UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LEROY "BUD" BENSEL, *et al.*, Plaintiffs, v. AIR LINE PILOTS ASSOCIATION, Defendant.	)	Civil Action No. 02-2917 (JEI)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SANCTIONS

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INTRODUCTION

The evidence demonstrates that Defendant Air Line Pilots Association ("ALPA") engaged in a persistent pattern of reckless, if not intentional, evidence destruction from the point at which this litigation was reasonably foreseeable in 2001 and its preservation duty was triggered, after suit commenced, and well into the discovery period. Key physical evidence that ALPA once possessed and that is central to Plaintiffs' claim no longer exists. ALPA admittedly never even instituted a litigation hold with respect to electronically stored information until four years after suit was filed. As a result, back-up tapes containing relevant communications were overwritten and computers of key witnesses were destroyed when ALPA internally acknowledged this litigation was likely and even after it was filed.

Specifically, ALPA's spoliation of evidence includes the following categories: (1) identifiable key documents; (2) email to and from key witnesses; (3) tapes used by ALPA to make its year-end email back-ups in 2001 and 2002 (the years at issue); (4) information stored on the lap top and desk top computers of nearly every key witness; (5) tapes used by ALPA in mid-2002 for a back-up as part of the installation of a new email computer software system; and (6) 269 boxes of documents shipped to Iron Mountain just after oral argument in the Third Circuit.

The prejudice to Plaintiffs from ALPA's spoliation of evidence is immeasurable. Because of Defendant's egregious conduct, Plaintiffs' efforts to compile the most important evidence in this case has been frustrated or rendered impossible. Severe sanctions are required to level the playing field and to assure that ALPA does not benefit from its failure to preserve its documents.

Plaintiffs request that sanctions be imposed against ALPA pursuant to this Court's inherent power, including: (1) striking of Defendant's Amended Answer and entering judgment

in Plaintiffs' favor; or, alternatively, (2) giving the jury appropriate instructions based upon the spoliation inference and/or barring countervailing evidence regarding the nature of electronic and other evidence destroyed; and (3) imposing monetary sanctions, including Plaintiffs' attorney's fees and costs incurred in bringing this motion and in connection with the Special Master Referral to address the electronic discovery spoliation.

FACTUAL BACKGROUND

This case arises out of American Airlines' ("American") acquisition of Trans World Airlines ("TWA") in 2001. Specifically, the case arises out of the placement of the TWA pilots on the American pilots' seniority list as a result of that acquisition. This "seniority integration" was the subject of negotiation between each pilot groups' union. The TWA pilots were represented by ALPA in that process. The American pilots were represented by the Allied Pilots Association ("Allied").

ALPA is the largest pilot union in the world. It represents the pilots of most of the major carriers in the United States and is an affiliate of the AFL-CIO. During the relevant time period, it had approximately 60,000 members. Allied is an independent company union which represents only the pilots of American.

A pilot's position on its airline seniority list is of the upmost importance. Seniority controls a pilot's pay, schedule and working conditions. It is no overstatement to say that ALPA's negotiations to protect the TWA pilots' seniority at American was the most important negotiation it ever conducted for the TWA pilots. The negotiation failed. The TWA pilots were ultimately placed on the American seniority list at the complete discretion of Allied and American in what was termed a "cram down." This cram down had a dramatic impact on the

TWA pilots. Only one-third of the most senior 2,300 TWA pilots were "integrated" into the American seniority list, and even that was done unfairly. The remaining two-thirds of the TWA pilots were simply "stapled" to the bottom of the American list, resulting in literally hundreds of veteran TWA pilots becoming junior to brand new hires at American.

I. ALPA Failed to Represent the TWA Pilots

ALPA breached its duty of fair representation to the TWA Pilots. It did so in an effort to gain favor with the American pilots and bring them into the ALPA fold after the American/TWA merger was completed. ALPA began its efforts to attract the American pilots in 2000 when it undertook what it termed the "Pilot Unity Campaign." The goal of this campaign was to add as members the pilots of American, Continental and Federal Express. The 11,000 plus pilots of American were the biggest prize, as that group was about the same size of the Continental and Federal Express pilot groups combined.

ALPA's unity efforts at American produced quick results. Its president, Duane Woerth, was invited to speak to Allied's Board of Directors in November 2000. Acchione Decl., Ex. 1 (Woerth Dep. Tr. 27:6 – 28:7). Although ALPA had long coveted the American pilots, this was the first time that any ALPA president had received such an invitation from Allied.[1] Acchione Decl., Ex. 1 (Woerth Dep. Tr., 29:2-7).

Woerth's speech was effective. The Allied Board established a committee to explore the possibility of a merger with ALPA, known as the "ALPA Exploratory Committee." Acchione Decl., Ex. 2 (APA BOD Minutes). This committee quickly went to work gathering information from ALPA. Acchione Decl., Ex. 3 (Johnson Dep. Tr., p. 85:14 - 86:12).

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[1] The American pilots were founding members of ALPA. In 1963, however, they broke away from ALPA to form their own independent union, the Allied Pilots Association ("Allied").

ALPA began researching potential issues it anticipated might arise if it were to merge with the Allied. Principal among these issues was whether ALPA would be bound by a $45 million fine which had been entered against Allied as a result of a sick-out it had staged against American or whether it would be bound by any judgments obtained from the passenger lawsuits pending against Allied arising out of the same sick-out.

The two unions continued exploring a possible merger throughout 2000 and into January of 2001. Acchione Decl., Ex. 4 (Johnson Letter). On January 10, 2001, things changed. On that day, American and TWA announced their transaction. At that moment, both unions knew the airline merger would require they negotiate with each other concerning the TWA pilots' placement on the American seniority list. They also knew that seniority negotiations are notoriously contentious ***and litigious***. Acchione Decl., Ex. 1 (Woerth Dep. Tr., 303:24 – 304:7).

In light of the seniority negotiation facing the TWA pilots, ALPA could no longer openly court the American pilots. However, ALPA president Duane Woerth viewed as his "legacy" the addition of the American pilots to ALPA. Acchione Decl., Ex. 5 (Rachford Dep. Tr., p.31:2-22). Woerth would not let his legacy be compromised by what he later referred to as a "little thing" like the American/TWA merger (the largest airline merger in history at the time). Acchione Decl., Ex. 6 (Woerth's 2002 speech to APA, p.2). Woerth continued to court the American pilots, and did so at the expense of the TWA pilots, who were quickly told by ALPA to surrender their fight.

On April 2, 2001, after only two meetings between the two unions' negotiating committees, ALPA surrendered its most powerful leverage in the negotiation. That leverage was a provision in its collective bargaining agreement that would require arbitration of any seniority

dispute. ALPA waived that provision in response to a motion filed by TWA in the bankruptcy court requesting the court reject ALPA's collective bargaining agreement.[2] ALPA conceded the motion on April 2 before it was even heard. On April 5, 2001, three days after ALPA surrendered in the bankruptcy court, President Woerth was back before the Allied Board of Directors for an historic second appearance (and one not disclosed to the TWA pilots). Acchione Decl., Ex. 7 (minutes for 4/5/01 Allied meeting). Woerth told the Allied Board that the TWA pilots needed to "get real" in their seniority expectations, forecasting to Allied that they would get no fight from ALPA in the continuing seniority negotiation. Acchione Decl., Ex. 8 (Reifsnyder Dep. Tr., p. 6); Ex. 9 (Reifsnyder email); Ex. 10 (TWA Pilot email complaint and Warner response). Woerth denies making the statement, but the evidence is otherwise. And, as forecasted by Woerth, ALPA put up no fight against Allied. Indeed, ALPA flatly rejected all prior and subsequent requests from the TWA pilots for any tough action against Allied. *See, e.g.*, Acchione Decl, Ex. 11 (Wilder Dep. Tr., pp. 86:16 – 91:17; 108:17 – 109:18; 135:7 – 140:15; 158:11 – 161:15).

Instead of fighting on behalf of the TWA pilots, ALPA enhanced its relationship with the American pilots. Two weeks after Woerth's "get real" comment to the Allied Board, a group of American pilots began a "card campaign" to re-join ALPA. Acchione Decl., Ex. 12. American pilots were provided cards which they could sign to express their interest in joining ALPA. *Id.* If a certain threshold number of cards were collected, they would be submitted to the National Mediation Board and an election would be held for the entire pilot group to vote on whether to join ALPA.

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[2] As part of the transaction, American required that TWA file bankruptcy so that it could shed debt and American could acquire TWA's assets as part of a bankruptcy "auction."

The campaign to join ALPA was spearheaded by American pilots Mark Hunnibell and John Clark, and supported by many other American pilots. ALPA's chief "organizer," Ron Rindfleish, worked closely with these American pilots on the campaign. While ALPA denies it had any material involvement in the campaign, the evidence demonstrates otherwise and ALPA's spoliation of evidence relevant to this issue casts further doubt on its denials.

Rindfleisch, the ALPA organizer, had frequent, almost daily contact with American pilots. American pilots sent him well over 150 emails during the time period at issue, and this number only represents the email saved from ALPA's spoliation.

Many of the emails from American pilots expressed outward hostility towards the TWA pilots. For instance, on April 16, 2001, American pilot Terry McCullough, a very frequent emailer with ALPA, sent an email to ALPA, care of Rindfleisch, which stated:

> "Maybe we should pledge our membership to ALPA in exchange for their agreeing to staple[3] the TWA pilots. We get the seniority and they gain 12,000 members instead of losing 2,300."

See Acchione Decl., Ex. 13.

The American pilot's suggestion of stapling all the TWA pilots foretold the pilots' future. ALPA and Rindfleisch made no attempt to discourage such harsh views among the American pilots with whom they dealt and did not disclose these communications to the TWA pilots. Instead, Rindfleisch continued corresponding with these American pilots, providing them with advice and encouragement.

ALPA significantly expanded its efforts to encourage the campaign just before Allied ended the seniority negotiations with the TWA pilots and imposed the "cram down. It then

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[3] Stapling refers to a seniority decision in the merger context that results in the addition of the union employees of the target company being added to the end of the purchaser's seniority list.

promised financial assistance to the American pilots' efforts. American pilot organizers requested that ALPA reimburse them for the expenses they incurred running the campaign. Acchione Decl., Ex. 14. On November 6, 2001, two days before the cram down was imposed, American pilot John Clark followed up with Rindfleisch: "What's going on with our reimbursement?" Rindfleisch responded: "John, I'm hoping to have an answer and check very soon." Acchione Decl, Ex. 15.[4]

Rindfleisch followed up and sent this message to Clark and Hunnibell: "Guys, please forward to me the original receipts of your expenses that you emailed to me on October 14. I apologize for the delay but as soon as we get the receipts we can get checks cut." Acchione Decl., Ex. 17.

Clark responded with this message to Rindfleisch: "I dropped the receipts ... in the mail today." Acchione Decl., Ex. 18. Rindfleisch replied: "Again, I must admit to you 3 guys that we will reimburse you for the expenses you already incurred, when we receive them." Acchione Decl., Ex. 19.[5]

This is the last written word produced from ALPA on the subject. ALPA denies it made the promised payment, but there is no question it made repeated promises to pay the campaign expenses. Moreover, there is no email or correspondence suggesting that it would not be paid.

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[4] At his deposition, Rindfleisch attempted to characterize the word "check," as used in his email, to mean the verb "to inquire," and not the noun meaning payment by negotiable instrument that Rindfleisch anticipated he would have "very soon." Acchione Decl., Ex. 16 (Rindfleisch Dep. Tr. 181:19 – 186:16).

[5] ALPA denies these statements were promises to pay and further claims Rindfleisch had no authority to pledge ALPA funds in this manner. The last email, however, which stated "we will reimburse you," was edited by ALPA legal and the head of finance before it was sent. Acchione Decl., Ex. 20 & 21. The lawyer who edited the email now incredibly claims he only reviewed the email for *grammatical errors* as a favor to Rindfleisch because he is not a good writer and was not reviewing the substance of the email. Acchione Decl., Ex. 22 (Warner Dep. Tr. 221:14 – 223:24).

ALPA's payment of the expenses would have not only violated federal labor law, *see* 29 U.S.C. § 481(g), but also clearly demonstrate ALPA's support for the campaign at a time when American and TWA pilots were adversaries.

ALPA denies it encouraged the American pilots' card campaign, even in the face of its written promises to pay their expenses. ALPA does admit one important fact: that the campaign produced many actual cards signed by American pilots. These cards were delivered to ALPA in early December, 2001. Acchione Decl., Ex. 1 (Woerth Dep. Tr., p. 308:12-19). The cards are now gone.

ALPA President Duane Woerth and several other ALPA executives were in Las Vegas at the time for an AFL-CIO meeting. On December 5, 2001 (the same day Rindfleisch promised to "get checks cut" for the American pilots), American pilot John Clark joined Woerth and the ALPA executives in Las Vegas. They treated him to a lavish meal and received from him the authorization cards he had collected from American pilots. Acchione Decl., Ex. 23 (expense form). Clark sent more cards (and expense receipts) to ALPA on April 30, 2002. Acchione Decl., Ex. 23a (letter). What happened to the cards next is a mystery. ALPA cannot find them and its 30(b)(6) witness on the topic could not explain their disappearance. Acchione Decl., Ex. 24 (Rosen Dep. Tr. 137:2 - 18).

While we may never know what information the cards contained, we do know that ALPA renewed its open campaign to organize the American pilots as soon as its representation of the TWA pilots was extinguished on April 3, 2002. That same day, American pilot Mark Hunnibell forwarded to Rindfleisch an ALPA/Allied merger resolution passed at Allied's Dallas/Ft. Worth base. Acchione Decl., Ex. 25. Soon thereafter, President Woerth was invited to speak at every

major base in the American system. Acchione Decl., Ex. 1 (Woerth Dep. Tr. 67:13-69:3).

The evidence shows that ALPA was working to organize the American pilots before, during and after its seniority "negotiation" for the TWA pilots. The evidence also shows that ALPA's desire for the American pilots infected the entire seniority negotiation and led to the unfairly harsh integration that resulted in this lawsuit. Along the way, ALPA destroyed the evidence that would have made Plaintiffs' case irrefutable. For that, it should be sanctioned.

LEGAL ANALYSIS

II. ALPA'S Duty To Preserve Arose in Early 2001

A party's "duty to preserve [evidence] exists as of the time the party knows or reasonably should know litigation is foreseeable." *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004). The evidence demonstrates that ALPA's duty to preserve in this case arose long before Plaintiffs filed their cross-claim against ALPA in October 2002. Yet ALPA failed utterly in meeting its duty to preserve relevant evidence not only during the pre-filing period but also during the four-year period after this litigation commenced when it actively destroyed electronic and paper files. *See infra* III & IV.

Despite the well established rule that preservation obligations extend to the period preceding litigation when such litigation is reasonably foreseeable,[6] ALPA asserts it need only

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[6] See *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746, 748 (8th Cir. 2004) (imposing sanctions where party knew or should have known litigation likely to arise); *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002) (spoliation if party has "some notice that the documents were potentially relevant to the litigation before they were destroyed"); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir.2001); *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."); *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, 2008 U.S. Dist. LEXIS 77199, at * 9 (D.N.J. Oct. 1, 2008); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

have maintained electronic data at the time Plaintiffs first specifically requested an electronic search four years after litigation commenced. Acchione Decl., Ex. 26 (Aug. 10, 2007 letter from Daniel Katz). But the duty to preserve evidence likely to be relevant to litigation is triggered not by a specific document request but instead by the event that makes litigation reasonably foreseeable. *See Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008) (rejecting defendant's argument that plaintiff was required to secure court order during litigation to prevent opponent from destroying evidence because preservation duty extends to pre-filing period when litigation is reasonably anticipated); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (rejecting claim that defendant had no duty to preserve electronic information until complaint was filed or plaintiff requested it); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 377 (D. Conn. 2007) (same). Indeed, Plaintiffs are aware of no reported opinion in which a party was found to have *no preservation duty* whatever until discovery requests were made. ALPA's refusal to acknowledge its obligation to preserve electronic evidence prior to an explicit post-filing request by plaintiff is consistent with its pattern of spoliation throughout the pre- and post-filing period.

A. January 10, 2001: Merger Announcement

ALPA's duty to preserve arose as early as January 10, 2001 when the American/TWA merger was announced. On that date, ALPA was not only aware of its statutory duty of fair representation, but its President also admits he anticipated litigation specifically *by* TWA pilots and *against* ALPA on that date because ALPA "*always* gets sued after *every* merger." *See* Acchione Decl, Ex. 1, (Woerth Depo. at 303-04) (emphasis added). When asked "when it was that you thought it was likely that ALPA might get sued by the TWA pilots or some segment of them," Woerth responded that he "*absolutely*" expected litigation on "The day the merger was

announced." Acchione Decl. at 1 (Woerth Dep. Tr. 303-04). ALPA's in-house counsel likewise concedes that duty of fair representation actions are a "common occurrence" in any airline merger. *See* Acchione Decl. at 27 (Holtzman Dep. Tr. 33).

ALPA's recognition that mergers typically result in such litigation, and its President's admission that he knew on January 10, 2001 that TWA pilots were likely to sue ALPA, triggered its duty to preserve evidence relevant to its duties to its TWA members, seniority negotiations, and any interaction with American pilots as of that date and going forward. *See, e.g., Stevenson*, 354 F.3d at 748 (spoliation sanctions appropriate where defendant destroyed tapes of communications associated with train crash because, *inter alia*, defendant knew that such circumstances give rise to litigation); *Zubulake*, 220 F.R.D. at 217 (duty arose upon date at which supervisor admitted he feared litigation would arise though civil claim was not filed until a year later).[7]

B. March 15, 2001: TWA's Bankruptcy Proceeding

Even if Defendant's duty to preserve did not arise on January 10, 2001, it surely arose on March 15, 2001 when, as foreseen by Woerth, litigation quickly ensued. On that date, TWA filed a motion against ALPA in the bankruptcy court requesting the court reject its collective bargaining agreement to eliminate protection of the TWA pilots' right to arbitrate its seniority dispute with Allied —a matter at issue in this litigation. Acchione Decl., Ex. 28 (TWA's Section 1113 motion).

Such a closely related proceeding put ALPA on notice that, at a minimum, evidence

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[7] *See also Scott v. IBM Corp.*,196 F.R.D. 233, 249 (D.N.J. 2000) (duty arose upon discharge of employee because, though litigation was not guaranteed, it was reasonably foreseeable where there was a litigious history and defendant knew employee was protected under federal employment laws).

relevant to the merger and TWA pilots' seniority rights must be preserved. *See, e.g.*, *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 589 (D. Minn. 2005) (rejecting defendants' argument that it had no preservation duty until claim was filed, finding duty arose when bankruptcy court began investigating potential fraud by defendants though defendants were not a party to that proceeding); *In re Krause*, 367 B.R. 740, 765 (D. Kan. 2007) (debtor may have been on notice of duty to preserve electronic data relevant to federal government's proceeding in bankruptcy court to exempt tax debt from discharge though debtor did not receive IRS summons on the separate matter against him until four months later).

C. May 2001: ALPA Receives Notice that TWA Pilots Were Seeking Legal Representation

On May 7, 2001, a TWA pilot shared with ALPA attorney David Holtzman a confidential memo from the TWA pilots' independent counsel stating that "[i]ndividual pilots have expressed interest in retaining counsel who would be asked to represent the TWA pilot groups in litigation against APA, [American Airlines] and perhaps ALPA . . . ." *See* Acchione Decl., Ex. 29 (May 7, 2001 email to David Holtzman and attached memo from Roland Wilder). Holtzman was thus on notice of a credible threat of litigation sufficient to trigger the duty to preserve evidence. *See Zubulake*, 220 F.R.D. at 217; *Kounelis v. Sherrer*, 529 F.Supp. 2d 503, 519 (D.N.J. 2008); *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 591 F.Supp.2d 1038, 1064 (N.D. Cal. 2006) (duty triggered when plaintiffs began interviewing litigation counsel).

D. Fall 2001: The Formation of the Aviation Workers' Rights Foundation & ALPA's Recognition of the Likelihood of Suit

After the threats of suit in May 2001, the foreseeability of litigation only increased throughout 2001. TWA pilot animosity towards ALPA mounted through the summer of 2001 as the pilots grew increasingly frustrated as their union did nothing to help. Rejected by their union, a group of TWA pilots formed a fund-raising foundation, the Aviation Workers' Rights Foundation ("AWRF") in September 2001. In a September 4, 2001 memo and fundraising letter to TWA pilots, plaintiff Bud Bensel noted that AWRF was proposing "litigation to protect the rights of TWA pilots" and highlighted the pilots' specific grievances with ALPA, including its "abuse of the duty of fair representation." Acchione Decl., Ex. 30, p. 3 (ALPA 047986). A November 28, 2001 memo from ALPA attorney Clay Warner to ALPA President Duane Woerth attached both Bensel memos, and concluded that the "purpose of the AWRF is to fund litigation on behalf of TWA pilots, and it seems clear that ALPA is the primary target of that litigation." Acchione Decl., Ex. 30 (Memo from Clay Warner to Duane Woerth).[8] On November 29, 2001, Woerth agreed with that assessment in a letter to plaintiffs Hollander and Case stating: "Material distributed by that Foundation makes clear that one of its primary purposes is to bring legal action against [ALPA]." Acchione Decl., Ex. 32. AWRF retained the legal services of Boies, Schiller and Flexner LLP. If ALPA wasn't on notice by this point, the formation of the foundation and ALPA's recognition of the credible litigation threat it posed triggered its duty to preserve in November 2001 when it became aware of the AWRF's purposes and viewed them as credible.

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[8] ALPA was aware of the threat even prior to the Nov. 28 memo: a November 16, 2001 e-mail from ALPA counsel noted the "likelihood of litigation against ALPA by TWA pilots." Acchione Decl., Ex. 31 (Nov. 16, 2001 email from Clay Warner to Steve Tumblin).

E. December 2001: The National Mediation Board Proceeding

The proceedings before the National Mediation Board relating to the "single carrier" issue solidified the adversarial position of TWA pilots and ALPA.[9] Indeed, ALPA's duty was triggered, *at the very latest*, on December 13, 2001, when the foundation, in a filing with the National Mediation Board, alleged with specificity ALPA's conflict of interest and its failure to represent the TWA pilots' interests.[10] Acchione Decl., Ex. 33 (AWRF December 13, 2001 NMB filing); *Cf. Zubulake*, 220 F.R.D. at 216 (duty to preserve arose *at the latest* when employee filed administrative complaint alleging discrimination though civil claim had not been filed). Assuming, *arguendo,* it was not already clear what claims were at issue, the NMB filing's extensive detail regarding ALPA's conflict of interest and the inadequacy of its representation in seniority negotiations put ALPA on notice of the specific types of information that would need to be preserved, including campaign cards, email and other communications between ALPA and American pilots, and any information regarding seniority negotiations.

F. February/March 2002: APA's Litigation & ALPA's Recognition that It Would be Joined

At the very latest, ALPA's duty arose in February 2002, when Allied filed its claim against Plaintiff Bensel in the United States District Court for the Northern District of Texas. ALPA legal counsel Jonathan Cohen noted in an early March 2002 meeting with ALPA IT staff

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[9] The seniority list created by Allied and American to be crammed-down the TWA Pilots would take effect upon the Mediation Board's determination that American and TWA are a single carrier.

[10] AWRF noted that given ALPA's efforts to organize other pilots, "the allegation could certainly be made that ALPA intends to subvert the interests of the 2,300 TWA pilots in favor of the interests of the substantially higher number of pilots now represented by APA;" that "ALPA should be filing an objection to the single carrier filing;" and that "ALPA is failing to exercise its authority and duty to protect and represent TWA pilots. Acchione Decl. 33 (Dec. 13, 2001 letter from AWRF counsel to NMB)

that the APA case "cld [sic] become a lawsuit against us" and was made aware that data could be lost if back-up tapes were not preserved. Acchione Decl. 34 (Wagner Notes from 3/11/02 meeting). This recognition obligated ALPA to preserve evidence relevant to the TWA pilots' claim. *See In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060, 1069 (N.D. Cal. 2006) (defendant's duty attached where it was reasonably foreseeable that it would be later joined as a defendant in pending litigation); *Cf. In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 193 (S.D.N.Y. 2007) (duty to preserve information relevant to a later claim for securities fraud triggered when legal counsel's memo warned that defendants' pending bankruptcy proceedings subjected the company to a "heightened risk" of litigation and recognized the need to preserve information). Cohen's prediction came to fruition when, after APA's claim was dismissed on jurisdictional grounds and refiled in this Court, Plaintiff filed their cross-claim against ALPA in October 2002.

III. ALPA Violated Its Duty to Preserve Evidence Likely to Be Requested in this Litigation

"'While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation, it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.'" *Mosaid*, 348 F.Supp.2d at 336 (quoting *Scott*, 196 F.R.D. at 249); *Zubulake*, 220 F.R.D. at 216. Failure to retain or preserve such evidence gives rise to a claim of spoliation. *Mosaid*, 348 F.Supp. 2d at 335. This case presents a classic claim of spoliation.

Indeed, ALPA utterly failed to take even the most elemental step to preserve materials likely to be requested in clearly foreseeable litigation—placing a litigation hold. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."

Zubulake, 220 F.R.D. at 218. The required hold includes electronic data. *See John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (duty to preserve relevant information includes electronically stored information) (citing *Fujitsu,* 247 F.3d at 436; *see also Zubulake*, 220 F.R.D. at 216-18

Moreover, the duty to preserve requires a party to speak directly with the custodians of relevant documents and key witnesses likely to have relevant information to ensure there is no spoliation. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004). Though parties need not preserve every document and file, "[t]he obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation." *Miller v. Holzmann*, 2007 U.S.Dist. LEXIS 2987, at *19 (D.D.C. Jan. 17, 2007) (citations and quotations omitted). To ensure relevant electronic data is not destroyed, a party must identify all relevant electronic data and take steps it ensure its preservation, which requires determining how systems are backed up, how data is retained, and where files are stored. *Zubulake*, 229 F.R.D. at 432. Finally, the obligation does not end with the placement of the hold; the obligation is ongoing and requires the party to monitor compliance and periodically reissue the hold. *Id.* ALPA took none of these steps until November 2006.

ALPA's electronic document destruction and retention policy provided that daily, weekly, monthly, quarterly and annual back-up tapes were created. Acchione Decl., Ex. 35 (McCarthy Dep. Tr., 20-24). With the exception of annual tapes, each back-up tape is overwritten by the tape for the next corresponding period. *Id.* Any email communications or files actively deleted by a user would not appear on the next sequential back-up tape. *Id.* (McCarthy Dep. Tr., 26, 30-31). Annual back-up tapes, however, are preserved for three years; under that policy, the 2001 and 2002 annual back-ups tape would not have been overwritten

until, at the earliest, the end of 2004 and 2005, respectively—long after this litigation began. *Id.*

It is undisputed that ALPA placed a litigation hold neither at the time litigation was reasonably foreseeable in January 2001 and data and documents could still have been preserved, nor even after the litigation began in late 2002 when it was unquestionably obligated to do so.[11] Nor did it suspend its routine electronic document destruction system. *See* Acchione Decl., Ex. 1 (Woerth Depo. at 305).[12] Such a hold would have prevented key players in this litigation from deleting relevant information from email accounts, desktops and servers so that it would be retained on back-up tapes. Suspension of ALPA's routine document destruction policy would have prevented back-up tapes from being overwritten and preserved information from computers that were replaced or scrubbed. And it would have ensured preservation of physical documents that go to the heart of this litigation.

But ALPA did not place a hold until *four* years after this litigation began. Acchione Decl. (Wagner Depo. at 119). This is so even though ALPA's IT director and legal counsel were aware in March 2002, at a point when back-up tapes created and computers used in 2001 and 2002 could have been preserved, that failure to take affirmative steps to preserve back-up tapes would result in the loss of data. Acchione Decl., Ex. 36 (Wagner Dep. Tr. 116:16 – 119:23). As a result, and as detailed below, substantial electronic information from the relevant time period

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[11] Rule 37(e)'s exemption from sanctions when the failure "to provide electronically stored information lost as a result of the routine, *good faith*, operation of an electronic information system," Fed. R. Civ. P. 37(e) (emphasis added), provides ALPA no safe harbor as "good faith" requires intervention, through a litigation hold, to suspend the routine operation of a normal retention/destruction policy once the party has a preservation obligation. *Norwalk Cmty. Coll.*, 248 F.R.D. at 378; Fed. R. Civ. P. 37(e), advisory committee notes, 2006 amendments.

[12] ALPA President Duane Woerth admitted that there was no "specific order . . . that all documents relating to TWA pilots . . . need to be retained . . . for the purposes of potential litigation". Acchione Decl., Ex. 1 (Woerth Dep. Tr., p. 305).

(2001-2002) was not preserved and key physical documents have been lost. Given that ALPA had early notice of the basis for the TWA pilots' claim, it was reasonably foreseeable that the information lost—key communications and documents regarding the ALPA/American pilots campaign and information regarding the seniority integration negotiations—would be requested in litigation.

A. Key documents were destroyed.

1. The campaign cards

The campaign cards collected by ALPA from the American pilots were true "smoking guns." Now they are gone. These were physical cards completed by American pilots expressing their interest in holding an election to make ALPA their bargaining agent. ALPA now denies the campaign was *its* campaign but the cards prove ALPA's inextricable link to the campaign. The first batch of cards was delivered to ALPA in December 2001, a month after the cram down. Acchione Decl., Ex. 1 (Woerth Dep. Tr. 308). The second batch of cards was delivered to ALPA in April 2002, just after ALPA lost their representational rights of the TWA Pilots. It can be easily inferred that the face of the cards themselves, and what may have been written on the cards, would have implicated ALPA in its scheme. Plaintiffs, the Court and the jury will never have the opportunity to see the actual cards collected by ALPA, the most direct evidence of its conflict of interest.

In light of the seriousness of this matter, Plaintiffs sought the deposition of a Rule 30(b)(6) designee of ALPA most familiar with the cards. The ALPA witness, however, could not (or would not) provide information concerning the cards' disappearance. Demonstrative of ALPA's reckless disregard of their obligations, the witness testified that ALPA attorney Daniel

Katz was the *only* person he talked with in his purported "investigation" to find out what happened to the cards. Acchione Decl., Ex. 24 (Rosen Dep. Tr., pp. 134-44).

2. A campaign card database

ALPA contends the missing campaign cards are unimportant because the data from the cards is on a spreadsheet it produced. This argument is not only wrong, but also identifies additional spoliation on ALPA's part.

The ALPA spreadsheet relied upon is attached as Exhibit 37 to the Acchione Declaration. It was sent to ALPA on December 18, 2001 as an attachment to an email from American pilot Clark to Rindfleisch and ALPA Vice President Jerry Mugerditchian. Acchione Decl., Ex. 38 (December 18, 2001 email). In the email, Clark wrote:

> Since you and Jerry have inquired about the contents of the ***card database I provided in disk form with the cards***, I have attached a spreadsheet that is drawn from previously developed databases. ... Most of the data was NOT supplied to us directly by the person signing the card. It has been extracted from a number of different sources, some of which may be confidential, so the information should be managed/used with care. (Emphasis added)

Id. The email refers not only to the cards, but the "card database [Clark] provided in disk form with the cards." *Id.* That disk, in addition to the cards themselves, were apparently destroyed by ALPA. Neither the disk nor a hard copy of its contents was produced. Importantly, Clark's communication was sent after AWRF's filing with the Mediation Board alleging ALPA's breach of fair representation and after ALPA's President and in-house counsel acknowledge that a claim by AWRF was likely. A proper litigation hold would have obligated ALPA to ensure the cards and the database were preserved. Finally, the spreadsheet produced by ALPA, Exhibit 37, as Clark aptly notes in his email, is not a *summary* of the cards. It is something entirely different. We will never know what information the cards contained, the result clearly intended by ALPA's

destruction.

3. Allied's 40 questions to ALPA

On January 31, 2001, Allied's Board of Directors passed a resolution requiring its ALPA Exploratory Committee to "find answers to the board's approximately 40 written questions [regarding a potential merger with ALPA]." Acchione Decl., Ex. 39 (APA BOD Resolution). These "40 questions" were prepared at a time when the seniority negotiation between the TWA pilots and the American pilots was being arranged. It is reasonable to believe that the document contained questions about the TWA pilots and ALPA's intent concerning the seniority integration.

The "40 questions" and ALPA's responses to these questions are potential key documents. ALPA admits it once had possession of the document, but it no longer exists today. Acchione Decl., Ex. 3 (Johnson Dep. Tr. 83:1 – 99:4). Like the campaign cards and database, the questions and any responses are gone.[13]

B. An Untold Amount of Relevant Email was Permanently Deleted and Any Back-up Tapes Containing Them Were Destroyed.

Email was one of the principal modes of written communication at ALPA in 2001 and 2002. Acchione Decl., Ex. 40 (Declaration of Robert Pastore). While ALPA produced some responsive email, there were areas where the production was sparse or nonexistent, leading to the conclusion that relevant email was destroyed. Plaintiffs, in fact, know that email was destroyed because: (1) ALPA destroyed its email back-up tapes from the years at issue—2001 and 2002—and yet, substantial relevant email was forensically retrieved from the oldest surviving tape from 2003; (2) Third-parties produced and testified to relevant email from ALPA that had not been

[13] Plaintiffs also requested that Allied produce the 40 questions and responses. Like ALPA, that union cannot find the document either.

produced; and (3) The email ALPA did produce refer specifically to other email which were not produced and discuss matters relevant to this litigation for which it is easily and fairly inferred that other email were sent on the subject.

1. ALPA destroyed its email back-up tapes from the years at issue, and yet, substantial relevant email was retrieved from a tape outside the relevant time period

A brief discussion of Plaintiffs' efforts to discover email is in order. Plaintiffs began their depositions by deposing the witnesses closest to the American pilot campaign -- Hunnibell, Clark, Rindfleisch and Mugerditchian. From those depositions it was clear that email had been exchanged between ALPA and the American pilots which had not been produced.

Plaintiffs followed up with ALPA after the initial deposition to inquire why relevant email were not produced. In response, ALPA sought to retrieve deleted email. In a January 8, 2007 letter, ALPA's counsel explained the efforts it made:

> Using the tape set from December 2003 [the oldest tapes available] ALPA was able to restore the requested mailboxes to a backup email server. The contents of each user's mailbox were then exported to a Microsoft Personal Information Store file and placed on a CD-ROM.

Acchione Decl., Ex. 41.

After it restored mailboxes from the 2003 tape, ALPA produced over 600 additional pages of email exchanged between American pilots and Rindfleisch and/or Mugerditchian. ALPA, however, limited the email restoration to Rindfleisch and Mugerditchian. Plaintiffs then requested the restoration be expanded to sixteen specific officers and staff members known to have received email from Rindfleisch concerning the American pilot card campaign. In an April 23, 2007 letter, ALPA represented it had complied with that request: "You now have the documents restored from the tapes for the 16 individuals in question from January 1, 2001

through April 3, 2002." Acchione Decl., Ex. 42. ALPA repeated that representation at a November 30, 2007 hearing at which ALPA's counsel stated: "The functioning backup tapes have already been searched. . . . There is no justification for going through these back-up tapes in any greater detail than has been done." Acchione Decl., Ex. 43 (November 30, 2007 hearing tr., 13:13 – 14:5).

These representations proved to be false. As part of the discovery he facilitated, Special Master Hedges ordered ALPA to search the existing tapes using expanded search terms requested by Plaintiffs. Forty-five additional relevant emails were produced, most of which were emails sent to ALPA by American pilots. An internal ALPA email was particularly probative. On December 19, 2001 (6 days after the AWRF submission to the Mediation Board), the head of ALPA's representation department wrote to Rindfleisch: "As to [Allied], do you know whether Duane [Woerth] did as we were told he would do and cut off the ALPA support there?" Acchione Decl., Ex. 44.

Plaintiffs' efforts did not end there. Special Master Hedges then granted Plaintiffs leave to search the back-up tapes. Twenty-five additional relevant emails were restored. Twenty of those emails were messages from American pilots forwarded by Rindfleisch to a large group of ALPA executives, including the President, Duane Woerth. Acchione Decl., Ex. 45 (emails).

As shown, almost all of the email to and from the American pilots which ALPA produced came from the 2003 back-up tape. These emails had been deleted by ALPA, and were restored from that tape. The tapes from 2001 and 2002 should also have been available for that purpose. ALPA, however, destroyed those tapes well after this litigation commenced. Acchione Decl., Ex. 46 (ALPA's Responses to Plaintiffs' Third Request to Admit). That spoliation precludes the

retrieval of the email deleted and backed up in those years. We will never know what deleted email those tapes contained, but in light of the substantial relevant email retrieved from the 2003 back up tape, it must be inferred that the 2001 and 2002 tapes would have contained more relevant deleted email.

2. Third-parties produced and testified to relevant email from ALPA that ALPA failed to produce

Plaintiffs subpoenaed the files of Dewey LeBoeuf, a law firm that worked with the TWA pilots during the time period at issue. That firm produced a number of relevant emails that were sent by ALPA representatives but which ALPA failed to produce. Acchione Decl., Ex. 47 (sample of these emails).

None of the email in Exhibit 47 is on the 2003 back up tape. They were thus either on the 2001 and/or 2002 tapes or deleted by the user before being backed up. Either way, it is email ALPA had a duty to preserve and did not.

Additionally, Terry McCullough, another American pilot who frequently exchanged email with Rindfleisch, testified that Rindfleisch sent him email in the relevant time frame. Acchione Decl., Ex. 48 (McCullough Dep. Tr. 25:4 – 28:16; 43:19 – 44:15). There were no emails from Rindfleisch to McCullough on the 2003 back up tape. Like the emails to the law firm, they must have been on the 2001 and/or 2002 tapes or deleted by Rindfleisch before being backed up.

These two areas of undisputed spoliation of email are not isolated events. It is reasonable to infer that relevant email were either destroyed as a result of ALPA's failure to impose a litigation hold or lost when ALPA failed to preserve the back-up tapes from 2001 and 2002.

3. The Retrieved Email Refer To Other Email Which Do Not Exist.

Much of the email restored from the 2003 tape was email ALPA *received* from American pilots. Very little email *sent by* ALPA to American pilots was on that tape. ALPA claims there were no such messages. The context and subject of many of the emails restored, however, leads one to infer that much more email existed at one time. A summary of some of these emails are detailed below:

Date	**Comments**
9/5/00	Email from American pilot Jim Gross to Rindfleisch thanking him for "forwarding those messages." We do not have Rindfleisch's email to Gross forwarding the messages.
3/9/01	Email from American pilot McCullough to himself attaching excerpts from a deposition given in the TWA bankruptcy case. The email was printed from an ALPA computer, but we have no record of its transmission to ALPA.
4/16/01	Email from McCullough to Rindfleisch responding to a request from Rindfleisch to know when the Allied election will be. We do not have the request from Rindfleisch to McCullough.
6/6/01	Email from American pilot McCullough to himself regarding Allied's agreement in principle with American. The email was printed from a ALPA computer, but we have no record of its transmission to ALPA.
6/15/01	Allied email regarding Boston Domicile Meeting of American pilots. The email was printed from an ALPA computer, but we have no record of its transmission ALPA.
7/26/01	Email from American pilot Hunnibell to ALPA Campaign Support List. The email was restored from the 2003 back-up tape, but we have no record of its transmission from ALPA.
11/12/01	Email from American pilot Clark to John Ley [believed to be an American pilot]. The email was printed from an ALPA computer but we have no record of its transmission to ALPA.
11/18/01	Email from American pilot John Clark to American pilot Michael McClellan. The email was printed from an ALPA computer, but we have

no record of its transmission to ALPA.

12/29/01 Email from Clark to Rindfleisch regarding Allied statements about the ALPA campaign. He states "I will need to know what you can get on the questions Mark [Hunnibell] asked." We do not have the "questions Mark asked" or any response.

12/21/01 Email from Rindfleisch to Hunnibell and Clark stating he will "try to get more info [regarding the National Mediation Board proceeding filed by Allied], but everyone is gone for the holiday and I won't be back until Jan 3. I will respond then if I have some answers." We have no follow-up.

1/15/02 Email from Clark to Rindfleisch and Mugerditchian which states: "I have received several cards since providing the majority I gave to ALPA late last year. I will send them to you if that is acceptable and Mark will provide an updated data base upon request. Please advise. Also, the PO Box I have as a receptacle for these cards is up for renewal on March 4, 2002. It can be renewed in 3 month increments. Please advise how many months ALPA would like for me to renew the box." We have no response.

1/18/02 Email from American pilot Samuel Mayer to American pilot Hunnibell regarding Allied negotiations with American. The email was printed from an ALPA computer but we have no record of its transmission to ALPA.

3/5/02 Email from "Mark" to "Ron" regarding the National Mediation Board ruling and required showing of interest to force an election. He states "if only 35% of the combined work force need to have signed cards, there may be a narrow opening (assuming everyone at TWA signed a card)." We have no record of the transmission of this email to ALPA and no follow up.

3/6/02 Email from Rindfleisch to group of ALPA executives forwarding an Allied information hotline regarding the National Mediation Board ruling. We have no record of the transmission of this email to ALPA.

3/7/02 Email from Rindfleisch to group of ALPA executives forwarding an Allied information hotline regarding Allied Board meeting. We have no record of the transmission of this email to ALPA.

3/7/02 Email from Rindfleisch to group of ALPA executives forwarding an Allied update regarding Allied board meeting. We have no record of the transmission of this email to ALPA.

Acchione Decl., Ex. 49 (copies of these emails are in chronological order).

Clearly there is missing email between Rindfleisch and the American pilots on a range of topics relevant to this litigation. There is also missing email internal to ALPA regarding the American pilots' campaign.

ALPA produced thirty-four emails which Rindfleisch sent to a large group of ALPA executives, including the president, vice-president, general counsel and other department heads. These 34 emails were all messages sent to Rindfleisch from American pilots which he then forwarded to the executives. Acchione Decl., Ex. 50 (copies of the emails). In all, these 34 messages had over 550 recipients, and yet, ALPA produced ***only one*** follow up email from any of the recipients. Such a result is implausible.

Any claim that the recipients never replied to these e-mails because they were sent for informational purposes only is unavailing. The mailbox of Rindfleisch restored from the 2003 tape produced more than 550 messages he sent to ALPA executives and only one reply to him. There can be little question that ALPA deleted substantial relevant email and that any hope to restore that deleted email is precluded by its destruction of the back-up tapes from 2001 and 2002 and failure to instruct key ALPA players not to delete or destroy relevant communications or documents

C. The Laptop and Desktop Computers From Most of the Key Witnesses Were Destroyed.

Relevant email can also be retrieved from the computers of the witnesses. The undisputed facts are, however, that ALPA disposed of, or wrote over, the computers of nearly all of the key witnesses in this case. ALPA admits to thirty-one separate acts of spoliation in this regard beginning in late 2001 when ALPA unquestionably acknowledged the threat of litigation.

Acchione Decl., Ex. 51 (Defendant's Responses to Plaintiffs' Second Set of Requests to Admit).[14] A summary of this destruction follows:

Witness	Date of Destruction	Item
Duane Woerth (President)	9/27/01	Desktop
	11/1/01	Desktop
	4/13/05	Desktop
Howard Attarian (Ass't to President)	10/18/01	Desktop
	After 11/01	Desktop
	11/29/06	Desktop
Jerry Mugerditchian (Vice-President)	After 11/01	Desktop
	1/29/03	Laptop
	5/22/06	Desktop
	11/7/06	Laptop[15]
Jonathan Cohen (Director of Legal)	After 11/01	Desktop
	1/1/02	Desktop
Seth Rosen (Director of Representation)	1/1/02	Laptop
	9/27/05	Desktop
Clay Warner (Legal Staff)	2/28/02	Laptop
David Holtzman (TWA Contract Admin.)	5/20/02	Desktop
	2/18/04	Laptop
Ken Cooper (Representation)	4/26/01	Laptop
	After 11/01	Desktop
Ron Rindfleisch (Representation)	8/5/01	Laptop
	8/31/01	Desktop

[14] Plaintiff served ALPA with a Second Set of Request for Admissions on July 13, 2007. Defendant failed to respond and, accordingly, pursuant to Fed.R.Civ.P. 36, Plaintiffs' requests are deemed admitted.

[15] In explaining the lack of email sent from his account, Mugerditchian testified he did not know how to "turn on" a computer. Acchione Decl., Ex. 52 (Mugerditchian Dep. Tr. 162:2 – 16). In fact, Plaintiffs now know that four of the destroyed computers were assigned to Mugerditchian.

	4/1/06	Laptop
Jalmer Johnson (General Manager)	5/21/04	Laptop
Paul Hallisay (Director of Gov't Affairs)	1/1/02	Desktop
	6/30/04	Desktop
	6/30/06	Desktop
Bill Roberts (Economic Affairs)	After 11/01	Desktop
	10/31/02	Laptop
	10/11/06	Desktop
Ann McCahron-Schultz (Economic Affairs)	9/30/03	Laptop
Kevin Barnhurst (Director of Finance)	12/31/05	Desktop

All of this destruction occurred after this litigation was reasonably foreseeable; more than one-third of these computers were destroyed or written over after suit was filed; and some destruction occurred while discovery was ongoing. Importantly, Jerry Mugerditichian's laptop was destroyed just *two* days before he was deposed. Plaintiffs did not know of the destruction at the time of the deposition. Moreover, Mugerditichain denied having an ALPA-provided laptop at all. Acchione Decl., Ex. 52 (Mugerditchian Dep. Tr., pp. 181:25 – 182:2). See *Kvitka v. The Puffin Co.*, LLC, 2009 U.S. Dist. LEXIS 11214 (M.D.Pa. 2009)(destruction of laptop during pendency of litigation warranted most severe sanction, particularly where party was "manipulative and evasive throughout the litigation.").

The prejudice to Plaintiffs from ALPA's failure to preserve these 31 computers of its senior management and staff cannot be overstated. Excluding Holtzman and Barnhurst, these witnesses were all part of the group of 16 union leaders to whom Rindfleisch forwarded the American pilot email. ALPA produced only one response to those 550 plus messages and now wants Plaintiffs and the Court to believe there were no other responses. The computers from

which relevant email could have been restored, and which might have mitigated the prejudice resulting from the destruction of the 2001 and 2001 back-up tapes, are gone. The tapes which backed up that email are also gone.

It is reasonable to conclude that the destroyed computers contained relevant data. Like the destroyed back-up tapes, this conclusion is bolstered by what ALPA left behind. The computer of one witness, Robert Christy, survived the spoliation. Special Master Hedges granted plaintiffs leave to search Christy's computer. That search produced discoverable email and documents not previously produced. *See, e.g.*, Acchione Decl., Ex. 53 (examples of documents retrieved from Christy's laptop).

It must be concluded that the 31 computers of key players in this litigation disposed of by ALPA would also have contained relevant documents.

D. In July 2002, ALPA changed its email server; it then destroyed its old server and the back-up tape used as part of that system change.

Sometime after July 2002, ALPA destroyed the ultimate source of all its email – its email server and everything on it. In mid-July 2002, ALPA changed its corporate email server from Microsoft Exchange 5.0 to Exchange 2000. As part of that change, ALPA copied its old server to a tape(s). ALPA admits it not only destroyed the old server, it also destroyed the back-up tape. Acchione Decl., Ex. 54a. (March 31, 2008 email from Daniel Katz to Special Master Hedges). As explained by Plaintiffs' computer forensic expert, Joshua Restivo, the original server and any back-up tape(s) are typically retained for a period of time, even in the absence of a duty to preserve. Acchione Decl., Ex. 54 (Report of Joshua Restivo). ALPA's destruction of these items is simply inexplicable.

ALPA will claim that all the data from the old server was successfully "migrated" to the

new server. This claim is suspect. Restivo explains that it is simple to omit entire user mailboxes or even individual messages during the migration process. The total lack of email from any of the ALPA executive suggests this is what happened. Plaintiffs sought to discover the email on the server when the other reasonably accessible data sources were destroyed. This last source for missing emails, however, had also been eliminated.

E. Iron Mountain Destroyed 269 Boxes of Documents from ALPA's TWA Field Office.

On August 27, 2004, pending Plaintiffs' appeal to the Third Circuit, ALPA shipped 269 boxes of documents to Iron Mountain.[16] These boxes contained the documents from ALPA's "field office in St. Louis, Missouri," where TWA was based. Acchione Decl., Ex. 55 (June 28, 2005 letter from Daniel Katz to Judge Donio). The St. Louis office is not only where David Holtzman, the ALPA attorney assigned to the TWA pilots, worked, but it is also where ALPA conducted its day-to-day TWA-related business. Documents from that office are relevant to this case. Iron Mountain destroyed them all.

In its June 28, 2005 letter to the Court, ALPA claimed the destruction was "erroneous." As support, it attached a letter from Iron Mountain which called the destruction "accidental." Acchione Decl, Ex. 56. But evidence suggests Iron Mountain's destruction of the boxes was intentional not inadvertent. First, five days prior to the submission of Iron Mountain's letter, its representative in charge of the destruction made a signed written statement which entirely contradicts ALPA's claim of inadvertence. The supervisor stated that the driver who picked up the documents at ALPA's office was told by "the customer ... that *all the boxes were for*

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[16] The timing of the shipment is suspect. The case was argued in the Third Circuit just five weeks prior to the shipment, on July 12, 2004. *Bensel v. Allied Pilots Ass'n.*, 387 F.3d 298 (3d Cir. 2004). The duty to preserve evidence remains in place during the pendency of an appeal.

destruction." Acchione Decl., Ex. 57 (June 23, 2005 statement of Phil Coleman) (emphasis added). Second, ALPA placed "pink labels" on the boxes before they were picked up by Iron Mountain. Pink labels denote files for destruction. Acchione Decl., Ex. 58 (Bonner Dep. Tr. 69:17 – 70:2; 226:1 - 17).[17] Third, Iron Mountain offered to assist it in recreating the documents, *see* Acchione Decl., Ex. 56 (June 16, 2005 letter), but ALPA ignored that offer.

The spoliation did not end there. ALPA took steps that prevented Plaintiffs from determining the contents of the boxes sent to Iron Mountain. After learning of the spoliation, Plaintiffs requested ALPA's index of the documents. ALPA initially objected, inexplicably claiming the index was protected "attorney work-product." In describing the index on its privilege log, ALPA described the index as a "*Reconstructed* list of missing boxes sent to Iron Mountain for storage." *See* ALPA's Second Supplement to Revised Privilege Log attached as Exhibit 59 (emphasis added). The original index was not produced and is presumably gone. The "reconstructed" list, eventually produced by ALPA, describes many files that suggest they contain relevant documents, though described in very general terms. Acchione Decl, Ex. 60, (list of "Boxes Shipped to Iron Mountain" page 1, item 1; page 3, items 14-16; page 4, item 16; page 8, item 6; page 9, items 14-21; page 12, item 10). Further, the "reconstructed" list is grossly incomplete. It identifies only 184 boxes. Acchione Decl., Ex. 60 ALPA's letter to the Court states there were 269 boxes. Acchione Decl., Ex. 55. ALPA's reconstructed list fails to account for 85 boxes of documents. It is fair to infer that many of those documents would have been

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[17] Plaintiffs took a 30(b)(6) deposition of Iron Mountain concerning the matter. Its witness testified that Iron Mountain knew of the driver's statement that ALPA ordered the destruction before it sent its June 16, 2005 letter. He testified that Iron Mountain made no mention of that fact in its letter because it "discounted" the driver's statement. Acchione Decl., Ex. 58 (Bonner Dep. Tr. 318:3 – 319:17). The witness never spoke to the driver.

relevant.[18]

IV. ALPA Should be Sanctioned for its Spoliation.

A. The Court Has Inherent Power to Impose Sanctions for Spoliation.

Courts have authority to impose sanctions for spoliation of evidence as part of their inherent authority to control the judicial process. *Scott*, 196 F.R.D. at 247-48. This power is necessary to redress "conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 111 S. Ct. 2123, 2133, 115 L. Ed. 2d 27, 45 (1991).

The Court has broad discretion in imposing sanctions, including the following: "dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines; attorneys' fees and costs." *Mosaid,* 348 F. Supp. 2d at 335 (footnotes omitted).

In this and other circuits, it is well established that intent is unnecessary for the imposition of sanctions; rather the severity of the sanction should reflect the spoliator's degree of culpability. *See, e.g., Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (sanctions depend on degree of fault, prejudice, and whether sanctions will avoid unfairness and, where fault is serious, deter future similar conduct); *Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 267-68 (2d Cir. 1999) (sanctions should be tailored based on degree of fault; intent is not necessary); *Sacramona v. Bridgestone/Firestone, Inc.* 106 F.3d 444, 447 (1st Cir. 1997) (bad faith is a proper consideration, but destruction through carelessness resulting in prejudice is sufficient); *Travelers Prop. Cas. of Am. v. Pavillion Dry Cleaners*, 2005 U.S.Dist. LEXIS 16835,

[18] In producing the Reconstructed List, ALPA stated the list contains less than 269 boxes "because some boxes unrelated to the TWA MEC were among those that ALPA sent to Iron Mountain for storage." Acchione Decl., Ex. 61 (November 28, 2007 email from Daniel Katz). This statement is inconsistent with ALPA's prior representation to the Court as to the source of the boxes.

at *8 (D.N.J. June 7, 2005).

As the court in *United Med. Supply Co. v. United States*, noted:

> [T]he policies underlying the sanctions are multifaceted: to punish the spoliator, so as to ensure that it does not benefit from its misdeeds; to deter future misconduct, to remedy, or at least minimize, the evidentiary or financial damages caused by the spoliation; and last, but not least, to preserve the integrity of the judicial process and its truth-seeking function.

77 Fed. Ct. 257, 264 (2007). "Spoliation sanctions serve a remedial function by leveling the playing field or restoring the prejudiced party to the position it would have been without spoliation." *Mosaid*, 348 F.Supp. 2d at 335.

B. ALPA's Conduct Warrants the Imposition of the Harshest Sanctions

1. The Court Should Strike ALPA's Answer.

Striking a party's pleading is the most severe sanction available to a court. That sanction is appropriate here in light of ALPA's destruction of crucial evidence prior to and during the pendency of this lawsuit despite its preservation obligations and its clear notice of the specific nature of this claim. Courts consider the following three factors in determining whether to strike a party's pleading:

> (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Mosaid, 348 F. Supp. 2d at 335 (quoting *Schmid*, 13 F.3d at 79). *See also Ogin v. Muhiddin Ahmed*, 563 F. Supp. 2d 539, 545 (M.D. Pa. 2008). These factors all weigh heavily against ALPA in this case: (1) the spoliation was a result of ALPA's recklessness and gross negligence, if not intentional destruction; (2) Plaintiffs have been severely prejudiced by the spoliation; and

(3) no lesser sanction will avoid the substantial unfairness to Plaintiffs by ALPA's conduct.

While courts have disagreed about the degree of culpability necessary to enter a default judgment or dismiss a claim,[19] ALPA's persistent and egregious spoliation is consistent with any of these standards. This is not a case in which a party recognized its preservation obligations and attempted in good faith to preserve relevant evidence but did so negligently. Here, ALPA's conduct was, at a minimum, grossly negligent if not reckless or intentional.

Circumstances surrounding ALPA's destruction both demonstrate fault and establish indicia of intent. ALPA took *no steps whatsoever* to preserve relevant evidence by placing a litigation hold or at least suspending routine document destruction or retention practices in 2001 when this litigation was not only reasonably foreseeable but the nature of the allegations were apparent, or even in late 2002, when this action commenced. Nor does ALPA even recognize that it was under *any* duty to preserve relevant electronic data or documents absent discovery requests. Acchione Decl., Ex. 26 (Aug. 10, 2007 Letter from Daniel Katz). ALPA continued active destruction of multiple sources of electronic evidence well into the discovery phase of this litigation. As a result, almost every source of electronic data created during the time period at issue was systematically destroyed. That much of the spoliation of electronic data occurred ***after*** a March 2002 meeting of ALPA legal counsel and Information Technology staff during which representatives acknowledged both that ALPA could be joined as a defendant in the APA Texas litigation against Plaintiff Bensel and the risk of permanent loss of data unless ALPA took

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[19] Some court have required only fault, while others require bad faith/intent. *Compare Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (willfulness, bad faith *or* fault sufficient for default judgment) *and West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (same), *with Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006) (bad faith or intentional destruction required for dismissal) *and Cole v. Keller Industries, Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998) (bad faith required for dismissal).

affirmative steps to preserve back-up tapes and computers[20] suggests failure to suspend document destruction systems was intentional.

The circumstances surrounding the destruction of physical documents by Iron Mountain—notably, evidence contradicting ALPA's claim that boxes were sent for storage not destruction and the lack of preservation of any original index for their contents—when this case was on appeal, suggest the destruction was intentional.

Further, the timing of the destruction of key players' computers just prior to and after this litigation commenced, and during discovery—including the destruction of a key player's laptop just days before his deposition—suggests intentional spoliation. *See Kvitka v. The Puffin Co.*, 2009 U.S. Dist. LEXIS 11214 (M.D. Pa. 2009)(harshest sanction of dismissal warranted following intentional destruction of laptop during pendency of litigation. Despite plaintff's protestations to the contrary, court could not "infer that [plaintiff] produced all emails regarding the controversy, especially given [plaintiff's] conduct during the course of the litigation. Indeed, the court has perused the emails produced and finds that nearly all of the produced emails were received by [plaintiff] and only a few were sent by her, suggesting that she may have retained or transferred self-serving emails from her old laptop just prior to discarding it in anticipation of litigation."). Given the extent, timing and nature of the spoliation in this case and the failure of

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[20] While ALPA attorney Wagner insists that the discussion of the need to preserve back-up tapes and computers was due to concern that TWA pilots would attempt to remove ALPA property, rather than for litigation purposes, both the APA claim against Plaintiff Bensel and the likelihood of litigation by TWA pilots against ALPA was also discussed at that meeting. References from Wagner's notes include a comment by Jonathan Cohen that a "lawsuit by APA agst [sic] AWRF, expanded to defendant class of TWA pilots-possible involvement – cld [sic] become lawsuit agst [sic] us," and that "any employees being deposed would be represented by ALPA"; a comment by Clay Warner to "keep everything from 2000→" and a comment by Charlie Murphy regarding "computer access and back-up." Acchione Decl., Ex. 34 (Wagner Notes from 3/11/02).

ALPA to recognize any duty to preserve despite its recognition of the likelihood of litigation at the earliest stages, ALPA cannot rely on a claim of inadvertence or accident to avoid a default judgment. *See PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, 2006 U.S. Dist. LEXIS 94456, at *15 (E.D. Mich. 2006) ("[T]here is a point beyond which bumbling and blindness to a party's discovery obligations sufficiently resemble the sort of willful, intentional and malicious conduct that calls for the heavy sanction of judgment by default.").

Even if "bad faith" or willful destruction is the requisite culpability to strike pleadings, ALPA's conduct meets that standard. Given its knowledge of the likelihood of litigation, ALPA's destruction of relevant email communications during 2001 and 2002—the only contemporaneous record of those communications—and its loss of the irreplaceable campaign cards are sufficient to demonstrate "bad faith." *See Stevenson*, 354 F.3d at 747-48 (finding destruction of voice recordings, the only contemporaneous recording of conversations regarding event, sufficient to demonstrate bad faith where defendant had general knowledge that litigation was likely to result though it lacked express notice that litigation was imminent). Further, ALPA's continued destruction of relevant information even after this claim was filed, when, at a minimum, back-up tapes from 2001 would still have been available and many computers had not yet been replaced, is sufficient to demonstrate willful destruction. *Leon*, 464 F.3d at 959 (destruction qualifies as willful . . . spoliation if party has "some notice that the documents were potentially relevant to the litigation before they were destroyed") (citation and quotations omitted); *Computer Assocs. Int'l., Inc. v. Am. Fundware, Inc.* 133 F.R.D. 166, 169 (D. Colo. 1990) (finding destruction intentional where defendant destroyed portions of relevant irreplaceable evidence after being served and when the significance of the evidence was clear).

Moreover, gross negligence alone is sufficient to strike defendant's answer. *Chan v. Triple 8 Palace, Inc.*, 2005 U.S. Dist. LEXIS 16520, at * 25 (S.D.N.Y. 2005) ("Gross negligence qualifies as "fault" such that the threshold requirement for the sanction of dismissal or default is met."). Here, ALPA's failure to implement *any* form of litigation hold when litigation became reasonably foreseeable in 2001 or upon the commencement of litigation in 2002 was grossly negligent. *See Norwalk Cmty. Coll.*, 248 F.R.D. at 379 (failure to place litigation hold, and preserve emails and hard drives after pre-filing duty to preserve arose was "*at least* grossly negligent, *if not reckless*") (emphasis added); *Chan,* 2005 U.S. Dist. LEXIS 16520, at * 9 (utter failure to adopt any litigation hold is grossly negligent); *Zubulake*, 220 F.R.D. at 221 (failure of litigation hold to direct preservation of back-up tapes containing files of key employees was grossly negligent, if not reckless).

A default judgment is appropriate here, regardless of intent, because no other remedy can eliminate the prejudice Plaintiffs suffered. Key evidence going to the heart of Plaintiffs' claim—ALPA's conflict of interest—is gone. Plaintiffs will never have the campaign cards ALPA collected in 2001 and 2002. And though, as this Court has noted, Plaintiffs' ability to win this case turns on the subtleties of the communications between ALPA and the American pilots, Plaintiffs will never know the true scope and character of those communications during the 2001 -2002 seniority integration process because computers from which communications were generated or received and the tapes that might have preserved them were destroyed: Those losses are total. *PML North America*, 2006 U.S. Dist. LEXIS 94456, at * 16-17 (default judgment appropriate where, in addition to noncompliance with court discovery order, defendants destroyed evidence after litigation was reasonably foreseeable and lack of available

discovery was total for hard drive that was rendered inoperable, relevant hard drives that could not be located and one drive that was overwritten). Further, by destroying much of that evidence from 2001 and 2002, ALPA freed itself to deny its conflict of interest, "spin" the existing evidence of that conflict and has hampered Plaintiffs' ability to effectively cross-examine the ALPA witnesses.

Because spoliated evidence central to Plaintiffs' claim that ALPA breached its duty of fair representation was destroyed, adverse inferences are inadequate to remedy the prejudice. *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc.,* 1998 U.S. App. LEXIS 2739, at * 22-23 (10th Cir. 1998) (dismissal appropriate where, though no showing of bad faith, no other sanction would restore fairness and an adverse inference "would result only in probative ambiguity"); *Computer Assocs. Int'l,* 133 F.R.D. at 170 ("Destroying the best evidence relating to the core issue in the case inflicts the ultimate prejudice upon the opposing party."). "Any lesser sanction [than default judgment] would allow a party possessing evidence that would insure an adverse result to destroy that evidence with impunity, thus assuring defeat for the opponent while risking only a comparatively mild rebuke." *Id.*

2. The Defendant's Destruction of Evidence Warrants an Adverse Inference Instruction for Spoliation as a Remedial Measure

The spoliation inference is a far less punitive sanction that would nevertheless begin to "level the playing field" in light of ALPA's spoliation. "The spoliation inference is an adverse inference that permits a jury to infer that 'destroyed evidence might or would have been unfavorable to the position of the offending party.'" *Mosaid,* 348 F. Supp. 2d at 336 (quoting *Scott,* 196 F.R.D. at 248). As explained by the Third Circuit,

> The general principles concerning the inference to be drawn from the loss or destruction of documents are well established. When the contents of a document

> are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him.

Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995) (citing *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983)).

Because the spoliation sanction is less punitive than the striking of a pleading or evidence, a showing of negligent destruction is sufficient; a plaintiff need not prove prejudice and bad faith. See *Mosaid*, 348 F.Supp. 2d at 337-38 ("As long as there is some showing that the evidence is relevant . . . the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced. . . . Contrary to [Defendant's] contention, negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference."). *See also Paris Bus. Prods., Inc. v. Genisis Tech.*, 2007 U.S. Dist. LEXIS 78870, at *8 (D.N.J. Oct. 24, 2007) ("[T]he Court need not have evidence of a party's specific intent to destroy evidence to order the imposition of a spoliation inference, as 'negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference.'")(quoting *Mosaid*, 348 F.Supp.2d at 338).

Courts in this district are not alone in this regard. "A finding of bad faith or intentional misconduct is not a sine qua non to sanctioning a spoliator with an adverse inference instruction." *Reilly*, 181 F.3d at 268. *See also Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101, 108 (2d Cir. 2002) (acts of ordinary negligence that have the effect of destroying potentially relevant data can be an appropriate basis for discovery sanctions); *Blinzler v. Marriott Int'l., Inc.* 81 F.3d 1148, 1159 (1st Cir. 1996) (adverse inference appropriate where party is aware of circumstances that are likely to give rise to future litigation and yet destroys

potentially relevant records without particularized inquiry); *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1572-73 (Fed. Cir. 1996) (failure to retain records requires that strong adverse inference be drawn); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (bad faith sufficient, but not necessary, for adverse inference sanction; mere failure to produce evidence may be sufficient).

Instead, to justify the adverse inference sanction, the plaintiff must establish that: (1) the spoliated evidence was within the defendant's control; (2) there was actual suppression or withholding of the evidence; (3) the spoliated evidence was relevant to the claims or defenses; and (4) it was reasonably foreseeable that the evidence would later be discoverable. *Mosaid*, 348 F.Supp. 2d at 336 (citations omitted).[21] Plaintiffs easily satisfy these four requirements.

First, it is indisputable that the destroyed evidence was within ALPA's control. All of the lost documents, with the exception of the documents sent to Iron Mountain, and electronic data were in ALPA's actual possession. That ALPA relinquished custody of the Iron Mountain documents does not vitiate its preservation obligations as it retained indirect control.[22] Second,

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[21] Third Circuit opinions suggest that where party in control of the evidence had reason to believe it be relevant to future litigation but nonetheless destroys it demonstrates actual, rather than accidental, suppression. *See In re Hechinger Inv. Co. of Del.*, 489 F.3d 568, 580 (3d Cir. 2007) (inference inappropriate where though party destroyed records, it had no basis to believe files would be useful in litigation); *Brewer*, 72 F.3d at 334 (no evidence of actual suppression where employee's personnel file from two years prior to the event giving rise to lawsuit was accidentally lost after in-house counsel died); *Gumbs*, 718 F.2d at 97, n.12 (adverse inference inappropriate where plaintiff's employer owned the vehicle from which evidence was lost).

[22] *See, e.g., In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 195 (S.D.N.Y. 2007) (party, though lacking custody, remained responsible for their preservation); *Cyntegra, Inc. v. Idexx Labs., Inc.*, 2007 U.S. Dist. LEXIS 97417, at * 15 (C.D. Cal. 2007) (party to litigation "cannot bypass [its affirmative preservation duty] by abandoning its documents to a third-party and claiming lack of control"); *Jordan F. Miller Corp.*, 1998 U.S. App. LEXIS 2739, at * 23 (affirming dismissal where third party holding the evidence inadvertently destroyed it).

ALPA's failure to preserve evidence within its control constitutes actual suppression and withholding of evidence. *Dowling v. United States*, 2008 U.S. Dist. LEXIS 79862, at *5 (D.V.I. Oct. 6, 2008) ("[I]t is logical to conclude that . . . Defendant failed to preserve the evidence, constituting actual suppression or withholding of the evidence.").

Third, the spoliated evidence was also unquestionably relevant. "Questions of relevancy are committed to the discretion of the trial court" and are to be determined based upon the facts and circumstances of each case. *In re Jacoby Airplane Crash Litig.*, 2007 U.S. Dist. LEXIS 69291, at *11 (D.N.J. Sept. 19, 2007). Relevant evidence includes discoverable evidence, as defined by Federal Rule of Civil Procedure 26. *Wong v. Thomas*, 2008 U.S. Dist. LEXIS 71246, at *7 (D.N.J. Sept. 10, 2008).

Although where documents are destroyed, there will necessarily be speculation over the content of those documents, *CentiMark Corp. v. Pegnato & Pegnato Roof Mgmt.*, 2008 U.S. Dist. LEXIS 37057, at *20-21 (W.D. Pa. 2008), the burden of proving relevance of spoliated evidence sufficient for an adverse inference is not high. "Accordingly, 'a party need not conclusively demonstrate that the evidence would have established liability on the part of the spoliator.' Rather, it needs only to 'come forward with plausible, concrete suggestions as to what the [lost] evidence might have been.'" *Id.* (quoting *In re Wechsler*, 121 F. Supp. 2d 404, 423 (D. Del. 2000)); *see also Kronisch v. United States*, 150 F.3d 112, 128 (2d. Cir. 1998) ("[C]are should be taken not to require too specific a level of proof. . . .[H]olding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference")(citation omitted), *overruled on other grounds by Rotella v. Wood*, 528 U.S. 549 (2000). *Cf. Wong*, 2008

U.S. Dist. LEXIS 71246 at *9-10 (plaintiff failed to show relevance of spoliated evidence after review of forensically retrieved emails failed to reveal anything of relevance).

Further, where a party's failure to preserve is grossly negligent, the relevance of the destroyed evidence may be presumed without more, and an adverse inference is warranted. *Residential Funding Corp.*, 306 F.3d at 109 (showing of gross negligence in the destruction of evidence may suffice, "standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party"); *In re Napster, Inc. Copyright Litig.* 462 F. Supp. 2d at 1078 (gross negligence sufficient for adverse inference instruction). As noted above, ALPA's failure to implement any form of a litigation hold after its duty to preserve was triggered was grossly negligent. Thus, the unfavorable nature of the spoliated materials may be presumed.

Here, however, Plaintiffs need not resort to speculation or presumptions as to the relevance of the spoliated evidence. Here, the spoliated evidence—emails, authorization cards, the campaign card database, and the "40 Q&A's"—were clearly relevant to Plaintiffs' claims. The campaign cards, the card database and the 40 questions and answers from Allied, all go directly to ALPA's divided loyalties. And where email is a prevalent form of communication, as it is at ALPA, courts find prejudice when email is not properly preserved. *See Mosaid*, 348 F. Supp. 2d at 336 (submission of affidavit attesting to prevalent use of email within the defendant company established prima facie showing of relevance). Plaintiffs also discovered relevant email from third parties that had been deleted by ALPA. They also forensically retrieved from ALPA relevant email it had deleted and denied existed. These are all documents that should have been produced by ALPA. Had Plaintiffs not uncovered these documents through other measures, they never would have known they existed. Plaintiffs will never know precisely what

communications were destroyed but have a well-based belief that those emails would have been relevant, particularly since the emails Plaintiffs obtained through forensic efforts and third parties were relevant.

Finally, there can be no question that the spoliated evidence would have been requested in discovery. ALPA's continued efforts to acquire the American pilots during the same time it was obligated to protect the interests of the TWA pilots go to the heart of this litigation and those allegations had been specifically leveled against ALPA long before the case was filed. ALPA reasonably should have expected that all communications and documents exchanged between ALPA and any American pilot as well as documents related to the campaign and seniority integration would be requested in this litigation.

The four factors required for the spoliation inference are all present in this case. If the Court is not inclined to strike ALPA's answer, it should at least give the following jury instruction, or an instruction as the Court deems appropriate, based upon the spoliation inference:

> As a result of ALPA's loss of the documents and electronic data mentioned in the evidence, you may infer that ALPA was highly desirous of having the American pilots join ALPA and that ALPA encouraged and assisted American pilots in doing so while at the same time ALPA had a duty to fairly represent the TWA pilots in their seniority negotiation with the American pilots.

3. The Court Should Enter Significant Monetary Sanctions Against Defendant, Including Attorneys' Fees and Costs

The Court should also order Defendant to pay all costs and fees associated with the issue of spoliation, including those related to the present application. "[M]onetary sanctions are used to compensate a party for 'the time and effort it was forced to expend in an effort to obtain discovery' to which it was entitled." *Kounelis*, 529 F.Supp. 2d at 521 (quoting *Mosaid*, 348 F.Supp. 2d at 339). Compensable costs also include the costs of "the investigation and litigation

of the document destruction itself," including Plaintiffs' costs for forensic investigation of ALPA's tapes and computer systems and the costs for preparing this motion. *Norwalk Cmty. Coll.*, 248 F.R.D. at 381-82 (citation and quotations omitted).

Defendant's failure to safeguard its electronic data forced Plaintiffs to expend significant time, expense and energy that would have been unnecessary had Defendant complied with its discovery obligations. As a result of electronic spoliation, in September of 2007, the Court referred the matter of electronic discovery to Special Master Hedges. Plaintiffs paid a total of $4,834.24 to Special Master Hedges for services rendered between November 2007 and July, 2008.[23] During the Special Master referral, the parties retained Capital Legal Solutions, an independent forensic firm, for the purpose of extracting data from Defendant's still-existing back-up tapes, and the laptop computer of Robert Christy. Plaintiffs were charged in excess of $22,000 by CLS for services rendered. These services and expenditures were necessitated solely by the Defendant's failure to implement an appropriate litigation hold. Plaintiffs were also required to retain their own computer forensic expert, United Forensics, for purposes of submitting a Rule 702 expert report on some of the discrete issues of spoliation. This report has been submitted in support of this motion and is attached to the Acchione Declaration as Exhibit 54. Plaintiffs paid a total of $ 4090.11 to United Forensics for their services.

In addition to these significant out-of-pocket expenses, Plaintiffs' counsel, collectively, spent well in excess of one hundred hours of attorney time preparing for multiple in-person hearings and telephone conferences with the Special Master, analyzing data retrieved by CLS,

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[23] The Order referring electronic discovery to Special Master Hedges provided that the fees associated with Judge Hedges' services would initially be split equally between the parties, subject to cost shifting at the appropriate time. *See* Order dated October 23, 2007 (PACER Docket Entry No.236-2). *See also* Order dated November 30, 2007 (PACER Docket Entry No. 241), providing for the shifting of costs associated with work performed by CLS.

and preparing this sanctions motion. Detailed time back-up records will be produced to the Court upon entry of an Order awarding fees and costs.[24]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for sanctions.

Dated: March 13, 2009

Respectfully submitted,

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[24] In accordance with Local Civil Rule 54.2(a), Plaintiffs' counsel will submit Affidavits of Services within thirty (30) days from an Order awarding sanctions, unless such requirement is dispensed with by the Court. *See* Local Civil Rule 54.2(c). *See also Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 2004 U.S. Dist. LEXIS 23596, at * 8 (D.N.J. 2004)(ordering award of attorneys' fees and requiring submission of Affidavit of Services within 14 days of order).