AND BELATED DISCLOSURE OF MCAS

242. On March 13, 2019, after consultation with the FAA, the NTSB, other national civil aviation authorities and customers around the world, Boeing conceded and recommended the temporary suspension of operations of the entire global fleet of three-hundred and seventy- one (371) 737 MAX aircraft.

243. The following day, Boeing suspended all 737 MAX deliveries.[85]

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[85] The Boeing Company, *In Consultation with the FAA, NTSB and its Customers, Boeing Supports Action to Temporarily Ground 737 MAX Operations,* March 13, 2019, https://boeing.mediaroom.com/news-releases-statements?item=130404

244. Currently, there is no official word on when deliveries will resume or when the grounding will be lifted.

245. In an April 5, 2019 press release, Boeing acknowledged that MCAS caused both the Lion Air and Ethiopian Airlines crashes. Boeing stated that the "Lion Air Flight 610 and Ethiopian Airlines Flight 302 accidents were caused by a chain of events, with a common link being erroneous activation of the aircraft's MCAS function."[86]

246. The day before, Boeing CEO Dennis Muilenburg also stated "erroneous activation of the MCAS function can add to what is already a high workload environment. It's our [Boeing's] responsibility to eliminate this risk." Mr. Muilenburg further acknowledged that Boeing is working on a software fix for MCAS.[87]

247. He did not explain why Boeing chose not to disclose the presence of MCAS on 737 MAX

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[86] The Boeing Company, *Statement from Boeing CEO Dennis Dennis Muilenburg: We Own Safety- 737 MAX Software, Production and Process Update,* April 5, 2019, https://boeing.mediaroom.com/2019-04-05-Statement-from-Boeing-CEO-Dennis-Muilenburg-We-Own-Safety-737-MAX-Software-Production-and-Process-Update.

[87] The Boeing Company, *Boeing CEO Dennis Muilenburg Addresses the Ethiopian Airlines Flight 302 Preliminary Report,* April 4, 2019, https://boeing.mediaroom.com/2019-04-04-Boeing-CEO-Dennis-Muilenburg-Addresses-the-Ethiopian-Airlines-Flight-302-Preliminary- Report; *see also* Robert Wall and Merrill Sherman, *The Multiple Problems, and Potential Fixes, With the Boeing 737 MAX, The Wall Street Journal,* August 19, 2019, https://www.wsj.com/articles/fixing-the-problems-with-boeings-737-max-11566224866.

aircraft prior to or at the time Boeing launched the MAX.

248. In an April 5, 2019 press release, Boeing explained that it would temporarily move from a production rate of fifty-two (52) 737 MAX aircraft per month to forty-two (42) airplanes per month starting in mid-April 2019, so it could prioritize the focus on software fix certification and returning the MAX to flight.[88]

V. THE 737 MAX IS BEING SUBJECTED TO INTENSE REGULATORY REVIEW AND INVESTIGATION

249. The 737 MAX is currently being scrutinized by regulators around the world.

250. In March 2019, the U.S. Department of Transportation Secretary Elaine L. Chao asked the Office of the Inspector General (OIG) to conduct a formal audit to compile an objective and detailed factual history of the activities that resulted in the certification of the Boeing 737 MAX aircraft.[89] The OIG audit commenced on March 27, 2019, and is

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[88] The Boeing Company, *Statement from Boeing CEO Dennis Dennis Muilenburg: We Own Safety- 737 MAX Software, Production and Process Update,* April 5, 2019, https://boeing.mediaroom.com/2019-04-05-Statement-from-Boeing-CEO-Dennis-Muilenburg-We-Own-Safety-737-MAX-Software-Production-and-Process-Update.

[89] *U.S. Secretary of Transportation Asks Inspector General to Ensure Audit of Boeing 737-MAX 8 Certification is Part of Review* (2019), https://www.transportation.gov/briefing-room/dot1419.

ongoing.[90]

251. On April 2, 2019, the FAA established a joint authorities technical review team comprised of safety experts from the FAA, NASA, and nine international aviation authorities with the purpose of conducting a comprehensive review of the certification of the 737 MAX to determine its compliance with a11 applicable regulations and to identify necessary future enhancements. The joint authorities technical review team held its first meeting on April 29, 2019.[91] Their review is ongoing.

252. The U.S. Department of Justice initiated a criminal investigation into Boeing's conduct in connection with the certification of 737 MAX aircraft.[92] The Department of Justice has sought from Boeing materials relating to its marketing of the 737 MAX.[93] Its investigation is

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[90] Office of the Inspector General & Matthew E. Hampton, *Information: Audit Announcement FAA* 's *Oversight of the Boeing 737 MAX Certification Project No. 19A3006A000 (2019),* https://www.oig.dot.gov/sites/default/files/Audit%20Annoucement%20%20FAA%27s%20Oversight%20of%20the%20Boeing%20737%20MAX%20Certification.pdf.

[91] FAA Updates on Boeing 737 Max, https://www.faa.gov/news/updates/?newsid=93206&xid=17259.

[92] Andy Pasztor & Andrew Tangel, *Senate Committee Opens Inquiry Into FAA Safety Inspectors, Training Requirements for Boeing 737 MAX,* The Wall Street Journal, April 2, 2019, https://www.ws j.com/articles/senate-committee-opens-inquiry-into-faa-safety-inspectors-training-requirements-for-boeing-737-max-11554241623.

[93] Evan Perez & Shimon Prokupecz, *Justice Department issues subpoenas in criminal investigation of Boeing,* CNN, March 21,

ongoing.

253. As part of its investigation, the Department of Justice served a subpoena on SWAPA.

254. The U.S. House of Representatives also has initiated an investigation into Boeing.[94] Its investigation is ongoing.

255. The U.S. Securities and Exchange Commission also is investigating Boeing's disclosures to shareholders. The SEC inquiry also focuses on whether Boeing adequately disclosed dangers associated with MCAS. [95] The investigation is ongoing.

256. Regulators have since discovered additional, previously undisclosed problems with the 737 MAX that must be fixed before the MAX can again be certified for flight.

257. For example, in June 2019, the FAA discovered an additional safety issue relating to the 737 MAX's flight control system that requires

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2019, https:/www.cnn.com/2019/03/20/business/boeing-justice-department-subpoenas/index.html.

[94] Andy Pasztor & Andrew Tangel, *Senate Committee Opens Inquiry Into FAA Safety Inspectors, Training Requirements for Boeing 737 MAX,* The Wall Street Journal, April 2, 2019, https://www.ws j.com/articles/senate-committee-opens-inquiry-into-faa-safety-inspectors-training-requirements-for-boeing- 737-max-11554241623.

[95] Samantha Masunaga, *Boeing reportedly facing SEC probe over investor disclosures related to 737 Max,* The Los Angeles Times, May 24, 2019, https://www.latimes.com/business/la-fi-boeing-737-max-sec-20190524-story.html

fixing.[96]

258. Around the same time, the FAA also noticed problems associated with the 737 MAX's emergency procedures, requiring an additional delay in recertification.[97] Although there has been no public disclosure of the emergency procedure problems being examined, reports indicate that such problems relate to measures pilots can take to counteract MCAS in the event of a malfunction.[98]

259. On July 5, 2019, it was reported that the European Union Aviation Safety Agency, commonly known as EASA, outlined five (5) issues that Boeing must address before it would approve the 737 MAX for return to service, including problems associated with the 737 MAX's angle of attack sensors, inadequate training measures, potential difficulty that pilots could have in turning the manual trim wheel, and problems associated

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[96] BBC, *Boeing 737 Max: New issue could delay aircraft's return,* June 27, 2019, https://www.bbc.com/news/business-48752932; *see also* Anurag Kotoky & Kyunghee Park, *Boeing's Grounded 737 MAX- The Story So Far,* The Washington Post, July 9, 2019, https://www.washingtonpost.com/business/boeings-grounded-737-max-the-story-so-far/2019/07/08/5eb2e4be-ale6-lle9-a767-d7ab84aef3e9 story.html?utm term=.7909863e133b.

[97] David Gelles, *Boeing Pledges $100 Million to Those Affected by 737 MAX Crashes,* The New York Times, July 3, 2019, https://www.nytimes.com/2019/07/03/business/boeing-737-max-crash-compensation.html.

[98] Andrew Tangel & Andy Pasztor, *FAA Finds New Software Problem in Boeing's 737 MAX,* The Wall Street Journal, June 26, 2019, https://www.wsj.com/articles/faa-finds-new-software-problem-in-boeings-737-max-l1561596917.

with the MAX's autopilot function.[99]

260. EASA also appears focused on a pilot's potential inability to counteract MCAS in the event of malfunction. [100]

261. EASA will conduct its own separate test flight of the MAX before it is allowed to return to service in Europe and is specifically considering whether it will require the MAX to have a third angle of attack sensor to be considered airworthy.[101]

262. On September 26, 2019, the NTSB issued a Safety Recommendation Report to address Boeing's erroneous "assumptions about pilot recognition and response to failure conditions used during the design and certification process" of the 737 MAX.[102] The NTSB found that neither Boeing's System Safety Assessment ("SSA") nor its simulator

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[99] Benjamin D. Katz & Alan Levin, *Boeing 737 MAX has Autopilots, European Regulators Find,* Bloomberg, July 5, 2019, https://www.bloomberg.com/news/articles/2019-07-05/europe-sets- out-demands-for-boeing-before-max-can-fly-again

[100] *Id.*

[101] Alan Levin & Richard Weiss, Boeing *737 MAX}et to face separate flight test by EU regulators,* The Seattle Times, September 10, 2019, https://www.seattletirnes.com/business/boeing-aerospace/boeing-737-rnax-jet-to-face-separate-flight-test-by-eu-regulators/.

[102] NTSB, Safety Recommendation Report: Assumptions Used in Safety Assessment Process and the Effects of Multiple Alerts and Indications on Pilot Performance, September 19, 2019, available at: https://www.ntsb.gov/investigations/AccidentReports/Reports/ASRl90l .pdf.

tests satisfied the requirements of 14 C.F.R. 25.1309 and it directed the FAA to "require that Boeing (1) ensure that system safety assessments for the 737 MAX in which it assumed immediate and appropriate pilot corrective actions in response to uncommanded flight control inputs, from systems such as [MCAS], consider the effect of all possible flight deck alerts and indications on pilot recognition and response; and (2) incorporate design enhancements (including flight deck alerts and indications), pilot procedures, and/or training requirements, where needed, to minimize the potential for and safety impact of pilot actions that are inconsistent with manufacturer assumptions."[103]

263. There is no publicly announced timetable for the 737 MAX's return to flight.

264. The full scope of previously undetected problems that may affect the 737 MAX's safety and need remediation currently are unknown.

VI. SOUTHWEST'S OPERATION OF THE 737 MAX AND ITS ANTICIPATED RETURN TO SERVICE

265. Southwest took delivery of its first 737 MAX on August 29, 2017, and put it into revenue service on October **1,** 2017.

266. By February 2019, Southwest had 34 737 MAX aircraft in its fleet with another 36 due to be delivered before the end of the year and more on order.

267. Accordingly, had the 737 MAX required

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[103] *Id.*

new pilot training, Boeing would have owed Southwest at least $70 million by the end of 2019.[104] *See* ¶ 55, *supra.*

268. Southwest's 737 MAX fleet remains grounded with the rest of the world's.[105]

269. All of Southwest's 737 MAX aircraft were removed completely from Southwest's flight schedule through January 5, 2019.[106]

VII. BOEING'S ACTIONS PUT SWAPA PILOTS IN HARM'S WAY

270. Boeing knew or should have known that the 737 MAX was unsafe, un-airworthy, and placed SWAPA pilots, the passengers in their care, and others, in danger.

271. First, that Boeing knew or should have

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[104] Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

[105] Hannah Sampson, *Everything Travelers Need to Know About Boeing 737 Max Developments,* The Washington Post , September 1, 2019, https://www.washingtonpost.com/travel/2019/08/14/everything-travelers-need-know-about-boeing-max-developments/.

[106] Leslie Josephs, *Southwest Won't Fly Boeing 737 Max Until 2020 and Will End Newark Flights,* CNBC, July 25, 2019, https://www.cnbc.com/2019/07/25/southwest-air-to-pull-out-of-newark-after-taking-a-growth-hit-from-the-boeing-737-max-grounding.html.

known that the 737 MAX was unsafe and unairworthy is demonstrated by its false SSA for MCAS that Boeing filed with the FAA and that the NTSB subsequently found to be non-compliant with 14 C.F.R. 25.1309.

272. The SSA:

a. Understated MCAS's authority to command the number and length of trim movements by the horizontal stabilizer;

b. Understated the degree to which MCAS could move the horizontal stabilizer;

c. Failed to account for the fact that MCAS was designed to reset and repeat its commands even after the pilot countermanded MCAS's automatic nose-down trim;

d. Failed to disclose that MCAS relied on a single angle of attack sensor and thus was a single point failure; and

e. Classified MCAS incorrectly as "hazardous."

273. Because MCAS's SSA was incorrect, Boeing knew or should have known that MCAS was being misrepresented when discussed with others.

274. Boeing nonetheless implemented MCAS in order to make the 737 MAX "feel" like prior generations of 737 aircraft, furthering its misinformation campaign upon which SWAPA relied.

275. Boeing did so without acknowledging

actual differences between the 737 MAX and prior generations of 737 aircraft.

276. Boeing thus failed to mitigate the actual risk of catastrophic stall on the 737 MAX.

277. Boeing also failed to inform and warn SWAPA pilots of the risk of catastrophic stall on the 737 MAX.

278. Boeing therefore also failed to adequately train SWAPA pilots on how to avoid the increased risk of catastrophic stall on the 737 MAX aircraft as compared to prior generations of 737s.

279. Boeing did so for the purpose of selling 737 MAX aircraft to Southwest and other air carriers without the need to alter its rushed development timeframe.

280. In doing so, Boeing also violated FAA's Airworthiness Standards for Commercial Aircraft, 14 C.F.R. § 25.203(a) - Stall Characteristics, which states in part "[n]o abnormal nose- up pitching may occur. ... In addition, it must be possible to promptly prevent stalling and to recover from a stall by normal use of the controls."

281. By virtue of selling an aircraft it knew violated Federal Aviation Regulations, it was reasonably foreseeable that such aircraft likely would be grounded in the future once its defect was discovered and until such defect could be remedied.

282. As a result of Boeing's negligent conduct, SWAPA pilots were placed in harm's way, and SWAPA and its members incurred damages and other losses described below.

VIII. SWAPA AND ITS MEMBER PILOTS HAVE INCURRED MILLIONS OF DOLLARS IN DAMAGES BECAUSE OF BOEING'S NEGLIGENCE, MISREPRESENTATIONS, AND INTERFERENCE WITH SWAPA'S COLLECTIVE BARGAINING AGREEMENT AND BUSINESS RELATIONSHIPS WITH SOUTHWEST

283. Southwest's published flight scheduled that incorporated the 737 MAX versus the actual Southwest schedule that incorporated the 737 MAX as compared to the actual Southwest flight schedules subsequent to the grounding can be used to determine the millions of dollars in compensation that SWAPA pilots have lost as a result of the 737 MAX grounding. [107]

284. Even if Boeing is able to get the 737 MAX re-certified, and Southwest is able to get the 737 MAX operating in commercial passenger service by the end of 2019,[108] SWAPA pilots will still have collectively lost millions of dollars in compensation.

285. These losses will continue until such time as Southwest is able to re-integrate the 737

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[107] *See, e.g.,* Ted Reed, *New Report Puts Impact Of Boeing 737 MAX Grounding at $4.1 Billion,* Forbes, August 10, 2019, https://www.forbes.com/sites/tedreed/2019/08/10/new-report-puts-impact-of-boeing-737-max-grounding-at-41-billion/#48e7808dlfdf.

[108] Elijah Shama, *Boeing 737 Max likely grounded until the end of the year after new problem emerges,* CNBC, June 28, 2019, https://www.cnbc.com/2019/06/28/boeing-737-max-likely-grounded-until-the-end-of-the-year.html.

MAX into its flight schedules at the level it was planning prior to the grounding.

286. Upcoming holiday travel will only exacerbate SWAPA's losses.[109]

287. SWAPA sought compensation from Boeing for these losses.

288. Boeing refused.

IX. SWAPA ALSO INCURRED LOSSES ARISING FROM ITS PARTICIPATION IN THE DOJ INVESTIGATION AND A REDUCTION IN DUES

289. SWAPA was subpoenaed in connection with the Department of Justice's investigation into the 737 MAX's certification, and Boeing's conduct in connection with same.

290. SWAPA also was subpoenaed by the SEC in connection with its investigation into Boeing's 737 MAX disclosures.

291. In connection with both investigations, SWAPA has been forced to retain legal counsel at its loss.

292. In connection with both

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[109] Andy Pasztor and Alison Snider, *New Delays Could Keep Boeing 737 MAX Grounded Into Holiday Travel Season,* The Wall Street Journal, September 1, 2019, https://www.wsj.com/articles/new-delays-could-keep-hoeing-737-max-grounded-into-holiday- travel-season-11567376957; *see also* Mary Schlangenstein, et al., *New Boeing Max Delays Imperil Jet Return by Christmas,* The Seattle Times, September 1, 2019, https://www.seattletimes.com/business/american-air-pulls-737-max-from-schedule-through- early-december/

investigations, SWAPA has been required to collect

thousands of potentially relevant documents, and to employ counsel to review such documents for production to the government.

293. In connection with both investigations, SWAPA already has produced documents to the government.

294. In connection with both investigations, SWAPA also has had to prepare for government-run interviews.

295. In short, SWAPA has been forced to spend hundreds of thousands of dollars in legal fees that it would not have but for Boeing's conduct.

296. SWAPA expects that these legal fees will continue to accrue as the investigations continue, and SWAPA's further participation is required.

297. SWAPA also is incurring lost dues as a result of the grounding. One percent of the wages that SWAPA pilots lost would have accrued to SWAPA.

298. As a result of the grounding, SWAPA therefore has sustained millions of dollars in damages.

299. SWAPA sought compensation from Boeing for each category of damages.

300. Boeing refused.

FIRST CLAIM FOR RELIEF – FRAUDULENT MISREPRESENTATION

301. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in

paragraphs 1 through 300 above with the same force and effect as if set forth herein in full.

302. Boeing marketed the 737 MAX as a variant of the safe, reliable and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed "minimal risk."

303. Boeing made these representations publicly, and to SWAPA directly when SWAPA: participated in simulator exercises to evaluate the extent of pilot training needed for the 737 MAX; reviewed Boeing drafted flight and aircraft manuals; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; and participated in Service Ready Operational Validation tests.

304. Boeing also made the foregoing representations on its website and in press releases described above, including, but not limited to its statements claiming that Boeing would minimize changes from the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

305. Boeing's representations concerning the 737 MAX were false in that Boeing did not disclose that, as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia*:

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's

handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

306. Boeing made these representations knowing that SWAPA pilots and union representatives were relying on their truth.

307. Boeing knew that the foregoing representations were false, or recklessly disregarded their truthfulness in making such representations.

308. Boeing's false representations related to objectively material facts concerning the 737 MAX.

309. Boeing concealed all or parts of the truth when it had a legal duty to speak, and when it had already made partial representations to SWAPA concerning the differences between the 737 NG and 737 MAX.

310. Boeing had a legal duty to correct these representations once made, but failed to do so until it was too late.

311. Boeing made the foregoing misrepresentations for its economic advantage.

312. Boeing made the foregoing misrepresentations with the intent to induce SWAPA's reliance on the representations.

313. SWAPA relied on Boeing's representations as true because of Boeing's superior knowledge concerning the 737 MAX, and SWAPA's

inability to acquire its own knowledge concerning Boeing's representations.

314. SWAPA's reliance on Boeing's representations and non-disclosures also was justifiable in light of SWAPA and Boeing's long-term relationship that previously did not include any reason to doubt the truthfulness and completeness of Boeing's representations and disclosures.

315. SWAPA was entitled to rely on Boeing's representations.

316. SWAPA would not have agreed to include the 737 MAX as a term of its 2016 CBA had it known of the truth about Boeing's misrepresentations or that Boeing was concealing objectively material information relating to the 737 MAX from SWAPA.

317. Boeing's misrepresentations therefore were the proximate cause and cause in fact of SWAPA's injuries.

318. SWAPA has been damaged in the amount of millions of dollars in lost compensation, which amount continues to accrue.

319. Such damages can be determined based on Southwest's published flight schedules that incorporate the 737 MAX versus Southwest's actual flight schedule subsequent to the grounding.

320. SWAPA also has been damaged in amounts to be determined for associated costs, such as legal fees in connection with its role in the DOJ investigation and SEC investigation.

321. SWAPA also has been damaged by the loss of dues from SWAPA pilots.

322. SWAPA is entitled to damages for those categories of losses in amounts to be determined at

trial.

SECOND CLAIM FOR RELIEF – NEGLIGENT MISREPRESENTATION

323. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 322 above with the same force and effect as if set forth herein in full.

324. Boeing marketed the 737 MAX as a variant of the safe, reliable and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed "minimal risk."

325. Boeing made these representations publicly, and to SWAPA directly when SWAPA: participated in simulator exercises to evaluate the extent of pilot training needed for the 737 MAX; reviewed Boeing drafted flight and aircraft manuals; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; and participated in Service Ready Operational Validation tests.

326. Boeing also made the foregoing representations on its website and in press releases described above, including, but not limited to its statements claiming that Boeing would minimize changes from the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

327. Boeing's representations concerning the 737 MAX were false in that Boeing did not disclose that, as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia*:

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

328. Boeing made these representations when it knew or should have known that SWAPA pilots and union representatives were relying on their truth.

329. Boeing knew that the foregoing representations were false, or recklessly disregarded their truthfulness in making such representations.

330. Boeing made the foregoing representations without exercising reasonable care and competence.

331. Boeing's false representations related to objectively material facts concerning the737 MAX.

332. Boeing knew or should have known that it made representations to SWAPA for the guidance of SWAPA in their business.

333. Boeing concealed all or parts of the truth when it had a legal duty to speak, and when it

had already made partial representations to SWAPA concerning the differences between the 737 NG and 737 MAX.

334. Boeing had a legal duty to correct these representations once made, but failed to do so.

335. Boeing made the foregoing misrepresentations for its economic advantage.

336. Boeing knew or should have known that the foregoing misrepresentations would induce SWAPA's reliance on the representations.

337. SWAPA relied on Boeing's representations as true because of Boeing's superior knowledge concerning the 737 MAX, and SWAPA's inability to acquire its own knowledge concerning Boeing's representations.

338. SWAPA's reliance on Boeing's representations and non-disclosures also was justifiable in light of SWAPA and Boeing's long-term relationship that previously did not include any reason to doubt the truthfulness and completeness of Boeing's representations and disclosures.

339. SWAPA was entitled to rely on Boeing's representations.

340. SWAPA would not have agreed to include the 737 MAX as a term of its 2016 CBA had it known of the truth of Boeing's misrepresentations or that Boeing was concealing objectively material information relating to the 737 MAX from SWAPA.

341. Boeing's misrepresentations therefore were the proximate cause and cause in fact of SWAPA's injuries.

342. SWAPA has been damaged in the amount of millions of dollars in lost compensation, which amount continues to accrue.

343. Such damages can be determined based on Southwest's published flight schedules that incorporate the 737 MAX versus Southwest's actual flight schedule subsequent to the grounding.

344. SWAPA also has been damaged in amounts to be determined for associated costs, such as legal fees in connection with its role in the DOJ investigation and SEC investigation.

345. SWAPA also has been damaged by the loss of dues from SWAPA pilots.

346. SWAPA is entitled to damages for those categories of losses in amounts to be determined at trial.

THIRD CLAIM FOR RELIEF – TORTIOUS INTERFERENCE WITH CONTRACTUAL RIGHTS AND RELATIONSHIP

347. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 346 above with the same force and effect as if set forth herein in full.

348. In 2016, SWAPA was negotiating an amended CBA with Southwest. This CBA was signed in November 2016.

349. Boeing was aware of these facts.

350. Boeing purposefully misrepresented to SWAPA that the 737 MAX was the same in all material respects to its predecessors that already were covered by the SWAPA/Southwest CBA, including the 737 NG.

351. Boeing marketed the 737 MAX as a variant of the safe, reliable and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed

"minimal risk."

352. Boeing made these representations publicly, and to SWAPA directly when SWAPA: participated in simulator exercises to evaluate the extent of pilot training needed for the 737 MAX; reviewed Boeing drafted flight and aircraft manuals; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; and participated in Service Ready Operational Validation tests.

353. Boeing also made the foregoing representations on its website and in press releases described above, including, but not limited to its statements claiming that Boeing would minimize changes from its then most recent 737 model, the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

354. These representations were false.

355. Boeing knew them to be false and/or recklessly disregarded their truth.

356. SWAPA could not have discovered the truth of the matter on its own.

357. The information that SWAPA could not have accessed on its own includes, but is not limited to, that as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia*:

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

358. The facts Boeing misrepresented to and concealed from SWAPA are objectively material.

359. Boeing had a financial incentive to make the foregoing misrepresentations, namely that including the 737 MAX in the SWAPA/Southwest CBA was critical to the domestic launch of the aircraft and would cause Southwest to purchase more 737 MAX aircraft and contribute generally to the acceptance of the 737 MAX into the commercial aircraft market.

360. Boeing made the foregoing misrepresentations in furtherance of its financial incentives.

361. There is no social interest in protecting Boeing's conduct; to the contrary, the social interest lies in penalizing Boeing's conduct because it put not only SWAPA pilots, but the flying public in harm's way.

362. SWAPA would not have entered into the CBA and/or agreed to its specific terms had it known that Boeing's representations were false, and had it known of the facts set forth in ¶ 357, *supra*.

363. SWAPA was reasonable and rightful in relying on Boeing's misrepresentations given SWAPA's close relationship with Boeing, Boeing's unique knowledge of the facts and Boeing's

understanding that SWAPA was relying on its misrepresentations in the course of CBA negotiations.

364. SWAPA's reliance on Boeing's representations and non-disclosures also was justifiable in light of SWAPA and Boeing's long-term relationship that previously did not include any reason to doubt the truthfulness and completeness of Boeing's representations and disclosures.

365. Boeing's misrepresentations and omissions thus proximately caused and were the cause in fact of SWAPA's injuries.

366. Boeing's actions were willful and intentional.

367. Boeing's misrepresentations interfered with SWAPA's expected benefits from its CBA, and its contractual relationship with Southwest.

368. SWAPA has been damaged in the amount of millions of dollars in lost compensation, which amount continues to accrue.

369. Such damages can be determined based on Southwest's published flight schedules that incorporate the 737 MAX versus Southwest's actual flight schedule subsequent to the grounding.

370. SWAPA also has been damaged in amounts to be determined for associated costs, such as legal fees in connection with its role in the DOJ investigation and SEC investigation.

371. SWAPA also has been damaged in a loss of dues from SWAPA pilots.

372. SWAPA is entitled to damages for those categories of losses in amounts to be determined at trial.

FOURTH CLAIM FOR RELIEF – TORTIOUS INTERFERENCE WITH AN EXISTING BUSINESS RELATIONSHIP

373. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 372 above with the same force and effect as if set forth herein in full.

374. In 2016, SWAPA was negotiating an amended CBA with Southwest. This CBA was signed in November 2016.

375. SWAPA had an existing business relationship with Southwest, and has since 1978.

376. Boeing was aware of these facts.

377. Boeing purposefully misrepresented to SWAPA that the 737 MAX was the same in all material respects to its predecessors that already were covered by the SWAPA/Southwest CBA, including the 737 NG.

378. Boeing marketed the 737 MAX as a variant of the safe, reliable and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed "minimal risk."

379. Boeing made these representations publicly, and to SWAPA directly when SWAPA: participated in simulator exercises to evaluate the extent of pilot training needed for the 737 MAX; reviewed Boeing drafted flight and aircraft manuals; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; and participated in Service Ready Operational Validation tests.

380. Boeing also made the foregoing representations on its website and in press releases

described above, including, but not limited to its statements claiming that Boeing would minimize changes from its then most recent 737 model, the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

381. These representations were false.

382. Boeing knew them to be false.

383. SWAPA could not have discovered the truth of the matter on its own.

384. The information that SWAPA could not have accessed on its own includes, but is not limited to, that as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia*:

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

385. The facts Boeing misrepresented to and concealed from SWAPA are objectively material.

386. Boeing had a financial incentive to

make the foregoing misrepresentations, namely that including the 737 MAX in the SWAPA/Southwest CBA was critical to the domestic launch of the aircraft and would cause Southwest to purchase more 737 MAX aircraft and contribute generally to the acceptance of the 737 MAX into the commercial aircraft market.

387. Boeing made the foregoing misrepresentations in furtherance of its financial incentives.

388. There is no social interest in protecting Boeing's conduct; to the contrary, the social interest lies in penalizing Boeing's conduct because it put not only SWAPA pilots, but the flying public in harm's way.

389. SWAPA would not have entered into the CBA and/or agreed to its specific terms had it known that Boeing's representations were false, and of the facts set forth in ¶ 384, *supra*.

390. SWAPA was reasonable and rightful in relying on Boeing's misrepresentations given SWAPA's close relationship with Boeing, Boeing's unique knowledge of the facts and expertise, and Boeing's understanding that SWAPA was relying on its misrepresentations in the course of CBA negotiations.

391. SWAPA's reliance on Boeing's representations and non-disclosures also was justifiable in light of SWAPA and Boeing's long-term relationship that previously did not include any reason to doubt the truthfulness and completeness of Boeing's representations and disclosures.

392. Boeing's misrepresentations and omissions thus proximately caused and were the

cause in fact of SWAPA's injuries.

393. Boeing's actions were willful and intentional.

394. Boeing's misrepresentations thus interfered with SWAPA's expected benefits from its CBA, and its business relationship with Southwest.

395. Boeing's misrepresentations were independently tortious as set forth in the First Second, and Sixth Claims for Relief.

396. SWAPA has been damaged in the amount of millions of dollars in lost compensation, which amounts continues to accrue.

397. Such damages can be determined based on Southwest's published flight schedules that incorporate the 737 MAX versus Southwest's actual flight schedule subsequent to the grounding.

398. SWAPA also has been damaged in amounts to be determined for associated costs, such as legal fees in connection with its role in the DOJ investigation and SEC investigation.

399. SWAPA also has been damaged in a loss of dues from SWAPA pilots.

400. SWAPA is entitled to damages for those categories of loss in amounts to be determined at trial.

FIFTH CLAIM FOR RELIEF – NEGLIGENCE

401. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 400 above with the same force and effect as if set forth herein in full.

402. Boeing knew or should have known that the 737 MAX was unsafe, unairworthy, and placed SWAPA pilots, the passengers in their care, and

others, in danger.

403. Boeing had a duty as an aircraft manufacturer to manufacture safe and airworthy aircraft.

404. That Boeing knew or should have known that the 737 MAX was unsafe and un-airworthy because it filed with the FAA a false SSA for MCAS that the NTSB found to be non- compliant with 14 C.F.R. § 25.1309.

405. The SSA:

a. Understated MCAS's authority to command the number and length of trim movements by the horizontal stabilizer;

b. Understated the degree to which MCAS could move the horizontal stabilizer;

c. Failed to account for the fact that MCAS was designed to reset and repeat its commands even after the pilot countermanded MCAS's automatic nose-down trim;

d. Failed to disclose that MCAS relied on a single angle of attack sensor and thus was a single point failure; and

e. Classified MCAS incorrectly as "hazardous."

406. Boeing nonetheless implemented MCAS in order to make the 737 MAX "feel" like prior generations of 737 aircraft, furthering its misinformation campaign upon which SWAPA relied.

407. Boeing did so without acknowledging

the actual differences between the 737 MAX and prior generations of 737 aircraft.

408. Boeing thus failed to mitigate the actual risk of catastrophic stall on the 737 MAX.

409. Boeing also failed to inform and warn pilots of the risk of catastrophic stall on the 737 MAX, despite its duty to do so.

410. Boeing also failed to adequately train SWAPA pilots on how to avoid the increased risk of catastrophic stall on the 737 MAX aircraft as compared to prior generations of 737s, despite its duty to do so.

411. Boeing did so for the purpose of selling 737 MAX aircraft to Southwest and other air carriers without the need to alter its rushed development timeframe, and without the need for those carriers to incur additional cost.

412. Boeing violated the FAA's Airworthiness Standards for Commercial Aircraft, 14 C.F.R. § 25.203(a) – Stall Characteristics, which states in part "[n]o abnormal nose-up pitching may occur…. In addition, it must be possible to promptly prevent stalling and to recover from a stall by normal use of the controls."

413. By virtue of selling an aircraft it knew violated Federal Aviation Regulations, it was reasonably foreseeable that such aircraft likely would be grounded in the future once its defect was discovered and until such defect could be remedied.

414. As a result of Boeing's conduct, SWAPA pilots have incurred lost compensation and other losses described below.

415. Among other things, SWAPA would not have agreed to its CBA had it known the truth of

Boeing's misrepresentations or that Boeing was concealing objectively material information relating to the 737 MAX from SWAPA.

416. Boeing breached its duties to manufacture safe aircraft, and to warn and adequately train SWAPA pilots. These breaches were the proximate cause and cause in fact of SWAPA's damages.

417. SWAPA has been damaged in the amount of millions of dollars in lost compensation, which continues to accrue.

418. Such damages can be determined based on Southwest's published flight schedules that incorporate the 737 MAX versus Southwest's actual flight schedule subsequent to the grounding.

419. SWAPA also has been damaged in amounts to be determined for associated costs, such as legal fees in connection with its role in the DOJ investigation and SEC investigation.

420. SWAPA also has been damaged in a loss of dues from SWAPA pilots.

421. SWAPA is entitled to damages for those categories of losses in amounts to be determined at trial.

SIXTH CLAIM FOR RELIEF –
FRAUD BY NON-DISCLOSURE

422. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 421 above with the same force and effect as if set forth herein in full.

423. Boeing marketed the 737 MAX as a variant of the safe, reliable and time-tested 737 family of aircraft, with new fuel-efficient engines and

"very deliberate" design enhancements that posed "minimal risk."

424. Boeing made these representations publicly, and to SWAPA directly when SWAPA: participated in simulator exercises to evaluate the extent of pilot training needed for the 737 MAX; reviewed Boeing drafted flight and aircraft manuals; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; and participated in Service Ready Operational Validation tests.

425. Boeing also made the foregoing representations on its website and in press releases described above, including, but not limited to its statements claiming that Boeing would minimize changes from the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

426. Boeing's representations concerning the 737 MAX were false in that Boeing did not disclose that, as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia*:

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety

critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

427. Boeing made these representations knowing that SWAPA pilots and union representatives were relying on their truth.

428. Boeing knew that the foregoing representations were false, or recklessly disregarded their truthfulness in making such representations.

429. In making these misrepresentations, Boeing failed to disclose the truth, including that as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia*:

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

430. Boeing's non-disclosures related to

objectively material facts concerning the 737 MAX.

431. Boeing concealed all or parts of the truth when it had a legal duty to speak, and when it had already made partial representations concerning differences between the 737 NG and 737 MAX to SWAPA.

432. Boeing had a legal duty to correct these misrepresentations once made, but failed to do so until it was too late.

433. Boeing made the foregoing non-disclosures for its economic advantage.

434. Boeing's non-disclosures concerning the 737 MAX were deliberate.

435. Boeing made the foregoing misrepresentations and non-disclosures with the intent to induce SWAPA's reliance on the representations.

436. SWAPA relied on Boeing's representations and non-disclosures as true because of Boeing's superior knowledge concerning the 737 MAX and its expertise, and SWAPA's inability to acquire its own knowledge concerning Boeing's representations and non-disclosures.

437. SWAPA's reliance on Boeing's representations and non-disclosures also was justifiable in light of SWAPA and Boeing's long-term relationship that previously did not include any reason to doubt the truthfulness and completeness of Boeing's representations and disclosures.

438. SWAPA was entitled to rely on Boeing's representations.

439. SWAPA was entitled to assume that Boeing's disclosures were complete and accurate, and relied on Boeing for that reason.

440. Boeing's deliberate non-disclosures were intended to cause SWAPA to agree to include the 737 MAX as a term in its 2016 CBA, and/or to refrain from continuing its disagreements with Southwest over that issue.

441. SWAPA would not have agreed to include the 737 MAX as a term of its 2016 CBA had it known of the truth about Boeing's misrepresentations or that Boeing was concealing objectively material information relating to the 737 MAX from SWAPA.

442. Boeing's non-disclosures therefore were the proximate cause and cause in fact of SWAPA's injuries.

443. SWAPA has been damaged in the amount of millions of dollars in lost compensation, which amount continues to accrue.

444. Such damages can be determined based on Southwest's published flight schedules that incorporate the 737 MAX versus Southwest's actual flight schedule subsequent to the grounding.

445. SWAPA also has been damaged in amounts to be determined for associated costs, such as legal fees in connection with its role in the DOJ investigation and SEC investigation.

446. SWAPA also has been damaged by the loss of dues from SWAPA pilots.

447. SWAPA is entitled to damages for those categories of losses in amounts to be determined at trial.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

Wherefore, Plaintiff demands judgment:

A. That Defendant Boeing pays Plaintiff SWAPA for the lost compensation it has incurred and is continuing to incur;

B. That Defendant Boeing pays Plaintiff SWAPA for its other losses associated with the 737 MAX grounding, including, but not limited to, costs of legal representation in connection with the DOJ and SEC investigation, and lost dues;

C. That Defendant Boeing pays Plaintiff SWAPA pre-judgment interest for the foregoing;

D. That Defendant Boeing pays Plaintiff SWAPA for all other relief to which SWAPA may be entitled, and which this Court deems just and proper.

Dated: October 7, 2019

SOUTHWEST AIRLINES PILOTS ASSOCIATION

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SOUTHWEST AIRLINES PILOTS ASSOCIATION

IN THE DISTRICT COURT
160TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Cause No. DC-21-03072

SOUTHWEST AIRLINE PILOTS ASSOCIATION (SWAPA) on behalf of itself and its members,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

PLAINTIFF'S ORIGINAL PETITION

Plaintiff Southwest Airlines Pilots Association ("SWAPA"), as assignee of 8,794 of its pilot Members[1], by and through its attorneys, for its Original Petition against The Boeing Company (hereinafter "Boeing" or "Defendant"), respectfully alleges as follows:

LOCAL RULE DISCLOSURE

1. In accordance with Dallas County Local Rule 1.08, SWAPA discloses that this suit is related to cause no. DC-19-16290, styled *Southwest Airlines*

[1] "Member" or "Members" refers, individually or collectively, to SWAPA's pilot members who have assigned their rights to the claims asserted herein to SWAPA.

Pilots Association (SWAPA) on behalf of itself and its members, v. The Boeing Company, in the 160th District Court, Dallas County, Texas.

DISCOVERY CONTROL PLAN

2. SWAP A intends that discovery be conducted under Discovery Level 3 in accordance with Texas Rule of Civil Procedure 190.4, and requests that the Court enter a discovery control plan order tailored to the circumstances of this suit.

INTRODUCTION

3. In this action, SWAPA seeks damages as assignee of 8,794 of its Members, who have collectively lost millions of dollars in economic damages as a result of Boeing's false representations and fraudulent non-disclosures concerning its 737 MAX aircraft—namely, that the 737 MAX aircraft was safe, airworthy, was essentially a more profitable iteration of the same as the time-tested 737 aircraft that SWAPA Members already were flying, and had no significant safety issues.

4. Boeing made a calculated decision to rush this re-engined aircraft to market to secure its single-aisle market share, and in doing so prioritized its bottom line over the safety of its customers and their passengers. By taking this approach, Boeing abandoned sound design and engineering practices, admittedly withheld safety critical information from regulators, and deliberately misled its customers, pilots—including, SWAPA and its Members—about the true scope of design changes to the 737 MAX and the profitability of this new aircraft, which Boeing knew was at risk of being grounded by regulators.

5. Boeing's misrepresentations and fraudulent non-disclosures caused SWAPA Members to believe that the 737 MAX aircraft was safe and that it was to their economic advantage to conclude its contract negotiations with Southwest Airlines ("Southwest") in 2016 and accept Southwest's fleet modernization plan with the 737 MAX at its center.

6. Boeing's misrepresentations and fraudulent non-disclosures caused SWAP A, acting on behalf of and with the support of its Members, to change their position during negotiations with Southwest, and forego negotiating contingencies that could haven mitigated the losses they sustained after two fatal accidents led the Federal Aviation Administration ("FAA") to issuing an order on March 13, 2019, grounding the aircraft for twenty (20) months.

7. Boeing's false representations and non-disclosures, made directly to Southwest and SWAPA Members through SWAPA deprived SWAPA and its Members of critical information and aircraft safety and performance data that Boeing knew was material to the negotiations taking place between Southwest and SWAPA on behalf of its Members in 2016.

8. In light of the aircraft's grounding, Southwest, the largest operator of the 737 MAX aircraft with thirty-four (34) 737 MAX aircraft in scheduled flight, and more than twenty (20) additional scheduled to be delivered and incorporated into scheduled flight by the end of 2019, had to cancel thousands of flights, thus limiting SWAPA Members' ability to fly and terminating the economic benefit of a Southwest fleet centered around the 737 MAX. As a

result, the aircraft's grounding caused SWAPA Members to lose millions of dollars each month because the 737 MAX was removed from Southwest's flight schedule and could not be replaced by other aircraft.

9. Tragically, the economic damages sustained by SWAPA Members were not the only result of Boeing's misrepresentations about the 737 MAX aircraft. Boeing's rushed certification and introduction of the 737 MAX aircraft into the hands of trusting pilots who, like SWAPA Members, believed that Boeing carefully designed a safe and airworthy aircraft, and had disclosed all of the information needed to operate the aircraft, caused two fatal crashes within a five-month period: the Lion Air Flight 610 crash on October 29, 2018 that killed 189 individuals; and, the Ethiopian Airlines Flight 302 crash on March 10, 2019 that killed 154 individuals.

10. Since those tragic and preventable accidents it has become clear that Boeing's representations concerning the 737 MAX aircraft were false, its fraudulent non-disclosures deadly, and that, contrary to what Boeing told SWAPA Members directly and through SWAP A, Boeing concealed information showing that the 737 MAX aircraft was not airworthy, had been certified by the FAA under false pretenses, and was at risk of grounding because, *inter alia:* it incorporated a single-point failure condition—a software/flight control logic called the Maneuvering Characteristics Augmentation System ("MCAS")—that, if fed erroneous data from a single angle- of-attack sensor,

would command the aircraft nose-down without pilot input or knowledge and into an unrecoverable dive.

11. Had SWAPA and its Members known the truth about the 73 7 MAX aircraft in 2016, they would have taken a different position during negotiations with Southwest, demanding that Southwest delay its fleet-wide shift toward the 737 MAX until Boeing fixed the 737 MAX's single point failure condition or, at a minimum, negotiated contingencies for a likely delay in the delivery and incorporation of the 737 MAX into Southwest's fleet. Worse still, had SWAPA and its Members known the truth about the 737 MAX aircraft in 2016, they would have demanded that Boeing rectify the aircraft's fatal flaws and provide737 MAX pilots with the necessary information and training needed to respond to the circumstances that the Lion Air Flight 610 and Ethiopian Airlines Flight 302 pilots encountered nearly three years later.

12. Boeing is liable to SWAPA, as the assignee of its Members' claims, for the economic damages SWAPA Members sustained from: Boeing's false representations and nondisclosures concerning the 737 MAX aircraft—specifically, Boeing's non-disclosure of MCAS's dangerous characteristics; Boeing's negligence in designing and self-certifying an aircraft that was at risk of being grounded; and Boeing's failure to provide accurate data relating to the training and the performance of the 737 MAX, which was material to the negotiations between Southwest and SWAP A, on behalf of its Members in 2016. Boeing's conduct interfered in SWAPA Members' business relationship with Southwest and deprived SWAPA of the opportunity to protect its

Members' economic interests during the 2016 contract negotiations with Southwest. As a result of Boeing's fraud, negligence, and tortious interference, SWAPA, as the assignee of its Members, has been damaged.

PARTIES

I. SWAPA

13. Plaintiff SWAPA was at all relevant times referenced herein, and still is, a nonprofit labor organization and employee association representing the pilots of Southwest. SWAPA is headquartered in Dallas, Texas.

14. Formed in 1978, SWAPA has acted as the sole bargaining unit for pilots employed by Southwest, currently numbering over 9,000 pilots, and has continued to represent the economic interests of its Members in all capacities since that time. SWAPA's mission, in part is "to provide a secure and rewarding career for [Southwest] pilots and their families by equitably enhancing compensation and quality of life issues through contract negotiations, faithfully defending individual and collective contractual rights via administration and enforcement procedures, and actively promoting professionalism and safety through effective organizational communications."

15. SWAPA has represented Southwest's pilots for over 40 years, and its existence, as well as its relationship with Southwest, are common knowledge in the aviation industry and are known to Boeing.

16. SWAPA is the assignee of the claims of 8,794 of its Members, each of whom voluntarily

entered into an Assignment of Claim for Damages ("Assignment") with SWAPA, pursuant to which the assignor-Member assigned to SWAPA all of his or her rights, title, and interest to any and all claims, demands, and causes of action against Boeing for damages sustained as a result of Boeing's actions and omissions with respect to the 737 MAX aircraft which resulted in, among other things, two fatal accidents, the worldwide grounding of all 737 MAX aircraft, and the cancellation of thousands of Southwest flights (the "MAX Crisis").

17. Each Member's Assignment states: "I hereby assign and transfer to SWAPA all rights, title, and interest to any and all claims, demands, and/or causes of action for My Damages that I have or may have against Boeing arising out of the MAX Crisis."

18. Each assignor-Member acknowledged that SWAPA's role as the assignee of the claim was "[c]onsistent with SWAPA's Constitution and the ordinary business it conducts in representing the interests of Southwest pilots[.]"

19. Each assignor-Member executed the Assignment electronically using unique identifying information after expressly acknowledging that he or she "voluntarily enter[ed] into [the] Assignment, having carefully read, understood, and accepted all of the terms of the conditions contained [within the Assignment].

20. Pursuant to these valid Assignment agreements, SWAPA is the owner of all claims herein and brings this action in its own name.

21. The facts herein relate to SWAPA as assignee of its 8,974 assignor Members.

II. BOEING

22. Upon information and belief, and at all times referenced herein, Defendant Boeing was, and still is, a corporation organized and existing under the laws of Delaware. Boeing maintains its corporate headquarters in Chicago, Illinois, and its principal places of business in Chicago, Illinois, and Washington State. Boeing is an aerospace company involved in the design, manufacture, and sale of commercial aircraft and business jets. Boeing may be served by its registered agent in Texas at Corporation Service Company, 211 East 7th Street Suite 620, Austin, Texas 78701.

JURISDICTION AND VENUE

23. The subject matter in controversy is within the jurisdictional limits of this Court pursuant to Texas Rule of Civil Procedure 47 as SWAPA seeks monetary relief over $1,000,000.

24. This Court has *in personam* jurisdiction over Boeing pursuant to Texas' long-arm statute Tex. Civ. Prac. & Rem. Code § 17.041 *et seq* (WEST). Boeing conducts business in the State of Texas, communicated with SWAPA Members directly and through SWAPA in Texas and committed torts in Texas. Boeing made most of the misrepresentations at issue in this action in Texas, fraudulently concealed the information at issue in this action in Texas, and aimed its communications to Texas.

25. Venue is proper in this Judicial District pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.002 (WEST) because a substantial part of the events and omissions giving rise to the claims asserted herein took place within Dallas County.

Boeing made the communications at issue in part in this County, made the misrepresentations at issue in this action in this County, and fraudulently concealed the information at issue in this action in this County.

26. At all relevant times, Defendant Boeing has conducted business within this County.

FACTUAL ALLEGATIONS

27. Plaintiff repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 26 above with the same force and effect as if set forth herein in full.

28. At all times mentioned herein, Boeing, and each of its employees, agents, and servants named herein were operating and acting within the scope of their employment, agency and service, and Boeing was aware of, and ratified and approved the acts of and statements made by each named employee, agent or servant. Each act or statement made by each named employee, agent or servant of Boeing was done in furtherance of Boeing's interest and substantially assisted Boeing's commission and omission of the wrongful acts alleged herein.

I. THE DEVELOPMENT OF THE 737 MAX AND ITS INHERENT, UNDISCLOSED RISKS

Boeing Introduced the 737 MAX to Protect Its Narrow-Body Market Position

29. The Boeing 737 is a narrow-body, single-aisle commercial airplane that has been in

production since 1967. It is Boeing's best-selling aircraft model.

30. Boeing's main competitor in the narrow-body market is, and at all relevant times herein has been, Airbus. Airbus manufactures the A320 family of narrow-body, single-aisle aircraft.

31. In 2010, Airbus announced the introduction of the Airbus A320neo ("A320neo") aircraft, a new engine variant of its popular A320 aircraft, which offered greater fuel efficiency than Airbus's prior generations of A320 aircraft and Boeing's 737 Next Generation ("NG") aircraft, which was Boeing's most recent 737 iteration at the time.

32. Following Airbus's announcement, Boeing considered but rejected the idea of introducing a new engine variant of its 737.

33. At a meeting in January 2011, Jim Albaugh, then the president of Boeing Commercial Airplanes, told Boeing employees that Boeing could wait until the end of the decade to produce a new plane from scratch rather than refit the most recent 737 NG with new engines. He further explained that the A320neo's use of a bigger, more fuel-efficient engine would be a "design change that will ripple through the airplane."[2]

34. Subsequently, Boeing learned that American Airlines, an exclusive Boeing customer for more than a decade, and one of the world's largest

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[2] David Gelles et al., *Boeing Was 'Go, Go, Go' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html.

airlines, was considering placing an order for 200 Airbus A320neos.

35. Faced with the prospect of a defection by American, Boeing ditched the idea of developing a new narrow-body airplane from scratch, which would take a decade, and, instead, decided to update its existing 737 NG with larger more fuel-efficient CFM International LEAP1- B (the "LEAP1-B") engines,[3] promising that the plane would be ready in six years.

36. A former senior Boeing official explained that updating the existing 737 NG airframe with new engines would be "far quicker, easier and cheaper than starting from scratch, and would provide almost as much fuel savings for airlines."[4]

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[3] *Id.; see also* Andy Pasztor, et al., *How Boeing's 737 MAX Failed,* The Wall Street Journal, March 27, 2019, https://www.wsj.com/articles/how-boeings-737-max-failed-l 1553699239; Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street Journal, August 16, 2019, https://www.wsi.com/articles/the-four-second-catastrophe-how-boeing-doomed-the-737-max-11565966629.

[4] David Gelles et al., *Boeing Was 'Go, Go, Go ' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html; *see also How Boeing's 73 7MAX Failed,* The Wall Street Journal, March 27, 2019, https://www.wsj.com/articles/how-boeings-737-max-failed-11553699239; Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street Journal, August 16, 2019, https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing-doomed-the-737-max-l 1565966629.

37. In August 2011, Boeing's Board of Directors authorized and Boeing announced the launch of a new iteration of 737—the "MAX" Series.[5]

38. Four months later, on December 13, 2011, Southwest placed a firm order for 150 737 MAX aircraft, becoming Boeing's launch customer for the 737 MAX program. Boeing reported that Southwest's "order [was] the largest in Boeing history both in dollar value, nearly $19 billion at list prices, and the number of airplanes."[6]

The Promise of a Common Type Rating and No Simulator Training Was Fundamental to the 737 MAX Program's Success

39. The 737 MAX program's overarching goal and primary design objective was to achieve commonality with the 737 NG, and ensure that the FAA would not require a new type certificate or aircraft simulator training for pilots transitioning to the 737 MAX from the 737 NG, the prior iteration of 737 aircraft, which Boeing's largest customers were flying at the time.[7]

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[5]The Boeing Company, *Boeing Introduces 737 MAX With Launch of New Aircraft Family,* August 30, 2011, https://boeing.mediaroom.com/201 l-08-30-Boeing-Introduces-737-MAX-With-Launch-of-New-Aircraft-Family.

[6] The Boeing Company, *Boeing 73 7 MAX Logs First Firm Order from Launch Customer Southwest Airlines* (December 13, 2011), https://boeing.mediaroom.com/2011-12-13-Boeing-737-MAX-Logs-First-Firm-Order-from-Launch-Customer-Southwest-Airlines

[7]Majority Staff of the House Committee on Transportation and Infrastructure, September 2020. *Final Committee Report The*

40. These design objectives served two important purposes. First, if Boeing could convince aviation regulators and airline customers that the 737 MAX was so similar to the 737 NG that costly and time-consuming simulator training was not necessary, the 737 MAX would be more competitive relative to the A320neo, more fiscally attractive to customers, and, in turn, more profitable for Boeing. Second, presenting the 737 MAX merely as an update to the 737 NG, not a new aircraft type, made it possible for Boeing to fast-track the type certification process by seeking an amendment to its existing FAA Type Certificate No. A16WE for the 737, which was issued in 1967. This approach allowed Boeing to bring the 737 MAX to market at around the same time as the A320neo.

41. More relevant here, the promise of a common type rating and no simulator training was central to Boeing's ability to satisfy Southwest, which would play a key role as the launch customer in determining the 737 MAX's success.

42. Southwest is unique in that its business model is predicated on the operation of a single type

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Design, Development & Certification of the Boeing 737 MAX. [online] ("Transportation Committee Final Report") p.24 Available at: https://transportation.house.gov/imo/media/doc/2020.09.15%20FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf [Accessed 17 November 2020] citing Boeing internal email, "Subject: 737 MAX Firm Configuration Status/Help Needed," Sent: May 4, 2013 11:3 5 AM, BATES Number TBC-T&I 048706 - 048707, at pp. 128-129 accessed here: https://www.govinfo.gov/content/pkg/CHRG-116hhrg38282/pdf/CHRG-116hhrg38282.pdf

of aircraft, the Boeing 737. Operating only 737 aircraft allows Southwest to keep overall cost structure down, and greatly simplifies operations since all pilots, cabin crew, maintenance, parts, training, and configurations are interchangeable between aircraft.

43. For instance, if an aircraft breaks down, Southwest can swap out the malfunctioning aircraft with any other 737 in its fleet, without a disruption to operations. If a flight crew has flown more than the FAA-mandated maximum number of hours in a day, it can be replaced with any other flight crew. If an aircraft needs maintenance, any of Southwest's maintenance bases can accomplish the work.

44. In 2011, Southwest's fleet consisted of 737 NGs and 737 "Classics," the generation of 737 aircraft that preceded the NG.

45. Accordingly, the promise of commonality with the 737 NG and no additional simulator training requirements were fundamental to Southwest's decision to make its historic order of 737 MAX aircraft. In recognition of this, Boeing demonstrated its commitment to delivering a common type rating with no simulator training requirement, by agreeing to pay Southwest a $ 1 million per aircraft rebate if Boeing was unsuccessful in achieving its design goals.[8]

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[8]Transportation Committee Final Report, p.24 Available at: https://transportation.house.gov/imo/media/doc/2020.09.15%20FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf [Accessed 17 November 2020] citing Letter from Southwest Airlines' Drew Richardson to Chair DeFazio and Subcommittee on Aviation Chair Rick Larsen, July 26, 2019.

46. With Southwest's eventual order of over 280 737 MAX aircraft and options to purchase additional 737 MAX aircraft, failure to deliver on its design objectives would have cost Boeing nearly $400 million to Southwest alone.[9]

47. Against this backdrop, Boeing's 737 MAX design objectives became a driving force in the development, certification, and marketing of the 737 MAX.

48. Rick Ludtke, an employee at Boeing for 19 years and an engineer who helped design the 737 MAX cockpit, explained that "[a]ny designs we created could not drive any new [pilot] training that required a simulator."[10] He described this difficult process, based on an existing airframe, to be "such a kludge," that he and other engineers working on the MAX wondered during the design process whether it was safe to create the 737 MAX.[11]

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[9] Transportation Committee Final Report, p. 148; Joanna Baily, *How Many Boeing 737 MAX Aircraft are US Airlines Expecting?* Dec. 14, 2020, Simply Flying https://simpleflying.eom/boeing-737-max-us-airline-orders//.

[10] David Gelles et al., *Boeing Was 'Go, Go, Go ' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html, *see also* Andy Pasztor, et al., *How Boeing's 737 MAX Failed,* The Wall Street Journal, March 27, 2019, Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street Journal, August 16, 2019, https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing-doomed-the-737-max-11565966629.

[11] Mike Baker & Dominic Gates, *Lack of Redundancies on Boeing 73 7 MAX System Baffles Some Involved in Developing the Jet,* The Seattle Times, March 26, 2019, https://www.seattletimes.com/business/boeing-aerospace/a- lack-

49. He further wondered whether the 737 MAX, with its new engine but existing airframe was "a bridge too far."[12]

Boeing Marketed the 737 MAX Based on the 737 Family Legacy

50. From its inception, Boeing marketed the 737 MAX as the newest variant of its 737 family of aircraft, specifically a new version the latest 737 model, the 737 NG.

51. In its launch announcement, Boeing emphasized the 737 MAX's connection to the 737 product line's service history explaining that "[w]e call it the 737 MAX because it optimizes everything we and our customers have learned about designing, building, maintaining and operating the world's best single-aisle airplane."[13]

52. Boeing further asserted, *inter alia,* that:[14]

a. "The 737 MAX will deliver big fuel savings that airlines will need to successfully compete in the future. Airlines will benefit from a 7 percent advantage in operating costs over future competing airplanes as a result of optimized CFM

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of-redundancies-on-737-max-system-has-baffled-even-those-who-worked-on-the-jet/.

[12] *Id.*

[13] *Id.*

[14] *Id.*

International LEAP-IB engines, more efficient structural design and lower maintenance requirements"; and

b. "Airlines will continue to benefit from maximum reliability. The 737 MAX will build upon the Next-Generation 73 7's highest reliability performance of any airplane in the world - 99.7 percent on-time departure rate."

53. Boeing's website featured a page marketing the 737 MAX entitled "The Legacy and Strength of the Boeing 737 Family," which boasted that reliability, safety, and simplicity of design had been the hallmarks of the 737 family since its inception in 1967 and would continue with the 737 MAX.[15]

54. Boeing presented the following infographic to highlight the 737's extensive in-service history:[16]

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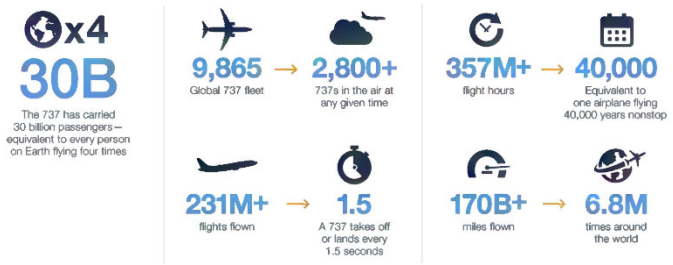
[15] The Boeing Company, *73 7MAX Updates,* https://www.boeing.com/commercial/737max/737max-legacy.page.

[16] *See id.*



55. In other words, Boeing was specifically marketing the 737 MAX based on the 737 family's long track-record for safety without disclosing the safety critical design changes, described below, which made the MAX a fundamentally different aircraft from prior generations of the 737 family.

56. Boeing's 737 family legacy messaging appeared throughout Boeing's marketing materials and statements upon which existing and potential future 737 MAX operators, including SWAPA and its Members, relied.

57. For example, a November 3, 2011 Boeing press release announcing 737 MAX design changes described the MAX as a "new-engine variant" and reminded the public and potential customers and operators that "[t]he Boeing 737 is the world's most popular and reliable commercial jet transport."[17]

58. A February 12, 2012 press release discussing the final phase of 737 MAX wind tunnel

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[17]The Boeing Company, *Boeing Updates 737 MAX Engine Configuration Status and Customer Commitments,* November 3, 2011, https://boeing.mediaroom.com/2011-11-03-Boeing-Updates-737-MAX-Engine-Configuration-Status-and-Customer-Commitments.

testing described the MAX as "a new engine variant of the world's best-selling airplane [that] builds on the strengths of today's NEXT-Generation 737."[18]

59. An April 11, 2012 press release disclosed the changes from the 737 NG to the 737 MAX, including an extension of the tail cone; integration of the LEAP1-B engines with the wing; a new pylon and strut, nose gear extension; and flight control and system updates such as fly-by-wire spoilers and an electronic bleed air system.[19]

60. In this same statement, Boeing's 737 MAX Chief Project Engineer characterized the allegedly limited changes to the MAX by stating "[a]ny new technology incorporated into the MAX design must offer substantial benefit to our customers with minimal risk for the team to pursue it."[20]

61. In an October 29, 2013 press release, Boeing echoed its prior marketing efforts, stating "we are being very deliberate about any changes we make to airplane systems on the 737 MAX to make the airplane even easier to operate."[21]

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[18] The Boeing Company, *Boeing to Begin Final Phase of 737 MAX Wind Tunnel Testing,* February 12, 2012, https://boeing.mediaroom.com/2012-02-12-Boeing-to-Begin-Final-Phase-of-737-MAX-Wind-Tunnel-Testing.

[19] The Boeing Company, *Boeing Makes 737 MAX Design Decisions,* April 11, 2012, https://boeing.mediaroom.com/2012-04-l l-Boeing-Makes-737-MAX-Design-Decisions.

[20] *Id.*

[21] The Boeing Company, *Boeing Continues to Improve 737 MAX Performance,* October 29, 2013,

62. But in disclosing only minor differences, Boeing concealed that the use of LEAP 1 - B engines on the existing 737 airframe which was designed to accommodate smaller, less powerful engines, created important differences between the 737 NG and the 737 MAX—changes that impacted safety, and put Boeing's overarching design objective in jeopardy.

63. Specifically, Boeing did not disclose that, as compared to the most recent 737 NG, the addition of the LEAP1-B engines to the existing airframe would, *inter alia:*

a. Change the aircraft's center of gravity;

b. Decrease aircraft stability;

c. Negatively affect flight handling characteristics to make the aircraft more susceptible to the catastrophic risk of aerodynamic stall; and

d. Create inherent safety risks.

The 737 MAX's Unique, Inherent and Undisclosed Safety Risks

64. Boeing claimed that it is "committed to being the leader in commercial aviation by offering airplanes and services that deliver superior design, efficiency and value to customers around the world."[22]

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https://boeing.mediaroom.eom/2013-10-29-Boeing-Continues-to-Improve-737-MAX-Performance.

[22]The Boeing Company, *Our Company,* https://www.boeing.com/company/.

65. However, in the rush to get the 737 MAX certified under the 737 type rating and without the need for simulator training, Boeing's plan to add new engines onto an existing airframe introduced the catastrophic risk of stall.

66. Adding the new, heavier LEAP1-B engines triggered design and engineering challenges for the aircraft, the same ripple effect that James Albaugh, Boeing's then commercial airplanes chief executive, had predicted back in 2011, when criticizing the A320neo.

67. Unlike Airbus's addition of a new, more fuel-efficient engine on the A320neo, Boeing was not able to mount the LEAP1-B engines in the same location as the 737 NG engines because the airframe was too close to the ground.

68. Boeing had to mount the LEAP1-B engines higher up and farther forward on the wing than 737 NG engines.

69. The weight and placement of the new engines, *inter alia:*

a. Changed the 737 MAX's aerodynamic center of gravity;

b. Decreased aircraft stability;

c. Created a greater pitch-up tendency at elevated angles of attack; and

d. Negatively affected the flight handling characteristics, making the 737 MAX more susceptible to the catastrophic risk of stall.

70. Asa result, when the 737 MAX is in full thrust, such as during takeoff, the aircraft nose tends to point too far upward, which creates a risk of aerodynamic stall. If not quickly corrected, a stall can lead to a loss of controlled flight and crash of the aircraft.

71. The 737 NG did not have the same problem.

72. Boeing became aware of the 737 MAX'S different handling characteristics, and the problems they created, in early 2012.[23]

73. The center of gravity change and the red flags it raised were first noticed on a model 737 MAX that was the size of an eagle and was being tested in a wind tunnel.[24]

74. Boeing's Chief Test Pilot, Ray Craig, also discovered an issue with the 737 MAX's high-speed handling qualities while conducting FAA-required evasive maneuvers in a simulator.

75. If Boeing did not fix the 737 MAX's pitch-up characteristic, the FAA could determine that the 737 MAX did not meet U.S. federal airworthiness

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[23] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 73 7 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytimes.com/2019/06/01/business/boeing-737-max-crash.html.

[24] Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia- lion-air-ethiopian-airlines-managerial-revolution.

standards required for the 737 MAX to obtain an amendment to Boeing's existing 737 type-certificate.

76. To address the issue, Boeing developed a software solution, MCAS, which is a flight control logic unique to the 737 MAX aircraft.[25]

77. Although Craig disliked automatic systems such as MCAS that take control from pilots and would have preferred a structural aerodynamic fix, he relented because the need for such high-speed maneuvers was so rare that he believed MCAS would rarely engage.[26] But as described below, Boeing's concept of MCAS changed so radically throughout the development process that the final result was an entirely new system that engaged in far different circumstances and far too often, with catastrophic consequences.

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[25]*Id.; see also* Andrew Tangel & Andy Pasztor, *Regulators Found High Risk of Emergency After First Boeing MAX Crash,* The Wall Street Journal, July 31, 2019, https://www.wsj.com/articles/regulators-found-high-risk-of-emergency-after-first-boeing-max-crash-11564565521; Douglas MacMillan & Aaron Gregg, *Boeing's 73 7 Max Design Contains Fingerprints of Hundreds of Suppliers*, The Washington Post, April 5, 2019, https://www.washingtonpost.com/steps-for-disabling-firefoxs-native-adblocker/2018/05/21/fb95bf4e-5d37-lle8-b2b808a538d9dbd6_story.html?utm_term=.8c5fedae8660; Anurag Kotoky & Kyunghee Park, *When Will Boeing 73 7 Max Fly Again and More Questions,* Bloomberg, June 16, 2019, https://www.bloomberg.com/news/articles/2019-06-17/boeing-s-grounded-737-max-the-story-so-far-quicktake.

[26] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 73 7 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytimes.com/2019/06/01/business/boeing-737-max-crash.html.

Boeing Downplayed and Misled the FAA About MCAS to Ensure that the 737 MAX Met Its Design Objective of Commonality with No Simulator Training

78. On January 27, 2012, Boeing petitioned the FAA for certification of the 73 7 MAX as an amendment to Type Certificate No. A16WE.[27]

79. The FAA reviewed Boeing's application in February 2012 and determined that the MAX project qualified for an amended type certificate rather than a new type certificate based on what we now know to be false representations and fraudulent non-disclosures in Boeing's application—namely that the 737 MAX would be sufficiently similar to prior generations of 737 aircraft already included on the same type certificate.

80. Under an amended type certificate, as agreed to by FAA and Boeing, only the significant differences between the 737 MAX and the 737 NG were required to be certified to current regulatory airworthiness standards.[28]

81. The FAA also granted Boeing Organization Designation Authorization ("ODA"), pursuant to which the FAA delegated its certification authority for the 737 MAX to Boeing and relied on

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[27] Pursuant to federal regulations, the FAA can either award a type certificate for a new aircraft or an amended type certificate for aircraft models that are derivatives of already-certified aircraft. 14 CFR 21, FAA Orders 8110.48 and 8110.4c.

[28] 14 CFR 21.101 and Advisory Circular 21.101-A, referred to as the "Changed Product Rule."

Boeing to identify which changes from the previous aircraft model, the 737 NG, were significant. Over the course of the 737 MAX's development, the FAA delegated upwards of 87% of the certification process to Boeing.[29]

82. As Rick Ludtke described: "The Company was trying to avoid costs and trying to contain the level of change. They wanted the minimum change to simplify the training differences, minimum change to reduce costs, and to get it done quickly."[30]

83. Thus, the pressure to minimize changes that could jeopardize a common type rating or create a need for simulator training had spilled over into Boeing's interactions with the FAA.

84. Boeing deliberately included limited information about MCAS in general familiarization

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[29] DOT *Office* of Inspector General, "Timeline of Activities Leading to the Certification of the Boeing 737 MAX 8 Aircraft and Actions Taken After the October 2018 Lion Air Accident," Report No. AV2020037 ("OIG Audit Report"), p. 9, June 29, 2020, accessed here: https://www.oig.dot.gov/sites/default/files/FAA%20Oversight%20of%20Boeing%20737%20MAX%20Certification%20Timeline%20Final%20Report.pdf.

[30] David Gelles et al., *Boeing Was 'Go, Go, Go ' to Beat Airbus With the 737 Max,* The New York Times (2019), https://www.nytimes.com/2019/03/23/business/boeing-737-max-crash.html; *see also* Andrew Tangel, et al. *Prosecutors, Transportation Department Scrutinize Development of Boeing's 737 MAX,* The Wall Street Journal, March 18, 2019, Andrew Tangel, et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 Max,* The Wall Street Journal, August 16, 2019, https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing- doomed-the-737-max-l 1565966629.

meetings with the FAA intended to introduce the regulator to changes, new systems and features of the aircraft.[31] FAA flight control engineers who participated in the meetings confirmed that MCAS information was not a point of focus and was presented with limited details.[32]

85. Because Boeing intentionally minimized the significance and novelty of this feature, the FAA focused its efforts on other areas identified as potentially high risk, such as the aircraft's larger engines, fly-by-wire spoilers, and landing gear changes; not MCAS.

86. Boeing meeting minutes from 2013 confirm that employees working on the 737 MAX recognized that if MCAS "was emphasized as a new function, there may be a greater certification and training impact."[33] Unwilling to jeopardize the program's design objective, they decided to abandon the term MCAS in external communications and instead present MCAS to the FAA as an extension of

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[31]OIG Audit Report, accessed here: https://www.oig.dot.gov/sites/default/files/FAA%20Oversight%20of%20Boeing%20737%20MAX%20Certification%20Timeline%20Final%20Report.pdf.

[32] *Id.* at pp 13-15.

[33] Transportation Committee Final Report, p.92 Available at: https://transportation.house.gov/imo/media/doc/2020.09.15%20FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf [Accessed 17 November 2020] citing Internal Boeing email, "PRG - 37MAXFCI-PDR AI22 - MCAS/Speed Trim," June 7, 2013, 9:10 PM, accessed at p. 93 here: https://transportation.house.gov/imo/media/doc/Compressed%20Updated%202020.01.09%20Boeing%20Production.pdf.

the existing speed trim system that would only activate under certain limited circumstances.[34]

87. This narrow definition was a strategy to muddy the waters around MCAS so that Boeing could claim that MCAS was not new or novel, and therefore should not be subjected to greater scrutiny during certification.[35]

88. According to the U.S. House of Representatives Transportation & Infrastructure Committee ("Transportation & Infrastructure Committee"), which investigated Boeing's conduct related to the MAX Crisis, while Boeing couched MCAS as simply an extension to the previously existing speed trim system, Boeing should have been designated MCAS as a safety critical system, because MCAS had never been incorporated on a commercial airplane and was fundamentally different from the MCAS system incorporated on the Boeing KC-46 Pegasus, a military tanker derivative of the Boeing 767 aircraft, in that it omitted key safety features.[36]

89. Boeing also intentionally withheld from the FAA flight test results showing that the

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[34] OIG Audit Report, p. 15, accessed here: https://www.oig.dot.gov/sites/default/files/FAA%20Oversight%20of%20Boeing%20737%20MAX%20Certification%20Timeline%20Final%20Report.pdf.

[35]Gregory Travis, "How the Boeing 737 Max Disaster Looks to a Software Developer," *IEEE Spectrum,* April 18, 2019, accessed here: https://spectrum.ieee.org/aerospace/aviation/how-the-boeing-737-max-disaster-looks-to-a- softwaredeveloper.

[36]Transportation Committee Final Report, p. 102-103,106.

assumptions upon which MCAS's risk level was assessed were false.

90. Boeing submitted a System Safety Assessment ("SSA") to the FAA, which concluded that there would be little risk in the event of an MCAS failure. That determination was based, in part, on an industry assumption that a pilot would recognize and respond to a runaway stabilizer condition within four seconds.

91. However, Boeing's stated assumption about pilot response conflicted with its own test results. Boeing's own test pilot took more than 10 seconds to respond to runaway stabilizer trim or uncommanded MCAS activation, and categorized the condition as a "catastrophic failure" condition, a term that the FAA defines as, a failure condition that is expected to result in multiple fatalities of the occupants normally with the loss of the airplane.[37]

92. Despite what its own test pilots concluded, Boeing described the condition in the SSA as a "major" failure condition, meaning that the system's failure could cause physical distress to passengers, but not death.

93. According to the Transportation & Infrastructure Committee, "the implications of this internal test data, that should have led to increased pilot training requirements regarding how to manage MCAS, appear to have been brushed aside by Boeing and its engineers. They did not take the time to determine methods to effectively eradicate the potential for the sort of experience one of Boeing's own test pilots had in a flight simulator that the pilot

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[37]FAA Advisory Circular, AC No: 23 .1309-IE.

found to be 'catastrophic[.]' Instead, they assumed away the danger, which was a tragic miscalculation."[38]

94. Boeing's misrepresentation of MCAS to the FAA continued throughout the certification process and has been thoroughly documented by several investigative agencies.

95. For example, the Joint Authorities Technical Review (JATR), an organization commissioned by the FAA to evaluate the 737 MAX Crisis and composed of technical representatives from national aviation regulators from around the world, found:

a. "[T]he content of certification deliverables would not have provided FAA technical staff with awareness of key details of the MCAS function on the B737 MAX, including architecture, signal inputs, and limits of authority."[39]

b. "MCAS should have been considered a novelty (and therefore clearly highlighted to the FAA technical staff) owing to the important

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[38] Transportation Committee Final Report Available at: https://transportation.house.gov/imo/media/doc/2020.09.15%20FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf [Accessed 17 November 2020].

[39] See Joint Authorities Technical Review (JATR), October 11, 2019 (hereinafter referred to as "JATR Report"), p. 24, accessed here: https://www.faa.gov/news/media/attachments/Final JATR Submittal to FAA Oct 2019.pdf.

differences in function and implementation it has on the B737 MAX compared with the previous MCAS installed on the B767-C2 (tanker)."[40]

c. "The FAA was not completely unaware of MCAS; however, because the information and discussions about MCAS were so fragmented and were delivered to disconnected groups within the process, it was difficult to recognize the impacts and implications of this system. If the FAA technical staff had been fully aware of the details of MCAS function, the JATR team believes the agency likely would have required an issue paper for using the stabilizer in a way that it had not previously been used. MCAS used the stabilizer to change the column force feel, not trim the aircraft... If an issue paper had been required, the JATR team believes it would have likely identified the potential for the stabilizer to overpower the elevator."[41]

[40]JATR Report, p. 23.

[41] JATR Report, p. 13-14.

96. According to the U.S. Department of Transportation Office of Inspector General, which also investigated the 737 MAX Crisis:

> Boeing included limited information in initial briefings to FAA on the MAX's flight control software, MCAS, which subsequently has been cited as a contributing or potentially contributing factor in both accidents. However, Boeing presented the software as a modification to the existing speed trim system that would only activate under certain limited conditions. As such, MCAS was not an area of emphasis in FAA's certification efforts and therefore did not receive a more detailed review or discussion between FAA engineers and Boeing.[42]

97. According to the U.S. House of Representatives Committee on Transportation and Infrastructure, a review of the 737 MAX development and certification process revealed a "disturbing pattern of technical miscalculations and troubling management misjudgments by Boeing."[43]

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[42] OIG Audit Report, p. 15, accessed here: https://www.oig.dot.gov/sites/default/files/FAA%20Oversight%20of%20Boeing%20737%20MAX%20Certification%20Timeline%20Final%20Report.pdf.

[43] Transportation Committee Final Report, p.6-7 Available at: https://transportation.house.gOv/imo/media/doc/2020.09.15%20

98. Among the "several unmistakable facts" uncovered *(id.* at 6) are that:

a. "Boeing withheld crucial information from the FAA, its customers, and 737 MAX pilots," including "concealing the very existence of MCAS from 737 MAX pilots."[44]

b. "In November 2012, for instance, it took a Boeing test pilot more than 10 seconds to respond to uncommanded MCAS activation during a flight simulator test, a condition the pilot found to be 'catastrophic[.]' . . . This event should have focused Boeing's attention on the need for enhanced pilot training for MAX pilots. It didn't." Rather, despite Boeing's "keen awareness of the importance of this information" and the "potentially 'catastrophic' consequences" that could result if it took a pilot 10 seconds to respond to uncommanded MCAS activation," there is "no evidence that Boeing shared this information with the FAA, its customers, or 737 MAX pilots[.]"[45]

FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf [Accessed 17 November 2020].

[44] *Id.* at 13.

[45] *Id.* at 16.

c. "One of Boeing's key goals for the 737 MAX program was that simulator-based training would not be required for pilots transitioning to the 737 MAX from the 737 NG. That goal undermined appropriate pilot training requirements, hampered the development of safety features that conflicted with that goal and created management incentives to downplay the risks of technologies that jeopardized that goal."[46]

d. In March 2016, "Boeing sought, and the FAA approved, the removal of references to MCAS from Boeing's Flight Crew Operations Manual (FCOM) ... .Asa result, 737 MAX pilots were precluded from knowing of the existence of MCAS and its potential effect on aircraft handling without pilot command."[47]

99. Finally, and most notably, the U.S. Department of Justice ("DOJ") investigated Boeing's conduct during certification of the 737 MAX and indicted Boeing on a Charge of Criminal Conspiracy to Defraud the United States.

100. In a Deferred Prosecution Agreement reached with the DOJ, Boeing itself admitted that, in

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[46] *Id.* at 25.

[47] *Id.* at 20.

the course of the 737 MAX certification process, it knowingly conspired to intentionally defraud the FAA Aircraft Evaluation Group ("FAA AEG"). Specifically, Boeing acknowledged that two of the Company's 737 MAX Flight Technical Pilots deceived the FAA AEG about MCAS and that, through this deception, Boeing interfered with the FAA AEG's lawful function to evaluate MCAS. In doing so, Boeing fraudulently obtained from the FAA AEG a differences-training determination for the 737 MAX *(i.e.,* an evaluation of the differences between the 737 MAX and 737 NG) that was based on incomplete and inaccurate information about MCAS.[48]

Boeing Continued to Conceal MCAS's True Characteristics as Its Inherent Risks Became Exacerbated

101. Because Boeing had misrepresented MCAS and its associated risks to the FAA and fraudulently omitted pertinent MCAS-related information from the FAA, Boeing was able to continue this pattern of behavior, and conceal MCAS's existence and true nature from its customers and operators, including SWAPA and its Members.

102. With MCAS in place, the 737 MAX program forged ahead toward its design milestones and Boeing continued to market the 737 MAX as if it was just a more fuel-efficient version of the 737 NG, and continued to conceal the existence of MCAS.

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[48]Deferred Prosecution Agreement, Jan. 7, 2021, United States of America v. The Boeing Company, No. 4:21-CR-00005-0 (Dist. Ct. N.D. Tex) ("Boeing Deferred Prosecution Agreement") accessed here: https://www.justice.gov/opa/press-release/file/1351336/download.

103. On December 8, 2015, following the assembly of the first 737 MAX aircraft, Boeing Commercial Airplanes Vice President and General Manager Keith Leverkuhn stated "... our team is upholding an incredible legacy while taking the 737 to the next level of performance."[49]

104. After a successful first flight, Boeing's Chief Production Pilot, Ed Wilson, stated, "[t]he 737 Max just felt right in flight giving us complete confidence that this airplane will meet our customers' expectations."[50]

105. But as flight testing continued, Mr. Wilson and his co-pilot, Craig Bomben, began to notice that the 737 MAX was not handling like the 737 NG when nearing aerodynamic stalls at low air speeds.

106. Specifically, the control forces required to pull the column (yoke) back were too low and could cause the airplane to stall, and the forces required to push the column forward to increase speed and recover from a stall were too high.[51]

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[49] The Boeing Company, *Boeing Debuts First 737 MAX8,* December 8, 2015, https://boeing.mediaroom.com/Boeing-Debuts-F irst-737-MAX-8.

[50]The Boeing Company, *Boeing Completes Successful 737 MAX First Flight,* January 29, 2016, https://boeing.mediaroom.eom/2016-01-29-Boeing-Completes-Successful-737-MAX-First-Flight.

[51] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 737 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytimes.com/2019/06/01/business/boeing-737-max-crash.html; *see* Scott McCartney, *Inside the Effort to Fix the Troubled Boeing 737 MAX,* The Wall Street Journal, June 5,

107. In other words, the 737 MAX did not handle like, and was dissimilar to, prior 737 generations, including the 737 NG.

108. The 737 MAX was more susceptible to an aerodynamic stall at low speeds than prior generations of 737s, and the technology available on the older generations of 737 aircraft that enabled pilots to manually control the aircraft by pulling back on the control column was disabled in the 737 MAX when MCAS activated.

109. Notwithstanding its growing awareness of the inherent risks introduced by MCAS and its design of the 737 MAX, Boeing continued to conceal information about such risks from the FAA and all those who relied on the FAA's certification, including Southwest, SWAPA and its Members.

110. Meanwhile, Boeing engineers scrambled to find a fix for the 737 MAX's dangerous low-speed handling characteristics.[52]

111. By March 2016, Boeing settled on a revision to its first iteration of the MCAS flight control logic.

112. However, Boeing chose to omit key safeguards that had previously been included in

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2019, https://www.wsj.com/articles/testing-the-fix-for-the-troubled-737-max-11559772634.

[52] Jack Nicas et al., *Boeing Built Deadly Assumptions Into 73 7 Max, Blind to a Late Design Change,* The New York Times, June 1, 2019, https://www.nytimes.com/2019/06/01/business/boeing-737-max-crash.html.

earlier iterations of MCAS, such as those used on the Boeing KC-46A Pegasus military tanker.[53]

113. Engineers who created MCAS for the military tanker designed the system to rely on inputs from multiple sensors and with limited power to move the tanker's nose. These deliberate checks sought to ensure that the system could not act erroneously or cause a pilot to lose control. Those familiar with the tanker's design explained that these checks were incorporated because "[y]ou don't want the solution to be worse than the initial problem."[54]

114. But the 737 MAX version of MCAS abandoned the safeguards previously relied upon. As described in further detail below, the new version had greater control authority than its predecessor, activated repeatedly, and relied on input from just one of the plane's two sensors that measure the angle of the plane's nose.

115. While the single-sensor version of MCAS was being developed commercial use, Boeing's Chief Test Pilot, Ray Craig, and other engineers urged the company to study a backup system known as synthetic airspeed.[55] The synthetic airspeed

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[53]Alison Sider et al., *Before 737MAX, Boeing's Flight-Control System Included Key Safeguards,* The Wall Street Journal, September 29, 2019, https://www.wsj.com/articles/before-737-max-boeings-flight-control-system-included-key-safeguards-11569754800.

[54] *Id.*

[55] Natalie Kitroeff et al., *Boeing Engineer, in Official Complaint, Cites Focus on Profit Over Safety on 737 Max,* The New York Times, October 2, 2019,

system is used on Boeing's 787 Dreamliner and draws on several data sources to measure how fast an aircraft is flying. In doing so, it can detect when an angle of attack sensor is malfunctioning and prevent other systems, such as MCAS, from relying on that faulty information.

116. Curtis Ewbank, an engineer who worked on the development of the 737 MAX explained that Boeing decided not to look into the use of a synthetic airspeed system because of its potential cost and effect on training requirements for pilots.[56]

117. In its second iteration of MCAS, Boeing gave MCAS enough authority to autonomously move the aircraft tail's horizontal stabilizer to the full nose-down limit if MCAS determined a stall may be oncoming.[57]

118. Although this fix was intended to conform the 737 MAX's handling characteristics to the 737 NG, so that the 737 MAX could be approved under the existing 737 Type Certificate, it introduced

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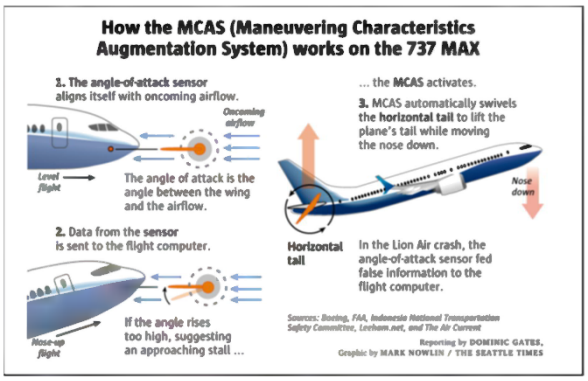
https://www.nytimes.com/2019/10/Q2/business/boeing-737-max-crashes.html.

[56]*Id.*

[57] Dominic Gates, *Flawed analysis, failed oversight: How Boeing, FAA certified the suspect 737 MAXflight control system,* The Seattle Times, March 17, 2019, https://www.seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash/; *see also* Andy Pasztor & Andrew Tangel, *Boeing's Latest 737 MAX Concern: Pilots 'Physical Strength,* The Wall Street Journal, June 19, 2019, https://www.wsj.com/articles/physical-strength-of-pilots-emerges-as-issue-in-returning-737-max-to-flight-11560937879.

the risk that the stabilizer would overpower the pilots' ability to counter MCAS's nose-down command with nose-up movement to stop an uncontrollable dive toward the ground. The graphic below demonstrates the problem.[58]



119. Further compounding its negligent design of MCAS, Boeing submitted documentation to the FAA indicating that MCAS could move the horizontal tail a maximum of 0.6 degrees, which described the first iteration of MCAS, not the second iteration that would ultimately be used on all 737 MAX delivered to Boeing customers, including Lion Air, Ethiopian Airlines and Southwest.

120. At the time of certification in 2017, MCAS had been expanded and actually was capable of moving the tail 2.5 degrees, more than four times

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[58]Dominic Gates, *Flawed analysis, failed oversight: How Boeing, FAA certified the suspect 737 MAXflight control system,* The Seattle Times, March 17, 2019, https://www.seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash/.

the 0.6 degrees stated in the initial SSA provided to the FAA.

121. Because Boeing had ODA authority to self-certify this aspect of the 737 MAX, Boeing was able to conceal this MCAS change from the FAA, and never updated its documentation on this point.

122. In its FAA-mandated SSA for MCAS, Boeing also failed to account for how MCAS could reset itself after each time a pilot responded to its nose-down command. This means that when MCAS malfunctioned, it would not just cause a single downward movement of 2.5 degrees, but would nose-down command the aircraft 2.5 degrees lower several times in succession as the pilot tried to regain control. Without correction, two cycles of MCAS at the 2.5 degree limit could cause the aircraft to reach its maximum nose-down trim position, which could cause the pilot to lose control of the aircraft, and a crash into the ground.

123. Peter Lemme, a former Boeing flight controls engineer, explained that since MCAS can reset each time it is used, "it effectively has unlimited authority."[59]

124. Based on the false representation that MCAS's maximum authority was 0.6 degrees, Boeing's SSA submitted to the FAA incorrectly classified the MCAS as a "major failure" risk in normal flight and a "hazardous failure" risk in the event of an extreme maneuver, such as a banked descending spiral.

125. As indicated above, a "major failure" indicates that the system's failure could cause

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[59] *Id.*

physical distress to passengers, but not death. A "hazardous failure" could cause serious or fatal injuries to a small number of passengers. By contrast, a "catastrophic failure" risk, which is what MCAS really is, represents the potential for loss of the plane with multiple fatalities.

126. The fact that MCAS is a catastrophic failure risk was tragically demonstrated when both Lion Air Flight 610 and Ethiopian Airlines Flight 302 crashed, killing scores of people.

127. Yet Boeing's website, press releases, annual reports, public statements and statements to operators and customers, submissions to the FAA and other civil aviation authorities, and 737 MAX flight manuals made no mention of the increased stall hazard or MCAS itself.

128. In fact, just hours after the approval for MCAS's redesign was granted, Mark Forkner, Boeing's 737 Chief Technical Pilot expressly requested, and the FAA AEG approved based on Boeing's misrepresentations and omissions, the removal of references to MCAS from Boeing's Flight Crew Operations Manual (FCOM), a document that provides procedures, performance, and systems information to flight crews to enable their safe and efficient operation of the airplane.[60]

129. As a result, prospective 737 MAX pilots including SWAPA Members were precluded from

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[60]Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

knowing of the existence of MCAS and its potential effect on aircraft handling without pilot command.

130. Boeing failed to inform the FAA that, unlike the first iteration of MCAS, which likely only would operate in the event of a rare high-speed maneuver, the second iteration would operate to prevent potential low altitude, low speed stalls, which could occur far more frequently.

131. The risk profile and required risk assessment of the second iteration of MCAS was completely different from the first, and yet Boeing neither assessed that increased risk nor even attempted to mitigate it. Instead, Boeing used its ODA authority to hide this information not only from the FAA but also from all those who relied on the FAA's certification, including Southwest, SWAP A, and its Members.[61]

132. No such system existed in the 737 NG to which Boeing had so frequently compared the 737 MAX.

133. Further, Boeing designed MCAS to rely on data from only one angle of attack sensor instead of two or more. If data from that single angle of attack sensor was wrong, it could activate MCAS and force the aircraft into a dive when one is unnecessary, and potentially at altitudes that could—and did—result in a catastrophic crash.[62]

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[61] Troy Wolverton, *Boeing reportedly kept the FAA in the dark about big changes it made to the 73 7 Max's flight-control software late in its development,* Business Insider, July 27, 2019, https://www.businessinsider.com/boeing-737-max-flight-system-faa-oversight-2019-7.

[62] Dominic Gates, *FAA Cautions Airlines on Maintenance of Sensors that were Key to 737 Max Crashes,* The Seattle Times,

134. The reason for using only one angle of attack sensor is obvious: using two angle of attack sensors may have created a disagree alert when one sensor was feeding false data, a problem which may have required the additional pilot training Boeing so desperately was seeking to avoid.[63]

135. The problem with using only one angle of attack sensor was compounded by the fact that the angle of attack sensor was mounted on the aircraft fuselage, just behind the nose, where it is vulnerable to damage from jetbridges, ground equipment and birds.

136. According to a review by Bloomberg, there have been at least 140 instances over the past 30 years wherein angle of attack sensors mounted in the same area were damaged.[64] By relying on data from only one angle of attack sensor, Boeing unreasonably risked a data feed from a damaged sensor. This foreseeable risk is precisely what led to the erroneous MCAS activations experienced by the

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August 20, 2019, https://www.seattletimes.com/business/boeing-aerospace/faa-cautions-airlines-on- maintenance-of-sensors-that-were-key-to-737-max-crashes/.

[63]Maureen Tkacik, *Crash Course: How Boeing's Managerial Revolution Created the 737 MAX Disaster,* The New Republic, September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

[64] Alan Levin & Ryan Beene, *Sensors Linked to Boeing 737 Crashes Vulnerable to Failure,* Bloomberg, April 10, 2019, https://www.bloomberg.com/news/articles/2019-04-ll/sensors-linked-to-737-crashes-vulnerable-to-failure-data-show.

pilots of Lion Air Flight JT610 and Ethiopian Flight ET302.

137. Boeing's implementation of MCAS—a new flight control logic with a single input that takes control away from the pilot, with no in-service history to address a potentially deadly stall hazard—marked a profound departure from the time-tested 737 family of aircraft. Boeing withheld this difference from the FAA all those who relied on the FAA's certification, including Southwest, SWAPA, and its Members.

138. In fact, it was so important to Boeing that Southwest and SWAPA Members believe that the 737 MAX was the same as prior generations of 737s that Boeing assured them that SWAPA Members only needed a two-hour iPad training course before entering the 737 MAX cockpit for the first time.[65]

139. Notwithstanding Boeing's failure to accurately disclose MCAS to the FAA, Southwest, SWAPA, and SWAPA Members, the MAX was added to Boeing's FAA 737 type certificate and approved for operations on March 9, 2017.

II. BOEING'S SPECIFIC RELATIONSHIP WITH, AND REPRESENTATIONS TO, SOUTHWEST AND SWAPA

Boeing's Relationship with Southwest

140. As indicted above, in 2011, Southwest reached an agreement with Boeing to purchase 737

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[65]Natalie Kitroeff et al., *After 2 Crashes of New Boeing Jet, Pilot Training Now a Focus,* The New York Times, March 16, 2019, https://www.nytimes.com/2019/03/16/business/boeing-max-flight-simulator-ethiopia-lion-air.html.

MAX aircraft as the launch customer for the program.

141. Boeing's relationship with Southwest was and still is unique to other airlines. As Mr. Albaugh explained in a December 13, 2011 press release, "Southwest is a special Boeing customer and has been a true partner in the evolution of the 737."

142. To facilitate Southwest's continued reliance on the 737, Boeing promised a common type rating with no simulator training requirement for the 737 MAX and rebate which would have been valued at nearly $400 million if Boeing was unsuccessful.

143. Throughout the development of the 737 MAX program, Boeing provided Southwest with commercial performance data, showing the increasing cost-savings and economic gains that the airline would achieve with the 737 MAX, and continued to encourage Southwest to modernize its fleet through the purchase of more 737 MAX aircraft.

144. As early as 2014, Boeing committed to delivering the first 737 MAX to Southwest in the third quarter of 2017.[66]

145. Boeing repeated that it was on track for a Q3 2017 delivery of the 73 7 MAX to Southwest - specifically, in May 2014,[67] July 2014,[68] September

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[66]The Boeing Company, *Boeing Accelerates First Delivery of 737 MAX,* June 19, 2013, https://boeing.mediaroom.com/2013-06-19-Boeing-Accelerates-First-Delivery-of-737-MAX.

[67] The Boeing Company, *Boeing 737 MAX Surpasses 2,000 Orders,* May 20, 2014, https://boeing.mediaroom.com/2014-05-20-Boeing-737-MAX-Surpasses-2-00Q-Orders.

2015,[69] December 2015,[70] in its January 2016 annual report for 2015,[71] its January 2017 annual report for 2016,[72] and again in March 2017.[73]

146. In the course of these communications concerning the Southwest delivery, Boeing failed to disclose to Southwest that the 737 MAX's rushed delivery schedule had left the aircraft with a:

a. Decrease in aircraft stability;

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[68] The Boeing Company, *Boeing Selects Supplier for 737 MAX Full-Flight Simulator,* July 11, 2014, https://boeing.mediaroom.com/2014-07-ll-Boeing-Selects-Supplier-for-737-MAX-Full-Flight-Simulator.

[69] The Boeing Company, *Boeing Begins Final Assembly of First 727 MAX,* September 15, 2015, https://boeing.mediaroom.com/news-releases-statements?item=129519.

[70] The Boeing Company, *Boeing Debuts First 73 7 MAX8,* December 8, 2015, https://boeing.mediaroom.com/Boeing-Debuts-First-737-MAX-8.

[71] The Boeing Company, Launching Our Second Century The Boeing Company 2015 Annual Report 3 (2015) http://s2.q4cdn.com/661678649/files/doc_financials/annual/2015/2015-Annual-Report.pdf.

[72] The Boeing Company, Creating Breakthroughs, Expanding Opportunities, The Boeing Company 2016 Annual Report 4 (2016) http://s2.q4cdn.com/661678649/files/doc_financials/annual/2016/2016-Annual-Report.pdf.

[73]The Boeing Company, *Boeing 737MAX8 Earns FAA Certification,* March 9, 2017, https://boeing.mediaroom.com/2017-03-Q9-Boeing-737-MAX-8-Earns-FAA-Certification.

b. Greater pitch-up tendency at elevated angles of attack;

c. Negative change in handling characteristics;

d. Increase in susceptibility to the risk of catastrophic stall; and

e. Reliance on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

147. Boeing further failed to disclose to Southwest, as well as SWAPA and its Members, that the expansion of MCAS to the low-speed regime in 2016 had the potential to jeopardize the certification timeframe and Boeing's ability to deliver on its promise of no simulator training and deliver the aircraft on time.

148. Indeed, Boeing admitted to the DOJ that its Chief Technical Pilot, Mark Forkner, sent emails to Southwest attaching drafts of airplane manuals and pilot-training materials, "none of [which] contained any information about MCAS, consistent Boeing [employees'] efforts to deceive the FAA AEG" and Southwest and SWAPA Members.[74]

149. At no time did Boeing disclose to Southwest, or to SWAPA and its Members, that the 737 MAX carried "catastrophic failure" risks, such

[74]Boeing Deferred Prosecution Agreement, p. 40-41.

that it was foreseeable that the 737 MAX would cause multiple fatal accidents, posing a threat to the lives of SWAPA Members, other Southwest employees, and Southwest customers, as well as threat to Southwest's operations.

150. At no time did Boeing disclose to Southwest, or to SWAPA and its Members, that to mitigate such a "catastrophic failure" risk would require extensive design changes that would delay the program for years.

SWAPA's Reliance on Boeing's Public Representations Regarding the 737MAX

151. SWAPA learned of Southwest's intent to revitalize its 737 fleet with 737 MAX aircraft in late 2011 when Southwest's historic firm order of 150 737 MAX aircraft was announced.[75] Pursuant to its role as sole collective bargaining unit for its Members, SWAPA disseminated this information, as well as all other information it received about the 737 MAX program from the FAA, Boeing, and Southwest, with its Members.

152. From that point forward, SWAPA followed Boeing's statements and obtained updates from Boeing and Southwest regarding the development, design, and certification of the 737 MAX and disseminated the information to its Members.

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[75]The Boeing Company, *Boeing 73 7 MAX Logs First Firm Order from Launch Customer Southwest Airlines,* December 13, 2011, https://boeing.mediaroom.com/201l-12-13-Boeing-737-MAX-Logs-First-Firm-Order-from-Launch-Customer-Southwest-Airlines.

153. As described above, those statements consistently:

a. Emphasized the 737 MAX's connection to the 737 family of aircraft;

b. Touted its increased range and efficiency;

c. Articulated only limited design changes;

d. Made no mention of the aerodynamic changes associated with the addition of larger, more powerful engines; and

e. Failed to disclose the existence or implementation of MCAS.

154. Boeing's statements thus failed to disclose the aircraft's:

a. Decrease in aircraft stability;

b. Greater pitch-up tendency at elevated angles of attack;

c. Negative change in handling characteristics;

d. Increase in susceptibility to the risk of catastrophic stall; and

e. Reliance on MCAS, a novel yet safety critical flight control logic with no service history that purported to

mitigate the deadly risk of stall but in fact caused greater problems

155. Boeing's misleading messaging also informed Southwest's statements to SWAPA and SWAPA Members regarding the 737 MAX.[76]

156. As an example, Southwest presented the below slide when discussing the benefits of the 737 MAX at the March 8, 2016 J.P. Morgan Aviation, Transportation and Industrials Conference.

[76] *See, e.g.*, Southwest 2011 Form 10-K, https://www.sec.gov/Archives/edgar/data/92380/000119312512049647/d293991dl0k.htm.

157. SWAPA, on behalf of its Members, responded to the above statement by acknowledging the stated 737 MAX benefits.

SWAPA and Its Members' Role with Boeing in the 737 MAX Development

158. As the pilots for Boeing's launch customer, the participation of SWAPA Committee Members in Southwest's 737 MAX Development Committee played an important role in evaluating the training procedures and manuals that Boeing was developing for the 737 MAX before it was put into service.

159. In the course of Boeing's partnership and collaboration with Southwest and SWAPA Committee Members, which took place along the same timeline, Boeing made direct misrepresentations concerning the 737 MAX to SWAPA.

160. Although the differences between the 73 7 MAX and the 73 7 NG were discussed when SWAPA Committee Members participated in Boeing-organized 737 MAX testing and development events, Boeing actively concealed the presence of MCAS and its effects, from the participating SWAPA Members.

161. From 2014 through 2015, Boeing worked with Southwest's training curriculum developers, which included SWAPA Members, to establish a training program for the 737 MAX.

162. During these meetings, Boeing provided Southwest with its draft Flight Crew Operations Manual for the 737 MAX to serve as a basis for the training program in development.

163. SWAPA Committee Members provided input throughout the process and attended meetings

with Southwest and Boeing in the fall of 2014, and later, during which the 737 MAX performance, operation and systems were discussed.

164. Although the need for training to handle MCAS was or should have been obvious to Boeing, Boeing never discussed or revealed the existence of MCAS during its meetings with the attending SWAPA Members. Rather, during this time, Boeing continued its pattern of misrepresenting the similarities between the 737 NG and the 737 MAX and misrepresenting and concealing the differences and design shortcuts that Boeing was taking in the interest of meeting its stated design objective of commonality and minimizing the need for simulator training.

165. In July 2016, Boeing's 737 Chief Technical Pilot, Mark Forkner, invited SWAPA Members to participate in 737 MAX differences training and validation exercises.

166. Boeing 737 Technical Pilot, Patrick Gustavsson, Boeing 737 Procedures Coordinator, Ross Chamberlain, and approximately 50 Southwest and SWAPA Members participated in the exercises, including then SWAPA Safety Committee Chairman, David Eiser, and SWAPA Training and Standards Committee member, Greg Bowen.

167. Boeing's differences training did not include any information on MCAS or its associated risks. In fact, based on Boeing's representations, Captain Eiser reported back to the SWAPA Membership that the 737 MAX handled similarly to the 737 NG.

168. Around September 23-27, 2016, Boeing continued its pattern of misrepresenting and

concealing the differences between the 737 NG and the 737 MAX.

169. Boeing flew a 737 MAX to Dallas's Love Field, to give SWAPA Members and other Southwest employees an opportunity to tour and learn about the aircraft.

170. Boeing Vice-President and General Manager of 737 Programs, Keith Leverkuhn, was on hand and provided comments to the media.[77]

171. In Leverkuhn's words: "We're gonna be putting this aircraft through its paces just as if an airline were gonna be operating it. We are going to be taking it to the airplane ports they fly into. We are going to be turning the airplane like they would if they were carrying passengers we are going to be using the equipment they do at their airports."[78]

172. He further stated: "There have been times when the reliability of an aircraft going into service has not been what the airline has expected. Our mission here is to make sure that there are no surprises, no secrets. And that we know exactly how this airplane is going to operate."

173. Moreover, Southwest itself was so convinced by Boeing of the similarity between the 737 MAX and the 737 NG that its Director of Compliance & Operations instructed SWAPA to call the 737 MAX the 737-8 because it allegedly was just another variant of the rest of Southwest's 737s, without enough of a difference to distinguish between the MAX and any other 737.

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[77] *See* https://www.youtube.com/watch?v=19bDH-gb9m4.

[78] *Id.*

174. In short, like it had done with Southwest, Boeing had wrongfully persuaded SWAPA Members individually and through SWAPA, that the 737 MAX was just another 737. That was not the case.

175. Despite Boeing's representations—namely, that: (1) the 737 MAX had no surprises; (2) that SWAPA Members would know exactly how the MAX would operate; (3) the 737 MAX was the latest iteration of the time-tested, well-known 737 that SWAPA Members were then piloting; and (4) operating the 737 MAX required no additional simulator training — Boeing was actively misrepresenting and concealing key differences from SWAPA and its Members, including MCAS, that made the 737 MAX distinct from its 737 predecessors and ultimately lead to a world-wide grounding of the fleet.

176. SWAPA and its Members believed Boeing's 737 MAX representations and was unaware of the significant safety risks and Boeing's concealment of key safety information.

177. Likewise, SWAPA and its Members were unaware of the extensive, and criminal, lengths Boeing went to deceive the FAA AEG to secure a common type rating with no simulator training requirement.

178. SWAPA and the individual SWAPA Members to whom these representations were directly made relayed Boeing's claims to SWAPA's full Membership. Further, because Boeing omitted key information from its discussions with a subset of SWAPA Members, such omissions filtered down to the membership and impacted their decisions.

179. Boeing knew or should have known that its representations and purposeful failure to disclose safety critical information to both Southwest, SWAPA, and individual SWAPA Members would impact the relationship and negotiations between Southwest and SWAPA, acting on behalf of its Members, which were ongoing at the time.

Boeing's Interference in SWAPA's Relationship with Southwest

180. As the 737 MAX's anticipated delivery date approached, Southwest and SWAPA, acting on behalf of its Members, were in the process of negotiating a Collective Bargaining Agreement ("CBA") in 2016.

181. The negotiations grew contentious as SWAPA pushed back on Southwest's desire to fast-forward a fleet modernization plan that centered on 737 MAX aircraft, the first of which Boeing had promised to deliver to Southwest by the third quarter of 2017.

182. The dispute played out publicly and over social media. As the dispute intensified, approximately 800 SWAPA Members picketed Southwest's 2016 shareholder meeting in Chicago to make clear that they would not fly the 737 MAX without certain contingencies relating to the MAX.[79]

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[79]Conor Shine, *Southwest Airlines bumps dividend and share buyback while union pickets over contracts,* The Dallas Morning News, May 18, 2016, https://www.dallasnews.com/business/airlines/2016/Q5/18/southwest-airlines- bumps-dividend-and-share-buyback-while-unions-picket-over-contracts/.

183. Boeing was aware of the dispute between SWAPA and its Members on one side and Southwest on the other.

184. In order to ensure that the dispute would not disrupt Boeing's domestic launch of the 737 MAX with Southwest, which was crucial to Boeing's 737 MAX program, and that Southwest would accept delivery of the 737 MAX as scheduled, Boeing interfered in SWAPA's negotiations with Southwest by providing performance data about the aircraft's profitability, perpetuating the false narrative that the 737 MAX'S safety profile and handling characteristics were the same as the 737 NG's and failing to disclose the "catastrophic failure" safety risks that should have been redesigned prior to certification.

185. This was occurring at the same critical time that Boeing's 737 MAX Chief Technical Pilot, Mark Forkner, was in the midst of defrauding the FAA AEG into removing all references to MCAS from the 737 MAX Flight Crew Operating Manual based on the false representation that MCAS "it's completely transparent to the flight crew and only operates WAY outside of the normal operating envelope."[80]

186. As this dispute was playing out, Boeing invited SWAPA Members, including David Eiser and Greg Bowen, to participate in 737 MAX training validation exercises and to evaluate Boeing's differences training in July 2016. Based on Boeing's

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[80]Transportation Committee Report, p., 119 citing Email from Mark Forkner to FAA, "Subject: MCAS lives in bothFCCs," Sent: March 30, 2016 11:16:45.

representations about the 737 MAX, Captain Eiser reported back to SWAPA and other SWAPA Members that the 737 MAX handled similarly to the 737 NG.

187. Boeing purposefully continued to interfere in the SWAPA's business relationship with Southwest to ensure a smooth 737 MAX rollout from Boeing's 737 MAX launch customer.

188. More pointed negotiations between SWAPA, acting on behalf of its Members, and Southwest followed over the next six months, all based on faulty material information provided by Boeing.

189. In deciding to resolve its dispute with Southwest centered on Southwest's adding the 737 MAX to its network, fleet and schedule, SWAPA, acting on behalf of and with the support of its Members, relied on Boeing's data and representations that the 737 MAX was a safe and more profitable version of the safe and airworthy 737 NG.

190. Based on Boeing's misrepresentations and assurances to SWAPA, its Members, and Southwest, SWAPA altered the bargaining and negotiating position it was taking on behalf of its Members.

191. Had SWAPA and its Members been aware of the defects in the 737 MAX and the foreseeable risk that it would be grounded, halting Southwest's fleet modernization plan, SWAPA would have negotiated certain contingencies designed to prevent the economic damages that its Members would suffer if the 737 MAX delivery was delayed or the defects caused the grounding of the aircraft.

192. Had SWAPA and its Members known the truth, they would have informed the FAA regarding the safety issues arising from the design of the 737 MAX.

193. Doing so likely would have delayed the FAA's approval of the 737 MAX, caused the FAA to insist on greater differences training for pilots, delayed the delivery of the 737 MAX to Southwest and other customers, and prevented the Lion Air Flight 610 and Ethiopian Airlines Flight 302 accidents.

194. In other words, by purposefully concealing and failing to disclose the safety critical information relevant to the 737 MAX, Boeing robbed SWAPA of its ability to act and to negotiate on behalf of its Members with Southwest and protect its Members' financial interests.

195. Boeing knew or should have known that SWAPA was altering its negotiating position and, in turn, SWAPA Members' relationship with Southwest based on Boeing's representations and omissions concerning the 737 MAX.

196. Specifically, Boeing knew or should have known that SWAPA's position during negotiations with Southwest about the 737 MAX was based on Boeing's misrepresentations, failure to disclose safety critical information to Southwest and SWAPA, and certifying the 737 MAX under false pretenses.

Boeing Set SWAPA Members Up to Fail

197. As SWAPA President Jon Weaks publicly stated, SWAPA Members "were kept in the dark" by Boeing.[81]

198. There was no way for SWAPA Members to know about the lengths Boeing went to conceal the presence of MCAS, the danger it presented, or that the 737 MAX was certified under false pretenses.

199. The information Boeing provided to SWAPA and its Members led SWAPA to believe that the 737 MAX was a properly certified aircraft fit for revenue service and to agree to a series of events that ultimately resulted in Southwest retiring a large number of old aircraft (the 737 Classic) that were to be replaced by new 737 MAX aircraft.

200. Had the older aircraft not been retired and the delivery of the 737 MAX delayed to allow for design fixes and proper training, the grounding of the aircraft could have been avoided and SWAPA, acting on behalf of its Members, and Southwest could have planned to maintain Southwest's schedule without the addition of the MAX to the fleet.

201. Had SWAPA and its Members known of the critical dangers inherent to 737 MAX and that Boeing was purposefully manipulating the certification process, they would have insisted upon

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[81]Dominic Gates, *U.S. Pilots Flying 737 MAX Weren't Told About New Automatic Systems Change Linked to Lion Air Crash,* The Seattle Times, November 13, 2018, https://www.seattletimes.com/business/boeing-aerospace/u-s-pilots-flying-737-max-werent-told-about-new-automatic-systems-change-linked-to-lion-air-crash/.

changes to the MAX that would have resulted in its delayed delivery.

III. THE 737 MAX'S ENTRY INTO SERVICE REVEALED A CRITICAL DESIGN DEFECT THAT TOOK 346 LIVES AND LEAD TO A WORLDWIDE GROUNDING AND LOSS OF CONFIDENCE IN THE 737 MAX

The Lion Air Crash

202. After just one year of in-service history, on October 29,2018, a 73 7 MAX, operated as Lion Air Flight 610, crashed into the Java Sea killing all 189 people onboard.[82]

203. A preliminary report issued by Indonesia's National Transportation Safety Committee indicated that erroneous angle of attack data caused the MCAS system to repeatedly command automatic nose-down trim.[83] This was the first time that Boeing disclosed the existence of MCAS to SWAPA and its Members.

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[82]Hannah Beech & Muktita Suhartono, *Confusion, Then Prayer, in Cockpit of Doomed Lion Air Jet,* The New York Times, March 20, 2019, https://www.nytimes.com/2019/03/2Q/world/asia/lion-air-crash-boeing.html; *see also* Ben Otto & Gaurav Raghuvanshi, *Indonesian Plane With 189 People on Board Crashes Near Jakarta,* The Wall Street Journal, October 29, 2018, https://www.wsj.com/articles/plane-with-188-people-on-board-crashes-off-indonesia-1540784983.

[83] *Preliminary Aircraft Accident Investigation Report* (2018), https://wwwaviation24be-q41r3jh.stackpathdns.com/wp-content/uploads/2018/11/2018-035-PK-LQP-Preliminary-Report.pdf.

204. Like SWAPA Members prior to the Lion Air crash, the Lion Air pilots were not aware of the presence of MCAS, did not understand how it operated, and had no training on how to manage an MCAS activation caused by erroneous data.[84]

205. After the crash, SWAPA Members were outraged by Boeing's failure to disclose the presence of MCAS before the Lion Air crash.

206. Meanwhile, Boeing continued to maintain that the 737 MAX was a safe aircraft and instead focused on alleged pilot error and maintenance issues rather than the flight safety hazard posed by the activation of MCAS at low altitude, and the 737 MAX'S need for MCAS in the first place.

207. On November 20, 2018, Boeing conducted a conference call with 737 MAX operators, including SWAPA Members. During that conference call, Boeing insisted that the cause of the Lion Air crash was pilot error, and that MCAS problems already were covered and could be remedied by the ordinary runaway stabilizer correction procedure.

208. Three days later, Boeing conducted a separate individual meeting with SWAPA, attended by its President Jon Weaks, SWAPA's Training and Standards Committee Chair Greg Bowen, SWAPA Safety Committee Chair Matthew Cain, and incoming Second Vice President Brian Fitting. From Boeing, Michael Sinnett, Craig Bottom, and John Maloney attended.

209. During the meeting, Boeing continued to maintain that the 737 MAX was airworthy and safe.

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[84] *Id.*

SWAPA thought that Boeing was finally being honest and forthright. It was mistaken, as Boeing continued its pattern of making material misrepresentations and fraudulent non-disclosures to SWAPA and its Members to protect Boeing's economic interests.

The Ethiopian Airlines Crash

210. On March 10, 2019, a second 737 MAX, this one operated as Ethiopian Airlines Flight 302, crashed near Addis Ababa killing all 157 people onboard.[85]

211. According to a Preliminary Report, one minute into the flight, the pilots noticed flight-control problems. MCAS activated and pushed the nose of the aircraft down. The pilots fought to pull the nose of the plane up, and were briefly able to resume climbing. Then MCAS pushed the nose down again. The pilots then flipped two switches and temporarily disconnected MCAS, then tried to regain control. They asked to return to the airport but were continuing to struggle gaining altitude. MCAS engaged again, pushing the plane into a dive. Thirty seconds later the aircraft crashed.[86]

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[85] Hadra Ahmed, *et al. Ethiopian Airlines Plane Is the 2nd Boeing Max 8 to Crash in Months,* The New York Times, March 10, 2019, https://www.nytimes.com/2019/03/10/world/africa/ethiopian-airlines-plane-crash.html; *see also* Matina Stevis-Gridneff, *Ethiopian Airlines Jet Crashes En Route to Nairobi,* The Wall Street Journal, March 11, 2019, https://www.wsj.com/articles/ethiopian-airlines-flight-crashes-en-route-to-nairobi-11552207841 ?mod=hp_lead_posl&mod=article_inline.

[86]Aircraft Accident Investigation Bureau, https://flightsafety.org/wp-content/uploads/2019/04/Preliminary-

The 737 MAX Was Grounded Because It Was Unsafe

212. On March 11, 2019, Boeing finally acknowledged MCAS and its effects in a public statement: "[a] pitch augmentation control law (MCAS) was implemented on the 737 MAX to improve aircraft handling characteristics and decrease pitch-up tendency at elevated angles of attack."[87]

213. In the days following the Ethiopian Airlines crash, aviation authorities world-wide, including the FAA, grounded the 737 MAX.[88]

214. The Ethiopian Airlines crash demonstrated conclusively that the 737 MAX was not similar to prior generations of 737 aircraft and was not fit for service.

Report-B737-800MAX-ET-AVJ.pdf; https://flightsafety.org/wp-content/uploads/2019/04/Preliminary-Report-B737-800MAX-ET-AVJ.pdf (2019).

[87] The Boeing Company, *Boeing Statement on 737 MAX Software Enhancement,* March 11, 2019, https://boeing.mediaroom.com/news-releases-statements?item=130402.

[88] Emergency Order of Prohibition (2019), https://www.faa.gov/news/updates/media/Emergency Order.pdf*;Which countries have grounded the Boeing 737MAXjets,* PBS, March 14, 2019, https://www.pbs.org/newshour/world/which-countries-have-grounded-the-boeing-737-max-jets; *see also* Nigel Chiwaya & Jiachuan Wu, *MAP: These are the countries that have grounded the Boeing 737 MAX 8,* NBC News, March 13, 2019, https://www.nbcnews.com/news/world/country-banned-boeing-737-max-airplanes-list-n982776.

215. On March 13, 2019, the FAA issued an order grounding the 737 MAX.

216. The same day, Boeing conceded and recommended the temporary suspension of operations of the entire global fleet of three-hundred and seventy-one (371) 737 MAX aircraft.

217. On March 14, 2019, Boeing suspended all 737 MAX deliveries.[89]

218. In an April 5, 2019 press release, Boeing finally acknowledged that MCAS caused both the Lion Air and Ethiopian Airlines crashes. Boeing stated that the "Lion Air Flight 610 and Ethiopian Airlines Flight 302 accidents were caused by a chain of events, with a common link being erroneous activation of the aircraft's MCAS function."[90]

219. The day before, then Boeing CEO Dennis Muilenburg also stated, "erroneous activation of the MCAS function can add to what is already a high workload environment. It's our [Boeing's] responsibility to eliminate this risk." Mr. Muilenburg

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[89] The Boeing Company, *In Consultation with the FAA, NTSB and its Customers, Boeing Supports Action to Temporarily Ground 737 MAX Operations,* March 13, 2019, https://boeing.mediaroom.com/news-releases-statements?item=l30404.

[90]The Boeing Company, *Statement from Boeing CEO Dennis Dennis Muilenburg: We Own Safety - 737 MAX Software, Production and Process Update, April 5, 2019, https://boeing.mediaroom.eom/2019-04-05-Statement-from-Boeing-CEQ-Dennis-Muilenburg-We-Qwn-Safety-737-MAX-Software-Production-and-Process-Update.*

further acknowledged that Boeing is working on a software fix for MCAS.[91]

220. He did not explain why Boeing chose not to disclose the presence of MCAS on 737 MAX aircraft prior to or at the time Boeing launched the MAX.

IV. SOUTHWEST'S OPERATION OF THE 737 MAX AND ITS RETURN TO SERVICE

221. Southwest took delivery of its first 737 MAX on August 29, 2017, and put it into revenue service on October 1, 2017.

222. By March 2019, Southwest had 34 737 MAX aircraft in its fleet with another 36 due to be delivered before the end of 2019 and more on order.

223. Southwest's 737 MAX fleet was grounded with the rest of the world's fleet on March 13,2019.[92]

224. As a result, Southwest had to cancel tens of thousands of flights.

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[91] The Boeing Company, *Boeing CEO Dennis Muilenburg Addresses the Ethiopian Airlines Flight 302 Preliminary Report,* April 4, 2019, https://boeing.mediaroom.com/2019-04-04-Boeing-CEQ-Dennis-Muilenburg-Addresses-the- Ethiopian-Airlines-Flight-302-Preliminary-Report; *see also* Robert Wall and Merrill Sherman, *The Multiple Problems, and Potential Fixes, With the Boeing 737 MAX, The Wall Street Journal,* August 19, 2019, https://www.wsj.com/articles/fixing-the-problems-with-boeings-737-max-11566224866.

[92] Hannah Sampson, *Everything Travelers Need to Know About Boeing 737 Max Developments,* The Washington Post, September 1, 2019, https://www.washingtonpost.eom/travel/2019/08/14/everything-travelers-need-know-about-boeing-max-developments/.

225. Southwest plans to resume 73 7 MAX service on March 11, 2021, two years after the anniversary of the Lion Air crash.[93]

V. SWAPA MEMBERS HAVE INCURRED MILLIONS OF DOLLARS IN DAMAGES BECAUSE OF BOEING'S NEGLIGENCE, MISREPRESENTATIONS, NONDISCLOSURES AND INTERFERENCE WITH SWAPA'S BUSINESS RELATIONSHIP WITH SOUTHWEST

226. Southwest's published flight schedules that incorporated the 737 MAX when compared to the actual Southwest flight schedules subsequent to the grounding can be used to determine the millions of dollars in economic damages that SWAPA's Members sustained from the 737 MAX grounding.[94]

227. Although Southwest will return the 737 MAX to commercial passenger service soon, SWAP A Members will still have collectively lost millions of dollars in economic damages.

228. These losses will continue until such time as Southwest is able to re-integrate the 737 MAX into its flight schedules at the level it was planning prior to the grounding.

229. SWAP A, on behalf of its Members, sought remuneration from Boeing for these damages.

230. Boeing refused.

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[93]Southwest Airlines, *Southwest Estimated Return to Service Timeline,* https://www.southwest.com/737-max/#return-to-service-plan

[94]

FIRST CLAIM FOR RELIEF -
FRAUDULENT MISREPRESENTATION

231. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 230 above with the same force and effect as if set forth herein in full.

232. Boeing marketed the 737 MAX as a variant of the safe, reliable, and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed "minimal risk."

233. Boeing made these representations to SWAPA and its Members when SWAPA Members participated in 737 MAX simulator exercises at Boeing; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; participated in Service Ready Operational Validation tests; and in Boeing drafted flight and aircraft manuals.

234. Boeing also made the foregoing representations on its website and in press releases described above, including, but not limited to its statements claiming that Boeing would minimize changes from the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

235. Boeing's representations concerning the 737 MAX were false in that Boeing did not disclose that, as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia:*

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

236. Boeing's representations were also false in that Boeing did not disclose that it actively withheld critical safety information regarding MCAS from the FAA during the certification process, deceived and interfered with the FAA AEG's lawful function to evaluate MCAS, and fraudulently obtained a differences-training determination for the 737 MAX that was based on incomplete and inaccurate information about MCAS.

237. Boeing made these representations knowing that SWAPA and its Members were relying on their truth.

238. Boeing knew that the foregoing representations were false, or recklessly disregarded their truthfulness in making such representations.

239. Boeing's false representations related to objectively material facts concerning the 737 MAX.

240. Boeing concealed all or parts of the truth when it had a legal duty to speak, and when it had already made partial representations to SWAPA

and its Members concerning the differences between the 737 NG and 737 MAX and the 73 7 MAX'S fitness for commercial service.

241. Boeing had a legal duty to correct these representations once made, but failed to do so until it was too late.

242. Boeing made the foregoing misrepresentations for its economic advantage.

243. Boeing made the foregoing misrepresentations with the intent to induce SWAPA's and its Members' reliance on the representations.

244. SWAPA and its Members relied on Boeing's representations as true because of Boeing's superior knowledge concerning the 737 MAX, and their inability to acquire their own knowledge concerning the veracity of Boeing's representations.

245. SWAPA and its Members' reliance on Boeing's representations and non-disclosures also was justifiable in light of their and Boeing's long-term relationship, which previously did not include any reason to doubt the accuracy of Boeing's representations and disclosures.

246. SWAPA and its Members was entitled to rely on Boeing's representations.

247. SWAPA would not have collectively bargained on behalf of and with the support of its Members with Southwest about the 737 MAX or concluded its negotiations with the carrier predicated on a fleet-wide shift toward the 737 MAX, had SWAPA known of the truth about Boeing's misrepresentations or non-disclosures.

248. Boeing deprived SWAPA and its Members of the opportunity to protect and make

informed decisions about SWAPA Members' economic interests during SWAPA's negotiations with Southwest by providing incomplete, false and misleading data to them. Boeing's misrepresentations therefore were the proximate cause and cause in fact of the damages SWAPA has sustained as the assignee of its Members' claims against Boeing.

249. SWAPA Members have been damaged in the amount of millions of dollars in economic damages, which continue to accrue.

250. SWAPA, as the assignee of its Members' claims against Boeing, are entitled to damages for losses to be determined at trial.

SECOND CLAIM FOR RELIEF - NEGLIGENT MISREPRESENTATION

251. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 250 above with the same force and effect as if set forth herein in full.

252. Boeing marketed the 737 MAX as a variant of the safe, reliable, and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed "minimal risk."

253. Boeing made these representations to SWAPA and its Members when SWAPA Members participated in 737 MAX simulator exercises at Boeing; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; participated in Service Ready Operational Validation tests; and in Boeing drafted flight and aircraft manuals.

254. Boeing also provided aircraft performance and operation data to Southwest that it understood would be used by SWAPA and its Members and Southwest to inform contract negotiations. Boeing's failure to disclose design, safety and training data was material to and adversely impacted the negotiation process.

255. Boeing also made the foregoing representations on its website and in press releases described above, including, but not limited to its statements claiming that Boeing would minimize changes from the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

256. Boeing's representations concerning the 737 MAX were false in that Boeing did not disclose that, as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia:*

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to

> mitigate the deadly risk of stall but in fact caused greater problems.

257. Boeing's representations were also false in that Boeing did not disclose that it actively withheld critical safety information regarding MCAS from the FAA during the certification process, deceived and interfered with the FAA AEG's lawful function to evaluate MCAS, and fraudulently obtained a differences-training determination for the 737 MAX that was based on incomplete and inaccurate information about MCAS.

258. Boeing made these representations when it knew or should have known that SWAPA and its Members were relying on their truth.

259. Boeing knew that the foregoing representations were false, or recklessly disregarded their truthfulness in making such representations.

260. Boeing made the foregoing representations without exercising reasonable care and competence.

261. Boeing's false representations related to objectively material facts concerning the 737 MAX.

262. Boeing knew or should have known that it made representations to SWAPA, its Members, and Southwest for the guidance of both in their business dealings.

263. Boeing concealed all or parts of the truth when it had a legal duty to speak, and when it had already made partial representations to SWAPA, its Members, and Southwest concerning the differences between the 737 NG and 737 MAX and the 73 7 MAX's fitness for commercial service.

264. Boeing had a legal duty to correct these representations once made, but failed to do so.

265. Boeing made the foregoing misrepresentations for its economic advantage.

266. Boeing knew or should have known that the foregoing misrepresentations would induce SWAPA, its Members, and Southwest to rely on the representations.

267. SWAPA and its Members relied on Boeing's representations as true because of Boeing's superior knowledge concerning the 737 MAX, and their inability to acquire their own knowledge concerning Boeing's representations.

268. SWAPA and its Members' reliance on Boeing's representations and non-disclosures also was justifiable in light of their and Boeing's long-term relationship, which previously did not include any reason to doubt the accuracy of Boeing's representations and disclosures.

269. SWAPA and its Members were entitled to rely on Boeing's representations.

270. SWAPA would not have collectively bargained on behalf of and with the support of its Members with Southwest about the 737 MAX or concluded its negotiations with the carrier predicated on a fleet-wide shift toward the 737 MAX had SWAPA known of the truth about Boeing's misrepresentations or non-disclosures.

271. Boeing deprived SWAPA and its Members of the opportunity to protect and make informed decisions about SWAPA Members' economic interests during SWAPA's negotiations with Southwest by providing false and misleading data to them.

272. Boeing's misrepresentations therefore were the proximate cause and cause in fact of the

damages SWAPA has sustained as the assignee of its Members' claims against Boeing.

273. SWAPA Members have been damaged in the amount of millions of dollars in economic damages.

274. SWAPA, as the assignee of its Members' claims against Boeing, is entitled to damages for losses to be determined at trial.

THIRD CLAIM FOR RELIEF - TORTIOUS INTERFERENCE WITH AN EXISTING BUSINESS RELATIONSHIP

275. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 274 above with the same force and effect as if set forth herein in full.

276. SWAPA Members had an existing business relationship with Southwest.

277. At all relevant times, Boeing was aware of the business relationship between SWAPA Members and Southwest, as well as the representative role that SWAPA played in this relationship since 1978.

278. Boeing purposefully misrepresented to SWAPA and its Members that the 737 MAX was the same in all material respects to its predecessors.

279. Boeing marketed the 737 MAX to Southwest, SWAPA, and its Members as a variant of the safe, reliable and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed "minimal risk."

280. Boeing made these representations to SWAPA and its Members when SWAPA Members participated in 737 MAX simulator exercises at

Boeing; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; participated in Service Ready Operational Validation tests; and in Boeing drafted flight and aircraft manuals.

281. Boeing also provided aircraft performance and operation data to Southwest that it understood would be used by SWAPA, its Members, and Southwest to inform contract negotiations. Boeing's failure to disclose design, safety and training data was material to and adversely impacted the negotiation process.

282. These representations were false.

283. Boeing knew them to be false.

284. SWAPA and its Members could not have discovered the truth of the matter on their own.

285. The information that SWAPA and its Members could not have accessed on their own includes, but is not limited to, that as compared to the 737 NG, Boeing's use of the LEAP1- B engines on the 737 MAX, *inter alia:*

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

286. Further, SWAPA and its Members could not have accessed on their own that Boeing actively withheld critical safety information regarding MCAS from the FAA during the certification process, deceived and interfered with the FAA AEG's lawful function to evaluate MCAS, and fraudulently obtained a differences-training determination for the 737 MAX that was based on incomplete and inaccurate information about MCAS.

287. Boeing withheld the same critical safety information from Southwest, SWAP A, and SWAPA Members knowing that disclosure would impact Boeings' ability to certify the aircraft and timely delivery the aircraft to Southwest and maintain minimal differences training for pilots to operate the aircraft.

288. The facts Boeing misrepresented to and concealed from SWAPA and its Members are objectively material.

289. Boeing had a financial incentive to make the foregoing misrepresentations, namely that SWAPA Members piloting the 737 MAX was critical to the domestic launch of the aircraft program and would cause Southwest to purchase more 737 MAX aircraft and contribute generally to the acceptance of the 737 MAX into the commercial aircraft market. Any delays to the delivery of the aircraft to Southwest or alterations of the type of training

program would result in hundreds of millions of dollars of penalties to Boeing.

290. Boeing made the foregoing misrepresentations in furtherance of its financial incentives.

291. There is no social interest in protecting Boeing's conduct; to the contrary, the social interest lies in penalizing Boeing's conduct because it put not only SWAPA Members, but the flying public in harm's way.

292. SWAPA would not have collectively bargained on behalf of and with the support of its Members with Southwest about the 737 MAX or concluded its negotiations with the carrier predicated on a fleet-wide shift toward the 737 MAX had SWAPA known of the truth about Boeing's misrepresentations or non-disclosures.

293. SWAPA and its Members were reasonable and rightful in relying on Boeing's misrepresentations given their close relationship with Boeing, Boeing's unique knowledge of the facts and expertise, and Boeing's understanding that SWAPA, its Members, and Southwest were relying on Boeing's misrepresentations.

294. SWAPA and its Members' reliance on Boeing's representations and nondisclosures also was justifiable in light of their and Boeing's long-term relationship, which previously did not include any reason to doubt the accuracy of Boeing's representations and disclosures.

295. Boeing deprived SWAPA and its Members of the opportunity to protect and make informed decisions about SWAPA Members' economic interests during SWAPA's negotiations with

Southwest by providing false and misleading data to them.

296. In doing so, Boeing interfered with SWAPA Members' business relationship with Southwest.

297. Boeing's misrepresentations and omissions thus proximately caused and were the cause in fact of the damages SWAPA has sustained as the assignee of its Members' claims against Boeing.

298. Boeing's actions were willful and intentional.

299. Boeing's misrepresentations thus interfered with SWAPA Members' expected benefits from Southwest.

300. Boeing's misrepresentations were independently tortious as set forth in the First, Second, Fourth and Fifth Claims for Relief.

301. SWAPA Members have been damaged in the amount of millions of dollars in economic damages, which continue to accrue.

302. SWAPA, as the assignee of its Members' claims against Boeing, is entitled to damages for losses to be determined at trial.

FOURTH CLAIM FOR RELIEF - NEGLIGENCE

303. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 302 above with the same force and effect as if set forth herein in full.

304. Boeing knew or should have known that the 737 MAX was unsafe, un-airworthy, and unfit for commercial service and placed SWAPA Members, the passengers in their care, and others, in danger.

305. Boeing had a duty as an aircraft manufacturer to manufacture safe and airworthy aircraft.

306. That Boeing knew or should have known that the 737 MAX was unsafe and un-airworthy because it filed with the FAA a false SSA for MCAS that the NTSB found to be non- compliant with 14 C.F.R. § 25.1309.

307. The SSA:

a. Understated MCAS's authority to command the number and length of trim movements by the horizontal stabilizer;

b. Understated the degree to which MCAS could move the horizontal stabilizer;

c. Failed to account for the fact that MCAS was designed to reset and repeat its commands even after the pilot countermanded MCAS's automatic nose-down trim;

d. Failed to disclose that MCAS relied on a single angle of attack sensor and thus was a single point failure; and

e. Classified MCAS incorrectly as "hazardous."

308. Boeing nonetheless implemented MCAS in order to make the 737 MAX "feel" like prior generations of 737 aircraft, furthering its

misinformation campaign upon which SWAPA and its Members relied.

309. Boeing should further have known that the 737 MAX was unsafe and un-airworthy as certified because Boeing actively withheld critical safety information regarding MCAS from the FAA during the certification process, deceived and interfered with the FAA AEG's lawful function to evaluate MCAS, and fraudulently obtained a differences-training determination for the 737 MAX that was based on incomplete and inaccurate information about MCAS.

310. Boeing did so without acknowledging the actual differences between the 737 MAX and prior generations of 737 aircraft.

311. Boeing thus failed to mitigate the actual risk of a catastrophic stall on the 737 MAX.

312. Boeing failed to inform and warn SWAPA Members of the risk of a catastrophic stall on the 737 MAX, despite its duty to do so.

313. Boeing also failed to adequately train SWAPA Members on how to avoid the increased risk of a catastrophic stall on the 737 MAX aircraft as compared to prior generations of 737s, despite its duty to do so.

314. Boeing did so for the purpose of selling 737 MAX aircraft to Southwest and without the need to alter its rushed development timeframe, and without the need for Southwest to incur additional cost.

315. Boeing violated the FAA's Airworthiness Standards for Commercial Aircraft, 14 C.F.R. § 25.203(a) - Stall Characteristics, which states in part "[n]o abnormal nose-up pitching may occur.... In

addition, it must be possible to promptly prevent stalling and to recover from a stall by normal use of the controls."

316. By virtue of selling an aircraft it knew violated Federal Aviation Regulations, it was reasonably foreseeable that such aircraft likely would be grounded in the future once its defect was discovered and until such defect could be remedied.

317. As a result of Boeing's conduct, SWAPA Members have incurred economic and other damages described below.

318. Among other things, SWAPA would not have collectively bargained on behalf of and with the support of its Members with Southwest about the 737 MAX or concluded its negotiations with the carrier predicated on a fleet-wide shift toward the 737 MAX had SWAPA known of the truth about Boeing's misrepresentations or non-disclosures.

319. Boeing deprived SWAPA and its Members of the opportunity to make informed decisions to protect SWAPA Members' economic interests by misrepresenting, withholding and concealing accurate safety, design, performance, and training data from them.

320. Boeing breached its duties to manufacture safe aircraft, and to warn and adequately train SWAPA Members. These breaches were the proximate cause and cause in fact of the damages sustained by SWAPA as the assignee of its Members' claims against Boeing.

321. Boeing's conduct in this regard was directed toward SWAPA Members and was negligent.

322. SWAPA Members have been damaged in the amount of millions of dollars in economic damages, which continue to accrue.

323. SWAPA, as the assignee of its Members' claims against Boeing, is entitled to damages for losses to be determined at trial.

FIFTH CLAIM FOR RELIEF -
FRAUD BY NON-DISCLOSURE

324. Plaintiff SWAPA repeats, reiterates, and realleges each and every allegation in paragraphs 1 through 323 above with the same force and effect as if set forth herein in full.

325. Boeing marketed the 737 MAX to Southwest, SWAPA, and its Members as a variant of the safe, reliable and time-tested 737 family of aircraft, with new fuel-efficient engines and "very deliberate" design enhancements that posed "minimal risk."

326. Boeing made these representations to SWAPA and its Members when SWAPA Members participated in 737 MAX simulator exercises at Boeing; collaborated with Boeing to prepare Southwest's 737 MAX pilot training program; participated in Service Ready Operational Validation tests; and in Boeing drafted flight and aircraft manuals.

327. Boeing also provided aircraft performance and operation data to Southwest that it understood would be used by SWAPA, its Members, and Southwest to inform contract negotiations. Boeing's failure to disclose design, safety and training data was material to and adversely impacted the negotiation process.

328. Boeing also made representations that included statements claiming that Boeing would minimize changes from the 737 NG to the 737 MAX, and that Boeing had only made changes after being assured of their safety.

329. Boeing's representations concerning the 737 MAX were false in that Boeing did not disclose that, as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia:*

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

330. Boeing's representations were also false in that Boeing did not disclose to Southwest, SWAPA, or SWAPA Members that it actively withheld critical safety information regarding MCAS from the FAA during the certification process, deceived and interfered with the FAA AEG's lawful

function to evaluate MCAS, and fraudulently obtained a differences-training determination for the 737 MAX that was based on incomplete and inaccurate information about MCAS.

331. Boeing made these representations knowing that SWAPA and its Members were relying on the accuracy of the representations.

332. Boeing knew that the foregoing representations were false, or recklessly disregarded their truthfulness in making such representations.

333. In making these misrepresentations, Boeing failed to disclose the truth, including that as compared to the 737 NG, Boeing's use of the LEAP1-B engines on the 737 MAX, *inter alia:*

a. Changed the aircraft's aerodynamic center of gravity;

b. Decreased the aircraft's stability;

c. Created greater pitch-up tendency at elevated angles of attack;

d. Negatively changed the aircraft's handling characteristics;

e. Increased the aircraft's susceptibility to the risk of catastrophic stall; and

f. Relied on MCAS, a novel yet safety critical flight control logic with no service history that purported to mitigate the deadly risk of stall but in fact caused greater problems.

334. Boeing's non-disclosures related to objectively material facts concerning the 737 MAX.

335. Boeing concealed all or parts of the truth when it had a legal duty to speak, and when it had already made partial representations concerning differences between the 737 NG and 737 MAX and the 737 MAX's fitness for commercial service.

336. Boeing had a legal duty to correct these misrepresentations once made, but failed to do so until it was too late.

337. Boeing made the foregoing non-disclosures for its economic advantage.

338. Boeing's non-disclosures concerning the 737 MAX were deliberate.

339. Boeing made the foregoing misrepresentations and non-disclosures with the intent to induce SWAPA's and its Members' reliance on the representations.

340. SWAPA and its Members relied on Boeing's representations and non-disclosures as true because of Boeing's superior knowledge concerning the 737 MAX and its expertise, and SWAPA's inability to acquire their own knowledge concerning Boeing's representations and nondisclosures.

341. SWAPA and its Members' reliance on Boeing's representations and nondisclosures also was justifiable in light of their and Boeing's long-term relationship, which previously did not include any reason to doubt the accuracy of Boeing's representations and disclosures.

342. SWAPA and its Members were entitled to rely on Boeing's representations.

343. SWAPA and its Members were entitled to assume that Boeing's disclosures were complete and accurate, and relied on Boeing for that reason.

344. Boeing's deliberate non-disclosures were intended to cause SWAPA and its Members to resolve their disagreement with Southwest's fleet-modernization plan centered on the 737 MAX.

345. SWAPA would not have collectively bargained on behalf of and with the support of its Members with Southwest about the 737 MAX or concluded its negotiations with the carrier predicated on a fleet-wide shift toward the 737 MAX had SWAPA and its Members known of the truth about Boeing's misrepresentations or non-disclosures.

346. Boeing deprived SWAPA and its Members of the opportunity to protect and make informed decisions about SWAPA Members' economic interests during negotiations with Southwest by providing false and misleading data to them.

347. Boeing's non-disclosures therefore were the proximate cause and cause in fact of the damages that SWAPA sustained as the assignee of its Members' claims against Boeing.

348. SWAPA Members have been damaged in the amount of millions of dollars in economic damages, which continue to accrue.

349. SWAPA, as the assignee of its Members' claims against Boeing, is entitled to damages for losses to be determined at trial.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

Wherefore, Plaintiff demands judgment:

A. That Defendant Boeing pays Plaintiff SWAPA for the economic damages its 8,974 Assignor Members have suffered and are continuing to suffer;

B. That Defendant Boeing pays Plaintiff SWAPA pre-judgment interest for the foregoing;

C. That Defendant Boeing pays Plaintiff SWAPA for all other relief to which SWAPA may be entitled, and which this Court deems just and proper.

Dated: March 10, 2021 SOUTHWEST AIRLINES PILOTS ASSOCIATION

By: */s/Helen Yu*

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SOUTHWEST AIRLINES PILOTS ASSOCIATION

IN THE DISTRICT COURT
160TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Cause No. DC-21-3072

SOUTHWEST AIRLINE PILOTS ASSOCIATION (SWAPA), as assignee of 8,794 of its member pilots,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

ORDER

On this day came to be heard Defendant's Motion to Dismiss Pursuant to Texas Rule of Civil Procedure 91a (the "Motion."). The Court having considered the Motion, response and argument of counsel finds that the Motion should be granted.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Pursuant to Texas Rule of Civil Procedure 91a is GRANTED.

Signed on [June 30], 2021

[signature]
JUDGE PRESIDING

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00598-CV

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA), as Assignee of 8,794 of its Member Pilots, Appellant

v.

THE BOEING COMPANY, Appellee

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-21-03072

MEMORANDUM OPINION

Opinion by Justice Myers

Southwest Airlines Pilots Association (SWAPA) appeals the dismissal of its claims against The Boeing Company. SWAPA brings two issues on appeal contending (1) the trial court erred in granting Boeing's motion to dismiss under Rule of Civil Procedure 91a based on the affirmative defense

of res judicata, and (2) the trial court should have sustained SWAPA's objection to Boeing's untimely filing of the Rule 91a motion to dismiss. We conclude Boeing's motion to dismiss was not untimely but that the trial court erred by granting the motion to dismiss, and we reverse the trial court's judgment.

BACKGROUND

SWAPA is a non-profit labor organization and employee association that represents over 9,000 Southwest Airlines pilots. Acting in its representative capacity, SWAPA enters into collective bargaining agreements ("CBAs") with Southwest Airlines. The CBAs define employment terms, including pay, benefits, working conditions, and the approved aircraft that the pilots agree to fly. Southwest pilots pay SWAPA a percentage of their wages as dues.

In 2016, SWAPA entered into a CBA in which SWAPA agreed that its members would operate Boeing's 737 MAX aircraft. In 2018 and 2019, the 737 MAX was involved in catastrophic crashes and as a result, the 737 MAX fleet was grounded worldwide.

In October, 2019, SWAPA filed suit against Boeing on behalf of itself and its members. The petition alleged that SWAPA sought damages on behalf of itself and its pilots "who have collectively lost, and are continuing to lose, millions of dollars in compensation as a result of Boeing's false representations concerning its 737 MAX aircraft, namely that the 737 MAX was safe, airworthy, and

was essentially the same as the time-tested 737 aircraft that SWAPA pilots were already flying." SWAPA asserted Texas common law claims for fraudulent and negligent misrepresentation, tortious interference with contract and with an existing business relationship, negligence, and fraud by nondisclosure. SWAPA sought compensation for its member pilots in connection with cancelled or reduced flights following the grounding of the 737 MAX. SWAPA also sought damages on its own behalf for lost dues from its members and for legal fees incurred in connection with government investigations of the 737 MAX. Boeing filed a plea to the jurisdiction asserting SWAPA lacked standing to bring claims on behalf of its members and that SWAPA's claims were preempted by the federal Railway Labor Act. During the proceedings, SWAPA obtained assignments from some of the member pilots and asserted it had standing as their assignee. Boeing objected that the assignments were void as against public policy. The trial court granted Boeing's plea to the jurisdiction and dismissed SWAPA's case with prejudice. SWAPA appealed the dismissal to this Court. *See Sw. Airlines Pilots Ass'n v. Boeing Co.*, No. 05-20-01067-CV, 2022 WL 951027 (Tex. App.—Dallas Mar. 30, 2022, pet. filed) (*SWAPA I*).

While the appeal of *SWAPA I* was pending, SWAPA obtained assignments from most of its member pilots of their claims against Boeing related to the 737 MAX. In 2021, SWAPA filed this suit against Boeing. The 2021 suit is similar to the 2019 lawsuit. However, SWAPA sued "as assignee of 8,794 of its pilot Members" and not "on behalf of itself and its

members" as it had in the 2019 lawsuit. The 2021 lawsuit also omitted SWAPA's claims on its own behalf for lost dues and legal fees that it had alleged in the 2019 lawsuit.

Boeing filed an answer asserting the 2021 lawsuit was barred by res judicata. Boeing attached as exhibits to its answer copies of SWAPA's petition in the 2019 lawsuit and the trial court's order granting Boeing's plea to the jurisdiction and dismissing SWAPA's suit with prejudice. Boeing then filed a motion to dismiss under Rule 91a, asserting SWAPA's 2021 lawsuit had no basis in law because it was barred by res judicata. The trial court granted Boeing's motion to dismiss and dismissed SWAPA's suit. SWAPA appeals the dismissal under Rule 91a.

While the appeal of the Rule 91a dismissal of the 2021 lawsuit has been pending, this Court decided the appeal of the 2019 lawsuit. We determined that SWAPA lacked associational standing to bring claims on behalf of its members and that the post-petition assignments from its members could not give SWAPA standing because jurisdiction is determined at the time suit is filed. *SWAPA I*, 2022 WL 951027, at *6. However, we observed, "the Assignments might confer standing on SWAPA in the future." *Id.* at *8. We concluded SWAPA had standing to bring claims on its own behalf. We also held the claims were not preempted by the Railway Labor Act, *id.* at *13, and that assignments from the pilots were not against public policy, *id.* at *8. We held the trial court erred by granting the plea to the jurisdiction on SWAPA's claims brought on its own behalf, and we rendered

judgment changing the disposition of the other claims to "dismissed without prejudice."[1] *Id.* at *13.

RULE OF CIVIL PROCEDURE 91A

Texas Rule of Civil Procedure 91a provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* In ruling on a Rule 91a motion, a court "may not consider evidence ... and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." *Id.* 91a.6; *see also* Tex. Gov't Code Ann. § 22.004(g) ("The supreme court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss."). The motion to dismiss must be

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[1] Boeing has filed a petition for review of the 2019 lawsuit with the Supreme Court of Texas. As of the date of this opinion, the supreme court has not yet ruled on the petition for review. Boeing has filed a motion requesting that we abate this case until the supreme court either denies the petition for review or grants the petition and renders an opinion and judgment. Because we conclude the trial court erred by granting the Rule 91a motion to dismiss without regard to the merits of the issues in *SWAPA I*, we deny Boeing's motion to abate this appeal.

filed within sixty days after the pleading containing the challenged cause of action is served on the movant. *Id.* 91a.3(a). We review de novo a trial court's ruling on a Rule 91a motion to dismiss. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020).

Timeliness of the Motion to Dismiss

In its second issue, SWAPA contends the trial court erred by overruling its objection to the timeliness of Boeing's motion to dismiss. Boeing had to file its motion to dismiss within sixty days of being served SWAPA's petition. *See* Tex. R. Civ. P. 91a.3(a). Boeing was served the petition on March 15, 2021. The sixtieth day following March 15, 2021, was May 14, 2021. Boeing filed a motion to dismiss under Rule 91a on May 14, 2021. However, that motion to dismiss listed the cause number for the 2019 suit, not the 2021 suit. After filing the motion and serving it on SWAPA, Boeing's counsel discussed with SWAPA's counsel scheduling for the motion; SWAPA's counsel did not mention the fact that the motion had the incorrect cause number. On May 20, 2021, when Boeing's counsel contacted the trial court's court coordinator to schedule the hearing, the court coordinator asked Boeing to re-file the motion with the correct cause number. Boeing's attorney stated that was the first time she became aware of an issue with the cause number. On May 25, 2021, Boeing filed its "Corrected Motion to Dismiss Pursuant to Tex. R. Civ. P. 91a." That filing was seventy-one days after Boeing was served with the original petition.

SWAPA objected to the motion to dismiss as being untimely because it was filed seventy-one days after Boeing was served with the petition, but the trial court denied the objection and granted the motion to dismiss. SWAPA argues in its appellate briefing that the trial court erred by granting the motion to dismiss because it was not filed timely.

After the parties briefed the appeal in this case, the supreme court issued its opinion in *Mitschke v. Borromeo*, 645 S.W.3d 251 (Tex. 2022). In *Mitschke*, the supreme court held that a motion for new trial filed within thirty days of the judgment but that listed the wrong cause number was timely filed and that the error of filing the motion with the wrong cause number should be overlooked in favor of finding appellate jurisdiction. *Id.* at 262–63; *see* Tex. R. App. P. 26.1(a). The court observed, "Nothing suggests that the misfiling was done from trickery or to mislead anyone, and respondents have presented no argument about how Mitschke's filing the motion in the original docket number could have prejudiced them. It seems implausible that prejudice was even possible under these facts." *Id.* at 263. The court held, "when a party timely attacks an order that grants a final judgment and then files a notice of appeal that is otherwise timely, the court of appeals must deem the appeal to have been timely perfected despite a non-prejudicial procedural defect." The court stated that it was not addressing the situation where a party's misfiling was done with the purpose of causing litigation harm to the other side. *Id.* at 256 n.27.

At submission of this case, SWAPA's counsel brought *Mitschke* to this Court's attention. Counsel told the Court that Boeing's filing the motion to dismiss was not done with the purpose of causing litigation harm. *See id.* SWAPA's counsel also stated that "*Mitschke* is a head shot for us," which we interpret to mean the case is controlling authority contrary to SWAPA's argument that Boeing's motion to dismiss was untimely. Boeing's counsel agreed. We also agree that under these facts, *Mitschke* should apply in this situation and that Boeing's timely filing of its motion to dismiss with the incorrect cause number should not render the motion to dismiss untimely. The record contains no evidence that SWAPA was prejudiced by the timely filing of the motion with the wrong cause number. We conclude the trial court did not err by denying SWAPA's objection to the timeliness of the motion to dismiss. Although only the "Corrected" motion to dismiss is before us, SWAPA does not assert that the original and the corrected motions to dismiss are substantively different. We overrule SWAPA's second issue.[2]

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[2] Rule 91a.3(c) states, "A motion to dismiss must be ... granted or denied within 45 days after the motion is filed." Tex. R. App. P. 91a.3(c). In this case, the trial court granted the motion to dismiss 47 days after the May 14, 2021 original motion to dismiss was filed but 36 days after Boeing filed the May 25, 2021 corrected motion to dismiss. No party objected to the trial court's ruling as violating the Rule 91a.3(c) 45-day deadline for the court to rule on the motion, nor does any party argue on appeal that the timeliness of the trial court's ruling affects the outcome of the case. Accordingly, we do not consider whether the ruling was timely or, if it was not, the effect of an untimely ruling. A court's failure to decide a Rule 91a motion to dismiss within 45 days is not jurisdictional. *In re Joel Kelley Interests,*

Dismissal for Res Judicata

In its first issue, SWAPA contends the trial court erred by granting Boeing's motion to dismiss on the ground of res judicata.

Standard of Review

When a defendant alleges an affirmative defense as the basis for a motion to dismiss under Rule 91a, the court may examine the defendant's answer to determine whether the defense is properly before the court. *Bethel*, 595 S.W.3d at 656. However, in determining whether sufficient facts support an affirmative defense demonstrating that a cause of action "has no basis in law," the court may consider only the plaintiff's petition "together with any pleading exhibits permitted by Rule 59." Tex. R. Civ. P. 91a.6. "Of course, some affirmative defenses will not be conclusively established by the facts in a plaintiff's petition. Because Rule 91a does not allow consideration of evidence, such defenses are not a proper basis for a motion to dismiss." *Bethel*, 595 S.W.3d at 656.

Applying *Bethel*, we look to the motion to dismiss to find the grounds for dismissing the action under Rule 91a. *Id.* at 656 ("Both motions and hearings are avenues by which the movant may present legal

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Inc., No. 05-19-00559-CV, 2019 WL 2521725, at *1 (Tex. App.—Dallas June 19, 2019, no pet.) (orig. proceeding).

theories as to why the claimant is not entitled to relief."). If one of those grounds is an affirmative defense, we look to the answer to determine whether the affirmative defense has been pleaded and was properly before the court. *Id.* ("[A] court may consider the defendant's pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court."). If it was pleaded, then we look to the petition and any exhibits properly attached to the petition to determine whether the allegations in the petition establish the defense and demonstrate that the action has no basis in law. *See Bethel*, 595 S.W.3d at 656; *see also Owings v. Kelly*, 2020 WL 6588610, at *1 (Tex. App.—Amarillo Nov. 10, 2020, no pet.) (*Bethel* indicates "that we return to the plaintiff's pleading to ultimately decide whether the affirmative defense warrants dismissal. If this were not so, then there would be no reason for the Court to reference the 'plaintiff's petition' in saying that some defenses will not be conclusively established by the facts in it.").

Boeing disagrees with this interpretation of Rule 91a.6. Under Boeing's interpretation, courts determining whether facts support an affirmative defense should consider any party's pleading and the exhibits attached to any party's pleading:

> The plain language of Rule 91a expressly provides that the trial court may consider the pleadings "together with any pleading exhibits permitted by Rule 59." Tex. R. Civ. P. 91a.6 . Rule 59, in turn, provides for the consideration of "all other written instruments, constituting, in whole or in part, the

> claim sued on, or the matter set up in defense." Tex. R. Civ. P. 59. These provisions work together to allow Rule 91a to fulfill its purpose of providing for the "early and speedy resolution of baseless claims." *In re Butt*, 495 S.W.3d 455, 460 (Tex. App.—Corpus Christi 2016, orig. proceeding). After all, "when it is legally impossible for the plaintiff to recover on the claims in the petition, it is unjust to require the defendant to expend the time and money 'enduring eventual reversal of improperly conducted proceedings.' " *In re Shire PLC*, 633 S.W.3d 1, 19 (Tex. App.—Texarkana 2021, no pet.) (quoting *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014, orig. proceeding) (per curiam)).

We disagree that a court deciding a Rule 91a motion to dismiss may consider any party's pleading and exhibits. Nor do we agree with Boeing's argument that not considering other parties' pleadings and exhibits would leave a defendant with no remedy except "eventual reversal of improperly conducted proceedings."

Rule 91a.6 does not provide "that the trial court may consider the pleadings"; the rule provides the court must decide the motion to dismiss "based solely on the pleading of the cause of action," not "the pleadings" generally of any party as Boeing appears to assert. The "cause of action" referred to in Rule 91a is necessarily the plaintiff's (or counterplaintiff's, in the appropriate case) pleading of the legal basis for the relief sought in the petition. *See Cause of action*, Black's Law Dictionary (8th ed. 2004) ("A group of operative facts giving rise to one or more bases for suing").

We also disagree with Boeing's assertion that a court, in deciding a Rule 91a motion to dismiss, may consider the exhibits attached to any party's pleading. Rule 91a.6 states, "The court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." According to Boeing, the exhibits attached to its answer were "exhibits permitted by Rule 59," so the trial court did not err by considering them.

Rule 59 provides:

> Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such, or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition or answer made in reference to said instruments and shall be deemed a part thereof for all purposes.

Tex. R. Civ. P. 59. Boeing's exhibits to its answer were "records ... constituting ... the matter set up in defense," *id.*, namely, res judicata, and Boeing asserts the trial court should be able to consider those records in determining whether SWAPA's petition had no legal or factual basis.

Rule 91a.1 provides directions for determining whether a cause of action is legally or factually without basis: "*A cause of action* has no basis in law if *the allegations*, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. *A cause of action* has no basis in fact if no reasonable person could believe *the facts pleaded*." Tex. R. Civ. P. 91a.1 (emphasis added). It is "the allegations" and "the facts pleaded" in the "cause of action" that determine whether the cause of action has a basis in law or fact. Thus, the determination of whether there is a legal or factual basis is made from the face of the petition, not other parties' pleadings. *See Aguilar v. Morales*, 545 S.W.3d 670, 676 (Tex. App.—El Paso 2017, pet. denied) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (to survive Fed. R. Civ. P. 12(b)(6) motion to dismiss, claims must set forth "enough facts to state claim to relief that is plausible on its face.")). The exhibits attached to another party's pleading may tend to show the plaintiff's pleading is baseless, but Rule 91a does not permit their consideration. The rule requires the determination of baselessness be made from the allegations in the cause of action and the facts pleaded in the cause of action, not from documents extraneous to the petition and presented by other parties. *See* Tex. R. Civ. P. 91a.1, .6; *see also Raider Ranch, LP v. Lugano, Ltd.*, 579 S.W.3d 131, 134 (Tex. App.—Amarillo 2019, no pet.) (party's "seeking to inject its defensive theory into the Rule 91a procedure by means of an exhibit to its answer and motion, finds no support in the text of the rule itself or in the cases").

The standard of review also demonstrates that other parties' exhibits should not be considered. In considering a Rule 91a motion to dismiss, the court does not consider evidence and accepts the plaintiff's allegations as true. *See id.* 91a.6; *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 581 S.W.3d 306, 309 (Tex. App.—Dallas 2018), *aff'd*, 595 S.W.3d 651 (Tex. 2020). Granting a motion to dismiss based on the exhibits to another party's pleading would require the court to treat those exhibits as evidence and to accept those documents as true, both of which are contrary to the standard of review. *See San Jacinto River Auth. v. Burney*, 570 S.W.3d 820, 830–31 (Tex. App.—Houston [1st Dist.] 2018) (courts may not take judicial notice of information when deciding Rule 91a motions to dismiss because Rule 91a motions must be resolved solely on the pleadings), *aff'd*, 627 S.W.3d 618 (Tex. 2021).

Boeing also argues that denial of a Rule 91a motion to dismiss asserting the affirmative defense of res judicata will unjustly "require the defendant to expend the time and money 'enduring eventual reversal of improperly conducted proceedings.' " (Quoting *In re Shire PLC*, 633 S.W.3d at 19.) We disagree. Res judicata is a common ground for summary judgment, and summary judgment is an appropriate procedure for proving a defense, such as res judicata, that requires proof of facts not alleged in the plaintiff's pleading. *See* Tex. R. Civ. P. 166a(c); *see also, e.g. Alanis v. U.S. Bank Nat'l Ass'n*, No. 04-21-00021-CV, 2022 WL 3907925, at *6 (Tex. App.—San Antonio Aug. 31, 2022, no pet. h.) (mem. op.)

(affirming trial court's grant of motion for summary judgment on ground of res judicata); *Caballero v. Wilmington Savs. Fund Soc'y, FSB*, No. 05-19-01054-CV, 2021 WL 3642256, at *1, 5 (Tex. App.—Dallas Aug. 17, 2021, no pet.) (mem. op.) (same); *Womble v. Atkins*, 314 S.W.2d 150, 153 (Tex. App.—Dallas 1958) (same), *aff'd*, 331 S.W.2d 294 (Tex. 1960); *Couch v. Schley*, 297 S.W.2d 228, 229 (Tex. App.—Waco writ dism'd) (same). Res judicata may also establish that a pleading is groundless and brought in bad faith under Rule of Civil Procedure 13. *See* Tex. R. Civ. P. 13; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 10.001, .004; *Schlapper v. Forest*, No. 03-12-00702-CV, 2014 WL 3809753, at *4 (Tex. App.—Austin July 30, 2014, pet. denied); *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 73 (Tex. App.—El Paso 1994, writ denied). Boeing does not explain why the summary judgment procedure or Rule 13 would not provide appropriate, timely relief for its defense or why its filing a motion for summary judgment or motion for sanctions under Rule 13 would unjustly require it to "expend the time and money enduring eventual reversal of improperly conducted proceedings."[3] (Internal quotation marks omitted.) *See Gamma Group, Inc. v. Home State Cty. Mut. Ins. Co.*, 342 S.W.3d 762, 765 (Tex. App.—Dallas 2011, pet. denied) (standard of review for summary judgment in case asserting res judicata; Court

[3] Whether Boeing would prevail on a motion for summary judgment or Rule 13 motion for sanctions asserted on the ground of res judicata is not before us in this appeal, and we make no determination of the merits of its res judicata defense in this opinion.

affirmed summary judgment); *Campos*, 879 S.W.2d at 73 (on Rule 13 motion for sanctions, "*Res judicata* clearly barred their survival action, and [the case] was groundless as a matter of law.").[4]

Preservation of Error

Boeing also argues SWAPA did not preserve its assertion that the trial court could not consider the exhibits to Boeing's answer because SWAPA did not object to Boeing's argument that the trial court could consider the exhibits. *See* Tex. R. App. P. 33.1(a)(1) (party must object in trial court to preserve error and obtain ruling on objection). SWAPA's response to the motion to dismiss quotes Rule 91a.6 and states: "In ruling on a Rule 91a motion, a court 'may not consider evidence ... and must decide the motion based solely on the pleading of the cause of action.' " (Citing Tex. R. Civ. P. 91a.6 and *Bethel*, 595 S.W.3d at 654). This statement of the standard of review should have been sufficient to call to the trial court's attention that in determining the applicability of Boeing's defense, the court could not consider evidence nor anything outside SWAPA's petition. SWAPA also stated, "Boeing's Motion is based solely

[4] Boeing also argues that not allowing a trial court to consider the exhibits in other parties' pleadings that purport to establish a defense "would serve only to incentivize plaintiffs to omit references to their own prior filings and burden courts with improperly filed cases that could otherwise be dismissed." As discussed above, procedures exist for defendants to present evidence proving defenses such as res judicata and obtain prompt disposition of a cause of action—a motion for summary judgment and a Rule 13 motion for sanctions.

on its affirmative defense unsupported by the pleadings." This assertion notified the trial court that Boeing's motion was not based on the factual allegations in SWAPA's petition. We conclude SWAPA preserved its argument for appeal.

Invited Error

Boeing also argues SWAPA invited the trial court's error of considering the exhibits to Boeing's answer when SWAPA stated in its response to the motion to dismiss: "The Court should analyze the differences between the two Petitions in detail. If it does so, it would discover the many differences between the two."

In support of its argument that the above-quoted statement constituted an invitation to the trial court to make the error SWAPA asserts, Boeing cites this Court's opinion in *Haler v. Boyington Capital Group, Inc.* where we stated, "A party cannot ask something of the trial court and then complain that the court erred by granting the request." 411 S.W.3d 631, 637 (Tex. App.—Dallas 2013, pet. denied). In *Haler*, the trial court submitted a jury question in the form Haler requested, but Haler complained on appeal that the jury's answer should be disregarded because it did not afford a reasonable basis upon which to enter a judgment. *Id.* We stated, "the doctrine of invited error provides that a party may not complain of an error which the party invited. Because Haler requested the language that he now complains about, we do not consider the merits of the alleged error Haler complains of ...." *Id.*

The error SWAPA asserts in this case was the trial court's granting the motion to dismiss when the support for the motion to dismiss was contained in the exhibits to Boeing's answer and not in SWAPA's petition. That error was invited by Boeing, not SWAPA. SWAPA did not request the trial court to grant the motion to dismiss. SWAPA's statement quoted above, in context within its response to Boeing's motion to dismiss, asserted that the exhibits did not support dismissal because comparison of the exhibits with the petition in this case would show there was no unity of parties, no final judgment on the merits in *SWAPA I*, and different causes of action. SWAPA's argument did not invite the trial court to grant the motion to dismiss, which is the error SWAPA complains of on appeal.

Application of Rule 91a

We now consider whether the trial court erred by granting Boeing's Rule 91a motion to dismiss on the ground of res judicata. "The party asserting res judicata must prove: (i) a prior final determination on the merits by a court of competent jurisdiction, (ii) identity of parties or those in privity with them, and (iii) a second action based on the same claims as were raised or could have been raised in the first action." *TRO-X, L.P. v. Eagle Oil & Gas Co.*, 608 S.W.3d 1, 11 (Tex. App.—Dallas 2018), *aff'd*, 619 S.W.3d 699 (Tex. 2021).

For Boeing to be entitled under Rule 91a to dismissal of SWAPA's action on the ground that the action

lacked a basis in law because of res judicata, SWAPA's petition had to have alleged facts supporting the three elements of res judicata. SWAPA's petition contains no allegation that there was a prior final determination on the merits before a court of competent jurisdiction. SWAPA's petition makes only one reference to the 2019 suit: "In accordance with Dallas County Local Rule 1.08, SWAPA discloses that this suit is related to cause no. DC-19-16290, styled *Southwest Airlines Pilots Association (SWAPA) on behalf of itself and its members, v. The Boeing Company*, in the 160th District Court, Dallas County, Texas." This allegation shows SWAPA appeared in different capacities in the two suits. *See McNeil Interests, Inc. v. Quisenberry*, 407 S.W.3d 381, 389 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." (quoting Restatement (Second) of Judgments § 36(2) (1982))). The allegation shows SWAPA sued Boeing in the 2019 litigation "on behalf of itself and its members," while in this case SWAPA sued Boeing in the capacity of "assignee of 8,794 of its member pilots." Finally, although SWAPA alleged the two lawsuits were "related," its petition does not show the 2021 suit was based on the same claims that were raised or could have been raised in the 2019 action.

Boeing's "seeking to inject its defensive theory into the Rule 91a procedure by means of an exhibit to its answer ... finds no support in the text of the rule

itself or in the cases." *Raider Ranch, LP*, 579 S.W.3d at 134. Because SWAPA's petition provides no factual allegations supporting Boeing's res judicata defense, the trial court erred by granting the Rule 91a motion to dismiss. *See Reynolds v. Quantlub Trading Partners US, LP*, 608 S.W.3d 549, 557–58 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (trial court erred by granting Rule 91a motion to dismiss on res judicata; trial court could not take judicial notice of prior pleadings and rulings that were not alleged in plaintiff's petition). *Cf. Smale v. Williams*, 590 S.W.3d 633, 637–38 (Tex. App.—Texarkana 2019, no pet.) (no error in granting Rule 91a motion to dismiss on res judicata when allegations in and exhibits to plaintiff's petition established res judicata).

We sustain SWAPA's first issue.

CONCLUSION

We reverse the trial court's judgment dismissing SWAPA's claims under Rule 91a. We remand the cause to the trial court for further proceedings.

No. 22-0631

IN THE SUPREME COURT OF TEXAS

THE BOEING COMPANY,

Petitioner,

v.

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) ON BEHALF OF ITSELF AND ITS MEMBERS,

***Respondent*,**

On Petition for Review from the Fifth Court of Appeals, Dallas, Texas
Cause No. 05-20-01067

BRIEF OF THE CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

* * *

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before

Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

As one of the largest representatives of employers in the United States, the Chamber has a vital interest in ensuring that rules and procedures for interpreting collective bargaining agreements ("CBAs") are uniform across the nation. To the Chamber's knowledge, the decision below is the first in the nation that would allow a state court to interpret a CBA between an airline and its employees, jeopardizing the uniformity that the federal Railway Labor Act ("RLA") was enacted to ensure. If the decision is allowed to stand, it would jeopardize the norms around resolution of disputes over CBAs, make Texas a magnet for litigation seeking to evade Congress's carefully crafted scheme for interpreting such agreements, and ultimately harm Texas businesses. The Chamber writes to urge this Court to grant review to address the important issues raised in the petition.

No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than amicus, its members, or its counsel—made any monetary contributions intended for the preparation or submission of this brief.

BACKGROUND

An important purpose of Congress in enacting the RLA was to ensure uniformity in the

interpretation of CBAs and to prevent parties from being subject to inconsistent obligations based on different courts' interpretations of the same agreement. *See Int'l Ass'n of Machinists v. Cent. Airlines, Inc.*, 372 U.S. 682, 691–92 (1963) ("The needs of the subject matter manifestly call for uniformity."). In this lawsuit, Respondent Southwest Airlines Pilots Association ("SWAPA") asks Texas courts to become the only courts in the nation to interpret CBAs between airlines and their employees.

The theory underlying SWAPA's claims against The Boeing Company ("Boeing") is that Boeing made misrepresentations that induced SWAPA's members to agree to fly the 737 MAX in their 2016 CBA. But the success of that theory turns on whether the pilots were, in fact, obligated to fly the 737 MAX under an earlier CBA entered into in 2006. As the petition for review makes clear, for SWAPA's claims to proceed, a Texas state court would need to interpret the 2006 CBA—an action inconsistent with the RLA and its express purposes.

Southwest Airlines, the party with which SWAPA actually agreed to the CBAs, is not a party in this lawsuit. Southwest Airlines also alleged that it was damaged by issues related to the 737 MAX fleet being grounded, representing that it suffered losses of $435 million from March through the end of September 2019.[1] Southwest then reached a

[1] *Southwest Airlines reaches confidential settlement with Boeing for some of its 737 Max losses*, Aratani, L., THE WASHINGTON POST (Dec. 13, 2019) available at

confidential settlement with Boeing and, in December 2019, announced that approximately $125 million of the settlement would be shared with its employees, which would include its pilots.[2]

But despite the pilots receiving compensation through Southwest's settlement with Boeing, SWAPA nonetheless continued to pursue the underlying lawsuit, suing Boeing directly.[3] SWAPA's statement on the settlement acknowledged that its suit seeks damages "incurred as a result of the grounding of the 737 MAX,"[4] for which it was already receiving compensation in the form of profit-sharing from Southwest's settlement with Boeing.

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https://www.washingtonpost.com/transportation/2019/12/13/southwest-airlines-reaches-confidential-settlement-with-boeing-some-its-max-losses/ (last visited Oct. 26, 2022).

[2] *Id.*

[3] *Southwest reaches partial settlement with Boeing over projected 737 MAX damages*, Rucinski, T. & Shepardson, D., REUTERS (Dec. 12, 2019) available at https://www.reuters.com/article/us-southwest-boeing-compensation/southwest-reaches-partial-settlement-with-boeing-over-projected-737-max-damages-idUSKBN1YG19U (last visited Oct. 26, 2022).

[4] *Southwest Airlines will give employees $125 million from Boeing 737 Max settlement*, Arnold, K. THE DALLAS MORNING NEWS (Dec. 12, 2019) https://www.dallasnews.com/business/airlines/2019/12/12/southwest-airlines-reaches-deal-with-boeing-over-737-max-and-will-give-125-million-to-employees/ (last visited Oct. 26, 2022).

Boeing removed the lawsuit to federal court on the grounds that the RLA completely preempted the lawsuit. The federal district court remanded because it held there was not complete preemption giving rise to federal jurisdiction. *Sw. Airlines Pilots Ass'n v. Boeing Co.*, — F. Supp. 3d —, 2020 WL 2549748, at *5 (N.D. Tex. Apr. 29, 2020).[5] In reaching that conclusion, the federal district court noted that SWAPA's claims would require the court "to determine whether the 2006 CBA required SWAPA pilots to fly the 737 MAX," and so SWAPA's claims "will require interpretation of the CBA." *Id.* at *4–5.

On remand in state court, Boeing filed a plea to jurisdiction asserting: (1) SWAPA did not have standing to pursue the claims of its members; and (2) SWAPA's state-law claims are preempted by the RLA. The trial court granted the plea and dismissed SWAPA's claims. SWAPA then appealed, and the Fifth Court of Appeals reversed, (1) suggesting that SWAPA might have standing; and (2) holding that the RLA is not implicated because it does not apply to disputes between an aircraft manufacturer and a pilot union.

Amicus urges this Court to grant review to address the RLA preemption issue and reject the Court of Appeals's interpretation, which would

[5] Although the federal district court determined there was not "complete preemption" transforming a state common law claim into a federal claim, the workings of ordinary preemption (such as conflict preemption) still apply in state court. 2020 WL 2549748, at *3.

jeopardize Congress's protections for the uniform interpretation of CBAs nationwide.

ARGUMENT

I. This Court Should Grant Review to Hold that Ordinary Principles of Conflict Preemption Bar SWAPA's Lawsuit

This case presents an important question that touches on core issues of federal sovereignty. The Fifth Court of Appeals's holding threatens Congress's decision to "minimiz[e] interruptions in the Nation's transportation services" through the RLA. *Cent. Airlines*, 372 U.S. at 687. And the holding will impact not only the transportation industry but the entire body of labor-management relations law. This Court should grant review to ensure stability in the law, uphold the important federal interests at play, and preserve the interests of employers and employees alike in clarity regarding the meaning of their CBAs.

The Fifth Court of Appeals adopted an erroneously narrow view of RLA preemption. Although the RLA contains certain jurisdiction-stripping provisions that require "minor disputes" between airlines and their employees to be resolved by adjustment boards and not the state courts, the preemptive reach of the RLA extends beyond the specific jurisdiction of the adjustment board. Allowing this lawsuit to proceed would interfere with the express purpose of the RLA, which is to maintain uniformity in the interpretation of CBAs, and conflict with the RLA's full preemptive reach.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Even where Congress has not expressly adopted a provision preempting state law or occupied the field, "state law is naturally preempted to the extent of any conflict with a federal statute." *Id.* With federal labor law, "the question whether a certain state action is pre-empted by federal law is one of congressional intent." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

Under conflict preemption principles, state law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399–400 (2012). These purposes and objectives are based on the text of the federal statute: Determining whether state law would stand as a sufficient obstacle is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373. In considering "the entire scheme of the statute," the courts must bear in mind that what "must be implied is of no less force than that which is expressed." *Id.* "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress." *Id.*

"Congress'[s] purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for

resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). Congress expressly set forth that one purpose of the RLA was "to provide for the prompt and orderly settlement *of all disputes* growing out of grievances or *out of the interpretation* or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a (emphasis added).

Through the RLA, Congress intended to "minimiz[e] interruptions in the Nation's transportation services" and resolve labor disputes. *Cent. Airlines*, 372 U.S. at 687. If CBAs "are to serve this function under [the RLA], their validity, interpretation, and enforceability cannot be left to the laws of the many States." *Id.* at 961. "[I]t would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme." *Id.* at 961-62. "The needs of the subject matter manifestly call for uniformity." *Id.* at 692 (citing *Lucas Flour Co.*, 369 U.S. at 103); *see also id.* n.16 ("The lack of uniformity created by dividing everything by 50 . . . would multiply the burden [on commerce] by a substantial factor and aggravate the problem to an intolerable degree.").

In discussing the Labor Management Relations Act ("LMRA"), the Supreme Court has explained why such uniformity is necessary and why state law cannot be allowed to interfere with Congress's intentions:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 404 n.3 (1988) (quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)).[6]

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[6] Although these are Section 301 LMRA cases, because the RLA and LMRA Section 301 preemption standards are "virtually identical" in purpose and function, they are, for the most part, analyzed under a single test and a single, cohesive body of case

With respect to CBAs subject to the RLA, like those subject to the LMRA, if "a State . . . create[d] a remedy that, although nonnegotiable, nonetheless turned on an interpretation of a collective-bargaining agreement for its application," then "[s]uch a remedy would be pre-empted." *Lingle*, 486 U.S. at 407 n.7; *Allis-Chalmers Corp.*, 471 U.S. at 210–11, 217–18; *see also Norris*, 512 U.S. at 263. 263 n.9 (concluding "that *Lingle* provides an appropriate framework for addressing pre-emption under the RLA").

The petition for review raises an important question regarding whether the Fifth Court of Appeals correctly applied conflict preemption in determining that the suit could proceed. The Fifth Court of Appeals broke new ground by limiting the RLA's preemptive effect to those cases between a union and a carrier that must go before an adjustment board and by holding that preemption does not apply to any other dispute that "turns on the interpretation or application of a CBA." *Sw. Airlines Pilots Ass'n v. Boeing Co.*, No. 05-20-01067-CV, 2022 WL 951027, at *13 (Tex. App.—Dallas Mar. 30, 2022).

That decision by the Fifth Court of Appeals is unprecedented and violates ordinary rules of conflict preemption. There is no question that, as the Fifth Court of Appeals recognized, where the adjustment

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law. *Norris*, 512 U.S. at 260, 262–63 & n.9 (1994) (noting "the common purposes of the two statutes" and "the parallel development of RLA and LMRA pre-emption law").

board has jurisdiction (over a minor dispute between a union and a carrier), a state claim is preempted. *See, e.g.*, *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 273 (2d Cir. 2005) ("[S]tate-law claims that are disguised minor disputes are therefore preempted by the RLA."). But the Fifth Court of Appeals did not consider whether interpretation of a CBA outside the RLA's adjudicatory scheme, even in a claim that could not be brought before an arbitral panel, conflicts with the scheme established by Congress. *Cf. Lingle*, 486 U.S. at 407 n.7 (even "if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be preempted").

Instead of undertaking an ordinary conflict-preemption analysis, the court focused solely on whether Boeing was a "common carrier by air" or sufficiently controlled by one for purposes of the RLA's adjudicatory scheme. *Sw. Airlines Pilots Ass'n,* 2022 WL 951027, at *11. Because the parties to this matter did not fall within that adjudicatory scheme, the court refused to consider any broader preemptive effect, as it believed "[s]uch a suit does not implicate the statutory purpose of facilitating stability in labor-management relations, nor does it have the potential to affect national commerce." *Id.* at *12–13. But by focusing solely on the reach of the RLA adjustment boards' jurisdiction and not on whether state claims here would be an obstacle to Congress's expressed purpose, the court below erroneously truncated its analysis.

To *Amicus*'s knowledge, no other state court has allowed an RLA suit to proceed where it requires *interpreting* CBA terms. Some courts have allowed state-law claims to proceed when they merely reference undisputed terms of the CBA, as "the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994)*; see also Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 916 (9th Cir. 2018) (en banc). But courts have also held that where the interpretation of the CBA "is made necessary," even if the dispute does not involve a labor-management relations dispute but instead discrimination claims by the individual employee, such claims are preempted. *See Reece v. Houston Lighting & Power Co.*, 79 F.3d 485, 487 (5th Cir. 1996); *see also Lingle*, 486 U.S. at 407 n.7. In other words, state courts lack jurisdiction to adjudicate claims that turn on interpretation of a CBA. *Cf. Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545 (Tex. 1991) (explaining that the preemptive effect of federal statutes may deprive state courts of jurisdiction); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391 (1986) (same).

The federal district court has already determined that SWAPA's claims do not merely reference a CBA but require interpretation of the CBA. They are preempted as a result. Allowing the trial court to make a definitive interpretation of the CBA here would infringe upon the authority of the adjustment board in other cases, leading to potentially inconsistent interpretations or undue

influence upon the adjustment board to avoid such inconsistent interpretations. The Fifth Court of Appeals's decision therefore sets a dangerous precedent that Congress intended to prevent: "[t]he possibility that individual contract terms might have different meanings under state and federal law [which] would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lingle*, 486 U.S. at 404 n.3; *Lucas Flour Co.*, 369 U.S. at 103–04. No matter how the dispute that gave rise to a potentially conflicting interpretation came about, allowing the state court to interpose itself would disrupt the statutory scheme.

Indeed, the potential for inconsistent interpretations of a CBA is only heightened by the absence of the employer from this suit. Because SWAPA has sued only Boeing, a non-party to the CBA, it is asking for a state court to interpret its CBA in the absence of the other party to the contract. That poses risks not only of an incomplete presentation of the issues, but also difficult questions about the effect of the interpretation on the employer going forward. And it would certainly frustrate Congress's purpose in adopting the RLA. *Crosby*, 530 U.S. at 373. SWAPA's claims must yield.

II. If the Decision Stands, Texas Would Stand as an Outlier and Risks Creating Inconsistent Obligations for Both Employers and Employees Under CBAs.

The decision below would make Texas an outlier in its interpretation of the RLA. SWAPA and the Fifth Court of Appeals have not identified a single other case that has been allowed to proceed in state court where it turned on interpreting a CBA subject to the RLA. The lower court's innovation should not be countenanced in Texas or elsewhere. Employer and employees alike depend on having a clear understanding of their respective rights and obligations.

The RLA plays a critical role in ensuring the health of our national economy by promoting stability in the nation's air and rail labor forces and "minimizing interruptions in the . . . transportation service." *Cent. Airlines*, 372 U.S. at 687. The practical consequences are significant: The recent threat of a railway shutdown by striking labor unions was estimated to potentially cost $2 billion per day to the nation's economy.[7]

Nor will the holding be confined to CBAs governed by the RLA. Preemption under the LMRA, which governs a broader swath of CBAs, is generally interpreted in lockstep with the RLA, and courts treat the two statutes as giving rise to a cohesive body of case law. *See Norris*, 512 U.S. at 260, 262–63 & n.9 (1994). This ruling opens the door to all

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[7] *Deadline to avoid a national rail strike which could cost economy $2 billion a day is near*, LaRocca, L, CNBC (Sept. 8, 2022) available at https://www.cnbc.com/2022/09/08/deadline-for-rail-strike-which-could-cost-2-billion-a-day-nears.html (last visited Oct. 26, 2022).

lawyers forum shopping for a different interpretation of a CBA than the one they could obtain through the processes established by Congress.

If this Court allows this precedent to stay in place, nothing prevents courts in other jurisdictions from adopting their own interpretations of CBAs. Soon, rather than CBAs being exclusively interpreted through the RLA's or LMRA's mechanisms, state courts across the country, not only in Texas but also in California and New York, will get in the game. The risk of different jurisdictions offering conflicting interpretations is only compounded by different jurisdictions having vastly different public policy views of employer–employee relationships.

Chaos would reign for both employers and employees—the very scenario the RLA and the LMRA were designed to avoid. In the same way that federal law should be uniform across the country, a CBA between a national employer and its employees—which forms the "law of the shop," *e.g.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984)—should be uniform across the country and not subject to varying interpretations from state to state.

Under the decision below, over 80 employers in Texas[8] with CBAs are now subject to a risk they

[8] The federal Department of Labor has an online database of CBAs on file that is searchable by geography. A search for "TX" yields 82 results. Available at https://olmsapps.dol.gov/olpdr/?&_ga=2.128309320.559407878.1666123766-

could have never anticipated when they engaged in the collective bargaining process—the prospect of disparate state interpretations of their CBAs. And this all could occur in a dispute between their employees and a third party, where the employer is not even involved in the litigation. This uncertainty calls out for this Court to grant the petition and respect the uniformity that Congress intended in enacting the RLA.

CONCLUSION & PRAYER FOR RELIEF

This Court should grant review to ensure Congress's purposes in enacting the RLA are upheld and to prevent Texas from becoming a jurisprudential outlier that upsets Congress's carefully crafted scheme.

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45 U.S.C. § 151

Definitions; short title

When used in this chapter and for the purposes of this chapter—

First. The term "carrier" includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of Title 49, as of December 31, 1995,,[1] and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of

its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or

interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

45 U.S.C. § 151a

General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152

General duties

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 designation 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 agreement 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.

45 U.S.C. § 153

National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor

organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment

Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop

laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this

manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board,

which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any

dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order

to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as

chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall

be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the

other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the

carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to

render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

45 U.S.C. § 181

Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 184

System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a

permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

45 U.S.C. § 185

National Air Transport Adjustment Board

When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this chapter, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of

the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of this subchapter. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party,

upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.