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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
	:	
AMR CORPORATION, *et al.*,	:	Case No. 11-15463-SHL
	:	
Debtors.	:	(Jointly Administered)

ALLIED PILOTS ASSOCIATION'S MEMORANDUM IN OPPOSITION TO DEBTORS' RENEWED MOTION FOR ENTRY OF ORDER PURSUANT TO 11 U.S.C. § 1113 AUTHORIZING REJECTION OF COLLECTIVE BARGAINING AGREEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

INTRODUCTION

The Allied Pilots Association ("APA," "Association" or "Union") submits this Memorandum in Opposition to the Debtors' August 17, 2012 Motion, ECF No. 4044 ("New Section 1113 Application" or "New Application"), seeking authorization to reject the most recent collective bargaining agreement ("2003-2008 CBA" or "CBA") between American Airlines, Inc. ("American" or "Company") and the APA. After considering the APA's objections, arguments and supporting evidence, the Court must deny the Debtor's New Application because the Company has failed to satisfy the requirements of 11 U.S.C. § 1113.

This Court's August 15, 2012 Memorandum of Decision, ECF No. 4044 ("Decision"), denied the Debtors' original March 27, 2012 application (ECF Nos. 2035, 2041, 2042) without prejudice to their "submitting *a new application under Section 1113*." Decision at 106 (emphasis added). The Debtors did so two days later, after tendering a comprehensive proposal to the APA dated August 16, 2012. ECF No. 4084, Exhibit 1. Regrettably, that August 16 proposal was not formulated to seek the contract changes and cost savings that American had assured the pilots and the general public would fulfill its current restructuring plans and allow American to emerge as a successful stand-alone airline.

Instead, the August 16 proposal supporting the New Section 1113 Application recycles a set of stale, outdated contract modification demands that the Company originally formulated over six months ago and modified once during the prior Section 1113 proceedings (the "Term Sheet" or "April Term Sheet"). From its inception, the Company's Term Sheet has required a fixed, non-negotiable total of at least $370 million per year in cost savings from the pilots, to satisfy a business plan requiring 20% reduction in labor costs. That $370 million demand remains unaltered in the August 16 proposal now before the Court, despite American's most

recent admissions that it has revised its restructuring business plan to require only a 17% reduction in its labor costs, and that the Company now needs only $315 million per year in pilot labor cost savings to reorganize successfully.

As the APA will demonstrate here, the Debtors' New Section 1113 Application and supporting August 16 proposal completely ignore this significant revision in American's restructuring plan, along with other material changes in the Company's relevant circumstances since the close of the evidentiary record in the first Section 1113 proceeding. The Company's continued demand for the old Term Sheet concessions, including $370 million in pilot cost savings, greatly exceeds what the Company has determined and announced is *now* necessary and appropriate for American's successful reorganization.

Accordingly, the Company cannot meet its statutory burden to prove that the August 16 proposal underlying its New Application provides for only "those necessary modifications in the employees benefits and protections *that are necessary*" to permit American's reorganization. 11 U.S.C. § 1113(b)(1)(A) (emphasis added). Equally fatal under the statute, the August 16 proposal underlying the Company's New Section 1113 Application is not "based on the most complete and reliable information available" (§ 1113(b)(1)(A)); the Company failed to provide relevant contemporaneous information needed by the APA to evaluate the necessity of its August 16 proposal (§ 1113(b)(1)(B)); the Company's gesture of re-proposing stale, non-negotiable demands that have no reality outside this motion is incompatible with any notion of "good faith" dealings (§ 1113(b)(2)); and the Company cannot establish that the APA now lacks "good cause" (§ 1113(c)(2)) for refusing to accept the outdated April Term Sheet as proposed on August 16.

The Company mistakenly invokes the Second Circuit's decision in *Coopers & Lybrand* as justification for limiting review of the New Section 1113 Application to only two items in the

August 16 proposal.[1] Significantly, however, the Company has omitted the very next sentence of that Court of Appeals opinion, which speaks directly to the present case: "Thus, those [prior] decisions may not usually be changed unless there is an intervening change of controlling law, *the availability of new evidence,* or the need to correct a clear error or prevent a manifest injustice." 322 F.3d at 167 (emphasis added). Here, there is ample "new evidence" that squarely addresses and refutes the Company's *current* demand for $370 million per year in pilot concessions.

We note that the APA is not seeking to relitigate the first Section 1113 proceeding, which assessed the legal sufficiency of the Debtors' March 27, 2012 application based on the circumstances contemporaneous with that application, as the Code required. Nor is the APA revisiting here the merits of the Court's Decision denying that first application, which left the Company free to explore any number of avenues, without prejudice or imminent litigation deadlines. Rather, the APA contends that following denial of that first application, on whatever legal grounds, for American to prevail on its New Section 1113 Application the Company must establish its *current* compliance with each of the Section 1113 requirements, including the current necessity of the $370 million in Term Sheet concessions for American's reorganization. Thus, the closed record and Decision in the prior Section 1113 proceeding cannot dictate the outcome here or foreclose full scrutiny under Section 1113 of the Code.[2]

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[1] *See* ECF No. 4044, Memorandum in Support of Renewed Motion ("Company Mem.") at 2 n.2, citing *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003). To the same end, on August 23, 2012, the Debtors filed a separate Motion in Limine, ECF No. 4148 ("Motion in Limine"). Accordingly, in addition to the arguments set forth herein, the APA also incorporates by reference and relies on its concurrent Response in Opposition to Debtors' Motion in Limine ("APA Response to Motion in Limine").

[2] In addition to the Declaration and Exhibit accompanying its second application on August 17, the Company has incorporated by reference the entire record compiled in connection

The relevant facts are summarized below, followed by APA's arguments addressing the key defects under Section 1113 that require denial of this New Application.

STATEMENT OF FACTS

I. The Company's Business Plan and its Determination of the Concessions Necessary For American's Successful Reorganization Have Changed Materially

This Chapter 11 reorganization case began in late November 2011. As of February 1, 2012, the Company had determined that its business plan required annual labor cost reductions of 20% from all labor groups – including $370 million per year from the pilots – along with significant Scope concessions in order to restructure as a stand-alone airline. *See* ECF No. 2041 at 61. The Company pursued those demands in the latest comprehensive proposal underlying its first Section 1113 application (Term Sheet presented March 21, 2012, which was re-promulgated as of April 19, 2012 without changing the $370 million figure). *See* ECF No. 2041, AA Exhibits 918-19, 1733. The Company maintained the necessity of the April Term Sheet, its $370 million in pilot cost savings, and the accompanying Scope concesssions throughout the evidentiary hearing on its first application, which concluded on May 25, 2012.

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with its initial March 27 Section 1113 Application, including all parties' pleadings and briefs, and has expressly preserved all rights to challenge the Decision issued in that proceeding. *See* Company Mem. at 1, 2 and n.1. Without waiving our position that the current Section 1113 application and the prior Section 1113 application are two separate proceedings, and without conceding the relevance for the present proceeding of everything in the record of the first Section 1113 proceeding, for purposes of this proceeding and in the interest of judicial economy and convenience the APA will not oppose reference to portions of the record in the first Section 1113 proceeding. Following the Company's protocol, the APA's current objections to the New Section 1113 Application should be deemed to include, incorporate by reference, and preserve for appeal, any and all APA objections and legal arguments raised in the prior Section 1113 proceeding. The APA may refer to its prior submissions, including briefs addressing the statutory standards and relevant authority governing applications for relief under Section 1113, rather than reiterate all of that legal discussion in this Memorandum. Finally, the APA expresses its agreement with certain aspects of the contemporaneously filed Objection of Certain TWA/American Pilots to American's new application, namely the fact that Supplement CC is a separate agreement due to its distinct duration clause. *See* Adv. Proc. No. 12-01094-SHL, ECF No. 14, APA's Memorandum of Law in Opposition to Debtors' Motion to Dismiss and in Support of APA's Motion for Summary Judgment.

That necessity determination changed significantly after the evidentiary record closed in the first Section 1113 proceeding. As detailed in the Declarations of Allison Clark ("Clark Decl.") and Neil Roghair ("Roghair Decl."), by June 26, 2012 the Company had revised its original February 2012 business plan to require no more than 17% in labor cost reductions from all employee groups. The Declarations of Ms. Clark and Mr. Roghair are attached to these Objections as APA Exhibits A and B, respectively. With respect to the pilots in particular, the Company concluded that American could successfully reorganize with $315 million (instead of $370 million) in annual cost reductions and less severe Scope concessions on regional flying than it had previously demanded from APA.

These material changes in American's restructuring plan were shared with union representatives and Company employees, and they were reflected in American's June 27, 2012 Tentative Agreement with the APA. Indeed, the Company has freely admitted *to the general public*, as well as to its pilots and the APA, that the new target of $315 million in annual pilot cost savings and less severe Scope concessions fulfills American's revised, current restructuring business plan and that the old April Term Sheet, seeking $370 million per year in cutbacks, is no longer necessary. The Company's relevant admissions include the following:

- In a June 26, 2012 conference call, the Company stated that [redacted]. Clark Decl. ¶ 9.[3]
- In June and July 2012, the Company issued letters to its employees confirming that it had adjusted the labor cost savings target in its restructuring business plan downward from 20% to 17% for all labor groups. Clark Decl. ¶ 10 and Exhibits 1-2.

[3] In addition to representatives from the Company and the APA, participants in that June 26 conference call included representatives from Rothschild and Lazard, financial advisors to the Company and the APA, respectively, in this Chapter 11 case. *Id.*

- Since on or about June 27, 2012, the Company has announced on its public websites that it can restructure successfully with pilot concessions totaling $315 million per year (representing a 17% reduction in pilots labor costs) on the terms contained in the June 27 Tentative Agreement ("TA") between American and the APA. Roghair Decl. ¶¶ 46-62 and Exhibits 8-17. Regarding the use of regional jets, the Company specifically stated that the more restrictive terms in the TA would satisfy American's current plans by giving the Company the "flexibility it needs to expand its network through codeshare and regional feed." Roghair Decl. ¶ 50 and Exhibit 9.

- In the most recent of American's periodic financial briefings, held at Company headquarters on August 16, 2012 – the day before American filed its New Section 1113 Application, and the same day the Company re-promulgated the old April Term Sheet as its current Section 1113 proposal – American's Vice President and Controller, Brian McMenamy, reiterated that [redacted]. Clark Decl. ¶ 8.[4]

- On August 20, 2012, CEO Thomas Horton issued and posted a letter to all American employees explaining that that the Company's current plan was to work within the "economic parameters" of the TA. Roghair Decl. ¶ 59 and Exhibit 16.[5]

Further, the Company has confirmed that this significant change in the labor cost savings component of its business plan is associated with other changes in the Company's current and projected financial performance. At the August 16, 2012 financial briefing, for example, Company officials explained that [redacted]

[4] In addition to Mr. McMenamy, Company representatives in attendance at this briefing included labor relations executives Taylor Vaughn and Dennis Newgren. Clark Decl. ¶ 8. Mr. Newgren, American's Managing Director, Flight, was the official who delivered the Company's August 16, 2012 proposal and Term Sheet demanding a 20% reduction in pilot labor costs, or $370 million per year.

[5] The Horton letter, which was posted on the Company's "Jetwire" bulletin board, was republished in full in several public blogs and internet sites.

[redacted]. Clark Decl. ¶ 13. Likewise, in the June 26, 2012 conference call the Company indicated that [redacted]. *Id.*

Despite these publicly acknowledged changes in its business plan and the level of labor concessions currently needed for restructuring, the Company's August 16, 2012 proposal to APA re-promulgated the outdated April Term Sheet demanding $370 million (20% reduction in labor costs) from the pilots and much greater allowances for regional outsourcing than contained in the TA. Roghair Decl. ¶¶ 11-14. *See* ECF No. 4084, Exhibit 1. As the Company had not previously made available its revised business plan, and the August 16 proposal was not accompanied by updated information, the APA sent a letter dated August 17, 2012 requesting specific information it needed to evaluate the August 16 proposal. Roghair Decl. ¶¶ 15-18 and Exhibit 5; Clark Decl. ¶ 6 & n.2, ¶ 13. Eleven days later, the Company responded to inform the APA that it was unwilling to provide any information on the Company's business plan or comprehensive proposal aside from information related to codesharing and furlough. Roghair Decl. ¶ 18; Clark Decl. ¶ 6 & n.2.

II. Material Changes Among American's Competitors in the Pilot Labor Market

Since the record closed in the first Section 1113 proceeding, both Delta and United/Continental, American's two largest competitors, have reached new agreements with their pilots. Roghair Decl. ¶¶ 63-79. As a result, much of the Company's previous evidence and analysis regarding competing carriers' pilot labor costs and industry standards for pilot contracts is now outdated and inaccurate. *See, e.g.*, ECF No. 2041, AA Exhibit 500 ("First Brundage Decl."), ¶¶ 33-35 (discussing "convergence"). *See generally* ECF No. 2041, AA Exhibit 800 ("First Glass Decl.") (extensively comparing American's proposal to industry standards).

At Delta, the pilots achieved an industry-leading three-year contract in July 2012 that provides dramatic improvements in wages and benefits, as well as enhanced furlough and Scope protections (including greater limitations on regional flying and codesharing). Roghair Decl. ¶ 65. Pilot compensation under the new Delta contract greatly exceeds what American pilots received under the APA's last agreement, the 2003-2008 CBA, and the gap is even wider when compared with the Company's current proposal of August 16. *Id.* At United, although the specific terms of the merged carriers' August 3, 2012 "agreement in principle" are currently confidential, public summaries indicate that the new accord equals or exceeds the pilot compensation standard set by the Delta contract. Roghair Decl. ¶¶ 76-79 and Exhibits 21-22.

Thus, among other factors, the new Delta and United agreements completely change the "convergence" analysis presented by Company witnesses in the first Section 1113 proceeding. *See, e.g.*, First Brundage Decl. ¶¶ 33-35. For example, in his direct testimony on rebuttal, Jeff Brundage asserted that American had "approximately a billion dollars of labor cost disadvantage." *See* Clark Decl. ¶ 15.[6] That figure was based on an analysis using the old Delta and United contracts and does not reflect changes to those agreements, including significant pay raises. Clark Decl. ¶¶ 15-17. Taking into account the new agreements, the contractual labor gap – as measured using the Company's own spreadsheet and all of their own assumptions – will shrink to nearly a quarter of its previous size, or $71 million in the coming year, with absolute "convergence" occurring soon thereafter. *Id.* American's demand for $370 million in contract concessions is thus five times larger than the real contractual labor gap. *Id.*

[6] In its case opposing American's first application, the APA demonstrates significant flaws with this claim. Although the APA incorporates all of those arguments here, it now focuses narrowly on changes to the Company's own calculation based on new agreements at Delta and United.

III. Recent Developments Relating to American's Consolidation Prospects

In the first Section 1113 application, the Debtors argued that the possibility of a merger or consolidation in bankruptcy was wholly speculative; Company witnesses denied having considered consolidation and insisted that the Company was committed to emerging from Chapter 11 as a stand-alone carrier. During the course of that first proceeding, the Company modified its position slightly, acknowledging its responsibility to consider consolidation as an alternative. *See* Decision at 35. Since the evidentiary record in that first Section 1113 proceeding closed, American's focus on consolidation has become more concrete, and the range of likely partners other than U.S. Airways has narrowed significantly.

As of early August, 2012, the Company has repeatedly confirmed its commitment to exploring consolidation during the Chapter 11 case, emphasizing that specific analysis is already well in progress. Public statements from CEO Tom Horton include the following updates:

- In late July, "AMR sent non-disclosure agreements (NDAs) to several carriers, including US Airways, to begin the process of evaluating potential merger partners." Roghair Decl. ¶ 80 and Exhibit 23. "[S]ince [American] has previously considered merging with other airlines, it has already assessed synergies and strategic implications of various partnerships." *Id.*.
- The Company's review of strategic alternatives should not take an extended period of time "because, as you might guess, we've done a lot of this analysis. . . . We've looked at alternatives for a long time. We know how to run the revenue synergy models, and we know how to evaluate the cost synergies and dyssynergies. So a lot of that work has been done. . . . It will be refined with the exchange of data. As we do that, I think we'll come to a pretty quick conclusion as to whether there is an avenue that will make this new American – which I think is going to be very strong and very profitable – even stronger." Roghair Decl. ¶ 81 and Exhibit 24.
- As of August 1, "[w]e're now at the point where we've got line of sight on revenue,

> we've got line of sight on cost. That baseline is strong and it is robust and so we can compare against that. So that's what we'll do with a very fair and disciplined and analytical process in collaboration with the board and the creditors committee."

Roghair Decl. ¶ 82 and Exhibit 25.

Meanwhile, while U.S. Airways received a non-disclosure agreement ("NDA"), the predicate for evaluation of potential consolidation with American in this Chapter 11 case, JetBlue had not received an NDA as of August 21, 2012. Roghair Decl. ¶ 83 and Exhibit 26. Indeed, JetBlue's Chief Executive emphasized that "we're not interested in receiving a non-disclosure agreement from American Airlines . . . [and] just not interested in participating in the consolidation path." *Id.* Thus, although American had previously sought to deflect focus on U.S. Airways by suggesting JetBlue as the more likely consolidation candidate, that suggestion has been publicly refuted.

ARGUMENT

THE NEW SECTION 1113 APPLICATION MUST BE DENIED BECAUSE THE COMPANY HAS FAILED TO MEET ITS BURDEN UNDER 11 U.S.C. § 1113

For purposes of the present proceeding, the substantive and procedural requirements prescribed by Section 1113(c) of the Code are not disputed. Rather, what is at issue here is whether American currently satisfies those requirements.

As discussed below in Part I of the Argument, the APA contends that when a debtor chooses to file a second Section 1113 application after denial of its initial application, the debtor must satisfy Section 1113's requirements at the time of that second application. Substantive statutory criteria, such as whether the employer's proposed contract changes are "necessary" for the debtor's reorganization, must be applied based on the relevant circumstances existing at that time. Depending on whether and how the debtor's needs and plans have changed since the prior application, the debtor's new proposal may reiterate its original "ask," may justifiably seek more

extensive concessions, or may need to relax previous demands, in order to satisfy Section 1113. Under any scenario, Section 1113 would accommodate the fluid Chapter 11 landscape by requiring the Bankruptcy Court's up to date assessment of the current circumstances.

Following that Part I discussion, the remaining portions of the Argument address specific Section 1113 requirements that the Company has failed to satisfy in this second application.

I. The Company Cannot Prevail on its New Section 1113 Application Unless it Currently Satisfies Each of the Requirements of Section 1113

Shortly after filing its New Section 1113 Application, the Company moved to limit the hearing and evidence on this New Application to a single issue, the CBA modification on domestic code sharing that was included in American's comprehensive pre-application proposal dated August 16, 2012. *See* Motion in Limine at 15. American thereby seeks to prevent application of Section 1113's criteria to its comprehensive new Section 1113 proposal based on current, updated facts, which establish material changes in the business plan and other circumstances directly relevant to the legal sufficiency of the August 16 proposal. Rather than burden the court with extensive, duplicative argumentation, we incorporate by reference the arguments and authorities set forth in the APA Response to Motion in Limine, and we highlight certain of those points here.

First, Section 1113 expressly requires that the Company's new, comprehensive August 16 proposal, the basis for the Company's current application to reject the pilots' CBA, satisfy the requirements of the statute, including that the August 16 proposal be "based on the most complete and reliable information available *at the time of such proposal*" and that it provide for only those "necessary modifications . . . that *are necessary* to permit the reorganization of the debtor" when evaluated in light of that "complete," current information. 11 U.S.C. § 1113(b)(1)(A) (emphasis added). Accordingly, every court that has been confronted with a new

(or "renewed") application following the denial of a previous Section 1113 motion has rightly evaluated that new application based on the current facts. *See, e.g.*, Transcript of Decision on the Debtor's Second Section 1113 Application in *Mesaba*, July 14, 2006, attached as Exhibit A to APA Response to Motion in Limine, at 8-9, 20-37; *In re Delta Air Lines*, 351 B.R. 67, 74 (Bankr. S.D.N.Y. 2006).[7]

Despite the plain text of Section 1113, the Company would invoke the "law of the case" doctrine to preclude this Court's consideration of any new facts when determining whether American's August 16 comprehensive proposal satisfies the statutory requirements. That doctrine by its terms, however, posits only that a court can choose to apply an earlier decision "to govern *the same issues* in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 830 (1988) (emphasis added). Here, new facts give rise to new issues in considering the Company's new proposal. Moreover, even when applicable, the law of the case doctrine expressly provides for reconsideration in light of the availability of new evidence. *See, e.g., United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991). The Company would erroneously foreclose such well-justified reconsideration by excluding the APA's new evidence establishing current facts.

The simple fact is that the Company overreached in its first Section 1113 application. Management sought to completely abrogate the pilots' CBA unless the APA acquiesced to two

[7] As the APA Response to Motion in Limine discusses at greater length, American's reliance on the bankruptcy court's third decision in *Mesaba* is misplaced. That decision involved consideration, on remand, of particular issues identified by the district court with respect to the same Section 1113 application filed at an earlier point in that same bankruptcy, not consideration of a new Section 1113 application. What is more pertinent here is that the bankruptcy judge in *Mesaba* did just what the APA asks this Court to do in this case, i.e., recognize that a second Section 1113 application must stand or fall on its own merits, so that the legal sufficiency of the Company's proposal and the Company's compliance with other Section 1113 requirements are determined based on full consideration of current evidence in the second proceeding. *See* APA Response to Motion in Limine at 6-8 (citing July 14, 2006 Transcript in *Mesaba* at 8-9, 20-37).

dramatic CBA modifications that were not, in fact, necessary to the Company's reorganization. This Court consequently denied the Company's motion, as required by the statute, leaving it entirely up to the Company whether, and at what point, to initiate a second Section 1113 proceeding. The Company has now filed a new Section 1113 application at a time when its business plan and other relevant circumstances have changed in significant respects. As with its first application, the Company now faces the burden to satisfy, in the ordinary course, the requirements that Congress prescribed – including that its August 16 comprehensive proposal to APA be based on the most "complete and reliable information available *at the time of such proposal*," and that the August 16 proposal be evaluated for compliance with other statutory criteria on that same "complete," "reliable" and current evidentiary basis. 11 U.S.C. § 1113(b)(1)(A).

II. The Company's August 16 Proposal, Demanding $370 Million in Concessions, Does Not Propose Only Those Necessary Modifications in the Pilots' Benefits and Protections That are Necessary to Permit American's Reorganization

Section 1113 requires American to have made a proposal, in advance of this New Application, seeking only those "necessary modifications in the employees' benefits and protections that *are necessary* to permit the reorganization of the debtor." 11 U.S.C. § 1113(b)(1)(A) (emphasis added). Thus, this Court must scrutinize the Company's August 16, 2012 proposal, which incorporates most of the old Term Sheet, to determine whether the 20% reduction in pilot labor costs ($370 million per year) and Scope and other concessions demanded in this proposal are the conditions currently "necessary" for American's reorganization.

In the first Section 1113 proceeding, the Company took the position that American's restructuring business plan sets the appropriate framework for the necessity analysis: if the Company's labor concession demands are required to meet the goals and targets embodied in the business plan, the Company argued, they satisfy the "necessary" criterion of Section 1113. *See*

Decision at 70 ("It is the Company that presented and relied upon its Business Plan as the cornerstone of necessity, and it must accept both the benefits and drawbacks of that decision."). Accepting solely for purposes of this proceeding the key role of the Company's internal business plan targets, the question here is whether the current version of American's business plan requires the old Term Sheet conditions the Company re-proposed on August 16 – particularly, a 20% reduction in labor costs, or $370 million per year in pilot labor savings, and allowances for outsourcing a number of jets operated at 88 seats up to 50% of the mainline fleet. On the present record, the answer is no.

American's own admissions suffice to defeat this New Section 1113 Application under the business plan standard of "necessary." As detailed above, the Company has admittedly adjusted its labor cost reduction target downward from 20% to 17% for all labor groups, including pilots, and [redacted]. *See supra* at 5-7. Furthermore, the Company [redacted] to APA on August 16, the day before filing the New Section 1113 Application and the same day American repromulgated its outdated demand for $370 million per year, or a 20% reduction in pilot labor costs. *Id.* In short, the Company's immutable "ask" of $370 million per year from the pilots no longer aligns with American's own business analysis and financial planning. The August 16, 2012 proposal demands far more than what is necessary for restructuring under American's own standard.

Moreover, the Company has publicly admitted that the old Term Sheet demands it proposed on August 16 are not the conditions now deemed necessary for American's successful reorganization as a stand-alone carrier. Instead, the Company has widely proclaimed that pilot cost savings of $315 per year will satisfy its needs, and that a successful restructuring requires

fewer pilot furloughs and less extensive Scope concessions than demanded under the old Term Sheet. *See supra* at 5-7.

In short, the Company advances a proposal here that has no present reality outside its pleadings, and that its own public statements refute. Even if a successful reorganization will require significant changes in pilots' employment conditions, the Court must deny the Debtors' current, August 17 Application because the Company's August 16 proposal greatly exceeds what is "necessary" under Section 1113. *See In re Sun Glo Coal Co., Inc.*, 144 B.R. 58, 63 (Bankr. E.D. Ky. 1992) (denying application under the "necessity" requirement although debtor had shown that it needed "major economic concessions" to avoid liquidation); *In re Fiber Glass Indus., Inc.*, 49 B.R. 202, 206-08 (Bankr. N.D.N.Y. 1985) (denying application under the "necessity" requirement despite the debtor's apparent need for "substantial modifications" of its contract to avoid liquidation).

III. The Company's August 16 Proposal, Demanding $370 Million in Concessions, is Not Based on the Most Complete and Reliable Information Available

Section 1113(b)(1)(A) requires the Company to prove that its pre-application proposal for contract changes, dated August 16, 2012, was "based on *the most complete and reliable information available* at the time of such proposal." 11 U.S.C. § 1113(b)(1)(A) (emphasis added). This means, among other things, that proposed cutbacks allegedly pegged to the labor cost savings requirements of American's broader business plan must align with the most recent revisions to that plan, reflecting realistic current projections based on "accurate" and "up-to-date" data. *See In re Mesaba Aviation, Inc.*, 341 B.R. 693, 713 (Bankr. D. Minn. 2006).

As detailed above, the Company's own admissions establish that the target for necessary labor cost savings in American's business plan has been revised downward from a 20% to a 17%

reduction in costs for all labor groups.[8] As recently as August 16, 2012 – the same day it delivered the proposal accompanying its New Section 1113 Application – the Company [redacted]. *See* Clark Decl. ¶¶ 8-10. But the Company did not base its August 16 proposal on that most current information and analysis. Instead, the Company's August 16 proposal demands the same $370 per year in pilot cost savings prescribed by the old Term Sheet, a number based on an inaccurate, now superseded 20% reduction target.

Likewise, the evidence demonstrates that Company's August 16 proposal failed to take account of other material changes and updates in the circumstances and information underlying its previous Term Sheet demands. For example, that proposal ignored the dramatic improvements in pilot compensation and working conditions at American's two largest competitors, Delta and United, which radically alter the Company's "convergence" and industry standards analyses. Similarly, the August 16 proposal ignored the Company's own evaluation and publicly stated conclusion that American could successfully restructure with fewer pilot furloughs and less extensive Scope concessions than those set forth in the old Term Sheet.

Accordingly, the New Application fails because the Company's supporting proposal clearly was not based on the most complete and reliable information available as of August 16, 2012.

IV. The Company Failed to Provide Contemporaneous Information Needed by the APA to Evaluate the Necessity of the August 16 Proposal

Section 1113(b)(1)(B) required the Company, *before* filing its New Section 1113 Application, to give the APA "such relevant information as is necessary to evaluate the [pre-application] proposal." 11 U.S.C. § 1113(b)(1)(B). As explained in APA's prior briefs (*see* ECF

[8] That evidence also indicates that the Company has concurrently revised other financial projections in its plan, including revenue and non-labor cost savings.

Nos. 2577, 2722), this is an affirmative duty that the Company must fulfill on its own initiative, whether or not APA has made a request for particular information. *See In re Century Brass Products, Inc.*, 795 F.2d 265, 273 (2nd Cir. 1986) (noting that Section 1113(b)(1) requires debtor to "make a proposal to the union accompanied by the kind of relevant and reliable information needed to evaluate it" before filing an application seeking rejection); *Teamsters Airline Div. v. Frontier Airlines, Inc*., No. 09 Civ. 343 (PKC), 2009 WL 2168851, at *8-9, 11, 13 (S.D.N.Y. July 20, 2009) (recognizing that the plain text of section 1113(b) "requires a debtor to make adequate disclosures before filing an application to reject").

Here, the Company did not timely provide current information required to evaluate the present necessity and validity of the $370 million in pilot cost savings and other Term Sheet demands embodied in its August 16 proposal. There can be no doubt that the Company in fact possessed that relevant information and analysis as of August 16, 2012. The Company's own admissions in the period preceding the New Application establish that [redacted]; that the Company had decided on a new 17% reduction target for all labor groups; that the Company had determined, consistent with this revision, that it now needed only $315 million per year from the pilots; and that the Company had also concluded that less extensive furloughs and Scope concessions would suffice for a successful reorganization. *See supra* at 5-7. Yet, American failed to make the required disclosures on these subjects even after the APA made a carefully targeted request on August 17, 2012.

The APA's August 17 letter properly identifies the categories of updated information needed to fairly evaluate the Company's August 16 concession demands in the context of American's revised, current business plan, updated financial projections, and related changes in

circumstances. Roghair Decl. ¶¶ 15-17 and Exhibit 5. American's failure to provide that information contemporaneously with its New Section 1113 Application requires denial of the Application.

V. The Company Has Failed to Meet and Bargain in Good Faith With APA

The Company's current dealings with the APA are incompatible with any notion of good faith negotiation toward mutually satisfactory contract modifications. 11 U.S.C. § 1113(b)(2).[9] As the foregoing discussion demonstrates, the August 16, 2012 proposal made to APA was not and is not "real" in any sense. American obviously does not contemplate ever reaching a deal with the APA on the terms set forth in its August 16 proposal, even under the best case scenario as defined by its own current business plan.[10] Indeed, American formulated its August 16 proposal for one and only one purpose: to obtain rejection of the APA's 2003-2008 CBA.

Company CEO Thomas Horton confirmed American's real plan three days after American's New Application: "to work with the union [the APA] to explore paths to a consensual deal which addresses our pilots' priorities while working *within the economic parameters of the tentative agreement*." Roghair Decl. ¶ 59. That admission is consistent with the other public and private statements detailed above, which confirm that the Company has adopted a new business strategy targeting a 17% reduction in labor costs.[11]

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[9] Because the statute requires the debtor to meet and negotiate in good faith during the period "ending on the date of the hearing," 11 U.S.C. § 1113(b)(2) – here, September 4, 2012 – there can be no doubt that the Court must assess American's present compliance with the requirement rather than merely reiterating its earlier findings.

[10] Likewise, since American's current business plan no longer requires a 20% reduction in labor costs, and no longer prescribes the $370 million per year in pilot concessions put forth in the August 16, 2012 proposal, that proposal cannot be justified as a vehicle designed to "lock in" the labor conditions that the Company allegedly needs in order to compare its stand-alone model and plan against other alternatives.

[11] It is entirely proper for this Court to consider the Company's statements away from the bargaining table in considering good faith. *See Bryant & Stratton Bus. Inst., Inc. v. N.L.R.B.*,

American could have chosen to proceed forthrightly, by acknowledging this new business plan in its last pre-application proposal to the APA and its New Section 1113 Application to this Court. Instead, those two documents are the only places where the comprehensive August 16 Term Sheet will ever exist as a proposal for a modified CBA. As this Court has recognized, a debtor acts in bad faith where it constructs proposals in "an attempt to . . . allow it to obtain outright rejection rather than a negotiated compromise." Decision at 92 (parenthetical quoting *In re Northwest Airlines Corp*., 346 B.R. 307, 327 (Bankr. S.D.N.Y. 2006)). The Company's actions here exemplify that kind of bad faith conduct. American's refusal provide updated information on the Company's business plan – or any other topic apart from codesharing and furloughs – only confirms that the comprehensive package of concession demands delivered on August 16 was not designed as a real proposal for actual good faith contract negotiations.

Moreover, by its own admissions, American's August 16 proposal is entirely disconnected from its true needs. American cannot in good faith cling to its demand for $370 million per year in cost savings and allowances for outsourcing large numbers of aircraft operated at 88 seats because it can no longer credibly claim that it is "essential" to do so. Decision at 89 (quoting *Delta*, 342 B.R. at 697 for the proposition that a debtor may adhere to a cost saving target in good faith only when its "ask" is "essential to its reorganization").

VI. The APA Has Good Cause for Refusing to Accept the Outdated Term Sheet, Demanding $370 Million in Concessions, Proposed on August 16

American's recent admissions make clear that the APA now has "good cause" to reject the Company's August 16 proposal recycling the outdated Term Sheet. The Decision on American's first Section 1113 application concluded that the APA would have had "good cause" if the Union had made a counterproposal meeting American's needs for a successful

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140 F.3d 169, 182 (2d Cir. 1998) (upholding a finding of bad faith based on "actions both away from and at the bargaining table").

reorganization. *See* Decision at 94. *Accord Northwest Airlines Corp.*, 346 B.R. at 328 (noting that a union has "good cause" when it offers "alternatives that would permit the debtor to reorganize"). This Court further clarified the "good cause" inquiry in *In re Hostess Brands, Inc.*, No. 12-22052 (RDD), 2012 WL 1994487 (Bankr. S.D.N.Y. May 14, 2012). There, the Bankruptcy Judge denied an application under Section 1113 because the union's counterproposal would have led to an earnings margin within one percentage point of the debtor's target, and the debtor did demonstrate specifically that the one percentage point was critical to its prospects for reorganization. *See* ECF No. 2895, Exhibit 1, Excerpts from *In re Hostess Brands, Inc.*

In connection with the Company's first Section 1113 application, the relevant comparison focused on the amount of savings generated by the APA's counterproposal, "between $260 and $270 million," and the Company's $370 million target reflecting a 20% reduction in pilot labor costs. *See* Decision at 94. That analysis must now be updated in light of American's new business strategy and revised financial projections. Given the Company's new target of 17% reduction in labor costs generally and $315 million in pilot savings, the difference between APA's counterproposal and American's stated target has now been cut in half. Adoption of the APA's counterproposal would lead American's earnings before interest, taxes, depreciation, amortization, and rent ("EBITDAR") margin to fall by less *than one quarter of one percent*.[12] Similarly, on specific terms such as the outsourcing of regional jets, American's admissions regarding the sufficiency of the contract modifications embodied in the June 27 Tentative Agreement demonstrate that the gap between Company targets and Union counterproposals is much smaller now than at the time of the first Section 1113 proceeding.

[12] Making the conservative assumption that American's annual revenue in future years will be $20 billion, a $50 million increase to labor costs (and resulting reduction to EBITDAR margin) equals 0.25% of revenue.

The Company has failed to make any showing that eliminating the remaining incremental EBIDTAR difference of less than 0.25%, or the other differences noted above, is currently necessary for American's restructuring. Under these circumstances, the APA had good cause for refusing to accept the Company's August 16 proposal.

CONCLUSION

For all the reasons set forth above, and based on the entire record in this proceeding, the APA respectfully urges this Court to deny the Debtors' August 17, 2012 motion seeking authorization under 11 U.S.C. § 1113(c) to reject the pilots' collective bargaining agreement.

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