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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, et al., Plaintiffs, v. ALLIED PILOTS ASSOCIATION et al., Defendants.	Case No.: 17-cv-01160-RS [Assigned to Judge Richard Seeborg] **PLAINTIFFS' OPPOSITION TO DEFENDANT APA'S MOTION FOR JUDGMENT ON THE PLEADINGS** [HEARING VACATED BY 2/3/2019 ORDER DOCKET NO. 87]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

After undertaking a well-established pattern of discrimination against Plaintiffs – one recognized by this Court in a related action – Defendant Allied Pilots Association ("APA") now seeks to whitewash that conduct and have it blessed by this Court, avoiding altogether a full consideration of the complex factual history here by any trier of fact. APA's motion for judgment on the pleadings is based on an over-simplified and distorted presentation of the facts and allegations of Plaintiffs' First Amended Complaint ("FAC"), and effectively asks this court to rule on factual issues that are not subject to determination as a matter of law. The 137-paragraph FAC is well pled and full of detailed factual allegations that, if taken as true (as they must be at this stage of the litigation) easily withstand a motion for judgment on the pleadings. APA's motion should be denied.

II. FACTS AND PLEADINGS

Plaintiff American Airlines Flow-Thru Pilots Coalition ("AAFTPC") is an association of pilots referred to as *Flow-Through Pilots* ("FTPs") who obtained their positions at American Airlines pursuant to a "Flow-Through Agreement" previously negotiated with American and APA. This lawsuit stems from a long history of APA's discrimination against the FTPs based on APA's early desire to favor American Airline pilots over American Eagle pilots for work flying regional jets, and its relentless efforts thereafter to improperly disadvantage FTPs at every turn. (American Eagle is a regional carrier owned by American.) This pattern of discrimination continued throughout the Seniority List Integration proceedings ("SLI Process") – an arbitration conducted for the purpose of integrating pilot seniority lists from the merged American Airlines and US Airways – at which absolutely nobody represented the interests of the FTPs. Although APA was obligated to represent the interests of the FTPs in the SLI Process, and promised to do so, the union instead favored all other pilot groups, refused to afford the FTPs so much as a seat at the table or any effective representation of their interests, and intentionally discriminated against the FTPs. Unsurprisingly, the FTPs were blatantly disfavored and harmed by the resulting integrated pilot seniority list.

Earlier, when regional jets first came into large scale use, APA fought to have them flown by APA-represented American Airline pilots. In connection with that effort, APA asserted that flying regional jets was work properly belonging to American Airline pilots because the new generation of regional jets were mainline equipment (FAC ¶¶ 19, 20) and the pilots at American Eagle flying those jets (represented by a different union) were inferior pilots (FAC ¶ 21). The Flow-Through Agreement arose from APA's failure to obtain that work for American pilots.[1] The Flow-Through Agreement gave furlough protection to American pilots by allowing them to flow-down and displace Eagle pilots from regional jets; a significant sacrifice extracted from Eagle pilots. FAC ¶ 22. In return, though, Eagle pilots obtained irrevocable "flow-through" rights to transfer to American. *Id.* But even more importantly, the deal provided for each Eagle Flow-Through Pilot a seniority number on the American Airlines Pilot System Seniority List, and provided that even if that pilot was delayed in actually transferring to American, the pilot was deemed to have attended the new hire class and been issued a number, thereby establishing his or her critical Occupational Seniority number at American. FAC ¶30.

The importance of a pilot's seniority cannot be overstated. *See, e.g., Addington v. US Airline Pilots Ass'n,* 791 F. 3d 967, 980 (9th Cir. 2015) ("Seniority is immensely valuable to pilots; greater seniority means better wages and working conditions… [it] determines her rank, the aircraft she flies, and the control she maintains over her work schedule… exposure to 'furloughs,' …[it] can mean the difference between being in or out of a job…")

The events of September 11, 2001 (FAC ¶ 54), the acquisition of TransWorld Airlines in early 2001, and the creation of TWA-LLC to fly the former TWA routes impacted the ability of FTPs to flow up to American. (FAC ¶¶ 36 et seq.) In April 2002, approximately 1067 TWA pilots were integrated into the American Airlines list at a ratio of 1:8, and another 1225 pilots employed by TWA-LLC were placed at the bottom of the American Pilot System Seniority list (the "Staplees"). FAC ¶ 37. Yet these Staplees had been furloughed from TWA-LLC without

[1] APA's proposal seeking to secure for American pilots the work flying regional jets was rejected by the Presidential Emergency Board ordered by President Clinton to settle the 1997 strike.

ever flying for American. FAC ¶ 40. Then in May 2003, APA and American amended their prior agreements so as to allow all TWA pilots to flow-down to Eagle and take Eagle pilots' jobs. FAC ¶¶ 44-47. This was in violation of the Flow-Through Agreement, and adversely impacted the interests of FTPs with American seniority numbers, as well as the interests of other Eagle pilots. That new agreement between American and APA was not submitted for approval by Eagle pilots or by their union, but was instead forced on them by American and APA. FAC ¶¶ 44-53.

Thereafter, APA regularly and continuously discriminated against the FTPs to favor the interests of the Staplees and other former TWA pilots (groups larger than the minority FTP group). FAC ¶¶ 54 - 79. This favoritism included, among other things: (a) moving Staplees to American in preference to FTPs, in violation of the Flow-Through Agreement and even when the FTPs had superior American Occupational Seniority numbers (FAC ¶¶ 54-60); (b) ignoring an arbitration decision finding that Staplees are new hires who may not interfere with the rights of FTPs, and permitting them to be hired by American ahead of FTPs anyway in violation of that arbitration order (FAC ¶¶ 55-60; Declaration of G. Cordes filed May 15, 2017, dkt # 27-1, ¶11); (c) colluding with American to re-negotiate away the preferential transfer rights of FTPs and falsely presenting this re-negotiation as if it were the decision of a neutral arbitrator (FAC ¶¶ 61-74); and (d) establishing the conditions for receipt of equity distribution benefits in a way that maximized the benefits for Staplees and other TWA pilots and minimized or eliminated equity distribution benefits for FTPs (FAC ¶¶ 75-79). This discrimination meant that many FTPs were kept at Eagle for years longer before moving to American, and Staplees got to move to American years earlier than they should have. FAC ¶ 74.

This background of discrimination provides an important context for understanding APA's substantive and procedural discrimination against Plaintiffs that permeated the Seniority List Integration Process required by the American-US Air merger. FAC ¶ 80, et seq. FTPs were legitimately concerned that APA (or its committee in the SLI Process: AAPSIC) would not represent the interests of FTPs fairly. So Plaintiff AAFTPC asked that it be allowed to participate in the SLI process as an interested party. FAC ¶ 89. After all, APA created separate

"East" and "West" committees to represent the competing interests of different pilot groups from USAir in the SLI Process. FAC ¶ 89; APA Mem. P. 2, ll. 1-8. But APA denied Plaintiff AAFTPC's request to participate in the SLI Process. FAC ¶ 89; APA Mem. P. 2, ll. 8-9. Critically, *APA claimed that it would represent the FTPs' interests*. FAC ¶ 89. That turned out to be an outright lie. In fact, there was effectively nobody representing the interests of the FTPs; APA/AAPSIC had a vastly different agenda and actively worked to undermine the FTPs' interests in the SLI Process.

The issue of longevity was of particular concern. Under longstanding practice in seniority list integrations, longevity is a significant factor in merging seniority lists. FAC ¶ 90. APA, however, entered into a pre-hearing stipulation that Eagle time would be excluded from longevity calculations. FAC ¶ 92. APA also submitted an initial proposed integrated seniority list that singularly and irrationally disadvantaged the FTPs. FAC ¶¶ 93-95.

Thereafter, APA/AAPSIC played games regarding its longevity position. In September 2015 it submitted a revised statement that, deceptively, did not indicate whether or not service at Eagle by FTPs should be included in any longevity calculation. FAC ¶ 98. However, during the SLI arbitration and in writing in its post-hearing brief, APA/AAPSIC took the position that if longevity is a factor in seniority, **time flying at Eagle should not be counted in that longevity calculation**. FAC ¶ 99. APA/AAPSIC weakly explained that this was because Eagle is not a mainline carrier. *Id.* Yet the logic of that excuse was blatantly contradicted by APA's previous position that regional jets -- the very equipment flown by Eagle pilots -- *are* "mainline" equipment. FAC ¶¶ 19, 20, 97, 115. These positions were utterly irreconcilable and can be explained only by APA's anti-FTP animus. APA's position was also particularly ironic – and further indicative of APA's bad faith – given that APA had so aggressively strived over the years to prevent FTPs from transferring to American, and then turned around and argued that only time flying at American should count in a longevity calculation.

Throughout this months-long process, Plaintiff AAFTPC sent several letters to AAPSIC asking it to reveal the positions it would take and explain the rationale of its stated positions, explaining to APA/AAPSIC how the proposals of the other committees unfairly harmed FTPs,

and begging APA/AAPSIC to argue for the FTPs and present evidence in support of including time at Eagle in any longevity analysis. FAC ¶¶ 96, 100-102. Plaintiff AAFTPC recognized the significant likelihood that longevity would be used to create the final seniority list, and insisted that APA/AAPSIC's refusal to present the requested argument and evidence would be both arbitrary and inequitable. FAC ¶ 102.

APA/AAPSIC ultimately replied to those letters, but only to state it would not provide any substantive response at all because AAFTPC had instituted litigation against APA (the related action, *AAFTPC I)*. FAC ¶ 103.

APA/AAPSIC did not present any evidence in the SLI Process to support including Eagle time in longevity. FAC ¶104. In fact, as noted above, it took the opposite position in the arbitration and its closing brief. FAC ¶ 99.

The SLI arbitrators issued an integrated seniority list ("ISL") that included longevity as a factor, but which excluded time at Eagle with the sole explanation that flying at Eagle was "non-mainline service", which is the reason that APA had provided. FAC ¶¶ 99, 105-108. The knife that APA had stuck in the FTPs' back had done its job.

The resulting ISL was unfair and inequitable to the FTPs in that (*inter alia)* its longevity calculations distinctly disadvantaged FTPs while not similarly disadvantaging comparable pilot groups; it disregarded the benefits that the FTPs had bargained for under the Flow-Through Agreement; and it perpetuated the past discrimination against FTPs, as discussed more fully below. FAC ¶¶ 109, 115. Consequently, the FTPs have suffered actual damages in the form of reduced employment opportunities, loss of income, and worse working conditions. FAC ¶ 117.

Plaintiffs allege that this conduct constitutes a multi-faceted breach of APA's duty of fair representation, as discussed in specific detail below. FAC ¶¶ 105-116.

The FAC also alleges that the seniority lists were not integrated in a fair and equitable manner – that *both the procedure and the result* were unfair and inequitable -- in violation of the McCaskill-Bond Amendment. FAC ¶¶ 123.

Finally, the FAC alleges that APA violated Section 101(a)(4) of the Labor Management Reporting and Disclosure Act ("LMRDA") (29 U.S.C. § 401(a)(4)) by refusing to respond to

Plaintiffs' questions about APA's positions during the SLI Process and taking positions adverse to FTPs in the SLI Process in retaliation for filing suit against APA. FAC ¶¶ 127-137.

III. LEGAL STANDARD

The standards for a motion for judgment on the pleadings under Fed. R. Civ. P. Rule 12(c) are "functionally identical" to those that apply to a Rule 12(b) motion to dismiss. *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). "A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999). As such, a judgment on the pleadings is proper only when the moving party "clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

Looking at the deeply factual nature of both the FAC and the arguments in APA's motion (and the 200+ pages of exhibits it seeks to add to the "pleadings"), it is clear that the claims pled are not subject to determination as a matter of law. The myriad of ways in which Plaintiffs allege that APA violated its duty of fair representation, the McCaskill-Bond Amendment and the LMRDA are very fact-specific. Accepting those allegations as true, as the Court must do at this stage, Plaintiffs state causes of action which cannot be dismissed.

IV. ARGUMENT

A. APA Is Not Entitled to Judgment as a Matter of Law on Plaintiffs' Claim for Breach of the Duty of Fair Representation.

At its most fundamental level, a union's duty of fair representation ("DFR") is the duty "to represent all members of a designated unit[, it] includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v.*

Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). It is the duty "to make an honest effort to serve the interests of *all, . . . without hostility to any*." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337, 73 S. Ct. 681, 97 L. Ed. 1048 (1953) (emphasis added).

Plaintiffs agree with APA that a breach of a union's duty of fair representation occurs when the union's conduct toward a group of its members is arbitrary, discriminatory, *or* in bad faith, and likely caused harm to that group. In order to succeed on a DFR claim, "the plaintiffs need only prove a breach under one of the prongs of the tripartite analysis." *Bishop v. Air Line Pilots Ass'n, Int'l,* 900 F.3d 388, 400 (7th Cir. 2018).

Plaintiffs allege that APA breached its duty of fair representation throughout the SLI Process most importantly by not presenting evidence and argument that longevity should include time flying at Eagle, and in fact taking the opposite position during the arbitration and in its post-hearing brief that Eagle time should not be counted. FAC ¶¶ 99, 104, 114, 115. Plaintiffs further allege that APA breached its duty of fair representation in numerous other ways described in the FAC at ¶¶ 105-116, and specifically including: (a) refusing to let the FTPs participate in the SLI Process or have separate representation (FAC ¶89), (b) initially stipulating that time flying at Eagle would not count in any longevity determination (FAC ¶¶ 92, 114), (c) proposing an integrated seniority list that arbitrarily and/or discriminatorily disadvantaged FTPs (FAC ¶¶ 93-95, 114), (d) refusing to provide information to or communicate with Plaintiffs throughout much of the SLI Process (FAC ¶¶ 102-104, 114), (e) favoring TWA Staplees and US Airways pilots over FTPs throughout the process, and in ways that perpetuated the effects of APA's prior violations of the Flow-Through Agreement (FAC ¶¶ 109, 114, 115); (f) asserting and agreeing that longevity should only include service at a mainline airline, contradicting its previous position regarding mainline aircraft and disregarding the many other factors that traditionally should be considered at SLI proceedings (FAC ¶¶ 114, 115); and (g) arbitrarily or discriminatorily agreeing to credit other pilot groups for time flying regional jets while not crediting FTPs for their time flying regional jets (FAC ¶¶ 97, 109, 114).

APA's actions were consistent with its prior pattern of discrimination and hostility toward FTPs. This prior discrimination included (a) allowing TWA pilots to flow-down to

Eagle and displace Eagle pilots, abrogating Eagle pilot rights under the Flow-Through Agreement (FAC ¶¶ 44-47, 51), (b) agreeing to give the TWA Staplees jobs at American before FTPs (FAC ¶¶ 54-60), (c) using an arbitration to cover-up an agreement to allow TWA Staplees to move to American ahead of FTPs, contrary to the FTPs' established rights (FAC ¶¶ 61-74), and (d) manipulating an equity distribution process to increase the shares given to TWA pilots and reduce those provided to FTPs (FAC ¶¶ 75-79). This long history of hostility and discrimination against the FTPs, a minority pilot group long viewed as having interests in conflict with those of the other pilot groups, provides a meaningful context for understanding APA's continuing breach of its duty to fairly represent the FTPs.

The FAC adequately alleges that APA did not fulfill its duty to serve the interests of *all.* Concluding that APA is not entitled to judgment as a matter of law should not be difficult. Nonetheless, the different prongs relevant to an analysis of a DFR claim are considered below.

1. *Arbitrary prong*

As a general matter, APA's conduct toward the FTPs in connection with the SLI Process, combined with its long history of hostility to the FTPs, is not nearly benign enough to be considered arbitrary; it was intentional. Accordingly, Plaintiffs' DFR claim focuses on APA's discriminatory and bad faith conduct. However, some of its conduct was also arbitrary.

The Ninth Circuit recognized, in a case entirely overlooked by APA, that "in the context of negotiating a seniority list, the prohibition on arbitrariness means that 'a union may not juggle the seniority roster for no reason other than to advance one group of employees over another.'" *Addington v. US Airline Pilots Ass'n*, 791 F.3d 967, 984 (9th Cir. 2015) (internal citations omitted). Yet that is precisely what APA did here by submitting a proposed integrated seniority list that disadvantaged the FTPs and advanced other pilot groups by arbitrarily putting the TWA Staplees plus 755 former US Airways pilots ahead of FTPs, even though FTPs had American seniority numbers that had been pre-empted by APA's earlier misconduct in favoring the Staplees as new hires at American. FAC ¶ 93. No other pilot groups were adversely

impacted by this proposed list or the methodology used to develop the list. FAC ¶ 94.[2] Additionally, in later taking positions during the arbitration and closing brief that time flying at Eagle should not count in any longevity analysis, by suppressing critical evidence relevant to the arbitrators' longevity analysis, and by advocating that only mainline carrier time should count even though that credited other pilot groups, but not FTPs, for time flying regional jets (FAC ¶¶ 97, 109, 114), APA was effectively juggling the seniority roster to advance other groups of pilots over FTPs. This plainly meets the Ninth Circuit's description of arbitrariness.

2. *Discriminatory prong*

Critically, in the related *AAFTPC I* action, this Court has already found that "plaintiffs have pointed to what may **plausibly be characterized as a pattern of having been treated less favorably than those pilots arriving at American from other 'mainline' carriers**." *See American Airlines Flow-Thru Pilots Coalition v. Allied Pilots Association* ("AAFTPC I"), Case No. 15-cv-03125-RS, 06/16/18 Order, dkt # 67, p. 7 (emphasis added). This Court further noted there that while APA's conduct "may ultimately be accepted by a trier of fact as appropriate … **that conclusion is not subject to determination as a matter of law**." *Id.* (Emphasis added.)

This present action is based on that *same background* of APA's hostility to the Eagle pilots and the Flow-Through Agreement, its violations of arbitration awards relating to that Agreement, APA's conduct in favoring the TWA Staplees, APA's discrimination against the FTPs, and APA's blatant stonewalling when the FTPs sought information from APA regarding the SLI Process. That history of discrimination -- already recognized by this Court -- is properly considered in order to shed light on APA's continuing misconduct during the SLI Process. *See Lyons v. England,* 307 F.3d 1092, 1109-1112 (9th Cir. 2002); *Haerum v. Air Line Pilots Ass'n,* 892 F.2d 216, 219 (2d Cir. 1989) (past events may be used to show that current

[2] It does not matter whether APA's position was later withdrawn in an attempt to whitewash the union's unfair conduct. It is irrational to think that the stipulations and proposed list submitted by APA had no impact on the SLI proceedings. And in any event, the positions that APA later took during the arbitration hearing were consistent with the unfair methodology underlying this proposal.

failure to renegotiate seniority list was breach of duty of fair representation). *See also AAFTPC I*, *supra,* dkt # 67, p. 5 (historical evidence of the relationship between APA and the FTPs is admissible to show union's discriminatory motive or intent).

APA's discrimination against the FTPs then continued throughout the SLI Process at issue here. As described above (there with citations to the FAC), much of APA's conduct was patently discriminatory in nature. It included: (a) denying the FTPs separate representation and participation in the SLI Process, notwithstanding the fact that other pilot groups were afforded separate representation by APA; (b) refusing to present argument or evidence that the FTPs' time flying at regional carrier Eagle should count in any longevity analysis, even though it agreed that other pilot groups should be credited with time flying comparable regional aircraft; (c) proposing placement of FTPs on an integrated seniority list that unfairly gave preference to TWA Staplees and US Air pilots; and (d) arguing that longevity should only include service at a mainline carrier, which discriminated against Eagle pilots flying regional jets but not against other pilots flying regional jets. APA's assertion in its motion that Plaintiffs do not allege that APA's tactics targeted Plaintiffs for adverse treatment is difficult to understand. That is exactly what Plaintiffs allege.

And there was no legitimate objective related to APA's refusal to advocate counting Eagle flying time in a longevity calculation (or for its other misconduct). APA's proffered reason – precedent from prior arbitrations – is plainly a pretext, and one which is belied by its repeated refusal to respond to Plaintiffs' letters asking APA to explain its longevity position. FAC ¶¶ 100-103. More importantly, there was no relevant precedent. The FTPs were a distinct group with unique seniority rights due to the Flow-Through Agreement, and many had been held back from "flowing up" to American in violation of that Agreement. This was not a typical pilot group seeking credit for past time at a regional airline. Precedent was lacking.[3]

[3] APA's citation to *Salinas* for a court's acceptance of precedence as an excuse for refusing to advocate a position is misguided. In that case, involving an employee termination hearing, there were no facts or pattern of discrimination toward the subject employee, so the court had no reason to look beyond the union's explanation for its position. *Salinas v. Milne Truck Lines, Inc.,* 846 F.2d 568 (9th Cir. 1988). Here, there was a longstanding pattern of discrimination.

In any event, an independent rationale supporting a union's conduct does not make it immune from suit where, as here, its conduct is motivated by animus toward plaintiffs. *Ramey v. Dist.141, Int'l Ass'n of Machinists,* 378 F.3d. 269, 276 (2nd Cir. 2004). Rather, where "plaintiffs have plausibly pleaded allegations of bad faith and discrimination, they are not required to negate [the union's] claim that it acted rationally and, therefore, not arbitrarily." *Bishop v. Air Line Pilots Ass'n, Int'l,* 900 F.3d 388, 400 (7th Cir. 2018).

Courts have not hesitated to find a breach of the DFR in similar situations. Guidance is provided by the Ninth Circuit's holding in *Addington, supra.* That dispute involved competing factions of pilots from the merged US Airways and America West, and seniority list integration efforts in which they were initially represented by a common union. The Court found that the union had breached its duty of fair representation because of its long-term advocacy of positions that suppressed the minority pilot group, and the union's opposition to the negotiation positions of the minority group. 791 F.3d 985-986. The Court also found the union breached its DFR by failing to defend and implement an earlier arbitration award. *Id.* Critically, also, the Court rejected the union's proffered "legitimate purpose" for its conduct, noting that accepting the explanation would "merely bless[] the [union's] discriminatory conduct against the West Pilots." 791 F.3d at 988. Similarly, here, APA repeatedly took positions that suppressed the FTPs, opposed the longevity position urged by the FTPs, failed to implement and protect the rights granted to the FTPs by the Flow-Through Agreement, and pursued an integrated seniority list that merely blessed its past violations of that Agreement and its discriminatory conduct against the FTPs.

The Ninth Circuit's opinion in *Bernard v. Air Line Pilots Ass'n Int'l, AFL-CIO,* 873 F. 2d 213 (9th Cir. 1989) is also instructive. There the court found a breach of the DFR for two reasons. First, one pilot group was not permitted to participate in integrated seniority list negotiations, despite requests to participate; and second, the union failed to follow the requirements of its own merger policy. 873 F.2d at 216. Similarly, here, the FTPs were not permitted to participate in the SLI Process by APA's admission (APA Mem. P. 2), and APA failed to honor the rights owed to the FTPs from the pre-existing Flow-Through Agreement and

recognized by a previous arbitration.

APA argues that since the FTPs initially agreed on APA's broader approach that longevity should not count at all, APA's refusal to argue that *if* longevity is counted then Eagle flying time should be counted is not discriminatory. But that argument misses the important point that based on the positions of the other pilot groups, it was becoming increasingly clear to the FTPs that longevity would be counted in the final integration. FAC ¶ 102. The FTPs thus knew that it was critically important that their Eagle time be counted in any longevity analysis, and for the arbitrators to understand the FTPs' unique position due to the Flow-Through Agreement and its impact on longevity.[4] APA understood that too, but refused to protect the FTPs' interests. APA's citation to *Vaughn v. Air Line Pilots Ass'n, Int'l,* 604 F.3d 703, 712 (2nd Cir. 2000) on this issue is unpersuasive. That case found simply that where the union agreed to a plan that actually benefitted the plaintiffs, there was no discrimination and no harm. Here APA took a position that would and did harm the FTPs. And even if APA were to prevail on this argument, it would excuse only one of several facets of APA's discriminatory conduct.

The FAC adequately alleges a discriminatory breach of the DFR.

3. *Bad faith prong*

"There is no single standard by which to evaluate claims of bad [faith] breaches of DFRs. All of the Circuits, however, do consider the union's intent as critical to determining if there was in fact a bad faith breach. **As with most determinations of intent, this makes the inquiry fact-intensive."** *Bensel v. Allied Pilots Ass'n*, 675 F. Supp. 2d 493, 499-501 (D.N.J. 2009) (emphasis added).

Looking first at APA's argument, APA asserts that the bad faith prong of Plaintiffs' claim fails because the FAC purportedly does not allege that APA lied or hid anything, and APA was not deceitful or dishonest. To the contrary, the FAC does indeed allege that APA "concealed" from the SLI arbitrators the fact that a previous arbitration order used to modify the FTPs' rights was really a negotiated agreement disguised as a neutral decision. FAC ¶ 67.

[4] Support for these allegations can be found in the Oct. 9, 2015 letter referenced in ¶ 100 of the FAC and attached to APA's Demain Dec. as Exh. B.

The FAC further alleges that APA hid and concealed information from the FTPs when APA refused to answer several written letter requests for specific information regarding strategy and positions in the SLI Process. FAC ¶¶ 100-103. APA's pretext for refusing to respond (that litigation had begun) does nothing to abrogate the FTPs' right to be kept informed. Likewise, APA's conduct was deceitful when it submitted a revised position statement that did not reveal its position on whether or not service at Eagle by FTPs should be included in a longevity analysis, but then at the hearing and in its post-hearing brief APA argued that Eagle time should not be counted. FAC ¶¶ 98, 99. Notably, the FTPs' letter requests for information were sent between the time of APA's revised position statement and the arbitration hearing, and they specifically asked for information about APA's position on this longevity issue. Yet APA simply stonewalled, not revealing its position until the hearing, which makes its conduct seem all the more deceitful. "'Deceptive actions can be evidence of bad faith.'" *Bishop,* F.3d at 400, quoting *Yeftich v. Navistar, Inc.,* 722 F.3d 911, 916 (7th Cir. 2013).

Looking beyond APA's narrow argument, even without such deceit and the hiding of information, a union's brazen stonewalling is plain evidence of bad faith, simply as a matter of common sense. *See, e.g., Truck Drivers Local 807, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Carey Transp. Inc*., 816 F.2d 82, 92 (2d Cir. 1987) ("[B]ecause the union engaged in such prehearing stonewalling here, it now cannot claim that it had good cause for refusing the proposal.")

Moreover, a union's refusal to entertain the litigation strategy urged by a pilot group it represents could lead a factfinder to the reasonable inference that the union's strategy was motivated by bad faith in violation of its DFR. *Bensel*, 675 F. Supp. 2d at 503-505. That reasonable inference creates a question of fact regarding the union's state of mind underlying its strategy decisions, thus precluding even summary judgment on the question of bad faith. *Id.* APA's refusal to introduce argument and evidence at the hearing that the FTPs begged it to introduce on the longevity issue likewise creates a reasonable inference that APA acted in bad faith, and thus creates questions of fact precluding dismissal.

Similarly, a union's improper motives can be inferred when it takes a position that is

contrary to a position it had previously taken. *Ramey,* 378 F. 3d at 284. Here, APA's improper motive is evident from its position that only "mainline" carrier flying time is worthy of being counted towards longevity, which contradicts its earlier position that regional jets are "mainline" equipment.

APA's bad faith was evident throughout the SLI Process. APA breached its duty of fair representation by any measure.

4. *Causation*

As a result of APA's breach of its duty of fair representation, Plaintiffs were harmed by a resulting seniority list that was inequitable and unfair, as it (a) failed to give FTPs longevity credit for time flying at Eagle while giving longevity credit to other comparable pilot groups, (b) disregarded the benefits that the FTPs had bargained for under the Flow-Through Agreement, (c) did not recognize the career expectations of FTPs, (d) put US Air First Officers flying regional jets above FTPs who were Captains on regional jets, (e) perpetuated past discrimination against FTPs that had delayed their movement to American, and (f) relied on the false premise that flying regional jet aircraft at Eagle was not equivalent to mainline flying. FAC ¶¶ 109, 115. Consequently, the FTPs have suffered and will continue to suffer reduced employment opportunities, loss of income, and disadvantaged working conditions. FAC ¶ 117.

The bar for establishing causation in a DFR case is a not nearly as high as APA argues.[5] Under binding Supreme Court authority (utterly ignored by APA's motion), all that the FTPs must prove is that APA's DFR violation "seriously undermine[d] the arbitral process." *Hines v. Anchor Motor Freight, Inc*., 424 U.S. 554, 567, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231 (1976); *Barr v. United Parcel Serv., Inc*., 868 F.2d 36, 43 (2d Cir.1989) (same, citing *Hines*);

[5] Cases relied on by APA that involve conduct of union officials *during collective bargaining negotiations* are inapposite to the present case, where the DFR violation undermined the integrity of the arbitral process itself. *See, e.g., Bishop v. Air Line Pilots Ass'n, Int'l*, No. C-98-359 MMC, 1998 WL 474076, at *16 (N.D. Cal. Aug. 4, 1998), *aff'd sub nom*., 211 F.3d 1272 (9th Cir. 2000) (discussing causal relationship between breach and injury in context of DFR claim relating to ratification of collective bargaining agreement); *Ackley v. W. Conference of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992) (involving complaints of inadequate union representation during collective bargaining process).

Engelsberg v. Transcon Lines, Inc., 530 F. Supp. 628, 630 (W.D. Wash. 1982) (under *Hines*, employees may obtain relief in federal court by demonstrating that union breached its duty of fair representation and that the breach seriously undermined the integrity of the arbitral process); *Mullen v. Bevona*, No. 95 CIV. 5838 (PKL), 1999 WL 974023, at *2 (S.D.N.Y. Oct. 26, 1999) (same, citing *Hines*.)

APA's argument that the FAC does not allege that the arbitration result would have been different if APA/AAPSIC had altered its positions is therefore disingenuous. The allegations noted above are plainly sufficient causation under the *Hines* standard – APA's actions and positions (both the positions it took and the things it failed to do) seriously undermined the arbitral process resulting in an integrated seniority list that was harmful to Plaintiffs in numerous ways. FAC ¶¶ 115, 117. APA's conduct was designed to, and did, infect the fairness of the arbitration, which meets the standard under *Hines*.

In any event, putting aside the absurdity of APA's suggestion that Plaintiffs must prove a negative, it is easy to understand that things would likely have turned out differently if the FTPs had been separately represented, if APA had not taken positions directly contrary to the FTPs' interests, if the arbitrator had actually been informed about the unique position of the FTPs pursuant to the Flow-Through Agreement and the ways in which that Agreement had previously been violated, and if APA had presented evidence and argument on the longevity issue unique to the FTPs. This was an arbitration proceeding at which APA had an obvious conflict of interest, took positions that directly undermined the FTPs, and effectively left the FTPs with no representation or participation in the proceeding at all! Yes, a factfinder might reasonably infer that APA seriously undermined the arbitral process such that that things would likely have turned out differently were it not for APA's conduct.

APA's secondary arguments do not save its motion. APA argues that the arbitration award suggests that the arbitrators considered but rejected the possibility of crediting Plaintiffs with their time flying at Eagle, and were not swayed by the East Committee's similar request for longevity credit for time at Mid-Atlantic Airways. (APA Mem., pp. 9-10.) But in fact, a review of that arbitration award reveals that the FTPs are not mentioned one single time in that

60-page decision! (*See* Exh. A to APA's Demain Dec.) It describes the history and competing positions of all other pilot groups, but completely ignores the FTPs, and mentions the issue of longevity credit for Eagle flying time only in passing, deciding to not to count it (p.46). It is obvious that the arbitrators did not consider, and were not made aware of, the unique position and interests of the FTPs. So of course it can reasonably be inferred that the arbitrators might have ruled differently if somebody had actually presented argument in favor of crediting Eagle flying time, presented evidence of the unique position of the FTPs, explained how the FTPs thus differed from the Mid-Atlantic pilots, argued that the regional jets flown by FTPs were similar to those flown by many American and TWA pilots, or even if the East Committee had not been the lone voice arguing for regional carrier longevity credit.

Nor does it matter (contrary to APA's suggestion) whether APA's initial proposed integrated list that favored the TWA Staplees (and former USAir pilots) was later withdrawn. It nonetheless undoubtedly impacted the SLI *Process*, and APA continued taking positions consistent with the methodology underlying that proposal and which favored the Staplees and former USAir Pilots over the FTPs. In any event, that proposal was not APA's only misdeed.[6]

Finally, APA argues that Plaintiffs do not allege what they would have done with the information that APA wrongly withheld from them. APA's position seems to be that it can stonewall its own members, refusing to discuss strategy with them, and then say that doesn't matter because no amount of communication could have convinced APA to fairly represent the FTPs' interests. That position only illustrates how doggedly hostile APA was to the FTPs.

Facts establishing causation under *Hines* are pled in detail in the FAC. And even under the higher standard urged by APA, it does not take a leap of faith to believe that results might

[6] APA further suggests in fn. 7 of its Motion that the TWA Staplees were ranked higher on the pre-merger seniority list than most FTPs anyway - partially mitigating the damages caused. But to the extent that is true, it would only be because APA permitted them to jump the line ahead of more senior FTPs in violation of the Flow-Through Agreement. FAC ¶ 60.b. Additionally, the Staplees had been arbitrarily inserted into that seniority list and assigned artificial hire dates, which unfairly improved their positions on that list. In fact, in 2007, before such shenanigans, the Staplees were generally below the FTPs on the seniority list. Declaration of G. Cordes filed May 15, 2017, dkt # 27-1, ¶8.

have been different if APA had not so blatantly and repeatedly violated its DFR and infected the fairness of the arbitration process itself. Certainly, just as this Court concluded in the *AAFTPC I* action that the showing of APA's breach of duty was adequate to prevent summary judgment for lack of causation (*AAFTPC I*, dkt # 67, p. 7), likewise here the allegations present factual questions that cannot be determined as a matter of law. In the unlikely event that this Court disagrees, Plaintiffs request leave to amend to further strengthen their allegations.

B. **APA Is Not Entitled to Judgment as a Matter of Law on Plaintiffs' McCaskill-Bond Claim.**

As APA correctly notes, the McCaskill-Bond Amendment requires that seniority lists from merged airlines be integrated "in a fair and equitable manner." APA argues that Plaintiffs' claim for violation of the McCaskill-Bond Amendment fails because 1) APA did not breach its duty of fair representation, and thus the integration process was not unfair or inequitable; 2) McCaskill-Bond permits only a challenge to the procedural fairness of the integration process, not to the substantive fairness, and Plaintiffs purportedly challenge only the substantive fairness; and 3) McCaskill-Bond does not create a private right of action. APA's arguments are nothing more than wishful thinking, and can be readily rejected.

1. ***APA's breach of its DFR establishes a violation of McCaskill-Bond.***

As described above, APA blatantly breached its duty of fair representation in numerous ways, which tarnished the entire SLI Process and its results. "[T]he question presented by a McCaskill-Bond claim brought by unionized employees, is whether the union violated its duty of fair representation." *Bakos v. Am. Airlines, Inc.,* 266 F. Supp. 3d 729, 749–50 (E.D. Pa. 2017), aff'd, 748 F. App'x 468 (3d Cir. 2018). If this Court concludes, as it should, that Plaintiffs' DFR claim withstands a motion for judgment on the pleadings, then Plaintiff's McCaskill-Bond claim should likewise withstand challenge.

2. *APA's conduct made the SLI Process procedurally unfair and inequitable.*

APA relies on the Third Circuit's recent ruling in *Bakos* to argue that a challenge under McCaskill-Bond must focus on procedural fairness rather than substantive fairness, and then suggests that Plaintiffs challenge only the substantive fairness of the SLI award. *See Bakos v. Am. Airlines, Inc.,* 748 Fed. App'x. 468, 474 (3rd Cir. Aug. 30, 2018). The facts and issues presented in the *Bakos* case are quite different from those presented here, and the complaint there apparently less thorough. Yet even if that portion of *Bakos* were adopted in this Circuit, Plaintiffs have pled facts which indisputably show that APA's conduct created an SLI process that was *procedurally* unfair and inequitable.[7]

The heart of Plaintiffs' claim for violation of the McCaskill-Bond Amendment is found in paragraph 123 of the FAC. Paragraph 123 has two subparts. Subpart (a) lists the numerous ways in which the SLI *process* was unfair and inequitable, due primarily to APA's breach of its DFR. Those allegations summarize multiple other allegations throughout the FAC (discussed above) describing the manner in which APA discriminated against the FTPs in breach of its DFR. Subpart (b) of Paragraph 123 lists the numerous ways in which the SLI process did not result in an integrated seniority list that is fair and equitable to the FTPs. APA's motion focuses only on subpart (b). (APA Mem. P. 15.) Of course, just because the FAC (which was drafted and filed before the Third Circuit's *Bakos* ruling) includes allegations that might be characterized as challenging the substantive fairness of the final seniority list, that does not

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[7] McCaskill-Bond's requirement that seniority lists be integrated in a "fair and equitable manner" raises questions of semantics and interpretation that do *not* necessarily require that "manner" be interpreted as limited to procedural issues as narrowly defined as APA suggests. While scrutiny of each individual pilot's placement on the final list might be substantive, a "fair and equitable manner" might reasonably and logically be interpreted to mean that the guidelines and parameters used to create the integrated list must be fair and equitable. For example, an integrated list created in a manner which credits some but not all groups of pilots for time flying regional jets, or that ignores the traditionally relevant factor of career expectations for only a single pilot group, or that ignores the pre-existing contractual rights of a single group of pilots, should logically and reasonably be considered to have been created in an unfair and inequitable manner. Even the *Bakos* case, which distinguishes procedure from ultimate outcome, is not inconsistent with this interpretation.

negate the fact that the FAC, at Paragraph 123(a), also includes allegations challenging the procedural fairness of the SLI Process.

Indeed, Plaintiffs' allegations in Paragraph 123(a), consistent with supporting factual allegations pled throughout the FAC and incorporated by reference into the McCaskill-Bond claim, undeniably describe a *process* that was neither fair nor equitable. There is nothing fair about an SLI Process in which the FTPs were denied the opportunity to participate as an interested party or have separate representation; a process in which effectively nobody represented the interests of the FTPs.[8] There is nothing fair or equitable about a process in which the agent (APA/AAPSIC) that was obligated to represent the FTPs instead adopted positions contrary to the interests of the FTPs and simply sold the FTPs out in favor of other groups. There is nothing fair or equitable about a process in which that agent advocated positions that favored other pilot groups and discriminated against the FTPs. There is nothing fair or equitable about a process in which APA/AAPSIC refused to present argument or evidence critical to, and specifically requested by, the FTPs. There is nothing fair about a process in which APA/AAPSIC refused to communicate with or provide information to one of the pilot groups that it supposedly represented, or failed to inform the arbitrators about past violations of the FTPs' contractual rights. These are all matters of process, and each of these transgressions rendered the SLI *process* horribly unfair.

These assaults on the SLI process and the FTPs' utter lack of any representation in the process whatsoever are glaringly evident from a review of the arbitration decision itself. (*See* Exh. A to APA's Demain Dec.) As previously noted, that decision reviews in great detail the history of the various pilot groups from US Air, including the East and West subgroups, and the competing positions of all pilot groups. Yet shockingly, *nowhere* in the 60-page arbitration decision is there *any mention of the FTPs*! Even the issue of longevity credit for time flying at

[8] Arbitration boards hearing seniority list integration matters have commonly understood that providing separate representation and participation to pilot groups with competing interests is "consistent with McCaskill-Bond's requirement that the SLI process be 'fair and equitable'". *Addington,* 791 F.3d at 979. *See, also, Bernard, supra,* finding violation of the DFR where one pilot group was not allowed to participate in the proceedings.

Eagle is mentioned only twice: once in the summary of the West Committee's position (p. 33), and once almost in passing in the arbitrators' decision to exclude it (p. 46). Obviously, nobody informed the arbitrators of the unique position of the FTPs due to the Flow-Through Agreement. Nobody presented any argument or evidence on their behalf. There was plainly absolutely nobody advocating on behalf of the FTPs during this process.

Any ruling that the McCaskill-Bond Amendment does not cover the types of procedural unfairness alleged here would render the McCaskill-Bond Amendment meaningless. At a minimum, any consideration of whether this conduct actually occurred or whether it rendered the process unfair is a question of fact not subject to determination as a matter of law.

3. *McCaskill-Bond created a private right of action.*

Finally, APA argues that even if the SLI Process was horribly unfair, the McCaskill-Bond Amendment did not create a private right of action. Yet, APA is attempting to have its cake and eat it too, since the Third Circuit in *Bakos* held that McCaskill-Bond did in fact create a private right of action. (Curiously, while APA is happy to rely on the *Bakos* decision for its argument that review under McCaskill-Bond must be limited to issues of procedural fairness, APA describes the decision as "non-precedential" when discussing its holding on the private right issue.)

Although APA carefully uses the term "private right", the *Bakos* decision unmistakably uses the term "private right of action":

> We agree with the District Court that the statute **creates a private right of action**. First, the McCaskill-Bond Amendment contains 'rights-creating language' because it is 'clearly "phrased in terms of the persons benefitted."' … Second, there is no agency tasked with enforcement, which suggests private plaintiffs may sue to enforce McCaskill-Bond's requirements.

Bakos, 748 Fed. App'x. at 474 (emphais added, citations omitted). For these reasons (and others discussed further in the *Bakos* opinion), the Third Circuit correctly held that plaintiffs have a private right of action under McCaskill-Bond.

Grasping at straws, APA goes on to argue that even if private plaintiffs have a right of action under McCaskill-Bond, perhaps they don't have a private remedy. That makes no sense. A private right of action that cannot be enforced with a remedy is effectively no right of action at all. Indeed, the purpose of McCaskill-Bond would be defeated if there were no private right of action with remedy because, as the *Bakos* Court noted, there is no other mechanism for enforcement. Courts regularly conclude that "Congress did not intend to create a mere illusory right, which would fail for lack of means to enforce it." *Laughlin v. Riddle Aviation Co.,* 205 F.2d 948, 949 (5th Cir. 1953). As the Ninth Circuit has explained: "In every implied right of action case, the reviewing court, however obliquely in some cases, has satisfied itself before permitting an action to proceed both that the statute confers a right and that permitting a private remedy to vindicate that right is consistent with Congress's intent in enacting the statute." *Save Our Valley v. Sound Transit,* 335 F.3d 932, 952 (9th Cir. 2004). Indeed, "It is an elementary maxim of equity jurisprudence that there is no wrong without a remedy." *Leo Feist v. Young,* 138 F. 2d 972, 974 (7th Cir. 1943). In Latin the axiom is *ubi jus ibi remedium* --for every wrong, the law provides a remedy.[9]

Notably, though many lawsuits have alleged violations of McCaskill-Bond, no known authority has held such claims to be barred on the grounds that no private right of action is available, and APA cites none. Nor has any court barred such claims on the grounds that there is a private right but no remedy. This Court should not be the first to issue such an out-on-the ledge ruling, as doing so would not only defy logic, but it would render the private right of action under McCaskill-Bond illusory.[10]

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[9] http://www.duhaime.org/LegalDictionary/U/UbiJusIbiRemedium.aspx

[10] APA's additional throw-away argument in fn. 11 of its Memorandum, that McCaskill-Bond imposes duties of fairness on air carriers only, not unions such as APA, is belied by a recent Seventh Circuit case reinstating and remanding for further proceedings a McCaskill-Bond claim against a union. *Comm'te of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. Int' Broth. Of Teamsters Airline Div.,* 662 F.3d 954 (7th Cir. 2011). Similarly, *Bakos, supra,* alleged a McCaskill-Bond claim against the union. In concluding that McCaskill-Bond created a private right of action, the Third Circuit implicitly assumed that such an action would lie against a union defendant (as in that case), and certainly drew no contrary distinction. 748 Fed. App'x. 468.

Plaintiffs have an enforceable private right of action under McCaskill-Bond, and they have alleged facts which plausibly support a claim for violation of the McCaskill-Bond Amendment. APA's motion for judgment on the pleadings on this claim must be denied.

C. **APA Is Not Entitled to Judgment as a Matter of Law on Plaintiffs' LMRDA Claim.**

The Labor Management Reporting and Disclosure Act ("LMRDA"), codified at 29 U.S.C. § § 411 et. seq., was the product of congressional concern about widespread abuses of power by union leadership. *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 352 (1989). The LMRDA's overriding objective was to ensure that unions are democratically governed and responsive to the will of their memberships. *Finnegan v. Leu*, 456 U.S. 431, 441 (1982).

Section 101(a)(4) protects a union member's right to sue, providing, in part, that "[n]o labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency…" 29 U.S.C. § 411(a)(4). The Ninth Circuit has repeatedly lauded the importance of the rights protected by this subsection: "'If a union member's right to sue is to have any meaning, courts must be ever vigilant in protecting that right against indirect and subtle devices as well as against direct and obvious limitations.'" *Moore v. Local 569 of Int'l Broth. Of Elect. Workers,* 53 F.3d 1054, 1057 (9th Cir. 1995), *quoting Phillips v. Int'l Ass'n of Bridge Workers, Local 118,* 556 F.2d 939, 942 (9thCir. 1977). "Conduct by the union that would chill, even indirectly, its members' rights is also proscribed by section 101(a)(4)." *Davis v. Prof'l Musicians Local 47,* No. SACV 12-0960 (ANX), 2013 WL 12124388 (C.D. Cal. Mar. 28, 2013).

The FAC alleges that APA/AAPSIC violated Section 101(a)(4) of the LMRDA by (a) refusing to respond to requests for information about APA/AAPSIC's positions in the SLI Process, (b) refusing to put forth argument and evidence in the SLI Process supporting the FTP's position that any longevity calculation should include Eagle flying time, and (c) asserting in the SLI arbitration hearing and in APA's post-hearing brief that Eagle flying time should be excluded from any longevity calculation. FAC ¶ 131. The FAC alleges that those

actions were taken in retaliation for Plaintiff's exercise of their legal right to file a lawsuit (*AAFTPC I)* against APA for its previous misconduct, thereby chilling that right, and deprived the FTPs of an opportunity to present their position in the SLI proceedings. FAC ¶ 131, 132.

APA argues, first, that withholding information and preventing the FTPs from participating in the SLI Process does not rise to the level of an LMRDA violation, citing *Davis, supra.* But APA misconstrues *Davis.* In that case the Court found that the alleged conduct did not rise to the level of a LMRDA violation because there plaintiffs did not actually lose work, and thus were not harmed. 2013 WL 12124388 at *7. Not so, in the present case, where the FTPs suffered immediate and continuing harm as a result of APA's misconduct. At a minimum, APA's *hey, our conduct was bad but not that bad* argument raises questions of fact not subject to determination as a matter of law.

Likewise, APA's contention that it did not respond to the FTPs' request for information because they were required to go through formal discovery procedures to obtain information once the *AAFTPC I* lawsuit was filed is unavailing, at best. A union is obligated to respond to reasonable requests for information from its members. *NLRB v. Carpenters Local 608*, 811 F.2d 149, 152-153 (2nd Cir. 1987). APA fails to explain how the filing of a lawsuit terminated that obligation. APA is essentially stating that the filing of the lawsuit gave APA authority to exclude plaintiffs from the SLI Process and withhold information from them. That is absurd. In fact, that type of retaliation for filing suit and restriction of Plaintiffs' rights in connection with the SLI proceedings is exactly the type of conduct the LMRDA was designed to prevent.

Additionally, APA's timing argument is a red herring. APA suggests that because it took positions adverse to the FTPs in a position statement and stipulation *before* Plaintiffs filed the *AAFTPC I* lawsuit on July 6 (which positions are questioned in Plaintiff's June 25, 2015 letter), APA's misconduct must not have been undertaken in retaliation for the lawsuit. (APA Mem. pp. 19-20.) Of course, APA's logic is circular. In any LMRDA claim based on retaliation for filing suit, there would by definition be pre-suit misconduct leading to the lawsuit. But that does not shield future misconduct.

And here, APA continued taking new and further actions in retaliation for filing the *AAFTCP I* action. Shortly after that action was filed, AAPSIC sent a letter to Plaintiffs dated August 13, 2015, stating plainly that because the lawsuit was filed, AAPSIC will not respond to Plaintiffs' July 13 letter demanding various types of information relating to the SLI Process. (See Exh. A to Declaration of Timothy McGonigle submitted herewith.) That is an unambiguous admission of retaliation. Then in September 2015, APA/AAPSIC submitted a revised position statement that deceptively failed to indicate whether or not service at Eagle by FTPs should be included in any longevity calculation, misleading and withholding that critical information from the FTPs. FAC ¶ 98. Subsequently, after receiving letters dated October 9, 2015, and December 21, 2015 in which Plaintiffs again requested information on AAPSIC's positions, APA/AAPSIC stonewalled, refusing to respond until by letter dated January 7, 2016, AAPSIC said it would not respond to the matters raised in those letters because Plaintiffs had instituted litigation against APA. FAC ¶¶ 100-103. Again, APA/AAPSIC overtly admitted the retaliatory nature of its conduct. Thereafter, in the actual arbitration itself the FTPs were denied any representation, and APA took positions adverse to the FTPs in both the hearing and its closing brief. FAC ¶¶ 99, 131, 132. All of this conduct occurred *after* the *AAFTPC I* lawsuit was filed, was admittedly retaliatory, and had the effect of both chilling Plaintiffs' right to pursue redress in court, and preventing its participation and effective representation in the arbitration proceedings.

Finally, APA's hint that LMRDA claims require "malicious" conduct is misdirected. Malice is not the standard. APA erroneously relies on *Phillips v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 118*, 556 F.2d 939 (9th Cir. 1977) and misapplies the court's ruling. While that case refers to a retaliatory malicious court action, it does not stand for the proposition that all retaliation must be malicious.

The FAC alleges that APA engaged in a series of misdeeds that occurred after Plaintiffs filed a lawsuit, that were admittedly in retaliation for that lawsuit, that impacted Plaintiffs' rights in the SLI arbitration proceedings, and that also (by definition as retaliation for filing suit) indirectly chilled Plaintiffs' right to pursue legal action. This Court must be ever vigilant

in protecting those rights against such indirect and subtle devices and direct and obvious limitations. *Moore, supra.* Certainly, APA's motion relating to this claim raises factual issues that cannot be decided at this stage. APA's motion should be denied.

V. CONCLUSION

APA's motion improperly asks this Court to rule on factual matters that are not subject to determination as a matter of law. Indeed, resolution of the claims alleged here requires very fact-specific inquiries. The FAC adequately alleges claims against APA for breach of the duty of fair representation, and violations of the McCaskill-Bond Amendment and LMRDA. Taking those allegations as true, as this Court must at this stage of the proceeding, APA's motion for judgment on the pleadings must be denied.

DATED: March 21, 2019

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