STEVEN K. HOFFMAN*
DANIEL M. ROSENTHAL*
James & Hoffman, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, D.C. 20036
Telephone: (202) 496-0500
Facsimile: (202) 496-0555
skhoffman@jamhoff.com
dmrosenthal@jamhoff.com

JEFFREY B. DEMAIN (SBN 126715)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
jdemain@altshulerberzon.com

Attorneys for Defendant
Allied Pilots Association

**Admitted pro hac vice*

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 REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EVIDENCE** Date: April 19, 2018 Time: 1:30 p.m. Courtroom: 3, 17th Floor Judge: Hon. Richard Seeborg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Judicial Decisions

Statutes

Rules and Regulations

Defendant Allied Pilots Association ("APA") respectfully submits this reply brief in support of its Motion in Limine (Doc. No. 111) ("Motion") and in response to Plaintiffs' Memorandum in Opposition to the Motion (Doc. No. 118) ("Opposition" or, in citations, "Pl. Opp."). As we demonstrate below, the Opposition provides no basis for denying APA's Motion.

I. APA's Motion properly raises evidentiary issues suitable for pre-trial determination.

Plaintiffs begin their Opposition by contending that the Motion is procedurally inappropriate. Pl. Opp. at 1:1 – 2:14. On the contrary, APA's Motion properly seeks to exclude evidence under Federal Rules of Evidence 401, 402, and 403, and in doing so, fulfills several "proper reasons for a motion in limine": it "help[s] trial planning and expense by eliminating a major issue at trial," "help[s] the Court thoroughly research and review a significant and complicated evidentiary issue outside the pressure and parameters of a trial in session," and "resolve[s] highly sensitive issues before the 'bell is rung' in front of the jury." *Mixed Chicks LLC v. Sally Beauty Supply LLC*, 879 F. Supp. 2d 1093, 1094 (C.D. Cal. 2012) (cited in Pl. Opp. at 1:22-23).

Plaintiffs complain that the Motion seeks to "re-litigate[s] the summary judgment issue." Pl. Opp. at 1:19-20. But APA's Motion, if granted, would not be dispositive as to any claim or defense, or obviate the need for a trial on Plaintiffs' claim for breach of the duty of fair representation ("DFR") in the Letter G negotiations. Plaintiffs will remain free to present evidence regarding the negotiation of Letter G, including evidence of APA's alleged hostility or bad faith in those negotiations or by the individuals involved, and evidence regarding the alleged arbitrariness of the distinction in Letter G between pilots who had been furloughed and those who had not. APA's Motion therefore differs from that in *C & E Services, Inc. v. Ashland Inc.* (cited in Pl. Opp. at 1:20-21), where the defendant used a motion in limine to argue that "a large portion of the damages claimed by plaintiffs is unsupported by the evidentiary record." 539 F.Supp.2d 316, 323 (D.D.C. 2008). APA's Motion does not ask the Court to resolve any such ultimate issue that will be presented to the jury. Instead, it fulfills the ordinary purpose of a motion in limine: asking the Court to exclude inadmissible evidence.

Moreover, although Plaintiffs suggest that APA is asking the Court to revisit its summary judgment decision, that decision expressly recognized that that the issues raised in this Motion could be raised subsequently. Doc. No. 67 at 5:19-23 & nn.2-3. Moreover, the Court actually invited APA to

raise the issue through an early pretrial motion in limine and set a cut-off date for hearing such a motion. Doc. No. 85 at 2:4-5; Doc. No. 111-1 at ¶ 2. Further, to the extent APA's Motion calls on the Court to reexamine issues presented (but not resolved) at the summary judgment stage, the Court can now do so after a full discovery period in which Plaintiffs had the opportunity to collect evidence to bolster the admissibility of their proffered evidence.

Further complaining about the propriety of APA's Motion, Plaintiffs appear to suggest that the admissibility of evidence should be evaluated only in the context of the trial, rather than in a pretrial motion in limine. *See* Pl. Opp. at 1:27 – 2:2. But that argument is contrary to the numerous federal court decisions granting such pretrial motions. *See, e.g.*, *Howard v. Raytheon*, 2011 WL 13177257, *2 (C.D. Cal. Mar. 28, 2011) (granting a motion in limine to exclude evidence of alleged prior discriminatory acts by the defendant); *Gaur v. City of Hope*, No. CV 11-00651 SJO (RZX), 2012 WL 12919354, at *3-*4 (C.D. Cal. Sept. 19, 2012), *aff'd*, 589 F. App'x 359, 360 (9th Cir. 2015) (same); *Van v. Language Line Servs., Inc.*, No. 14-CV-03791 LHK, 2016 WL 3566980, at *3-*5 (N.D. Cal. June 30, 2016) (granting various pre-trial motions in limine). Plaintiffs are also wrong to suggest that motions under Federal Rule of Evidence 403 should not be granted before trial. *See, e.g., Howard*, 2011 WL 13177257, *2 (granting pretrial motion in limine under F.R.E. 403); *Van*, 2016 WL 3566980, at *3-*5 (same).

Finally, Plaintiffs argue that evidence should be excluded before trial only where it is inadmissible on all potential grounds. *See* Pl. Opp. at 1:27 – 2:14. But APA's opening brief established that the evidence at issue is inadmissible for the sole purpose Plaintiffs have asserted for its admission: to demonstrate APA's alleged hostility to the Flow-Through Pilots in the negotiation of Letter G. *See* Opening Brief at 1:10-14. In response, Plaintiffs have not asserted any other purpose to justify that evidence's admission, and therefore have waived any argument that the evidence might be admissible on another ground. Thus, under the authority Plaintiffs cite, the evidence should be excluded.

II. Plaintiffs fail to contest the central legal basis for APA's Motion.

As to the merits of APA's Motion, Plaintiffs do not contest the legal points that form its central basis. Plaintiffs do not deny (1) that APA owed a duty of fair representation ("DFR") to pilots within its bargaining unit (and to no others); (2) that pilots at Eagle were not in APA's bargaining unit, even if

they had a contractual right to future positions at American under the Flow-Through Agreement; (3) that APA owed a DFR to the former TWA pilots, whose interests conflicted with Plaintiffs'; (4) that APA was legally barred from tempering its advocacy for bargaining unit members in order to accommodate the interests of non-bargaining unit members such as Plaintiffs; or (5) that APA's conduct at issue in this Motion involved the representation of its bargaining unit members in accordance with its legal duties.

APA's opening brief showed that predicating liability on a union's conduct in fulfillment of its DFR is both illogical and contrary to federal labor policy. *See* Opening Brief at 7:18 – 14:16. It is illogical because a union's conduct towards a group whom the union has no duty to represent—and whose interests the union is prohibited from advancing—does not evidence the union's attitude to that group during a later period after that group has joined the union's bargaining unit and the union is therefore legally required to protect that group's interests. Moreover, admitting such evidence would be contrary to federal labor policy because it would penalize unions for zealously representing their bargaining unit members against adverse interests, thereby subverting the intent underlying the DFR. Under Plaintiffs' approach, unions would have to choose between fulfilling their legal duties and thereby risking suit by employees outside the bargaining unit (as here) or tempering their advocacy for bargaining unit members and risking suit by those members (as in *Bensel v. Allied Pilots Ass'n*, 657 F. Supp. 2d 493, 502-03 (D.N.J. 2009)).

Plaintiffs ignore the dilemma in which their position places APA, and simply assert that the conduct undertaken by APA to fulfill its DFR can nonetheless be used as evidence of APA's alleged hostility to Plaintiffs and the other Flow-Through Pilots ("FTPs"), federal labor policy be damned. Plaintiffs would have a jury determine whether, during various long-past disputes, APA exceeded the bounds of zealous advocacy required by the DFR to harm the FTPs unnecessarily. *See* Pl. Opp. at 6:19 – 7:16. That approach is fundamentally inconsistent with the broad deference that the law accords unions on representational issues, "recognizing the wide latitude that [unions] need for the effective performance of their … responsibilities," *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991), which does not permit juries to second-guess union decisions unless they are "so far outside a wide range of reasonableness as to be irrational," *id*. Here, Plaintiffs would ask the jury to decide not

just whether APA adequately protected the interests of its bargaining unit members (the normal inquiry in a DFR case) but to answer a vastly more amorphous question: whether APA advocated *too vigorously* for its bargaining unit members, such that its advocacy bled into the realm of hostility to pilots outside the bargaining unit. Plaintiffs offer no authority deeming such a question to be relevant or even permissible under DFR law, and they set forth no standards that could guide the jury in drawing the boundaries of the degree of advocacy allowed by the DFR. The absence of such authority speaks volumes: the question is simply not one that the law requires (or indeed permits) juries to entertain.

Simply put, to effectuate the purposes of the DFR, evidence of union conduct undertaken in fulfillment of the DFR cannot evidence hostility toward an unrepresented group whose interests were in conflict with a represented group. Such evidence should therefore be excluded under Federal Rules of Evidence 401, 402, and 403. *See* Opening Brief, Doc. No. 111, at 7:18 – 14:16, 17:15 – 21:28, 23:1 – 24:25.

III. APA's duty to represent its bargaining unit members was not superseded by the Flow-Through Agreement or by the precedent cited by Plaintiffs.

While Plaintiffs fail to dispute that APA owed a DFR to the former TWA pilots and not to the Eagle pilots waiting for jobs at American, Plaintiffs suggest that APA had other obligations that somehow trumped its DFR. First, Plaintiffs note that the Flow-Through Agreement provided that its terms would supersede conflicting terms of the collective bargaining agreement ("CBA") between American and APA. They assert from this provision that "APA agreed that its collective bargaining duties would be *subordinate* to the terms of the Flow-Through Agreement." Pl. Opp. at 7:11-12 (emphasis in original). This simply does not follow. Nothing in the Flow-Through Agreement indicates that APA would "subordinate" its collective bargaining duties or requires APA to do so. Nor could APA have made such a promise without violating the DFR. Instead, APA agreed only that one set of contract provisions would supersede another set of contract provisions, an agreement that did not (and could not) alter APA's duties under federal labor law to zealously represent its bargaining unit members with respect to whatever contract provisions governed their employment. In addition, to the extent Plaintiffs would ask the jury to conclude that APA violated its obligations under the Flow-

Through Agreement, Plaintiffs are barred from doing so because federal courts are not the proper forum for claims that a union breached a CBA entered into under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 51, *et seq.* We discuss this issue further at 6:9 – 8:10, below.

Plaintiffs next cite *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952), to argue that a union may not use its power as a collective bargaining representative to harm other employees outside of the bargaining unit it represents. *See* Pl. Opp. at 7:17-27. But Plaintiffs fail to address, much less rebut, the showing made in APA's Opening Brief that *Howard* has been limited to the factual context in which it was decided: the complete elimination of the jobs of employees outside of the defendant union's bargaining unit, motivated by racial discrimination, neither of which is at issue here. *See* Opening Brief at 13:12 – 14:12. Moreover, in its opening brief, APA cited the Supreme Court's subsequent clarification in *Allied Chemical Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971), 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." *Id.* Plaintiffs attempt to sidestep this language from *Allied Chemical* by quoting the Supreme Court's statement that "vested retirement rights may not be altered without the pensioner's consent." *Id.* But this confuses the question of whether an employee has a right to enforce a contract with the question of whether a union has a duty to represent the employee in such an effort. While Flow-Through Pilots, like retirees, were entitled to enforce any vested rights they may have had under the Flow-Through Agreement,[1] they were not entitled to be represented by APA with respect to such claims. Instead, another union, the Air Line Pilots Association ("ALPA"), performed that role, representing Plaintiffs in numerous arbitrations. Plaintiffs cannot fault APA for representing its own bargaining unit members in those arbitrations; nor can Plaintiffs attempt to relitigate the arbitrations in a jury trial in federal court. *See* 6:9 – 8:10, *infra*.

[1] APA disputes that Flow-Through Pilots had any rights under the Flow-Through Agreement that were "vested" in the sense that retirees' pension rights are vested, but that dispute is not material to APA's Motion.

Finally, Plaintiffs' reliance on *Addington v. US Airline Pilots Ass'n*, 791 F.3d 967 (9th Cir. 2015), *see* Pl. Opp. at 8:13 – 9:2, is misplaced. *Addington* held that a union risks violating the DFR by ignoring an arbitration decision that advantaged one group of employees in its bargaining unit at the expense of another group of employees in that same unit. As Plaintiffs admit, "*Addington* involved two-groups [sic] within the same bargaining unit . . . ." Pl. Opp. at 8:19-20. As such, *Addington* is inapposite here, in light of the clear law cited in our opening brief holding that a union owes no duty to employees outside of its bargaining unit and, indeed, violates its DFR by privileging their interests over the interests of the employees in its bargaining unit. *See* Opening Brief at 7:27 – 9:14.

IV. Plaintiffs cannot ask the jury to resolve issues outside the jurisdiction of federal courts under the Railway Labor Act.

Rather than show that the evidence at issue in APA's Motion in Limine is admissible, Plaintiffs' Opposition instead reveals an additional reason why it is *not* admissible: Plaintiffs seek to use it to convince the jury that APA violated the Flow-Through Agreement, that APA violated arbitration awards issued under that Agreement, that several such arbitration awards were wrongly decided, and that one of those awards was a disguised settlement. *See, e.g.*, Pl. Opp. at 5-6. As we show below, such contentions are not within the purview of the federal courts (including federal juries) to consider.

For example, Plaintiffs contend that APA violated the Flow-Through Agreement by agreeing with American to permit former TWA pilots to "flow down" to Eagle under the Flow-Through Agreement. *See* Pl. Opp. at 5:4-10. But as APA has shown, an arbitrator has already considered and rejected that argument, holding that APA did not violate the Flow-Through Agreement by negotiating flow-down rights for TWA pilots. *See* Opening Brief at 5:4-10, 17:26 – 18:13 (and record evidence cited therein). Plaintiffs seek to have the jury reach the opposite conclusion, which would require them not only to find that APA breached the Flow-Through Agreement, but also that the arbitrator's contrary decision was wrong. Similarly, Plaintiffs contend that APA violated the Flow-Through Agreement and an arbitration award issued thereunder by continuing to hire former TWA pilots in place of FTPs, even though APA – unlike American – has never had the authority to hire anyone to work for American. *See* Pl. Opp. at 5:14-18. Yet, the arbitrator in that proceeding (known as FLO-

0903) explicitly declined to issue an order requiring the hiring of FTPs before the recalls of the furloughed TWA pilots. *See* Ex. 15 at 29-32 (refusing to issue an "order placing AE flow-through pilots with AA seniority numbers, into AA training classes ahead of or instead of any former TWA pilot"), submitted herewith under cover entitled "APA's Compendium of Reply Exhibits in Support of APA's Motion in Limine."[2] Plaintiffs would apparently ask the jury to decide whether the arbitrator should have issued such an order and whether APA violated the more limited order the arbitrator did issue. And as a further example, Plaintiffs seek to have the jury disregard an arbitrator's express statement as to the nature of his arbitration award and to conclude that the award was in fact a settlement reached among the parties to the arbitration, collusively disguised as an arbitration award. *See* Pl. Opp. at 5:19-21.

In their attempt to have the jury decide that APA violated the collectively-bargained Flow-Through Agreement and arbitration awards, that arbitration awards were wrongly decided, and that one such award was a disguised settlement, Plaintiffs run headlong into an insuperable obstacle. This Court lacks jurisdiction under the RLA to determine whether a CBA was violated or to review the merits of an arbitration award issued under a CBA. Rather, controversies arising under CBAs constitute "minor disputes," which, under the RLA, can be resolved solely through arbitration; the federal courts lack subject matter jurisdiction over such disputes. *See, e.g., Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904 (9th Cir. 2002).[3] Indeed, "Congress considered it essential to keep these so-called 'minor disputes' . . . out of the courts" in order to "secure the prompt, orderly, and final

---

[2] In another proceeding (known as FLO-0106), the same arbitrator rejected ALPA's claim that American had violated the Flow-Through Agreement by recalling former TWA pilots before Flow-Through Pilots. Doc. 112-13 at 52. It is undisputed that, when a later arbitrator ordered American to hire some Flow-Through Pilots before recalling furloughed former TWA pilots (in FLO-0108), American complied with that order. However, Plaintiffs insist that that arbitration award was actually a settlement in disguise.

[3] The exception to this rule, permitting federal courts to exercise jurisdiction over claims against employers for breach of the CBA when accompanied (in a so-called "hybrid claim") by a viable claim against the union for breach of the DFR, does not apply here. This Court has already held on summary judgment that any DFR claim based on these long-ago events are time-barred, a conclusion bolstered by the fact that the relevant events all occurred years before Plaintiffs entered the APA bargaining unit; thus APA owed them no DFR with regard to those event and they had no claim against APA for violation of its DFR with regard to its conduct in connection with those events.

settlement" of contract disputes that might otherwise fester in litigation. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). Plaintiffs seek to avoid this "essential" element of federal labor law by reopening issues settled in arbitration.

Similarly, the federal courts cannot review the merits of arbitration awards. The scope of judicial review of an arbitration award rendered under a CBA is "among the narrowest known to the law," *id.* at 91, and is limited to the question "*whether* the arbitrator interpreted the collective bargaining agreement, *not* whether he did so correctly," *Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Service*, 241 F.3d 1177, 1178 (9th Cir. 2001) (emphasis in original). Thus, the courts' "task is, in essence, to review the procedural soundness of the arbitral decision, not its substantive merit." *Id.* at 1181.

V. Governing precedent bars Plaintiffs from introducing alleged acts of discrimination with no connection to Letter G.

APA's opening brief also showed that the evidence in question should be excluded for a separate and independent reason: the events, which occurred as much as 15 years in the past, did not involve any of the individuals who negotiated Letter G. *See* Opening Brief at 14:17 – 17:14. In response, Plaintiffs do not assert that the negotiators of Letter G had any involvement in those pre-Letter G events or statements. Rather, they contend that APA's alleged conduct was part of a "consistent pattern" that is admissible whether or not the negotiators of Letter G were involved in the pre-Letter G events. *See* Pl. Opp. at 2:24 – 3:8; 9:3 – 10:3.

While a pattern of prior discrimination can sometimes be admissible as background evidence, such evidence is not automatically permitted. Instead, as the Ninth Circuit held in *Lyons v. England,* ordinary standards of admissibility (e.g., Federal Rules of Evidence 401, 402, and 403) govern the admissibility of alleged discriminatory acts outside the statute of limitations. 307 F.2d 1092, 1110 (9th Cir. 2002). Applying this standard, courts have excluded evidence of prior alleged discriminatory acts that are insufficiently connected to the plaintiff's claims at issue. In *Howard v. Raytheon*, the court applied *Lyons* to exclude evidence of time-barred acts of race discrimination because the "supervisors involved in the 2003 and 2004 incidents [the time-barred incidents] were not involved in the 2008 layoff [the incident under challenge] and had no contact with Plaintiff's supervisors in 2008." 2011

WL 13177257, *2 (C.D. Cal. Mar. 28, 2011). Similarly, in *Gaur v. City of Hope*, the trial court held—and the Ninth Circuit affirmed—that the plaintiff was barred from introducing evidence of an alleged pattern of discriminatory promotion decisions made by a supervisor other than the supervisor who denied a promotion to the plaintiff. No. CV 11-00651 SJO (RZX), 2012 WL 12919354, at *3-4 (C.D. Cal. Sept. 19, 2012), *aff'd*, 589 F. App'x 359, 360 (9th Cir. 2015).

For their part, Plaintiffs cite no case in which a court admitted evidence so remote—in either time or in connection to the relevant decisionmakers—as the evidence at issue here. In the first case cited by Plaintiffs, *Lyons*, the Ninth Circuit held that plaintiffs alleging racial discrimination in employment could introduce evidence of widespread discrimination by the employer occurring within the five years prior to the first timely claim of discrimination. 307 F.2d at 1111-1112. In *RK Ventures v. City of Seattle*, the Ninth Circuit similarly allowed plaintiffs alleging racial discrimination in violation of the Equal Protection Clause to present evidence of discriminatory regulation occurring within the four years prior to the first timely claim of discrimination. 307 F.3d 1045, 1051-54 (9th Cir. 2002). In neither case did the defendant demonstrate that the decisionmakers involved in the challenged action were entirely distinct from the decisionmakers involved in prior conduct alleged to be discriminatory. *See generally id.; Lyons*, 307 F.2d 1092.

The evidence at issue here is far more like the evidence excluded in *Howard* and *Gaur* than the evidence admitted in *Lyons* and *RK Ventures*. First, APA seeks to exclude statements made by rank-and-file American pilots, mostly in the late 1990s, to the effect American pilots were more qualified to fly regional jets and that Eagle pilots, in seeking to fly the regional jets, were "scabs" and were stealing the jobs of American pilots. *See* Opening Brief at 6:1-7, 14:17 – 17:14, 22:2-25. The authority cited by Plaintiffs involves official acts of the defendant, not mere statements by individuals who never had a decisionmaking role. Instead, the comments fall squarely within the prohibition of "stray remarks" discussed in APA's opening brief. *See id.* at 15:1-18.[4]

[4] Interestingly, Plaintiffs quote statements made in arbitrations under the Flow-Through Agreement by then-APA negotiator Ralph Hunter, who had been involved in the negotiation of the Flow-Through Agreement, expressing as APA's official position an attitude favorable to the FTPs. *See* Pl. Opp. at 4 n.4.

Second, as to the arbitrations and negotiations that APA seeks to exclude, the relevant events took place between 2003 (when APA and American agreed to allow former TWA pilots to "flow down" to Eagle) and 2010 (when the last arbitration concluded), roughly five to twelve years prior to the execution of Letter G. Moreover, as in *Howard* and *Guar,* the decisionmakers with respect to Letter G are entirely distinct from the decisionmakers in those earlier incidents. Thus, in multiple respects, the evidence is more remote than that at issue in the cases cited by Plaintiffs.

Finally, Plaintiffs allege several more recent acts: APA's alleged denial of information to Flow-Through Pilots, its position in the so-called "equity distribution process," its position in the seniority integration with US Airways, and the very recent negotiation of "full LOS credits for all pilots." *See* Pl. Opp. at 6:7-13. These events are not covered by APA's Motion, but we nevertheless offer a brief rejoinder. Like all of Plaintiffs' factual claims in their opposition brief, Plaintiffs offer no record citation to support any such claims of mistreatment. As a result, the contentions should be disregarded. *See* N.D. Civil L.R. 7-5(a) ("Factual contentions made in support of or in opposition to any motion must be supported by an affidavit or declaration and by appropriate references to the record."). Moreover, with the exception of certain alleged denials of information, none of these allegations are properly part of this case, and none have been subject to more than minimal discovery. Plaintiffs' complaint says nothing about the equity distribution process or the recent grant of additional length of service credit to furloughees, and Plaintiffs have made no attempt to amend their complaint to add those issues. As to the seniority integration, Plaintiffs have chosen to pursue their claims on that topic in a separate case. Doc. No. 86. Finally, some of Plaintiffs' factual assertions on these points (and others in their brief) are simply untrue. For example, APA *did* respond to numerous inquiries from the Flow-Through Pilots, *see* Doc. Nos. 49-15 and 49-35 to 49-55 (letter exchanges between APA and Flow-Through Pilots), and in any event, Plaintiffs have failed to cite any authority requiring a union to respond to every single one of a series of repetitive inquiries from members. *See also supra* at 6:18 – 7:10 & n.2 (discussing Plaintiffs' claims regarding arbitration awards). In short, Plaintiffs should not be permitted to rely on any of these assertions—either in opposing APA's Motion or at trial.

VI. The evidence at issue should be excluded under Federal Rule of Evidence 403.

APA's opening brief also showed that even if any of the evidence at issue in the Motion were relevant to the issues to be tried, it should still be excluded under Federal Rule of Evidence 403 as more prejudicial than probative and as likely to cause undue delay and waste of time. *See* Opening Brief at 23:1 – 24:25. Far from rebutting that showing, Plaintiffs' brief confirms it.

Plaintiffs' brief makes clear that Plaintiffs seek to relitigate the merits of numerous arbitrations, arbitration awards, alleged breaches of the Flow-Through Agreement, alleged breaches of arbitration awards interpreting the Flow-Through Agreement, and an entire history spanning more than two decades of alleged hostile conduct on the part of APA. Such protracted litigation will overwhelm the litigation of the sole issue that is before the Court: whether APA breached its DFR in the negotiation of Letter G. Litigation of all of the convoluted and controverted history that Plaintiffs seek to introduce, and to which APA will be forced to respond, will transform what would likely be a manageable one- or two-week trial into a series of mini-trials over each incident that would not only confuse and divert the jury from the issues properly before it, but would prolong the trial for many more weeks. Plaintiffs' assertion that relitigating this lengthy history will not require much time is risible; even presenting the jury with sufficient information to understand the issues presented and resolved in each of the Flow-Through arbitrations, much less the positions of each of the parties thereto, will require substantial trial time.

To give but one example, litigation of Plaintiffs' theory that one of the Flow-Through Agreement arbitration awards was not in fact an arbitration award but a collusive settlement disguised as an arbitration award alone could occupy days of trial time, including testimony from multiple witnesses involved in the arbitration who will rebut Plaintiffs' claims[5] as well as presentation to the jury of various documents including the award itself, awards from other related arbitrations, transcripts from arbitration hearings, and correspondence between the parties and the arbitrator. *See* Doc. No. 55-

[5] Two such witnesses were deposed: Wayne Klocke (from ALPA) and Mark Burdette (from American). *See* Opening Brief at 21:9-12 (citing Klocke and Burdette deposition transcripts) and accompanying exhibits. If the issue were raised at trial, APA would also likely present testimony from one or more of its representatives who participated in the arbitration.

2 at 5:8 – 14:16 (laying out in detail Plaintiffs' theory regarding the "disguised agreement"). Multiply that by the sheer number of incidents over the two-decade period that Plaintiffs seek to litigate, and the result will be an unmanageable trial of tit-for-tat evidence on wholly collateral issues that will unduly delay the proceedings and waste the Court's and jury's time. These effects will only be exacerbated if Plaintiffs are allowed to rely on additional incidents not pled in the complaint or subject to discovery, such as the equity distribution and recent agreement regarding additional length of service credit for furloughees. *See supra* at 10:7-19.

Aside from wasting trial time, Plaintiffs' efforts will likely lead to a confused jury that is unfairly prejudiced against APA. The jury is unlikely to fully understand the contours of APA's legal duties and thereby to be able to distinguish between APA's conduct when it did not owe Plaintiffs any duty—and in fact had a duty to advance the contrary interests of other pilots—and APA's conduct that is really at issue in this case (the negotiation of Letter G). Moreover, the jury will likely struggle to understand the intricate factual and procedural background of the numerous arbitrations that Plaintiffs seek to relitigate, all of which were initially presented—for good reason—to arbitrators with extensive experience and expertise in labor relations.

In short, to the extent that any of Plaintiffs' proffered evidence is even marginally relevant, it presents a paradigmatic case for exclusion under Federal Rule of Evidence 403.

///

///

///

///

///

///

///

///

///

///

///

CONCLUSION

For the reasons discussed above and in APA's opening brief, 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: March 15, 2018

Respectfully submitted,

STEVEN K. HOFFMAN
DANIEL M. ROSENTHAL
James & Hoffman, P.C.

JEFFREY B. DEMAIN
Altshuler Berzon LLP

By: */s/ Jeffrey B. Demain*
Jeffrey B. Demain

Attorneys for Defendant Allied Pilots Association