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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*,

Plaintiffs,

v.

ALLIED PILOTS ASSOCIATION, *et al.*,

Defendants.

Case No. 3:15-cv-03125-RS

DEFENDANT ALLIED PILOTS ASSOCIATION'S NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE EVIDENCE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 29, 2018
Time: 1:30 p.m.
Courtroom: 3, 17th Floor
Judge: Hon. Richard Seeborg

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NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE EVIDENCE RE: PRE-2015 REPRESENTATION

TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:

Pursuant to Northern District of California Civil Local Rule 7 and this Court's statements at the November 3, 2016, Case Management Conference, Defendant Allied Pilots Association ("APA") hereby moves this Court for an order in limine excluding from admission at trial of certain evidence that Plaintiffs may use to attempt to characterize APA as hostile to the "Flow-Through Pilots," pilots who worked at American Eagle and elected to "flow up" to American Airlines. The evidence in question involves decisions made by APA when it did not represent the affected Flow-Through Pilots, as well as "stray remarks" made years before the actions at issue in this case.

The basis for this motion consists of the following: (1) APA's prior actions at issue in this motion cannot constitute evidence of hostility, animus, bad faith, or discrimination because, in taking positions adverse to the interests of the Flow-Through Pilots, APA was complying with its legal obligation to advance the interests of the pilots it was certified to represent—the American Airlines pilots, including pilots who formerly flew for TWA—and privilege those interests over those of all others (including American Eagle pilots who had not yet arrived at American); (2) even if such evidence could be relevant to *someone's* hostility, animus, bad faith, or discrimination towards the Flow-Through Pilots, such motivations cannot be imputed to the negotiators of "Letter G," who were not involved in the events at issue in this motion; and (3) even if such evidence were marginally relevant, it should be excluded under Federal Rule of Evidence 403 as more prejudicial than probative and as likely to cause undue delay and waste of time.

This Motion is based on the attached Memorandum of Points and Authorities, the accompanying Declarations of Jeffrey B. Demain and Mark R. Myers in Support of APA's Motion in Limine, the deposition transcripts and other discovery materials accompanying this Motion, any reply

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papers that APA may submit, the arguments and any evidence presented at the hearing on this Motion, and all of the Court's pleadings and papers on file in this matter.

Dated: February 22, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND SUMMARY OF MOTION

As narrowed by this Court's summary judgment decision in June 2016, Doc. No. 67 ("SJ Order"), this case is limited to Plaintiffs' claim that APA violated its duty of fair representation ("DFR") in negotiating "Letter G," a portion of the 2015 collective bargaining agreement between APA and American Airlines, Inc. ("American"). SJ Order at 6:1–7:10. To show that APA breached its duty, Plaintiffs must prove at trial that APA acted arbitrarily, discriminatorily, or in bad faith toward them and other members of the certified class ("Plaintiffs" or "Flow-Through Pilots"). *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) ("*O'Neill*").

Plaintiffs have indicated that they intend to rely on evidence of past conduct by APA that, according to Plaintiffs, demonstrates hostility towards the interests of the Flow-Through Pilots. *See, e.g.*, Doc. No. 38 at ¶¶ 21-57, 75-77, 80; Doc. No. 54 at 1:11–4:14, 5:20–6:2, 16:4–18:9; Doc. No. 82 at 12:2–8. Plaintiffs also intend to rely on statements made as long as 15 years before APA negotiated Letter G, and made by individuals with no connection to Letter G.

In its summary judgment briefs, APA argued that much of this evidence was irrelevant to this case. The Court found it unnecessary to reach that issue in resolving APA's summary judgment motion. SJ Order at 5:19–23 & nn. 2–3 (commenting that "[r]esolution of that issue must await a later day"). *See also id.* at 6:23–7:5. APA reiterated its intent to seek resolution of the issue in the Joint Case Management Statement, Doc. No. 82 at 7:10–13, 10:15–22, and at the subsequent Case Management Conference held on November 3, 2016, *see* Declaration of Jeffrey B. Demain in Support of APA's Motion in Limine ("Demain Decl."), filed herewith, at ¶ 2. At the Case Management Conference, the Court invited APA to seek such resolution through an early in limine motion, *id.*, and set a cut-off date of April 5, 2018 for hearing such a motion, Doc. No. 85 at 2:4–5. By means of the present motion, APA now does so.

The Court should grant the present motion and exclude the categories of evidence enumerated specifically on pages 4–6 and 17–22, below. First, the Court should exclude evidence of positions taken by APA in pre-Letter G negotiations and arbitrations—a period extending from the negotiation of the Flow Through Agreement in 1997 to the series of arbitrations interpreting that agreement, the

last of which concluded years before the negotiation of Letter G—in which the interests of APA's bargaining unit members conflicted with the interests of Flow-Through Pilots who were not then members of APA's bargaining unit. Notably, APA's bargaining unit included pilots who flew for Transworld Airlines ("TWA") when American acquired its assets in 2001. In 2002, the National Mediation Board ("NMB") certified APA as the bargaining representative of those pilots. Doc. No. 47 at ¶ 10.[1]

In the negotiations and arbitrations at issue here, APA had a legal duty to zealously advocate for the interests of the pilots in its bargaining unit, including the former TWA pilots, and to privilege those interests over the interests of anyone outside the bargaining unit. For that reason, APA was compelled by law to reject the positions urged by Plaintiffs, lest APA violate its legal duty to its own bargaining unit members. To use such conduct as evidence of a union's hostility would mislead the jury, waste time, and distort the incentives that guide union behavior.

Second, the Court should exclude this and other evidence discussed below because it is irrelevant to the motivations of the individuals who negotiated Letter G but were not involved in the pre-Letter G events on which Plaintiffs rely.

As shown in more detail below, the evidence discussed in this motion is not relevant under Federal Rules of Evidence 401 and 402. Finally, even if the evidence had some marginal relevance, it should still be excluded under Federal Rule of Evidence 403 because it is more prejudicial than probative and likely to cause undue delay and waste of time at trial. Indeed, if the evidence is admitted, the jury will likely be subjected to a series of elaborate "mini-trials" regarding APA's positions in at least five different arbitrations and multiple negotiations, all occurring long before the negotiation of Letter G, and each raising disputed factual and legal issues that have no direct connection to this case.

FACTUAL BACKGROUND

At all relevant times, APA has served as the labor union representing pilots employed by American. SJ Order at 1:25–2:1; Declaration of Mark R. Myers in Support of APA's Motion in Limine

[1] For the relevant NMB orders, see *American Airlines, Inc./Trans World Airlines, LLC*, 29 NMB 201, 2002 WL 399665 (2002); *American Airlines, Inc./Trans World Airlines, LLC*, 29 NMB 260, 2002 WL 512018 (2002).

("Myers Decl."), filed herewith, at ¶ 4. Plaintiffs are pilots who were formerly employed by American Eagle ("Eagle"), and who subsequently became employed by American by virtue of a 1997 agreement known as the "Flow-Through Agreement." SJ Order at 1:17–24. As American pilots, Plaintiffs are now represented by APA for collective bargaining purposes. *Id*. at 1:25–2:1; Myers Decl. at ¶¶ 4–5. When they were employed by Eagle, Plaintiffs were represented by a different union, the Air Line Pilots Association ("ALPA"). SJ Order at 3:25–4:3; Exh. 1 at 21:18–22:22.[2] At all relevant times, ALPA has been the sole representative of pilots flying at Eagle. Exh. 2 at 20:8–21:4. In that capacity, ALPA represented Plaintiffs in the negotiation of the Flow-Through Agreement. Exh. 2 at 25:4–20.

Under the Flow-Through Agreement, a pilot at Eagle could obtain a placement on the American seniority list while he or she was still flying for Eagle. Doc. No. 48 at ¶¶ 21, 25–28; Doc. No. 49-1 at III(A) – (B). After a waiting period, the pilot would then be eligible for openings at American, when they became available. Doc. No. 48 at ¶¶ 21, 25–27; Doc. No. 49-1 at III(A)-(B). During the period in which a pilot was still flying for Eagle but had a seniority placement at American, the seniority placement functioned as a "placeholder," according to an arbitration award interpreting the agreement. Exh. 13 at 46–47. ALPA remained the representative of Eagle pilots with American placeholder seniority numbers so long as those pilots continued to fly at Eagle, as both APA and ALPA understood. Exh. 1 at 22:8–23:2; Myers Decl. at ¶ 5. Accordingly, ALPA would represent the pilots' interests in negotiations and arbitration, while APA would represent the interests of pilots flying for American. Myers Decl. at ¶ 5. Likewise, an Eagle pilot with a placeholder seniority number would pay union dues to ALPA, but not to APA. Myers Decl. at ¶ 5; Exh. 3 at 25:6–14. APA never held itself out as a representative of pilots flying at Eagle who had placeholder seniority numbers at American. Exh. 3 at 25:15–17.

As provided by the Flow-Through Agreement, when Flow-Through Pilots began flying for American, they were treated like new hire pilots for certain purposes. Most relevant here, the pilots were granted "Length of Service" based on the date they began flying for American. Doc. No. 48 at

[2] All exhibits cited simply by exhibit number, e.g., "Exh. 1," are newly-submitted exhibits filed herewith, under a cover entitled, "APA's Compendium of Exhibits in Support of APA's Motion in Limine." *See* Demain Decl. at ¶¶ 3–15.

¶ 29; Doc. No. 49-1 at III(C); SJ Order at 3:27–4:2. Length of Service affects a pilot's pay and certain other benefits. SJ Order at 2:7–10. Under the American-APA collective bargaining agreement, a pilot ordinarily accrues Length of Service while flying for American Airlines or at a mainline airline that has been merged into American Airlines, excluding time spent on furlough. SJ Order at 6:2–4; Exh. 4 at 31:9–32:13, 40:20–42:3. The Flow-Through Agreement expressly provided that Flow-Through Pilots' Length of Service "will be based on the date each pilot is entered on the [American] payroll," Doc. No. 49-1 at ¶ III(C), i.e., that Flow-Through Pilots would not receive Length of Service credit at American for the time they spent flying for Eagle. *See also* SJ Order at 3:27–4:2.

Departing from the general rule that a pilot does not accrue length of service while on furlough, APA and American negotiated Letter G in 2015, providing up to two years of Length of Service credit to pilots furloughed after September 11, 2001. Doc. No. 49-2 at 44; SJ Order at 6:2–4. Plaintiffs did not receive credit under Letter G because they had never been furloughed by American (or by Eagle). SJ Order at 6:2–18; Exh. 5 at 42:24–43:3; Exh. 6 at 26:16–17, 27:4–7; Exh. 7 at 43:19–21; Exh. 8 at 18:19–20; Exh. 9 at 26:24–27:1, 45:8–10.

Plaintiffs brought this case against APA in 2015, alleging that APA violated its duty to them by not negotiating Letter G in such a way as to make them eligible to receive Length of Service credit thereunder. *See* SJ Order at 6:6–8. Plaintiffs also alleged that APA violated its duty to them in various other ways. *Id.* at 4:8–15. On summary judgment, the Court permitted Plaintiffs to pursue their claim regarding Letter G, but held that all of Plaintiffs' other claims were time-barred, moot, or unripe. *Id*. at 4:15–5:18, 8:17–20.[3]

Although the Court held Plaintiffs' pre-Letter G claims time-barred, Plaintiffs apparently intend to present many of the facts underlying those claims as evidence that APA has acted with hostility towards the Flow-Through Pilots. Plaintiffs also intend to present evidence of statements by APA members about the Flow-Through Pilots. By this motion, APA respectfully asks the Court to exclude all evidence regarding pre-Letter G incidents in which APA had no duty to represent Flow-Through

[3] Plaintiffs have filed a separate lawsuit raising the claim that this Court determined to be unripe. *See* Doc. Nos. 87, 89.

Pilots still flying for Eagle and acted in order to advance the interests of the pilots for which APA was the certified collective bargaining representative, as well as evidence of "stray remarks" not made by the negotiators of Letter G, including but not limited to the following.

(1) Plaintiffs complain of various actions taken by APA in response to American's acquisition of TWA in 2001 and the furloughs of thousands of pilots following the terrorist attacks of 9/11. First, APA and American agreed to permit furloughed former TWA pilots to obtain work at Eagle under the "flow down" mechanism in the Flow-Through Agreement. Doc. No. 54 at 1:20–22. In an arbitration known as FLO-0203, ALPA sought to invalidate this agreement and APA defended it. Doc. No. 49-10 at 10. Plaintiffs seek to use this agreement to paint APA as hostile to the Eagle pilots. Doc. No. 54 at 1:20–22.

(2) When American began to recall TWA pilots furloughed after American's acquisition of TWA, ALPA took the position that Eagle pilots waiting to flow up to American should be brought to American in a 1:2 ratio with the returning TWA furloughees under the Flow-Through Agreement. Doc. No. 49-10, at 24–28. APA argued, by contrast, that American should recall all of the former TWA pilots before it brought any Eagle pilots to American. Doc. No. 49-10 at 32–36. This and related issues were resolved in a series of hotly-contested arbitrations known as FLO-0903, FLO-0106, and FLO-0108, in which APA represented the American pilots and ALPA represented the Eagle pilots. *See infra* at 19–20. Relatedly, in a further effort to ensure the former TWA pilots' expeditious return to American, APA took the position that when the Flow-Through Agreement expired in 2008, Eagle pilots who had not yet flowed up to American should not retain rights under that agreement (including the right to occupy a spot that otherwise would be granted to a former TWA furloughee). *See* Doc. No. 54 at 1:23–25; Doc. No. 49-14 at 7–8. The issue was presented in an arbitration known as FLO-0107. *See* Doc. No. 49-14. Plaintiffs argue that APA's positions in these arbitrations reflected hostility towards the Eagle pilots who were waiting to flow up to American. *See* Exh. 11 at 11:26–14:12.

(3) Plaintiffs contend that the arbitrator's award resolving one of the aforementioned arbitrations was not actually an award but a settlement in disguise. Exh. 11 at 19:21–20:5. Plaintiffs intend to use the alleged settlement as evidence of APA's hostility towards them. *Id.*

(4) Along with the foregoing incidents, Plaintiffs seek to rely on statements made by pilots represented by APA, in which the pilots allegedly criticized Eagle pilots. *See infra* at 22. Many of these statements relate to a dispute in the late 1990s regarding whether regional jets should be flown by pilots at American or Eagle. During the course of this dispute, pilots at American allegedly said that they were more qualified to fly the jets and that Eagle pilots were stealing their jobs by seeking to fly the jets. Plaintiffs intend to use this evidence to argue that APA acted with hostility towards them when it negotiated Letter G, almost 20 years later. Doc. No. 54 at 4:15–24.

ARGUMENT

In assessing claims for breach of a union's DFR, courts take a "highly deferential" approach, "recognizing the wide latitude that [unions] need for the effective performance of their . . . responsibilities." *O'Neill*, 499 U.S. at 78. To prevail on the "breach" element of the claim, a plaintiff must show that the union acted arbitrarily, discriminatorily, or in bad faith. *Id.* at 67. A union's conduct is arbitrary "only if … the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* (internal quotations omitted). A union's conduct is discriminatory only if "substantial evidence" demonstrates that the conduct is "intentional, severe, and unrelated to legitimate union objectives," *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007) (internal quotations omitted), and that it arises from "prejudice or animus," *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist. Council*, 322 F.3d 602, 618 (9th Cir. 2003) (internal quotations omitted). To show bad faith, plaintiffs must provide "substantial evidence of fraud, deceitful action, or dishonest conduct." *Beck*, 506 F.3d at 880.

Plaintiffs here argue that APA breached its DFR by negotiating Letter G. If Plaintiffs intended to rely solely on evidence about APA's conduct in the negotiation of Letter G itself, the present motion would be unnecessary. However, Plaintiffs intend instead to introduce the evidence described above to try to show that APA was hostile toward them or discriminated against them many years earlier, in the hope that this *prior* alleged conduct will suffice to show that APA was hostile toward them or discriminated against them in negotiating Letter G.

But this evidence is irrelevant to demonstrating APA's hostility or discrimination in negotiating Letter G. In taking the positions of which Plaintiffs complain, APA merely complied with its duty to

represent the interests of the pilots in its bargaining unit and to privilege those interests over the interests of others—including Plaintiffs—who were not represented by APA. As we show below, this pre-Letter G evidence also is irrelevant because it sheds no light on the motivations of the individuals who negotiated Letter G; Plaintiffs cannot impute evidence of animus from non-decisionmakers to decisionmakers. Further, even if the pre-Letter G evidence were marginally relevant, it should still be excluded under Federal Rule of Evidence 403 as more prejudicial than probative due to its potential to vastly extend the length of the trial and to mislead the jury.

The remainder of this motion is organized as follows. Sections I and II set forth general principles that should govern the admissibility of the evidence at issue. In Section I, we show that Plaintiffs should not be permitted to portray APA as hostile to them based on instances in which APA owed them no legal duty, but did owe a legal duty to another group of pilots, and acted in accordance with that duty. In Section II, we show that Plaintiffs should not be permitted to characterize APA's motives in negotiating Letter G based on evidence of conduct and statements that cannot be attributed to the negotiators of Letter G. After setting forth these general principles, we show in Section III that they compel the exclusion of the evidence at issue as irrelevant under Federal Rules of Evidence 401 and 402. Finally, Section IV demonstrates that, even if the evidence were relevant, the Court should still exclude it under Federal Rule of Evidence of 403.

I. PLAINTIFFS SHOULD NOT BE PERMITTED TO CHARACTERIZE APA'S LAWFUL EFFORTS TO PRIVILEGE THE INTERESTS OF PILOTS WITHIN ITS BARGAINING UNIT AS EVIDENCE OF WRONGFUL HOSTILITY.

At all times relevant to this motion, APA has represented American pilots, not Eagle pilots. Rather, Eagle pilots have been represented by another union, ALPA. Most of the evidence that is the subject of this motion concerns positions that APA took in negotiations, grievances, arbitrations, and the like *before* the affected Eagle pilots "flowed-up" to American—while they were still flying for Eagle and were not represented by APA. As we show below, APA owed them no duty during that time and, indeed, would have violated its duty to the American pilots if it had moderated its positions in deference to Plaintiffs' interests before they were employed by American and represented by APA.

Under the Railway Labor Act, "[a] union's duty of fair representation . . . does not extend to persons who are not employees in the bargaining unit." *McNamara-Blad v. Ass'n of Prof'l Flight*

Attendants, 275 F.3d 1165, 1169–70 (9th Cir. 2002) (quoting *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F. 2d 819, 821 (9th Cir. 1985)). As the Supreme Court has stated in another context, a union is "not require[d] . . . to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." *Allied Chemical Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971). Moreover, "it is *actual* inclusion in the bargaining unit—not 'impending' inclusion—that triggers attachment of the duty of fair representation." *Bensel v. Allied Pilots Ass'n*, 387 F. 3d 298, 314 (3d Cir. 2004). Individuals who have seniority rights to a position, but who have not actually started working in that position, are not part of the bargaining unit and are not owed a DFR. *Spenlau v. CSX Transp., Inc.*, 279 F. 3d 1313, 1315 (11th Cir. 2002); *Allen v. CSX Transp., Inc.*, 325 F.3d 768, 772-74 (6th Cir. 2003).

Under this precedent, APA owed no duty to Plaintiffs until they actually began working for American. Until that time, Plaintiffs were working at Eagle under the exclusive representation of ALPA, *see supra* at 3, and therefore could not have been represented by APA. *See McNamara-Blad*, 275 F.3d at 1171. Indeed, Plaintiffs' situation is directly analogous to that of the plaintiffs in *Spenlau*, locomotive engineers at a railroad who had seniority rights to a different position, trainman, at the same railroad. *Id.* at 1314-15. The defendant union represented the trainmen, and negotiated an agreement that provided benefits only to trainmen in "active … service," thereby excluding the plaintiffs. *Id.* at 1314. The Eleventh Circuit held that, despite their seniority rights, the engineers "were not of the same class of employees as trainmen," and thus were not owed a duty by the union. *Id.* at 1315; *accord Allen*, 325 F.3d at 773 (rejecting a DFR claim on similar facts).

Aware of these principles, both APA and ALPA understood that ALPA represented all pilots flying at Eagle—including those with placeholder seniority numbers at American—and APA represented all pilots flying for American. *See supra* at 2-3. Consistent with that allocation of responsibilities, APA did not hold itself out as a representative of Eagle pilots and did not attempt to collect dues from Eagle pilots. *See supra* at 3.[4]

[4] Some of the Plaintiffs have acknowledged that APA did not represent them until they actually began flying at American. *See* Exh. 7 at 60:4–7 (agreeing that APA began representing him

Because APA did not represent pilots flying for Eagle, APA was barred from advancing the Eagle pilots' interests at the expense of the pilots in APA's bargaining unit of American pilots. *McNamara-Blad,* 275 F.3d at 1173. As the Ninth Circuit held in *McNamara-Blad*, a contrary rule "would force unions to protect the interests of any person who might become a bargaining unit member to the detriment of current bargaining unit members. Such a duty would contravene the union's statutory duty to protect the interests of its own bargaining unit members." *Id.*; *see also Bensel v. Allied Pilots Ass'n,* 675 F. Supp. 2d 493, 502–03 (D.N.J. 2009) (permitting plaintiffs to pursue a DFR claim alleging that their union entered into an agreement favoring the interests of a different bargaining unit, represented by a different union, to their detriment). In short, APA would have violated its legal obligations if it had moderated its positions to accommodate the interests of individuals adverse to its bargaining unit members. Put another way, if APA had taken the course advocated by Plaintiffs, the American pilots would have been deprived of a union advocating solely for their interests, while the Eagle pilots would have effectively had two representatives (APA and ALPA) advancing theirs.

As a result, this Court should deem inadmissible evidence of instances in which APA, in fulfillment of its legal duties, privileged the interests of bargaining unit members over the interests of Flow-Through Pilots who were not yet in its bargaining unit. Because APA was legally required to act in this manner, its conduct provides no information about APA's animus or motivations, other than its tendency to comply with its legal duties. Further, to permit such use would be to put unions to a Hobson's choice: either advocate zealously for the interests of the bargaining units they represent (and risk being sued for breach of duty by other employee groups whose interests are adverse) or moderate their positions to accommodate the interests of other employee groups whose interests are adverse (and risk being sued for breach of duty by their current members). Such a position would be untenable. *See Allen*, 325 F.3d at 772 ("The [Railway Labor] Act contemplates that unions represent *people* skilled in a particular craft, not those people's partial rights or interests"; and "a union would face a conflict of

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"when you showed up at American for your initial training"); Exh. 6 at 39:18–40:12 (agreeing that APA "start[ed] functioning as your representative . . . when you started at American Airlines").

interest if it was required to represent not only the members of its own craft, but also certain interests of those belonging to another craft.") (emphasis in original).

Plaintiffs also cannot transform evidence of APA's compliance with its legal obligations into evidence of animus and/or discrimination by arguing that APA should have reversed the challenged actions or taken remedial measures once the affected Eagle pilots began to work at American. The Ninth Circuit has explained that "a union's duty of fair representation to new employees is not implicated where a union implements a position that it adopted before the new employees became members in the union's statutory bargaining unit," even when that implementation occurs after the new employees enter the bargaining unit. *McNamara-Blad*, 275 F.3d at 1173; *see also Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 916 (7th Cir. 1999).

Based on their summary judgment papers, we anticipate that Plaintiffs are likely to raise two responses to the arguments set forth above. First, they may claim that, once they had an expectation of employment at American, APA owed them a DFR. Second, they may claim that APA did *not* owe a duty to another group of pilots whose interests were privileged by APA: pilots who flew for TWA when American acquired its assets in 2001 and who were subsequently furloughed from a transitional entity known as TWA-LLC.

The Court should reject these arguments. As to the first, even if Plaintiffs had an expectation of employment at American, that did not make APA their representative. As noted above, "it is *actual* inclusion in the bargaining unit—not 'impending' inclusion—that triggers attachment of the duty of fair representation." *Bensel*, 387 F. 3d at 314. On summary judgment, Plaintiffs attempted to evade this rule by invoking their placeholder numbers on the American pilot seniority list to argue that they were members of the American bargaining unit even before they worked for American. *See* Doc. No. 54 at 9:1–10:6. But that argument is mistaken. In both *Spenlau*, 279 F. 3d at 1314-16, and *Allen*, 325 F.3d at 770, 772-74, the Sixth and Eleventh Circuits held that the defendant union did not represent and did not owe a duty to plaintiff employees who were outside the bargaining unit represented by the union, notwithstanding that those employees possessed numbers on the bargaining unit seniority list, continued to accrue seniority on that list while working outside of the bargaining unit, and enjoyed a contractual right to return to bargaining unit positions if furloughed. Contrary to Plaintiffs' argument,

the *Spenlau* and *Allen* plaintiffs' contractual right to return to their bargaining unit positions in the event they were furloughed from their non-bargaining unit positions certainly gave them "an[] expectation that they would again become [bargaining unit employees]," Doc. No. 54 at 9:25–26, because the specificity of that right—linked as it was it to the particular circumstance of a furlough—clearly indicates that those employees' return to the bargaining unit was within the parties' contemplation. Moreover, Plaintiffs' attempts to distinguish *McNamara-Blad*, 275 F.3d 1165, and *Bensel*, 387 F. 3d 298, on the ground that the extra-bargaining unit employees at issue in those cases did not yet have placeholder numbers on the bargaining unit's seniority list, *see* Doc. No. 54 at 9:10–18, seizes on a meaningless distinction. It was clear in those cases that those employees would shortly be merged into the bargaining unit represented by the union.

In attempting to argue on summary judgment that APA represented them before they actually started flying for American, Plaintiffs also cited *Nashville C. St. L. R. v. Ry. Employees Dep't*, 93 F.2d 340 (6th Cir. 1937), and *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586 (2d Cir. 1941) (both cited in Doc. No. 54 at 7–8). But neither case supports the broad proposition offered by Plaintiffs that a union represents and owes a duty to any person with a "reasonable expectation of employment" in the bargaining unit. Doc. No. 54 at 7:19. Nor in the ensuing 75 years have these decisions ever been cited for that proposition. Rather, they support only the narrow proposition that a reasonable expectation of *reinstatement* qualifies an employee as a bargaining unit member, i.e., that workers already employed by an employer in a bargaining unit and represented by a union in that unit do not lose their status as represented employees when they are laid off or furloughed.[5] This rule helps explain why APA

[5] Plaintiffs also find no support in *Pittsburgh Plate Glass Co.*, 404 U.S. 157. *See* Doc. No. 54 at 8:13-27. There, the Court held that retirees are not "employees" within the meaning of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, but noted that applicants for employment are "employees" under the NLRA, *see* 404 U.S. at 168. The Railway Labor Act ("RLA") defines "employee" differently, as those actually "in the service of a carrier," excluding even those in training to fly for an airline though on the airline's payroll. *See* 45 U.S.C. § 151, Fifth; *Air Line Pilots Ass'n, Int'l v. United Air Lines*, 802 F. 2d 886, 911 (7th Cir. 1986). Even if *Pittsburgh Plate Glass* applied to the RLA, the Court did not opine (much less hold) that applicants are members of the bargaining unit into which they seek to be hired, are represented by the union that represents that bargaining unit, or are owed a DFR by that union.

assumed representation of the former TWA pilots furloughed after American acquired TWA, but it provides no help to Plaintiffs, who were never laid off from American.

Plaintiffs' "reasonable expectation of employment" test would have troubling practical consequences. Unions, employers, and employees all need certainty as to whom the union represents, and a fuzzy "reasonable expectation of employment" test would deprive them of the bright line guidance necessary to that determination. Moreover, while it is easy for a union to identify current employees and learn about their interests, it would be burdensome to expect them to do so for individuals with a future expectation of employment. Notably, too, advocacy efforts on behalf of future employees would have to be funded with fees paid by current employees, since unions lack mechanisms to collect dues or fees from those they do not yet represent (and, indeed, APA did not do so with regard to Plaintiffs or the other Flow-Through Pilots at Eagle). Thus, a union might be required to use the dues of current employees to advance positions adverse to their interests.

Second, Plaintiffs were equally mistaken in asserting on summary judgment that APA did *not* represent the TWA-LLC furloughees. Doc. No. 54 at 6:8–7:18. Plaintiffs' argument is grounded on the assertion that those employees never actually worked for American, but rather for TWA-LLC, before they were furloughed. *Id.* But in 2002, the NMB determined that TWA-LLC and American were operating as a single company, and on April 3, 2002, the NMB certified APA as the representative of pilots at American and at TWA-LLC. *See supra* at 2 & n.1. The NMB's ruling means that APA legally owed a duty to the TWA-LLC pilots. Likewise, under the precedent cited above, APA owed a duty to the pilots furloughed from TWA-LLC with an expectation of reinstatement. *See supra* at 11. Previously-employed workers do not lose their representation rights merely as a consequence of being laid off or furloughed as long as they have a reasonable expectation of recall. *See* Doc. No. 54 at 7:20–8:12. Plaintiffs have admitted that the TWA-LLC furloughees had such an expectation. *See id*. at 6:22–7:2; Doc. No. 49-16 at § 11(D).

Further, in response to APA's Requests for Admission, Plaintiffs admitted that APA was the representative of the TWA-LLC furloughees even before they actually worked for American: "[F]ormer TWA pilots were integrated into the American pilot seniority list in 2001 and such integration became effective in about April 2002; . . . prior to April 3, 2002, APA was the

representative of the TWA-LLC pilots for purposes of the RLA separately from representation of plots at American." Demain Decl., Exh. 12 at 2:16-27, 16:1–7, 21. Since it was their collective bargaining representative, APA clearly owed the TWA-LLC furloughees a duty whether or not they were at American.[6]

In short, APA represented the TWA-LLC furloughees because they were employees of TWA-LLC, a carrier whose pilots APA represented by order of the NMB, and their furlough did not affect APA's representational status because they enjoyed a contractual right to reinstatement. In contrast, APA did not represent the Flow-Through Pilots, who were employees of Eagle, a separate airline whose pilots were represented by ALPA. Indisputably, ALPA, not APA, negotiated and enforced on their behalf the terms of their employment with Eagle—which included the Flow-Through Agreement and the interests they had thereunder.

Finally, on summary judgment, Plaintiffs also argued that under *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952), APA owed them a duty not to adversely impact their employment rights with American, even if it did not represent them and did not owe them a DFR. *See* Doc. No. 54 at 10:7 – 11:7. This argument, too, fails. First, Plaintiffs recognize that *Howard* is limited to the situation in which the defendant union attempts to eliminate the extra-unit employees' jobs entirely, in order to give those jobs to bargaining unit employees. *Id.* at 10:20–23. None of the conduct at issue in this motion falls within this narrow *Howard* exception. The alleged injuries to Plaintiffs' Length of Service credit and relative seniority rights arising from the negotiation of Letter G for which Plaintiffs seek a remedy in this case do not rise anywhere near the level of the complete elimination of their jobs. On the contrary, all of the Plaintiffs are currently working for American. Instead, Plaintiffs' alleged injuries fit comfortably within the Supreme Court's subsequent clarification of *Howard* in *Pittsburgh*

[6] Plaintiffs' reliance on Arbitrator LaRocco's decision in grievance FLO-0903 finding former TWA-LLC pilots to have had the status of new hires when recalled from furlough by American, *see* Doc. No. 54 at 6:10–20, is misplaced. Arbitrator LaRocco was construing the terms of the Flow-Through Agreement, not addressing the statutory issue under the RLA whether APA represented the TWA-LCC furloughees and owed them a DFR (questions which were not presented in that arbitration). Moreover, he would have had no authority to overrule the NMB's finding, even if he had purported to do so (which he did not). The Flow-Through Agreement and the arbitrations conducted thereunder are silent, and therefore irrelevant, as to whether APA represented the TWA-LLC furloughees and owed them a DFR.

Plate Glass Co., 404 U.S. at 181 n.20, that *Howard* "obviously does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." *Accord McNamara-Blad*, 275 F.3d at 1172.

Second, just as this Court found with regard to *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230 (5th Cir. 1957), "the case arose in very different factual circumstances, and is not controlling law here." Doc. No. 37, at 4:17–18, 20–21. Both *Richardson* and *Howard* involved race discrimination for which no remedy then existed under the civil rights laws, and the DFR was adapted by the courts to fill that gap. With the passage of Title VII in 1964, no further adaptation is necessary and the courts have closely cabined such decisions. *See, e.g.*, *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20 (noting that "[t]he reach and rationale of *Howard* is a matter of some conjecture"). The present case involves no allegations of racial discrimination and *Howard* is simply inapposite.

In sum, when APA advanced the interests of its bargaining unit members, including TWA-LLC furloughees, over the interests of Plaintiffs, APA was acting in accordance with its legal duty. As we show in Sections III and IV below, Plaintiffs should be barred from using evidence of APA's compliance with the law as evidence of its hostility towards the Flow-Through Pilots.

II. PLAINTIFFS SHOULD NOT BE ABLE TO RELY ON EVIDENCE OF PRIOR CONDUCT OR STATEMENTS WITH NO CONNECTION TO THE MOTIVATIONS OF THE NEGOTIATORS OF LETTER G.

The evidence at issue in this motion is also irrelevant for a separate and independent reason: it sheds no light on the motivations behind APA's decision to negotiate Letter G. None of the evidence consists of statements made or positions taken by the decisionmakers at issue in this case, *i.e.*, the negotiators of Letter G. During the negotiations of the 2015 CBA, APA's Negotiating Committee was led by Dave Brown and Norm Miller. Myers Decl. at ¶ 6. The other members of the committee from APA were Jeff Thurstin, Brian Smith, Carrie Giles. *Id.* None of these individuals was involved in any of the pre-Letter G negotiations and arbitrations in which APA took positions adverse to the Flow-Through Pilots. *Id.* Moreover, as shown in more detail below, Plaintiffs have not charged these individuals with any such involvement or even with hostility towards the Flow-Through Pilots in general. *See infra* at 18–19.

Generally, in cases challenging employment decisions as discriminatory or retaliatory, evidence that a non-decisionmaker possessed bias or hostility toward the plaintiff may not be imputed to the decisionmakers, *i.e.*, those who made the challenged decision. This rule was originally developed in cases brought under antidiscrimination statutes such as Title VII and its state law analogs, which hold that to establish direct evidence of an employer's discriminatory intent based an employee's discriminatory statements, a plaintiff must demonstrate a "nexus between [the] discriminatory remarks and [the employer's] subsequent employment decisions." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). In *Vasquez*, the Ninth Circuit held that the plaintiff's evidence that one of his supervisors had made anti-Hispanic remarks could not be imputed to the decisionmaker who disciplined the plaintiff. *Id*. "[S]tray remarks not directly tied to the decisionmaking process are not direct evidence" of a discriminatory motive. *France v. Johnson*, 795 F.3d 1170, 1173 (9th Cir. 2015) (assessing claims brought under the Age Discrimination in Employment Act); *see also Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (applying same rule to Title VII claims). And even if a biased employee ordered an investigation of the plaintiff's conduct, resulting in an adverse employment action, "if an adverse employment action is the consequence of an entirely independent investigation by an employer, the animus of the retaliating employee is not imputed to the employer." *Poland v. Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007), *abrogation in other part recognized by Porter v. Mabus*, 2014 WL 4436303 at * 4 (E.D. Cal. Sept. 9, 2014).[7]

In accordance with these principles, the Ninth Circuit has affirmed in a Title VII case the exclusion of evidence regarding discriminatory conduct by the former director of the employer, who was not a decisionmaker as to the plaintiff's discharge and non-promotion. *Gaur v. City of Hope*, 589 F. App'x 359, 360 (9th Cir. 2015). Other courts have likewise excluded evidence of animus by non-decisionmakers. *See, e.g., Smith v. Leggett Wire Co.*, 220 F.3d 752, 759-60 (6th Cir. 2000) (reversing judgment in favor of employee both because the trial court had improperly admitted evidence of

[7] Evidence of a retaliatory motive on the part of an employee who was not the principal decisionmaker may be imputed to the employer only "where the subordinate influenced, affected, or was involved in the adverse employment decision," *Id*. There is no evidence in the present case to support such an argument.

allegedly discriminatory statements from non-decisionmakers and because those statements were made long before the events at issue); *Harris v. Wackenhut Servs., Inc.*, 648 F. Supp. 2d 53, 62 (D.D.C. 2009), *aff'd*, 419 F. App'x 1 (D.C. Cir. 2011) (excluding evidence of statements by non-decisionmakers).

The same rule against imputing bias from non-decisionmakers to decisionmakers applies to DFR claims, where the hostility of some union members or officers towards a plaintiff cannot be imputed to the union so long as it does not affect the decisionmakers in a proceeding that disadvantages the plaintiff. Thus, for example, in *Souter v. Int'l Union, UAW, Local 72*, 993 F.2d 595 (7th Cir. 1993), the plaintiff proffered evidence that union members made racist comments and drew racist graffiti in the employee locker rooms. Rejecting his claim, the court held that although "the slurs…are repugnant…[plaintiff] offered no evidence linking this graffiti to his treatment by the union, which he must do to show a breach of the union's duty of fair representation." *Id.* at 599. The same rule has been applied to evidence of bias of union officials who were not the decisionmakers with regard to the challenged incident. *See Reed v. Int'l Union of UAW, Local Union No. 663*, 945 F.2d 198, 203 (7th Cir. 1991) (holding that the hostile acts of a union official could not be imputed to the union in a DFR case, absent a showing that the union "instigated, supported, ratified, or encouraged" the hostile conduct).

The D.C. Circuit affirmed this principle under factual circumstances analogous to the present case in *Air Line Pilots Ass'n, Int'l. v. Dep't of Transportation*, 880 F.2d 491 (D.C. Cir. 1989). There, two pilots alleged that their union breached the DFR based on the union's conduct with respect to a seniority integration after a merger of two airlines. The plaintiffs' challenge to the seniority arbitration award was initially heard by the U.S. Department of Transportation ("DOT"), which found in favor of the plaintiffs, and then appealed to the D.C. Circuit, which reversed. The D.C. Circuit held that plaintiffs could not support their claim through allegations of "hostility to [the two pilots] during their introductory training, as well as the circumstances surrounding the assignment to the two pilots of an erroneous seniority date in 1981." *Id*. at 498–99. Instead, "any hostility on the part of other pilots that may have been 'in the air' in 1981, assuming it could be imputed to [union] officials . . . would seem to bear, at best, a tenuous connection" to the challenged union conduct, and provided insufficient

evidence of animus to support a conclusion that the union breached the DFR in the seniority integration arbitration. *Id*.

Finally, the Ninth Circuit has affirmed that evidence of non-decisionmakers' bias cannot be imputed to the union in the DFR context. In *Johnson v. U.S. Postal Service*, 756 F.2d 1461 (9th Cir. 1985), the Ninth Circuit concluded that the lower court's finding that the "decision makers in the grievance process bore no discriminatory animus toward [the plaintiff]" supported its conclusion that the Union had not breached its DFR in refusing to take the plaintiff's grievance to arbitration, *id*. at 1466, notwithstanding evidence that other union members were hostile to the plaintiff and had harassed him, *see id.* at 1463. *Cf. Scoggins v. Boeing Co., Inc*., 742 F.2d 1225, 1229 n.6 (9th Cir. 1984) (holding that, in assessing alleged union hostility as an excuse for failure to exhaust internal union remedies, "[f]or there to be an adequate demonstration of hostility, it must appear that persons involved in the intraunion appeals procedure are hostile toward the union member").

Here, as shown further below, none of the incidents and statements alleged by Plaintiffs have any connection to the decisionmakers in this case. Thus, the evidence should be excluded.

III. THE COURT SHOULD EXCLUDE THE EVIDENCE AT ISSUE IN THIS MOTION UNDER FEDERAL RULES OF EVIDENCE 401 AND 402.

Federal Rule of Evidence 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Based on the principles laid out above, and as shown in more detail below, the evidence at issue in this motion does not have any tendency to make it more or less probable that APA acted arbitrarily, discriminatorily, or in bad faith toward Plaintiffs in negotiating Letter G in January 2015. It should therefore be excluded under Federal Rule of Evidence 402, which provides, in part, that "[i]rrelevant evidence is not admissible."

A. Evidence that APA negotiated for former TWA pilots to have access to flow-down opportunities

The first category of evidence relates to APA's advocacy for "flow down" rights for former TWA pilots. Aside from allowing Eagle pilots to "flow up" to American, the Flow-Through

Agreement permitted American pilots to "flow down" to Eagle if they were laid off. Doc. No. 48 at ¶¶ 23-24; Doc. No. 49-1 at IV. Pilots flowing down from American to Eagle could "displace" Eagle pilots who had elected to make themselves eligible for opportunities at American. Doc. No. 48 at ¶¶ 23-24; Doc. No. 49-1 at IV.[8] For Eagle pilots, this was the "essential tradeoff" of the Flow-Through Agreement: they got access to opportunities at American but assumed a risk of displacement at Eagle. Exh. 2 at 41:13–17.

In 2003, after American acquired TWA and then furloughed many of the former TWA pilots, American and APA agreed to allow former TWA pilots to flow down to Eagle under the Flow-Through Agreement, thereby amending an earlier agreement between APA and American. Doc. No. 48 at ¶ 45; Doc. No. 49-8 at ¶ 10. Concerned that these furloughees might displace Eagle pilots from their positions, ALPA argued before an arbitrator that APA and American had violated the Flow-Through Agreement by allowing former TWA pilots to flow down. Exh. 1 at 30:15–33:21. The arbitrator ruled for APA. *Id.*

Plaintiffs attempt to use these events to argue that APA acted out of "longstanding hostility to the use of jets by Eagle and Eagle pilots." Exh. 11 at 7:12–24. The basis for this claim appears to be that, by allowing former TWA pilots to flow down, APA harmed the interests of pilots flying for Eagle who might be displaced. But as shown above, APA had no duty to consider the interest of pilots flying at Eagle; instead, ALPA was their sole representative. *See supra* at 3. Moreover, APA *did* have a duty to advance the interests of former TWA pilots, who clearly benefited from access to flow down opportunities. *See supra* at 12–13. Thus, if APA had chosen not to pursue the flow down opportunities out of concern for Eagle pilots who might be displaced, APA would have breached its duty to the former TWA pilots by subordinating their interests to pilots outside of APA's bargaining unit.

Further, Plaintiffs have offered no evidence that any of the individuals involved in these events in 2003 was also involved in negotiating Letter G in 2014 and 2015. Indeed, Plaintiffs have testified that they have no reason to believe that any of the members of APA's negotiating committee during

[8] A displaced pilot is still employed by the carrier, but occupies a different (and possibly less desirable) position. *See* Exh. 7 at 46:1–47:2.

the Letter G negotiations were hostile to the Flow-Through Pilots. *See* Exh. 5 at 87:14–89:15, 90:13–92:21; Exh. 6 at 45:25–48:18; Exh. 7 at 69:17–71:22; Exh. 8 at 29:15–32:22; Exh. 9 at 59:10–63:24. Three plaintiffs have alleged that APA president Keith Wilson was hostile to them, but that testimony had nothing to do with the events described in this section. Instead, Plaintiff Robson believes in his "heart" that Wilson is hostile because of Letter G itself. Exh. 8 at 29:12–30:5. Plaintiff Poulton believes that Wilson "doesn't give a rats you-know-what about flow-thru pilots" based on the recent seniority integration with US Airways. Exh. 7 at 67:11–68:18. And Plaintiff Valente believes that Wilson is hostile because of his "cold" demeanor at APA functions. Exh. 9 at 118:9–21.

For these reasons, APA's negotiation of flow-down opportunities for the furloughed former TWA pilots it represented (who otherwise would have been unemployed) does not make it more or less probable that APA acted with animus to the Flow-Through Pilots in negotiating Letter G. Instead, APA's conduct shows only that it complied with its legal obligations to pilots in its bargaining unit. Thus, the Court should exclude the evidence as irrelevant under Federal Rules of Evidence 401 and 402.

B. Evidence of APA's position that former TWA pilots were not "new hires" and should be brought to American ahead of Eagle pilots

In a complicated series of disputes arising after American's acquisition of TWA and post-9/11 furloughs, APA consistently took the position that furloughed former TWA pilots should be brought to American before Eagle pilots were allowed to "flow up." Doc. No. 48 at ¶¶ 49-55; Exh. 11 at 10:4–8, 11:26–12:3. ALPA argued, by contrast, that some or all of the former TWA pilots should be deemed "new hires" under the Flow-Through Agreement, which would mean that Eagle pilots would be entitled to positions at American on a 1:2 basis with the former TWA furloughees. Exh. 1 at 34:9–37:11. This dispute led to a series of hotly-contested arbitrations resolved between 2007 and 2010:

- In FLO-0903, Arbitrator John LaRocco held that a subset of the former TWA pilots were "new hires" for purposes of the Flow-Through Agreement. In a separate remedy ruling, Arbitrator LaRocco ordered that some Eagle pilots receive seniority numbers at American but declined to address the question of whether Eagle pilots should be allowed to start flying at American before the recall of furloughed TWA pilots. Doc. No. 49-10.

- In FLO-0106, Arbitrator LaRocco rejected ALPA's claim that American's order of recall violated the Flow-Through Agreement. Exh. 13 at 52.
- In FLO-0108, Arbitrator George Nicolau issued a further remedy for the violation found in FLO-0903. Among other things, Arbitrator Nicolau ordered American to bring some Eagle pilots to American before completing recalls of former TWA pilots. Doc. No. 49-12.
- In FLO-0107, Arbitrator Richard Bloch ruled that Eagle pilots with "placeholder" seniority numbers would retain the right to positions at American despite the expiration of the Flow-Through Agreement, but that Eagle pilots without "placeholder" seniority numbers would not retain any rights. Doc. No. 49-14.

Plaintiffs intend to introduce evidence regarding these arbitrations to support their argument that APA "consistently favored the TWA-LLC pilots and disfavored the [Flow-Through Pilots]." Exh. 11 at 11:16-14:12.

This evidence is irrelevant to Plaintiffs' claim that APA breached its duty in negotiating Letter G. As Plaintiffs admit, in each of these disputes, the interests of former TWA pilots conflicted with the interests of pilots at Eagle who desired to fly for American under the Flow-Through Agreement. *Id.* Further, as shown above, APA did not owe a legal duty to pilots flying for Eagle—including those with a placeholder on the American seniority list—but did owe a legal duty to furloughed former TWA pilots as a result of the NMB's certification of APA as the representative of those pilots. *See supra* at *See supra* at 7–13. Thus, APA's conduct shows only that it took seriously its duty to advocate on behalf of pilots in its bargaining unit. In addition, Plaintiffs have offered no evidence that any of the individuals involved in these arbitrations was also involved in negotiating Letter G, and their testimony demonstrates the opposite. *See supra* at 18–19. For these reasons, the Court should exclude the evidence as irrelevant under Federal Rules of Evidence 401 and 402.

C. Plaintiffs' theory that APA, ALPA, American, and Eagle entered into a secret settlement

Plaintiffs allege that APA entered into a secret settlement in the arbitration known as FLO-0108. In that proceeding, Arbitrator Nicolau issued an award stating that:

> In light of the complex and inter-related nature of the issues, I elected to announce certain aspects of my decision to the Parties on the record and then to ask the Parties to discuss with me, collectively, the remedy issues that would remain open in light of my preliminary rulings. . . . While this consultation process was helpful to me in further defining the issues and understanding the competing views and considerations, the Award that follows is my Award; it does not represent the 'agreement' of any of the four parties.

Doc. No. 49-12 at 10.

Plaintiffs allege that Arbitrator Nicolau was lying and that his award did in fact represent an agreement among the four parties. Exh. 11 at 19:21–20:5; Exh. 3 at 94:21–22. Plaintiffs apparently intend to use this allegation to portray APA as hostile to them. Exh. 11 at 19:21–20:5.

Plaintiffs should be precluded from presenting evidence on this topic because it is entirely irrelevant to APA's motives in negotiating Letter G. First, Plaintiffs' theory is speculative and contrary to the testimony of those who were actually involved in proceeding. Exh. 1 at 96:8–97:6; Exh. 10 at 28:23–29:19. Second, APA did not represent the Flow-Through Pilots in the proceeding and had no duty to advance their interests, but did have a duty to advance the contrary interests of the former TWA pilots. *See supra* at 7–13. If Plaintiffs believe the resolution was unfavorable to them, their claim lies against the union that represented them and would have agreed to the alleged settlement on their behalf.[9] Third, even if Plaintiffs were right about what happened in FLO-0108, and even if APA had a duty to represent the Flow-Through Pilots in that proceeding, there is nothing wrong with settling a labor dispute. *See, e.g.*, *O'Neill*, 499 U.S. at 79-81 (rejecting a DFR claim against a union based on a settlement, despite assuming that the settlement was disadvantageous to the plaintiffs, because the settlement was not wholly irrational). Finally, Plaintiffs do not allege that the individuals involved in that proceeding had anything to do with Letter G. *See supra* at 18–19. Consequently, the alleged incident has no probative value whatsoever regarding APA's motives in negotiating Letter G and evidence thereof should be excluded as irrelevant under Federal Rules of Evidence 401 and 402.[10]

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[9] As explained by the president of Plaintiff AAFPTC: "[I]f I'd have known what I know now . . . I guarant[ee] you, discussing with the Eagle pilots, they would most probably have filed a DFR against ALPA." Exh. 3 at 87:9-15.

[10] For the same reasons, any other pre-Letter G evidence should be excluded as irrelevant under Federal Rules of Evidence 401 and 402 to the extent that it either (1) demonstrates that APA complied with its DFR by privileging the interests of pilots it represented over those of the Flow-

D. Statements allegedly critical of Eagle pilots

Plaintiffs also intend to rely on a variety of statements allegedly made by American pilots. Specifically:

- Plaintiffs allege statements that American pilots were more qualified to fly regional jets than Eagle pilots. Exh. 11 at 4:10-12.
- Plaintiffs allege statements referring to Eagle pilots as "scabs" or "job-stealers." *Id.* at 4:24-25.

Plaintiffs should not be permitted to present evidence of these alleged statements. Plaintiffs have no evidence that anyone involved in the negotiation of Letter G made these or similar statements, or held such beliefs 20 years after the fact. On the contrary, during their depositions, Plaintiffs testified that they have no personal knowledge of any APA official making such statements at least since the late 1990s, in the context of a dispute over whether regional jets should be flown by Eagle or American. *See* Exh. 7 at 76:4-79:6; Exh. 5 at 100:4-102:10; Exh. 6 at 49:8-52:11; Exh. 8 at 34:14-35:22, 37:20-38:9; Exh. 9 at 70:17-24, 94:12-96:14, 110:10-111:11, 112:19-23. Since then, Plaintiffs have heard these comments rarely if ever, and only from "rank and file" pilots, not APA leadership. *Id.*

Plaintiffs have also testified that they have no reason to believe that any of the members of APA's negotiating committee during the Letter G negotiations were hostile to the Flow-Through Pilots. *See supra* at 18–19. While some plaintiffs have alleged that former APA President Keith Wilson was hostile, that testimony is not based on the comments described in this section or on similar comments. *See supra* at 19.

In short, the statements alleged by Plaintiffs do not make it more likely that the negotiators of Letter G were motivated by animus towards the Flow-Through Pilots. Under the precedent described above at 15–17, they are "stray remarks" that should be excluded as irrelevant under Federal Rules of Evidence 401 and 402.

Through Pilots still at Eagle whom it did not represent and whose interests were adverse, or (2) pertains to conduct of or statements made by persons who did not participate in the negotiation of Letter G.

IV. EVEN IF THE EVIDENCE IN QUESTION WERE MARGINALLY RELEVANT, IT SHOULD BE EXCLUDED UNDER FEDERAL RULE OF EVIDENCE 403 AS MORE PREJUDICIAL THAN PROBATIVE AND AS LIKELY TO CAUSE UNDUE DELAY AND WASTE OF TIME.

Alternatively, even if the evidence had some probative value, that value would be outweighed by its potential to mislead the jury and waste the time of the parties and the Court. Federal Rule of Evidence 403 provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 403 permits the Court to exclude even evidence of unquestioned relevance under certain specified circumstances, almost all of which apply here.

First, "considerations of undue delay" and "waste of time" substantially outweigh any probative value of the allegations. The evidence in question would consume extensive time and attention at trial, if it were admitted. Plaintiffs would have to describe the many complex and bygone disputes discussed above, providing extensive background necessary to understand the issues at stake, set forth APA's positions, and explain the resulting arbitration awards or agreements. Then, APA would have to introduce evidence to contradict Plaintiffs' evidence or put it in its proper context. For example, for each dispute, APA would have to explain the basis for its position, why the position was justified, and how it benefited the pilots in APA's bargaining unit. Plaintiffs would presumably introduce further evidence in an attempt to cast doubt on APA's explanations. As to the alleged settlement of FLO-0108, meanwhile, the parties would present extensive evidence not only regarding the issues and resolution but also whether the resolution constituted an arbitrator's award or settlement. *See supra* at 20–21.

In short, Plaintiffs' grievances threaten to create a series of mini-trials over each incident on which they rely—even though this Court has ruled that any liability from those incidents is time-barred; and these mini-trials would overwhelm the main issues to be decided at trial. The Court can and should prevent this result. As the Ninth Circuit has held, courts may exclude relevant evidence when it might "result[] in a 'mini trial,' considering that much of [it] was disputed by [the opposing party]," and such a mini trial "would be an inefficient allocation of trial time." *Tennison v. Circus*

Circus Enters., Inc., 244 F.3d 684, 690 (9th Cir. 2001). Put another way, the Court has the discretion to exclude evidence that "would have gone to a collateral issue, was complicated and would be a waste of time." *City of Long Beach v. Standard Oil Co. of California*, 46 F.3d 929, 938 (9th Cir. 1995). That is precisely the case here.

Second, the probative value of the allegations at issue "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403. The Ninth Circuit has held, "[w]here the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005) (internal quotation marks omitted).

Here, Plaintiffs' laundry list of allegations is very likely to prejudice, confuse, and mislead the jury. Plaintiffs aim to use this evidence to argue that APA and its leaders behaved improperly in long-past disputes unrelated to the negotiation of Letter G. But this case is about the negotiation of Letter G, not about APA's conduct in a series of unrelated representations, any claims arising from which this Court has already held time-barred. *See* SJ Order at 4:15–5:18. Moreover, for the reasons discussed above, it would be unfair and prejudicial, and would undermine federal labor policy, to permit a jury to conclude that a union bore animus against an employee group it did not represent merely because it complied with its duty to advocate for and privilege the interests of the bargaining unit members it did represent. And, as shown above, the negotiators of Letter G were not involved in any of the prior incidents or statements on which Plaintiffs rely, so any animus possessed by the persons involved in those incidents may not be imputed to the negotiators of Letter G. As such, Plaintiffs' only purpose in introducing this evidence is to prejudice the jury as to matters that are actually at issue in this litigation, the negotiation of Letter G. Trial courts may exclude evidence that "would create a significant danger that the jury would base its assessment of liability on remote events involving other [people], instead of recent events concerning [the parties in the instant case]." *Tennison*, 244 F.3d at 690.

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CONCLUSION

For the foregoing reasons, the Court should grant APA's motion and exclude evidence of APA's representation prior to the negotiation of the January 2015 Letter G and of statements made by persons who did not participate in that negotiation.

Dated: February 22, 2018

Respectfully submitted,

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