

1 CHRISTOPHER W. KATZENBACH
(SBN 108006)
2 Email: ckatzzenbach@kkcounsel.com
KATZENBACH LAW OFFICES
3 912 Lootens Place, 2nd Floor
San Rafael, CA 94901
4 Telephone: (415) 834-1778
Fax: (415) 834-1842
5

6 Attorneys for Plaintiffs AMERICAN AIRLINES
FLOW-THRU PILOTS COALITION,
7 GREGORY R. CORDES, DRU MARQUARDT,
DOUG POULTON, STEPHAN ROBSON,
and PHILIP VALENTE III on behalf of themselves and all
8 others similarly situated

9
10 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
11
12 SAN FRANCISCO DIVISION

13 AMERICAN AIRLINES FLOW-THRU)
PILOTS COALITION, GREGORY R.)
CORDES, DRU MARQUARDT, DOUG)
14 POULTON, STEPHAN ROBSON , and)
PHILIP VALENTE III, on behalf of)
15 themselves and all others similarly situated,)

16 Plaintiffs,

17 vs.

18 ALLIED PILOTS ASSOCIATION and)
19 AMERICAN AIRLINES, INC.,)

20 Defendants.)
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Case No.: 3:15-cv-03125 RS

**OPPOSITION TO SECOND MOTION TO
DISMISS FILED BY DEFENDANT
AMERICAN AIRLINES, INC.**

March 17, 2016

1:30 P.M.

Courtroom 3, 17th Floor

Judge Richard Seeborg

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INTRODUCTION

On this motion, American Airlines (“American”) contends that the First Claim for Relief in the Second Amended Complaint (“SAC”) fails to do more than allege that American merely acceded to the contractual demands of the Allied Pilots Association (“APA”) that discriminated against the Flow-Through Pilots (“FTP’s”). AA Mem. pp. 3-4. The SAC does much more than allege that American merely acceded to the APA’s bargaining demands. American facilitated APA’s discrimination knowing of APA’s breach of duty.

The long pattern of discrimination against the FTPs is more than enough to show that American knew that APA was discriminating against the FTPs. The allegations of the Second Amended Complaint allege facts showing that American was an active participant in effecting the discrimination against FTPs. American did not simply accede to APA’s discriminatory demands, but joined with APA the discrimination against the FTPs. Some of American’s acts involved negotiating agreements that directly harmed the FTPs and abrogated their rights under the APA/American collective bargaining agreement and the Flow-Through Agreement. Other of American’s acts involved more tacit agreements or assistance—such as ignoring the May 2007 arbitration decision giving FTPs rights to new hire positions and undermining a remedy for American’s refusal to hire FTPs by off-the-record manipulation of the arbitration process that again adversely changed the FTPs contractual rights.

These allegations demonstrate the elements necessary to show American’s liability as colluding with or aiding and abetting the APA’s breach of duty.

23

MATERIAL ALLEGATIONS IN THE SECOND AMENDED COMPLAINT

24

A. The Flow-Through Agreement and the Flow-Through Pilots (FTP’s).

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The Flow-Through Pilots (FTP’s) came to American under the terms of a multiparty agreement, known as the Flow-Through Agreement, between American, its regional airline

1 subsidiaries (“American Eagle”),¹ and the unions representing pilots at American (APA) and
2 pilots at the American Eagle regional airlines (ALPA). SAC ¶¶ 4, 5, 6, 28, 31. The Flow-
3 Through Agreement also allowed furloughed American pilots to flow-back to American Eagle
4 while furloughed from American. SAC ¶32. The Flow-Through Agreement was negotiated and
5 signed in May 1997 and incorporated into the collective bargaining agreements at American and
6 American Eagle. SAC ¶¶ 6, 27, 30.

7 The Flow-Through Agreement followed a dispute between APA and American over
8 American’s plans to fly regional jet aircraft by American Eagle carriers. SAC ¶ 24. In this
9 dispute, APA demanded that all regional jet aircraft be flown by American pilots. APA asserted
10 that this was a crucial issue of job security for the pilots APA represented at American because it
11 feared that jets flown by American Eagle pilots would replace aircraft being flown by American
12 pilots represented by APA. SAC ¶ 26. On March 19, 1997, the Presidential Emergency Board
13 (“PEB”) convened under the Railway Labor Act (“RLA”) (SAC ¶ 25) rejected APA’s demand
14 that regional jets be flown by American pilots. The PEB decision did not provide any furlough
15 or other protection for American pilots. SAC ¶ 27. The Flow-Through Agreement was entered
16 into about six-weeks later. It provided for American pilots to take jobs at American Eagle in the
17 event of a furlough at American and for American Eagle pilots to move up to American when
18 American hired new pilots. SAC ¶¶ 27, 28, 32.

19 Under the Flow-Through Agreement, American Eagle pilots were initially entitled to one
20 out of every two positions in new hire classes at American. The American Eagle pilot obtained
21 an American seniority number when they were offered a position in a new hire class whether or
22 not they were able to attend the new hire class. When the pilot could not attend the new hire
23 class because of a training freeze or other operational reason, they received priority for the new
24 hire class once the training freeze or other operational reason expired. SAC ¶ 31.

25
26 ¹ Technically, both American and the Eagles were subsidiaries of AMR, Inc. However, the FAC
27 alleges that AMR “controlled labor relations at American Airlines and American Eagle,
28 including the negotiation of collective bargaining agreements and other agreements pertaining to
the wages, hours and terms and conditions of employment of pilots employed by American
Airlines and American Eagle.” SAC ¶ 6.

1 Also under the Flow-Through Agreement, a “pilot furloughed from [American] may
2 displace a CJ Captain at an AMR Eagle, Inc. carrier” subject to certain limitations. SAC ¶ 32.
3 When the Flow-Through Agreement was negotiated, an at all times thereafter, the American-
4 APA collective bargaining agreement defined furlough as a “removal of a pilot from active duty
5 as a pilot. . . due to a reduction in force. . .”. SAC ¶¶ 18, 35.

6
7 **B. American’s Acquisition of TWA In 2001 and Addition**
8 **of the TWA-LLC Staplees To the Bottom of the**
9 **American Pilot Seniority List.**

10 In 2001, American acquired the assets of TransWorld Airlines (TWA) and created a
11 subsidiary (TWA-LLC) to fly TWA’s routes. The TWA-LLC pilots were employees of TWA-
12 LLC. SAC ¶ 39. At some point after April 3, 2002, the TWA-LLC pilots were integrated into
13 the AAL Pilot System Seniority list and received AAL Occupational seniority numbers.
14 Approximately 1067 TWA-LLC pilots were integrated into the AAL Pilot System Seniority list
15 interspersed with AAL pilots at a ratio of approximately 1:8. The remaining approximately 1225
16 TWA-LLC pilots were placed at the bottom of the AAL Pilot System Seniority list (herein
17 referred to as the “TWA-LLC Staplees”). SAC ¶ 40. Thereafter, the TWA-LLC Staplees were
18 furloughed directly from TWA-LLC before they had performed any work for American. SAC ¶
19 42.

20 **C. American’s Participation In Discrimination Against**
21 **The FTPs.**

22 Prior to September 2001, approximately 513 American Eagle pilots had had obtained
23 AAL Occupational seniority numbers and were on the AAL Pilot System Seniority list (herein
24 the “FTP’s”). SAC ¶¶ 5, 36. Of these pilots, about 124 had transferred to and begun flying for
25 American while the remainder had been held back at American Eagle because of American
26 Eagle’s operational needs. SCA ¶¶ 37, 38.

27 All pilots who were on the American pilot seniority list were represented by APA for
28 purposes of employment conditions at American. This included the FTPs and the TWA-LLC
Staplees once they were placed on the American seniority list. SAC ¶¶ 43, 73.

1 After September 2001, American stopped hiring pilots and began layoffs. American did
2 not conduct new hire training classes until June 6, 2007. SAC ¶¶ 41, 49.

3 APA engaged in a pattern of repeated discrimination against the FTPs by favoring other
4 groups and advancing the interests of other pilot groups over the interests of the FTPs, contrary
5 to the interests of the FTPs and without taking account of the interests of the FTPs. SAC ¶¶ 51-
6 56. As a result, FTPs with greater AAL pilot seniority are paid less than TWA-LLC pilots with
7 lesser American seniority and FTPs who have worked longer at American are paid less for the
8 same jobs than TWA-LLC pilots who have worked less time at American. SAC ¶ 52(d) at p. 17.
9 In the most recent collective bargaining agreement, American pilots who had been furloughed
10 received an extra two years of seniority. Although the TWA-LLC Staplees did not qualify for
11 this benefit because they were not furloughed American pilots, they got this benefit. The FTPs
12 did not and APA did not attempt to get this benefit for the FTPs. SAC ¶ 52(e) at p. 18. FTPs
13 requested APA to take action to rectify or remedy this discrimination, but APA did not respond
14 these requests and did not provide any explanation or justification for its actions or the disparities
15 in pay and benefits suffered by the FTPs. SAC ¶ 57.

16 American participated in the APA's discrimination, knowing that APA was hostile to the
17 FTPs' interests, was discriminating against the FTPs and was favoring other pilot groups,
18 including the TWA-LLC pilots. SAC ¶¶ 78, 79. Specifically:

- 19 1. In November 2001, American and APA had agreed that the TWA-LLC pilots
20 would not have the ability to flow-down under provisions of the Flow-Through
21 Agreement. SAC ¶ 44. In 2003, after furloughs at American had started,
22 American and APA revised this agreement to allow the TWA-LLC pilots to flow-
23 down to American Eagle and displace FTPs from their jobs. FAC ¶¶ 45, 46. The
24 effect of this agreement was to change the terms of the Flow-Through Agreement
25 so that the flow-down provisions would apply to TWA-LLC pilots even if TWA-
26 LLC pilots (such as the TWA-LLC Staplees) were not furloughed American
27
28

1 pilots as that term was used in the APA/American collective bargaining
2 agreement. SAC ¶¶ 47, 52(a).

- 3 2. On May 11, 2007, Arbitrator John B. LaRocco, in Case No. FLO-0903, ruled that
4 the TWA-LLC Staplees were new-hire pilots for purposes of the Flow-Through
5 Agreement. He ruled “Pilots who did not commence active employment at AA in
6 conjunction with the merger are equivalent to new hires” (AA Motion to Dismiss,
7 Exh. A at p. 45 of decision) and this included the TWA-LLC Staplees (*id.* at p. 45
8 fn. 17, and p. 46). See SAC ¶ 52(b)(i). Although American was a party to the
9 arbitration that resulted in this ruling (SAC ¶ 52(b)(ii)), American and APA
10 continued to hire TWA-LLC Staplees into new hire position ahead of FTPs. SAC
11 ¶ 52(b)(iii). APA did nothing to protect the FTPs rights to these jobs. SAC ¶
12 52(b)(iv).
- 13 3. American agreed to include the TWA-LLC Staplees in the extra service credits
14 for “furloughed” American pilots, even though the TWA-LLC Staplees did not
15 meet the definition of a furloughed American pilot. SAC ¶¶ 52(d), 52(e).
- 16 4. Arbitrations under the Flow-Through agreement held that American had breached
17 the agreement by hiring TWA-LLC Staplees in preference to FTPs for new hire
18 classes starting in 2007. SAC ¶ 53. See Exhibits C and D to American’s Motion
19 To Dismiss (Arbitration in FLO-0108).
- 20 5. Thereafter, American participated with APA in off-the-record discussions that
21 resulted in changing the rights of FTPs to move to American and having these
22 changes presented as if they were the result of a neutral arbitration. SAC ¶¶ 54,
23 55.² American agreed to this arrangement to avoid claims that APA breached its
24 duty of fair representation and that American had breached its obligations under
25

26 ² The changes to the Flow-Through Agreement included requiring 286 FTPs (out of 527 FTPs)
27 to execute an irrevocable choice whether to take a position at American before any such position
28 was available for them and requiring future flow-up to American to be based solely on American
seniority numbers rather than the one-for-two or priority hiring under the Flow-Through
Agreement. SAC ¶¶ 54, 55.

1 the Flow-Through Agreement and the APA/American collective bargaining
2 agreement. SAC ¶¶ 55, 56.³

3 American's favoritism of the TWA-LLC pilots, and particularly the Staplees, violated its
4 contractual obligations under the APA/American collective bargaining agreement and its duties
5 as stated in arbitration decisions. SAC ¶79. The Flow-Through Agreement was itself part of the
6 APA/American contract as Supplement W. SAC ¶ 30. Additionally, Section 24.F of the contract
7 prohibited any pilot covered by the contract "to accrue rights in abrogation of the terms of this
8 agreement." SAC ¶¶ 20, 55. American's actions favoring the TWA-LLC Staplees allowed those
9 pilots to accrue rights under the collective bargaining agreement in abrogation of the terms of the
10 Flow-Through Agreement that had given the FTPs rights to new hire positions at American,
11 abrogated the limitations on displacement of FTPs in a flow-down to American pilots who had
12 been laid-off in a reduction in force by threatening TWA-LLC Staplees as if they were furloughed
13 American pilots and abrogated limitations on additional service credits to furloughed pilots by
14 including the TWA-LLC Staplees in those credits, although they were not furloughed from
15 American. See SAC ¶¶ 52, 54, 55, 79.

16 17 **ARGUMENT**

18 **A. American Colluded With APA By Aiding and Abetting** 19 **Its Discrimination Against The FTPs.**

20 **1. Summary of APA's discrimination and breach of the** 21 **duty of fair representation.**

22 APA's liability under its duty of fair representation turns on its bad faith, hostility and
23 discrimination against the FTPs, and particularly its favoritism of the TWA-LLC Staplees over
24 the interests of the FTPs. A union cannot favor one union group over another for arbitrary
25 reasons. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-799 (7th Cir. 1976); *Laborers & Hoc*

26 ³ The Flow-Through Agreement was itself part of the APA/American contract as Supplement W
27 (SAC ¶ 30) and the Section 24.F of the contract additionally prohibited any pilot covered by the
28 contract "to accrue rights in abrogation of the terms of this agreement." SAC ¶¶ 20, 55.
American's actions favoring the TWA-LLC Staplees

1 *Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977). “In their role as employees’
2 exclusive representatives, unions must be careful to protect the interests of *all* those whom they
3 represent: The needs of the many do not always outweigh the needs of the few, or the one.”
4 *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1443 (9th Cir. 1989). DFR violations have been
5 found where a union caused an employee to be discharged because other workers thought they
6 should have received the job he received (*Laborers Loc. No. 341*, supra, 564 F.2d at 836, 840);
7 where a union withdrew once set of grievances from arbitration because it felt that pursuing
8 those cases weakened other members’ positions before an arbitrator (*Gregg v. Chauffeurs*,
9 *Teamsters & Helpers Union Local 150*, 699 F.2d 1015, 1016 (9th Cir. 1983)); where a union has
10 a policy of not calling union members as witnesses if their testimony might be critical of another
11 member (*Banks v. Bethlehem Steel Corp.*, supra, 870 F.2d at 1442 (testimony that another
12 employee started the fight for which the grievant was fired); where a union favored a politically
13 stronger group (*Barton Brands, Ltd. v. NLRB*, supra, 529 F.2d at 798-799); and where a union
14 favored one pilot group at the expense of another in violation of union’s policies that required it
15 to meet, mediate and arbitrate with both groups before presenting proposals to employer
16 (*Bernard v. Air Line Pilots Assn.* 873 F.2d 213, 216-217 (9th Cir. 1989)). In the context of
17 negotiating a seniority list, the prohibition on arbitrariness means that “a union may not juggle
18 the seniority roster for no reason other than to advance one group of employees over another.”
19 *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992), quoted in *Addington v.*
20 *US Airline Pilots Association*, 731 F.3d 967, 984 (9th Cir. 2015).

21 Both the FTPs and the TWA-LLC Staplees were on the American seniority list. SAC ¶¶
22 36, 38, 39, 40. Apart from an initial group of FTPs who had begun flying for American before
23 September 2001 (SAC ¶37), the FTPs and the TWA-LLC Staplees had not been employed by or
24 flow equipment for American; the FTPs were held back at American Eagle for operational
25 reasons (SAC ¶ 38) and the TWA-LLC Staplees “were furloughed from TWA-LLC” and “[p]rior
26 to being put on furlough, the TWA-LLC Staplees did not perform any work for AAL.” SAC ¶

1 42. Both groups were equally entitled to APA's representation as to employment relations with
2 American. SAC ¶¶ 43, 73.

3 APA's actions repeatedly favored the TWA-LLC Staplees and disfavored the FTPs.
4 SAC ¶¶ 41-48, 52-56, 61-66. In repeated cases, APA undermined the contractual rights of the
5 FTPs. For example, (a) APA negotiated agreements with American to treat TWA-LLC Staplees
6 as if they were furloughed American pilots for purposes of the flow-down provisions of the
7 Flow-Through Agreement and for extra service credits when the TWA-LLC Staplees were not
8 furloughed pilots under the contract's definition of a furlough, (b) APA arranged with American
9 to hire TWA-LLC Staplees ahead of FTPs contrary to the hiring provisions of the Flow-Through
10 Agreement, notwithstanding arbitration decisions before such hiring that the hiring priority of the
11 Flow-Through Agreement applied to the hiring of TWA-LLC Staplees, (c) APA tried to have the
12 FTPs seniority numbers rescinded and (d) APA conducted secret negotiations to undermine a
13 remedy for American's violation of the Flow-Through Agreement in hiring TWA-LLC Staplees
14 ahead of FTPs and again change the terms of the Flow-Through Agreement adversely to the
15 FTPs. APA refused to explain its actions to the FTPs when they asked for explanations or
16 provided arbitrary and unreasonable explanations. SAC ¶¶ 57, 67-68, 70-71.

17 APA has always been hostile to the idea that American Eagle pilots would be flying
18 regional jets because APA thought that threatened the jobs of American pilots. SAC ¶¶ 21, 24,
19 26, 27. APA has been hostile to the FTPs because the FTPs are less numerous than the TWA-
20 LLC pilots, because APA wanted all jet aircraft to be flown by APA-represented pilots at
21 American and because APA was biased in favor of mainline pilots and against regional airline
22 pilots. SAC ¶ 76. APA also favored the TWA-LLC pilots because they had voted to have APA
23 represent them while the American Eagle pilots had voted for ALPA rather than APA. SAC ¶
24 77.

1 **2. An Employer may be liable for a union’s discrimination**
2 **by aiding and abetting discrimination or participating**
3 **in a union’s discrimination.**

4 When the Supreme Court first recognized a duty of fair representation in *Steele v.*
5 *Louisville & N. R. Co.*, 323 U.S. 192 (1944), the Court held that the employer could not escape
6 responsibility merely because the union had negotiated a discriminatory contract. The Court
7 stated: “No more is the Railroad bound by or entitled to take the benefit of a contract which the
8 bargaining representative is prohibited by the statute from making. ... It is the federal statute
9 which condemns as unlawful the Brotherhood's conduct. ‘The extent and nature of the legal
10 consequences of this condemnation, though left by the statute to judicial determination, are
11 nevertheless to be derived from it and the federal policy which it has adopted.’ [Citations
12 omitted.]” *Id.* at 203-204.

12 **(a) The standard for aiding and abetting liability requires**
13 **knowledge of the union’s wrongful conduct and**
14 **substantial assistance to it.**

15 Because the duty of fair representation arises under federal law, courts look to federal
16 common law to determine issues of joint liability. See *Moriarty v. Glueckert Funeral Home,*
17 *Ltd.*, 155 F.3d 859, 866 n. 15 (7th Cir. 1998). Federal law has long recognized civil liability for
18 aiders and abettors. In *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264-265 (9th Cir.
19 1996), the Ninth Circuit recognized that the aiding and abetting liability would apply to persons
20 “who assist others in direct trademark infringement.” *Id.* at 264. In finding such liability, the
21 Ninth Circuit has looked to the Restatement (Second) of Torts for the appropriate standards. *Id.*
22 at 265, citing *Hard Rock Café Licensing Corp. v. Concession Servs.*, 955 F.2d 1143, 1149 (7th
23 Cir. 1992) and *Hard Rock’s* citation to Restatement).

24 The *Restatement (Second) of Torts*, Section 876 “Persons Acting In Concert,” provides:

25 For harm resulting to a third person from the tortious conduct of
26 another, one is subject to liability if he

27 * * *

28 (b) knows that the other's conduct constitutes a breach of duty and
 gives substantial assistance or encouragement to the other so to
 conduct himself, or

1 The comments on “substantial assistance” under the *Reinstatement* note that assistance may be
2 “so slight” as not to constitute substantial assistance. “The assistance of or participation by the
3 defendant may be so slight that he is not liable for the act of the other. In determining this, the
4 nature of the act encouraged, the amount of assistance given by the defendant, his presence or
5 absence at the time of the tort, his relation to the other and his state of mind are all considered.”
6 Comment on Clause (b). Illustration 9 provides an example of such “slight” assistance negating
7 liability: “A is employed by B to carry messages to B's workmen. B directs A to tell B's
8 workmen to tear down a fence that B believes to be on his own land but that in fact, as A knows,
9 is on the land of C. A delivers the message and the workmen tear down the fence. Since A was a
10 servant used merely as a means of communication, his assistance is so slight that he is not liable
11 to C.” As discussed below, American’s assistance in this case was far greater than such “slight”
12 assistance illustrated in the Restatement.

13 Courts have described the “substantial assistance” element of aiding and abetting as
14 requiring “the actions of the aider/abettor proximately caused the harm on which the
15 primary liability is predicated.” *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y.
16 2001); *Neilson v. Union Bank of California*, 290 F.Supp.2d 1101, 1118, 1129-1130 (C.D.Cal.
17 2003) (substantial assistance requires that the defendants’ actions be a “substantial factor” in
18 causing the plaintiff's injury.). Ordinary business transactions can satisfy the substantial
19 assistance element of an aiding and abetting claim if the party actually knew those transactions
20 were assisting the commission of a specific tort. *In re First Alliance Mortgage Co.*, 471 F.3d
21 977, 995 (9th Cir. 2006).

22 **(b) Under RLA decisions, an employer’s knowing**
23 **participation in a union’s discrimination establishes**
24 **liability.**

25 Federal courts have applied similar standards for employer liability for a union’s breach
26 of the duty of fair representation. An employer, “can be joined as a party defendant if it ” acted
27 . . . with knowledge that the [union] was discriminating.’ [citation omitted]. Where the
28 employer's action is only a consequence of the union's discriminatory conduct [citation omitted],

1 or takes the form of joint discrimination with the union, then plaintiffs should be allowed to join
2 the employer and the union in one action.” *O'Mara v. Erie Lackawanna R.R.*, 407 F.2d 674, 679
3 (2nd Cir. 1969), *aff'd sub nom. Czošek v. O'Mara*, 397 U.S. 25 (1970). In the 1957 decision in
4 *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230, 235-236 (5th Cir. 1957), the Fifth Circuit
5 addressed at length the employer’s liability for a union’s breach of duty. In *Richardson*, the
6 railroad and the union had entered into agreements, in violation of the union’s duty of fair
7 representation, that discriminated against African-American employees “to the prejudice of their
8 seniority rights” and “with consequent loss . . . of income and retirement benefits.” *Id.* at 231.
9 The complaint in *Richardson* also alleged that the discriminatory contract provision “was agreed
10 upon between the Brotherhood and the Railroad without any prior notice to plaintiffs, and
11 without affording them an opportunity to be heard[.]” *Id.* at 231.

12 In holding the employer jointly liable for damages, rather than limiting the employer’s
13 liability to injunctive relief, the Fifth Circuit noted that the RLA expressly required employers
14 “to exert every reasonable effort to make and maintain agreements” concerning working
15 conditions “in order to avoid any interruption to commerce or to the operation of any carrier
16 growing out of any dispute between the carrier and the employees thereof.” *Id.* at p. 235,
17 quoting RLA Section 2 (45 U.S.C. § 152). The Fifth Circuit noted that “the Railroad, in entering
18 into the contact, was charged with knowledge that the Brotherhood as the statutory representative
19 of its employees was under a duty to represent all employees for whom it acted fairly,
20 impartially, in good faith and without hostile discrimination.” *Id.* at 235. The Fifth Circuit
21 reasoned: “It takes two parties to reach an agreement, and both have a legal obligation to not
22 make or enforce an agreement or discriminatory employment practice which they either know, or
23 should know, is unlawful.” *Id.* at 236. Accordingly, the Fifth Circuit held “the Brotherhood’s
24 obligation under the statute does not exist in vacuo, unsupported by any commensurate duty on
25 the part of the carrier.” *Ibid.* Consequently, the employer “can be required to respond in
26 damages for breach of its own duty not to join in causing or perpetuating a violation of the Act
27 and that policy which it is supposed to effectuate.” *Ibid.*

1 *Richardson* has since been accepted as stating the standard for imposing liability on an
2 employer who aids and abets a union’s breach of duty. See *Czosek v. O’Mara*, 397 U.S 25, 29
3 fn 2 (1970) (citing *Richardson* as an example of a case imposing liability on an employer if “as
4 discharge was a consequence of the union’s discriminatory conduct” or “the employer was in any
5 other way implicated in the union’s allegedly discriminatory action.”); *Glover v. St. Louis-S.F.R.*
6 *Co.*, 393 U.S. 324, 331 (1969) (allegations that union and employer “have been acting in concert
7 . . . to set up schemes and contrivances to bar Negroes from promotion wholly because of race.”)
8 and *ibid* (Harlan, J. concurring: “I believe that [*Richardson*] . . . also supports today’s holding
9 that the federal courts may grant railroad employees ancillary relief against an employer who
10 aids and abets their union in breaching its duty of fair representation.”).⁴

11 The district court in *Deboles v. Trans World Airlines, Inc.*, 350 F.Supp. 1274, 1288
12 (E.D.Pa. 1972) applied *Richardson*’s analysis to breach of duty in the airline industry. *Deboles*
13 concerned seniority provisions where the union and TWA had negotiated limited seniority for
14 employees working at the Kennedy Space Center, whereas all other employees had their
15 seniority determined from their date of employment regardless where they had worked. *Id.* at
16 1277. The district court noted that “[a]lthough TWA’s alleged wrongful cooperation is not
17 embodied in a contractual provision,” the discrimination was “a direct result of contract
18 negotiations.” *Id.* at 1288. The district court noted: “TWA is here charged with being an active
19 agent in effectuating the Union’s breach of its duty of fair representation. Without TWA’s
20 acquiescence, retroactive system seniority could never have been withheld from plaintiffs. . . .
21 TWA may be found, after a full hearing, to have been a pivotal and indispensable party rendering
22 effective the Union’s illegal discriminatory actions.” *Ibid.*

23
24
25 ⁴ The allegations in *Glover* that the Supreme Court held were sufficient to show that the railroad
26 was acting in concert with the union were: “In order to avoid calling out Negro plaintiffs to work
27 as Carmen and to avoid promoting Negro plaintiffs to Carmen, in accordance with a tacit
28 understanding between defendants and a subrosa agreement between the Frisco and certain
officials of the Brotherhood has for a considerable period of time used so-called ‘apprentices’ to
do the work of Carmen instead of calling out plaintiffs to so do said work as required by the
Collective Bargaining Agreement as properly and customarily interpreted[.]” *Id.* at 325.

1 but concluded that the union had not breached its duty of fair representation (*ibid.*), that the
2 airlines “mere participation in collective bargaining negotiations with ALPA, in which plaintiffs’
3 proposals were not realized, is not sufficient to hold United liable” and that the employees “have
4 not demonstrated a factual basis upon which to infer the existence of collusion between United
5 and ALPA”. *Id.* at 1509. In the present case, the opposite inference is compelling: American
6 colluded with APA through a series of agreements, tacit understandings or other actions that
7 repeatedly discriminated against the FTPs in favor of the TWA-LLC Staplees and repeatedly
8 changed or undermined the FTPs rights under both the Flow-Through Agreement and the terms
9 of the APA/American collective bargaining agreement.

10 In sum, *Rakestraw* does not support American’s argument that “collusion” in a union’s
11 breach of duty requires the employer to itself have bad faith, hostility or discriminatory motives
12 towards the affected employees. Rather, collusion means a knowing that the union is breaching
13 its duty and providing assistance to facilitate that breach. That is the aiding and abetting
14 standard normally applied under federal common law and in the Restatement. That is also within
15 the more-specific standard applied in cases under the RLA discussed above.

16 **B. The Facts Alleged Show American’s Liability For**
17 **Colluding With or Aiding and Abetting APA’s**
18 **Discrimination.**

19 **1. The allegations show American’s knowledge of APA’s**
20 **discrimination.**

21 The first element of aiding and abetting or colluding liability is American’s knowledge of
22 APA’s breach of duty. Knowledge is an element of aiding and abetting liability under the
23 Restatement and under the cases arising under the RLA. The cases under the RLA go somewhat
24 further, as they would apply both an actual knowledge and constructive knowledge standard.
25 *Richardson v. Texas & N.O. R. Co.*, supra, 242 F.2d at 236 (“both have a legal obligation to not
26 make or enforce an agreement or discriminatory employment practice which they either know, or
27 should know, is unlawful.”). That difference is not material here, as the facts show American’s
28 knowledge of APA’s breach of duty. The complaint specifically alleges: “At all material times,
AAL has known that that APA was hostile to the interest of FTPs and that APA and AAL were

1 discriminating against the FTPs and favoring other pilot groups, including the TWA-LLC
2 pilots.” SAC ¶ 78.

3 This is not a mere conclusion, but an allegation of fact. Moreover, the other facts alleged
4 would permit a trier of fact to find that American knew that APA was breaching its duty of fair
5 representation by discriminating against the FTPs.

- 6 1. APA has always been hostile to the idea that American Eagle pilots would be
7 flying regional jets because APA thought that threatened the jobs of American
8 pilots. SAC ¶¶ 21-27.
- 9 2. When American changed the agreement in 2003 to allow the TWA-LLC pilots to
10 flow-down to American Eagle and displace FTPs from their jobs, American knew
11 it was acting to harm the FTPs interests. This agreement changed the terms of the
12 contract adversely to the FTPs. Under the contract (including the Flow-Through
13 Agreement), flow-down rights applied only to (a) active American pilots who (b)
14 were furloughed due to a reduction in force. The definition of “furlough”
15 contained both requirements. SAC ¶ 18. The flow-down provisions of the Flow-
16 Through Agreement applied only to pilots “furloughed from AA”. SAC ¶ 32.
17 The TWA-LLC Staplees who then took advantage of the flow-down provisions
18 were never active American pilots and were laid off from TWA-LLC, not
19 American, because of the merger and not a reduction in force at American.
- 20 3. After the May 11, 2007, ruling by Arbitrator. LaRocco, in Case No. FL0-0903
21 that the TWA-LLC Staplees were new-hire pilots for purposes of the Flow-
22 Through Agreement, American ignored this ruling and proceeded to hire only
23 TWA-LLC Staplees ahead of FTPs for the subsequent new hire positions. Again,
24 it knew it was hiring TWA-LLC Staplees for positions that the arbitrator held
25 should go to FTPs and that APA was ignoring the rights of the FTPs the
26 arbitration had established.

- 1 4. After arbitrators concluded that American had violated the Flow-Through
2 Agreement by hiring TWA-LLC Staplees in preference to FTPs, American
3 participated with APA in secret off-the-record discussions that resulted in
4 changing the rights of FTPs to move to American, undermining a full remedy for
5 FTPs who had been discriminated against in favor of TWA-LLC Staplees who
6 had benefitted from this discrimination and having these changes presented as if
7 these were the result of a neutral arbitration. SAC ¶¶ 54, 55.⁵ American agreed
8 to this manipulation of the arbitration process in order to protect APA from duty
9 of fair representation claims and to protect itself from breach of contract claims.
10 SAC ¶¶ 55, 56. Again, American knew that APA was again disfavoring the FTPs
11 by changing the terms of the Flow-Through Agreement adversely to their interests
12 and by cutting back on the remedy for the FTPs who had been discriminated
13 against to protect the interest of TWA-LLC Staplees.
- 14 5. In extending extra service credits for “furloughed” American pilots, American
15 again knew that the FTPs were left out of this credit but the TWA-LLC Staplees
16 were included. American knew that TWA-LLC Staplees did not meet the
17 definition of a furloughed American pilot because (as noted previously) the
18 TWA-LLC Staplees had never been active American pilots and had not been
19 furloughed from American as part of a reduction in force. SAC ¶¶ 52(d), 52(e).

24 ⁵ The changes to the Flow-Through Agreement included requiring 286 FTPs (out of 527 FTPs)
25 to execute an irrevocable choice whether to take a position at American before any such position
26 was available for them, requiring future flow-up to American to be based solely on American
27 seniority numbers rather than the one-for-two or priority hiring under the Flow-Through
28 Agreement. SAC ¶¶ 54, 55. Nothing in the Flow-Through Agreement required irrevocable
elections for only the most senior FTPs—a completely arbitrary requirement—and the Flow-
Through Agreement had express provisions for hiring FTPs for new hire classes either on a two-
for-one or priority basis, not on American seniority.

1 **2. The allegations show American’s substantial assistance**
2 **to APA’s discrimination beyond merely acceding to**
3 **APA’s bargaining demands.**

4 The facts alleged in the complaint show substantial assistance to APA’s breach of duty
5 and discrimination against the FTPs. This assistance is not simply acceding to APA’s
6 negotiating demands as American argues. American’s collusion with APA consisted of
7 American’s agreement to alter existing agreements, to ignore the requirements of arbitration
8 decisions, to undermine remedies for violation of the FTPs rights and to give benefits to TWA-
9 LLC Staplees they were not entitled to receive under the contractual language while denying
10 these benefits to the FTPs. While some conduct occurred in a collective bargaining context,
11 other conduct did not. For example, the hiring of TWA-LLC Staplees ahead of FTPs did not
12 involve any collective bargaining context, but involved ignoring the FTPs’ right to these jobs
13 that arbitration decisions had established. Similarly, undermining the remedy for FTPs
14 discriminated against in hiring did not involve collective bargaining, but collusion to undermine
15 the contractual rights the FTPs had and a remedy for violation of those rights that they were
16 entitled to receive.

17 American changed agreements to allow TWA-LLC pilots to displace FTPs at American
18 Eagle contrary to the contractual definition of what constituted a furloughed American pilot.
19 This agreement only helped the TWA-LLC pilots and only harmed the FTPs by abrogating the
20 FTPs rights. This agreement was contrary to the existing contracts. The flow-down rights under
21 the Flow-Through Agreement applied only to a “pilot furloughed from [American]” (SAC ¶ 32)
22 which meant under the APA/American collective bargaining agree at the time this was
23 negotiated, a pilot who was “remov[ed]. . . from active duty as a pilot with the Company without
24 prejudice, due to a reduction in force” (SAC ¶ 18). The TWA-LLC Staplees did not meet this
25 definition because they had been active American pilots and had not been furloughed from
26 American as part of a reduction in force. SAC ¶¶ 52(d), 52(e).

27 American hired TWA-LLC Staplees ahead of FTPs for jobs in 2007 and later. The May
28 2007 arbitration ruling held that the FTPs were entitled to be hired for these positions under the

1 terms of the Flow-Through Agreement giving FTPs one-for-two or preferential hiring for these
2 positions. See SAC ¶31. Whether American hired the TWA-LLC Staplees with an express or
3 only a tacit understanding with APA, it was substantial assistance to APA's discrimination
4 against the FTPs and favoritism of the TWA-LLC Staplees. This was, again, the kind of
5 employer assistance that implicated the employer in the union's breach of duty. See *Jones v.*
6 *Trans World Airlines*, supra, 495 F.2d at 798 (finding employer participation in breach of
7 union's duty by employer's agreement to change employees' seniority rights that had vested
8 under a prior contract).

9 American joined with APA in the secret off-the-record meeting on the remedy for its
10 discrimination. This secret meeting developed a "remedy" that undermined a full remedy for the
11 FTPs who had been discriminated against and altered FTPs rights under the Flow-Through
12 Agreement in an arbitrary way to the FTPs detriment. Requiring only the 286 most-senior FTPs
13 (out of 527) to execute irrevocable decisions whether or not to flow-up to American is entirely
14 arbitrary and has the only apparent purpose of cutting down the number of FTPs entitled to flow-
15 up to American by disqualifying those FTPs who would not sign. Basing future flow-ups on
16 American seniority changes the one-for-two or priority flow-up required under the Flow-
17 Through Agreement to a seniority-based flow-up. Allowing laid off TWA-LLC Staplees who
18 were hired in preference to FTPs to go back to American before the FTPs who were
19 discriminated against simply favors the TWA-LLC Staplees at the expense of the FTPs. Neither
20 American nor APA had a right to manipulate an arbitration to undermine the rights the FTPs had
21 under prior decision or under the Flow-Through Agreement.

22 American entered into contracts that gave service credits for TWA-LLC Staplees for time
23 they were unable to work at American. The TWA-LLC Staplees, either by an express agreement
24 with APA or a tacit agreement, were treated as if they were furloughed American pilots and
25 therefore entitled to the service credits for furloughed pilots. As discussed above, the TWA-LLC
26 Staplees did not meet the contractual definition of a furloughed American pilot because they had
27 never been active American pilots. The FTPs did not get these credits, although FTPs had also
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1 been unable to work at American during the same period of time and, like the TWA-LLC
2 Staplees, had not been active American pilots for purposes of the contractual definition of being
3 a furloughed pilot.

4 This behavior goes far beyond merely acceding to APA's negotiating demands. Rather,
5 APA's negotiating demands were all based on a known policy and pattern of discrimination
6 against the FTPs and favoritism of the TWA-LLC pilots.

7 APA and American used the negotiating process to undermine the rights of FTPs under
8 the Flow-Through Agreement and prior arbitration awards. This is beyond arms-length
9 bargaining. *Jones v. Trans World Airlines*, supra, 495 F.2d at 798.

10 American and APA used off-the-record discussions with the arbitrator in FLO-0108 to
11 undermine the FTPs' rights established in arbitration decisions. This is beyond any legitimate
12 collective bargaining. As the Circuit court in *Chambers v. Local Union No. 639*, 578 F.2d 375,
13 383 (D.C.Cir. 1978) explained, a union and employer have no right to alter a grievance result to
14 undermine the employees' rights established in that grievance: "[T]he April 9, 1973 grievance
15 decision meant what it said, that it had a clear basis in the contract for deciding that Tuxedo
16 employees could exercise company seniority and bump *into* Grand Union jobs, and that the
17 union resisted that grievance decision and improperly attempted to use the second grievance as a
18 vehicle for overturning the earlier decision. It had no right to do this. Both the company, as well
19 as the union, were bound by the decision on the first grievance, and the rights of the employees
20 which were finally adjudicated in that grievance must be respected."

21 The most recent discrimination in service credits is part and parcel of this long-standing
22 pattern. Once again, American and APA reached an agreement or understanding that FTPs
23 would be excluded from this benefit but TWA-LLC Staplees would be included. Once again,
24 this discrimination was accomplished by an express or tacit understanding where TWA-LLC
25 Staplees would be considered as "furloughed" American pilots to qualify for the extra service
26 credits even though the TWA-LLC Staplees did not meet the definition of a furloughed pilot in
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1 the contract. FTPs, on the other hand, who were equally unable to work at American during this
2 period, were denied similar credits.

3 **C. American’s Contention That Plaintiffs Are Trying To**
4 **Re-litigate Arbitration Decisions Misses The Point That**
5 **These Decisions Are Evidence of the Pattern Of**
6 **Discrimination Against the FTPs By American and**
7 **APA.**

8 American argues that plaintiffs are trying to re-litigate arbitration decisions. AA Mem.
9 pp. 6-9. Plaintiffs’ use of these decisions is not an effort to re-litigate them, but to use these
10 decisions as evidence of the pattern of discrimination by American and APA against the FTPs
11 and to favor the TWA-LLC Staplees.

12 The significance of the May 2007 liability decision in FLO-0903 is that APA and
13 American ignored the decision that TWA-LLC Staplees were equivalent to new hire pilots for
14 purposes of the operation of the Flow-Through Agreement. This meant that the FTPs were
15 entitled to either one-of-two new class places or (if the FTPs had been held back at American
16 Eagle) priority for new hire classes. SEC ¶ 31. Instead, American and APA agreed to hire the
17 TWA-LLC Staplees in preference to the FTPs. SAC 52(b).

18 Similarly, the secret meeting as to the remedy in FLO-0108 (SAC ¶¶ 54-56) is not an
19 effort re-litigate the remedy—plaintiffs were not even parties to this arbitration and had no
20 ability to litigate this remedy at all—but to present evidence of facts showing APA and
21 American’s collusion in undermining a remedy for harm to the FTPs in a way that took away the
22 FTPs existing rights and favored the TWA-LLC Staplees.

23 American suggests that plaintiffs should have directly challenged Nicolau’s remedy
24 decision in FLO-0108 (AA Mem. p. 8:17-20). In fact, the FTPs attempted to do exactly that.
25 They were rebuffed by the Fifth Circuit holding that the FTPs lacked standing to challenge
26 Nicolau’s award directly. *Mackenzie v. Air Line Pilots Ass’n*, 598 Fed. Appx. 223, 2014 U.S.
27 App. LEXIS 2438 (5th Cir. 2014 No. 11-11098), cert. denied 135 S. Ct. 2896. American was a
28 party to that appeal and represented by counsel in it. *Id.* at p. 223.

1 **CONCLUSION**

2 The Court should deny American’s motion to dismiss. The SAC properly alleges that
3 American knew of APA’s breach of its duty of fair representation and colluded with by giving
4 APA substantial assistance in APA’s breach of duty. The SAC alleges far more than American
5 merely acceding to APA’s legitimate bargaining demands. American acted contrary to the
6 terms of its bargaining agreements, the Flow-Through Agreement and arbitration decisions.
7 American’s actions consistently favored the TWA-LLC Staplees and disfavored the FTPs and
8 undermined the FTPs rights to a degree that a trier of fact could properly conclude that American
9 was not merely acceding to legitimate union bargaining demands, but knowingly joining in
10 APA’s discrimination against the FTPs..

11
12 Dated: February 22, 2016.

KATZENBACH LAW OFFICES

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14 By s/ Christopher W. Katzenbach

15 Christopher W. Katzenbach
16 Attorneys for Plaintiffs AMERICAN AIRLINES
17 FLOW-THRU PILOTS COALITION, GREGORY R.
18 CORDES, DRU MARQUARDT, DOUG POULTON,
19 STEPHAN ROBSON, and PHILIP VALENTE III on
20 behalf of themselves and all others similarly situated
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