SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice PART 60

GLANZER & CO., LLC

-against-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

INDEX NO. 651001/2011

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). _____

Answering Affidavits — Exhibits _____ No (s). _____

Replying Affidavits _____ No (s). _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Defendant Air Line Pilots Association, International's motion for summary judgment is granted to the extent set forth in the accompanying decision/order dated October 23, 2013 and plaintiff Glanzer & Co., LLC's cross-motion for summary judgment is denied as set forth in that decision/order.

Dated: 10-24-13

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, J.S.C.

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GLANZER & CO., LLC

Plaintiff,

Decision and Order

-against-

Index No. 651001/2011

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant.

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This action arises out of a contractual dispute over a "success fee" between plaintiff Glanzer & Co., LLC (Glanzer) and defendant Air Line Pilots Association, International (ALPA). In its complaint, Glanzer pleads causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and misrepresentation. ALPA moves, and Glanzer cross-moves, for summary judgment.

The following material facts are undisputed unless otherwise stated. Michael Glanzer is the sole principal of Glanzer & Co., LLC, an investment banking firm that provides financial advice to labor unions. (Complaint, ¶¶ 2, 20.) ALPA is a labor union representing airline pilots in collective bargaining negotiations with various airlines. (Declaration of Jalmer Johnson [ALPA General Manager], ¶ 3 [Johnson Decl.].)[1] ALPA has retained investment bankers to provide financial advice and assistance in connection with negotiations with the airlines, since the 1980s when the airlines began entering into large financial transactions, such as mergers and restructurings. (See id., ¶¶ 4, 5; Aff. of Michael Glanzer In Opp. [Glanzer Aff.], ¶ 5.) The

[1] The parties stipulated on the record that the submitted declarations will have the force of affidavits, and this court accepted such stipulation. (See February 13, 2013 Transcript at 26-27.)

investment bankers are typically compensated by monthly retainer fees paid by ALPA, as well as large "success fees" or "customary investment banking fees," paid by the airline or a third party. (Johnson Decl., ¶ 5; Glanzer Aff., ¶¶ 8-10.) A success fee is only awarded to the investment bank if the financial transaction on which the investment bank has advised is completed. (Glanzer Aff., ¶ 9.)

In 1997, US Airways (US Airways or the Company) and ALPA engaged in collective bargaining negotiations for the US Airways pilots. In connection with those negotiations, Glanzer's then-company, Glanzer, Potok & Company, LLC, contracted with ALPA to provide investment banking advice. (See Declaration of Stephen B. Moldof [ALPA's counsel in this action] [Moldof Decl.], Glanzer Dep., Ex. 1 [Letter Agreement between ALPA and Glanzer, Potok & Co., LLC dated April 1, 1997 [1997 Agreement]].) ALPA and US Airways reached an agreement and executed a new collective bargaining agreement. As a result, Glanzer, Potok & Company, LLC was awarded a success fee in the amount of $2,000,000, which was paid by US Airways. The parties dispute whether US Airways agreed to pay the success fee while at the collective bargaining table or afterward. (See Johnson Decl., ¶ 9; Glanzer Aff., ¶ 23.)

In 2001, Glanzer entered into an agreement with ALPA for investment banking advice in connection with a new round of negotiations with US Airways.[2] (See Moldof Decl., Glanzer Dep., Ex. 4 [Letter Agreement between ALPA and Glanzer & Co., LLC dated May 1, 2001 [2001 Agreement]].) Shortly thereafter, US Airways faced severe financial difficulties and was forced

[2] ALPA and Glanzer, Potok & Co., LLC also entered into an agreement in 1998. However, it is unclear whether it was executed because ALPA anticipated further negotiations with US Airways. (See Moldof Decl., Glanzer Dep., Ex. 2 [Letter Agreement between ALPA and Glanzer, Potok & Co., LLC dated April 1, 1998 [1998 Agreement]].)

to file for bankruptcy (First Bankruptcy). (Johnson Decl., ¶ 17; Glanzer Aff., ¶ 38.) In connection with the First Bankruptcy, ALPA re-negotiated its collective bargaining agreement and sought advice from Glanzer. (Johnson Decl., ¶ 18; Glanzer Aff., ¶ 38.) Ultimately, ALPA and US Airways reached an agreement and Glanzer was awarded a success fee in the amount of $1,000,000,[3] paid by US Airways.

By late 2003, US Airways' financial situation had not improved and, in 2004, the Company approached ALPA seeking additional concessions. (Johnson Decl., ¶ 19; Glanzer Aff., ¶ 43.) ALPA again engaged Glanzer for investment banking advice. At that time, the 2001 Agreement remained in effect. (Johnson Decl., ¶ 19; Glanzer Aff., ¶ 44.) ALPA agreed to pay Glanzer's hourly fees, retainer fees, and expenses, but did not agree to pay "a customary investment banking fee." Instead, ALPA agreed to "use its reasonable best efforts to cause an entity or party other than ALPA . . . to pay . . . a customary investment banking fee."[4]

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[3] The parties dispute whether the full $1,000,000 was the success fee, or whether a portion of the $1,000,000 ($850,000) was the success fee and a portion ($150,000) was allocated to pay Glanzer's retainer. (See Johnson Decl., ¶18; Glanzer Aff., ¶ 40.)

[4] The 2001 Agreement provided in pertinent part:

> "In connection with any specific Transaction as to which we advise ALPA hereunder, and which occurs at any time within twelve months following the termination of this agreement, if any, where we and ALPA have agreed that payment of a fee and expenses to us will be sought in accordance with customary practice for such type of Transaction, ALPA agrees . . . (ii) in the case of any other Transaction (a "Non-Sale Transaction") to use its reasonable best efforts to cause an entity or party other than ALPA involved in such Transaction (including without limitation any entity in which pilots represented by ALPA participate or invest) to pay to us, directly or indirectly, including payment through any entity organized in connection with such Transaction, a customary investment banking fee for our services, and in each case cause us to be paid or reimbursed for expenses, in connection with such Transaction; provided that in the case of any Non-Sale Transaction, ALPA shall have no obligation to pay us any fee or expenses other than the Hourly Fees, Retainer Fees, Increased Retainer Fees, and expenses payable pursuant to paragraphs 2, 3 and 5, except that if any entity organized in connection with such Transaction receives such fee, or any amounts to pay or reimburse

More particularly, in April 2004, ALPA and US Airways began negotiating the terms of Letter of Agreement #93 (LOA 93), which is the subject of this action. During the negotiations, ALPA and US Airways included a clause providing for US Airways to pay reasonable fees and expenses incurred by ALPA including "the customary fees and expenses of outside . . . investment banking and other advisors." (Moldof Decl., Glanzer Transcript, Ex. 21 [Portion of LOA 93 between US Airways, Inc. and the Airline Pilots in the Service of US Airways, Inc. as represented by ALPA].) On September 12, 2004, before a final agreement was reached on LOA 93, US Airways filed for bankruptcy protection for the second time (Second Bankruptcy). (Johnson Decl., ¶ 21; Second Decl. of William Pollock [Chairman of ALPA's Master Executive Council] [Pollock Second Decl.], ¶ 8.)

As discussed more fully below, the parties sharply dispute whether the filing of the Second Bankruptcy mandated ratification of LOA 93 on an expedited basis, before the amount of Glanzer's success fee was negotiated. On October 21, 2004, LOA 93 was ratified by the pilots. (Id., ¶ 10; Johnson Decl., ¶¶ 20-23.) The final version of LOA 93 did not specifically name Glanzer or provide the amount of its fee. (Pollock Second Decl., ¶ 10.)

As to the sufficiency of the post-ratification negotiations, ALPA claims that numerous discussions, including several face-to-face meetings, took place between the fall of 2004 and the spring of 2005, regarding Glanzer's fee. (Pollock Decl., ¶ 12.) Glanzer acknowledges that in December 2004 and March 2005, two ALPA representatives, Captains William Pollock and Kim Allen Snider, approached US Airways in "well-intentioned" but futile efforts to negotiate

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us for expenses, then ALPA shall use its reasonable best efforts to cause such entity to pay such fee or other amount to us."

[* 6]

Glanzer's success fee in connection with its work on LOA 93. (See Glanzer Aff., ¶ 79; Pollock Decl., ¶ 12.) In September 2005, ALPA approached Glanzer and asked it to consider a success fee to be calculated by multiplying a high hourly rate by the number of hours spent by ALPA's legal counsel to negotiate LOA 93, an approach that it believed US Airways would consider. The parties dispute whether Glanzer agreed to consider the hourly rate arrangement. (See Pollock Decl., ¶ 13; Glanzer Aff., ¶ 81.)

In 2005, ALPA engaged in negotiations with US Airways over its acquisition of America West Airlines. (Johnson Second Decl., ¶ 7; Glanzer Aff., ¶¶ 60-62.) ALPA also entered into a new agreement with Glanzer for investment banking services. (See Moldof Decl., Glanzer Dep., Ex. 5 [Letter Agreement between ALPA and Glanzer & Co., LLC dated July 1, 2005] [2005 Agreement].) Glanzer claims that ALPA did not use the opportunity these 2005 negotiations presented to negotiate Glanzer's success fee for LOA 93. (Glanzer Aff., ¶ 62.)

On January 17, 2006, ALPA filed a grievance with the Pilots' Systems Board of Adjustment (Board) to determine whether US Airways was obligated to pay Glanzer's success fee and, if so, the amount due to Glanzer. (Declaration of Julie Glass [Legal Counsel to ALPA][Glass Decl.], Ex. 4.) On March 20 and 21 and September 18 and 19, 2007, the Board held an arbitration hearing. ALPA presented numerous witnesses, including Michael Glanzer and an expert selected by Glanzer. (Moldof Decl., Glanzer Dep., Ex. 27 [Transcript of Arbitration Hearing].) On April 1, 2008, the Board issued a written opinion and award (Arbitration Decision). (Moldof Decl., Glanzer Dep., Ex. 29.) In the Arbitration Decision, the Board considered the past success fees that ALPA had obtained for Glanzer, and held that ALPA was entitled to recover a success fee for Glanzer in the amount of $500,000 from US Airways.

(See Arbitration Decision at 29-30.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact.'" (Zuckerman, 49 NY2d at 562 [citing CPLR 3212[b]].)

Breach of Contract Claims

Collateral Estoppel

ALPA asserts that Glanzer is collaterally estopped by the Arbitration Decision from relitigating both whether ALPA used its reasonable best efforts to obtain a success fee for Glanzer and the amount of the fee to which Glanzer is entitled. (ALPA Memo In Support at 18-21.) ALPA argues that the Board necessarily decided these two issues in the Arbitration Decision, in finding that ALPA had used its reasonable best efforts, and that Glanzer was owed $500,000. (Id. at 20-21, citing Arbitration Decision at 15, 19, 30.) ALPA further argues that Glanzer was in privity with ALPA at the time because Glanzer controlled the arbitration and its interests were represented. (Id. at 19-20.)

In opposition, Glanzer argues that it did not have a full and fair opportunity to litigate the claims at issue because the question of whether ALPA used "reasonable best efforts" was not before the Board. (Glanzer Memo In Opp. at 20.) Glanzer further asserts that the Board's

statement on the "reasonable best efforts" issue was not necessary to the outcome of the arbitration and was dictum. (Id. at 21.) Glanzer also argues that the Arbitration Decision does not bind Glanzer because it was not a party to the arbitration agreement with US Airways and did not agree to be bound. (Glanzer Reply Memo at 12-13.)

It is well settled that "[c]ollateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." (Buechel v Bain, 97 NY2d 295, 303 [2001][citing Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984], cert denied 535 US 1096 [2002].) "The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." (Buechel, 97 NY2d 295 at 304 [internal citation omitted].)

With respect to privity in the context of collateral estoppel, the New York Court of Appeals has explained that

> "privity does not have a single well-defined meaning. Rather, privity is an amorphous concept not easy of application and includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action. In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate."

(Id. [internal citations, quotation marks, and some brackets and ellipses omitted].)

More specifically, in determining whether privity exists based on control over a litigation, the Court of Appeals has held, in the analogous res judicata context, that "[t]he character and extent of the participation in litigation which will in legal effect make one a party is most often an issue of fact. As a consequence, no single fact is determinative but all the circumstances must be considered from which one may infer whether or not there was participation amounting to a sharing in control of the litigation." (Watts v Swiss Bank Corp., 27 NY2d 270, 277 [1970] [internal citations omitted].) The Court of Appeals has reaffirmed that "the control/participation standard remains a useful and key factor in assaying the relationship between parties, for privity purposes. (David v Biondo, 92 NY2d 318, 323 [1998] [internal citations and quotation marks omitted].) Thus, the courts should consider the character and extent of the party's role in the prior proceeding, "including a party's access to personal counsel and direct representation." (Id. at 324 [internal citations omitted].)

New York Courts have found a party to be in privity where the party was in "practical control" of the prior action, as evidenced by the fact that it directed the prior action or had the opportunity to do so. (See e.g. Watts, 27 NY2d at 277-278 [holding that widow's executor was in privity with widow's legatees who were parties in prior action, where executor had "practical control of all [prior] proceedings" and hired same law firm to prosecute both actions – a factor Court found to be "of singular significance"]; Bay Shore Family Partners, L.P. v Foundation of Jewish Philanthropies of the Jewish Fedn. of Greater Fort Lauderdale, 270 AD2d 374, 375-376 [1st Dept 2000], lv denied 95 NY2d 756 [2000] [holding that individual partners were in privity with limited partnership of which they were members because "[t]heir interests were fully represented by [the partnership] in the prior litigation and they had control of that litigation"];

Sterling Doubleday Enter., L.P. v Marro, 238 AD2d 502, 503 [2d Dept 1997] [holding that shareholders and directors of closely-held corporation were in privity with corporation, as shareholders and directors had opportunity to participate in the initial litigation, but instead permitted the court to enter a default judgment against corporation].)

New York Courts have declined to find privity in cases where the party to be estopped lacked responsibility for the prior litigation or had interests that differed from or were adverse to the interest of the party to the prior litigation. (See e.g. David v Biondo, 92 NY2d at 321 [in holding that plaintiff in dental malpractice action was not in privity with Office of Professional Discipline (OPD) which brought prior disciplinary proceeding against dentist, notwithstanding that plaintiff had own counsel when testifying as witness in disciplinary proceeding, Court reasoned that OPD had "exclusive control and responsibility" for the proceeding, and remedies in the proceeding and malpractice action differed]; Baldasano v The Bank of New York, 174 AD2d 457, 460 [1st Dept 1991] [holding that limited partners were not in privity with general partner which commenced bankruptcy proceeding on behalf of limited partners, notwithstanding general rule that general partner has fiduciary relationship with limited partners in the operation of a partnership, where relationship between limited and general partners "appear[ed] to be adversarial in nature" with respect to subject of bankruptcy proceeding]); Lombardo v Walsh, 168 AD2d 989, 990 [4th Dept 1990] [holding that privity did not exist between son, who was injured during drunk driving accident and whose intoxication was found by arbitrator in insurance arbitration not to have been contributing factor to accident, and father, who brought action to recover son's medical expenses against passengers in car who provided alcoholic beverages to son, because father "did not exercise any control over the [arbitration] proceedings"

and because father and son's positions "are completely opposite, thereby negating any claim that they were united in interest"].)

Here, as a threshold matter, the court holds that the issue of whether ALPA used its "reasonable best efforts" to obtain a success fee for Glanzer was not necessarily decided by the Arbitration Decision. The Arbitration Decision makes the statement that "[t]his proceeding demonstrates that ALPA used its 'reasonable best efforts' to obtain a 'success' fee for Glanzer." (Arbitration Decision at 25.) However, ALPA's grievance letter, dated January 17, 2006, requested that the Board consider and decide the following question:

> "Whether the Company [US Airways] misinterpreted and misapplied Letter of Agreement #93 and related sections of the US Airways Pilots' Working Agreement when they failed to pay the reasonable fees and expenses incurred by the Association's investment banking firm during their representation of the Association throughout the Transformation Negotiations?"

(Glass Decl., Ex. 4.) In its Arbitration Decision, the Board characterized the issue before it as:

> "Whether the Company [US Airways] failed to comply with Letter of Agreement 93 when it failed to pay ALPA for financial services provided by Michael Glanzer? If so, what shall the remedy be?"

(Arbitration Decision at 2.) These two statements of the issue clearly demonstrate that the Board was not asked to decide whether or not ALPA had used best efforts in seeking Glanzer's success fee. The court agrees with Glanzer that the Board's statement regarding ALPA's best efforts was dictum and therefore does not collaterally estop Glanzer from litigating the best efforts issue in this action.

With respect to the damages issue, the court also finds that Glanzer is not collaterally estopped by the Arbitration Decision from asserting entitlement to a fee in an amount exceeding that found by the Board. As ALPA, not Glanzer, was the party of record to the arbitration,

collateral estoppel does not bar Glanzer's damages claim unless ALPA and Glanzer were in privity with one another. As a matter of law, the court holds that the record does not support a finding of privity.

Even crediting the assertion of Julie Glass, ALPA's counsel at the arbitration, that Glanzer was "fundamentally and integrally involved throughout the arbitration process" (Glass Decl., ¶ 7), the court finds that Glanzer did not have "practical control" over the arbitration. While he was consulted about strategy and testified at the hearing, ALPA's counsel was in control of the ultimate strategic decisions and of the conduct of the arbitration. Glanzer did not have final say on strategic decisions. Nor did he choose the counsel or have the opportunity to have his own counsel examine witnesses or submit evidence. (Glanzer Aff., ¶ 89; Second Decl. of Michael Glanzer [Glanzer Second Decl.], ¶ 23.) Moreover, in an email to Glanzer dated March 26, 2007, ALPA's counsel acknowledged her control over the arbitration, stating: "I have already stated my position about how I need to run the case, and will not reiterate it here." (Glanzer Aff., Ex. 4.)

Contrary to ALPA's contention (see ALPA's Memo In Support at 20, n 15), this case is not analogous to cases in which union members, who are represented by a union-grievant in an arbitration, are held to be in privity with the union for purposes of subsequent litigation. Here, ALPA had no contractual obligation to represent Glanzer in an arbitration and, indeed, Glanzer's claim is that ALPA should have represented its interests in the negotiations for LOA 93, and not after the fact in an arbitration proceeding. Nor is this a case in which Glanzer's participation in the arbitration was so extensive as to amount to an implicit agreement to arbitrate. (Compare Gvozdenovic v United Air Lines, Inc., 933 F2d 1100 [2d Cir 1991] [flight attendants who were

not parties to arbitration agreement held to have implicitly agreed to arbitration where they formed committee and chose counsel to represent them in arbitration, and vigorously participated in arbitration without objection to the process].)

The court accordingly holds that the Arbitration Decision is not a bar to the litigation of the issues in this action, and turns to the merits.

First Cause of Action – Success Fee for LOA 93

Glanzer claims that ALPA breached the contract with it by failing to use reasonable best efforts to obtain a success fee for Glanzer from US Airways for his work on LOA 93. Michael Glanzer attests that he requested that ALPA negotiate his fee either at the outset of the 2004 negotiations between US Airways and ALPA or at the end of the negotiations, but prior to ratification and signing of a final agreement. (Glanzer Aff., ¶ 45.) He contends that negotiation of the fee prior to ratification was customary and had been the parties' practice in the past, as US Airways had an incentive during negotiations to pay the fee in return for other concessions it was seeking. (Id., ¶¶ 13-16, 45.) Glanzer also submits the affidavits of members of the ALPA Negotiating Committee, attesting that "Members of the Negotiating Committee commonly understood that ALPA's agreement with Glanzer obligated ALPA to negotiate a success fee for Glanzer in good faith during ALPA's negotiations with the Company," while ALPA had leverage. (Aff. of Donn Butkovic Aff., ¶ 8; Aff. of Kelly Ison, ¶¶ 14-19.)

In opposition, ALPA asserts that US Airways agreed to pay for ALPA's customary advisor fees. However, ALPA claims that at the time of the 1997 collective bargaining negotiations, the parties held separate discussions "away from the collective bargaining table about Glanzer's fee, after they reached agreement on substantive issues." (Johnson Decl., ¶ 9.)

ALPA asserts that it was "standard practice" to leave "discussion of details as to the amounts and recipients [of the fee] until after the negotiations." (Id., ¶ 20.) ALPA also offers statements from ALPA representatives asserting that it was the parties' practice to discuss the amounts of the fee "after the negotiations were concluded." (Aff. of Kim Snider [Vice Chair of the Master Executive Council from 2003 through 2008], ¶ 4.)

With respect to the sufficiency of ALPA's best efforts, Glanzer claims that ALPA had a second chance to negotiate with US Airways for Glanzer's success fee for LOA 93 when ALPA entered into negotiations with US Airways regarding the company's proposed merger with America West, but failed to do so. (Glanzer Aff., ¶¶ 56, 60, 62.) Glanzer further claims that ALPA's release of its administrative claim in the US Airways bankruptcy without receiving compensation for such release was another missed opportunity for negotiations. (See id., ¶ 78.)

ALPA contends that it was unable to negotiate Glanzer's success fee before ratification of LOA 93 because, while negotiations with US Airways were pending, the Company filed for bankruptcy protection, putting significant pressure on ALPA to ratify the negotiated deal before the Bankruptcy Court awarded relief that would jeopardize the collective bargaining process. (Pollock Decl., ¶ 15.) ALPA cites the fact that on September 24, 2004, US Airways filed an application under section 1113(e) of the Bankruptcy Code "seeking permission to implement interim emergency changes to terms and conditions of employment in advance of the normal Section 1113(c) process for rejecting a collective bargaining agreement." (Pollock Second Decl., ¶ 8.) The Bankruptcy Court granted the requested relief on October 15, 2004, but did not immediately implement it. ALPA contends that it needed to "expeditiously reach an agreement in order to avoid implementation of the non-consensual interim relief terms and the likely

subsequent full-scale rejection of the pilot [collective bargaining agreement] through an 1113(c) process." (Id., ¶¶ 8, 9.)

Glanzer, in contrast, claims that ALPA did not "lose all bargaining leverage it had with US Airways" after the bankruptcy filing and that, in fact, ALPA continued to negotiate with US Airways over its own concerns through the beginning of October 2004. (Glanzer Second Decl., ¶ 13.) Moreover, Glanzer asserts that US Airways and ALPA did not prepare for 1113 litigation and "[t]he Company needed a deal, not a lawsuit, with the pilots, if it was going to attract investors and resolve its finances through bankruptcy." (Id., ¶ 15.) Glanzer thus disputes that the Second Bankruptcy required ratification of the contract before its success fee was negotiated.

There is substantial authority that for a contractual provision requiring a party to employ reasonable efforts or "best efforts" to be enforceable, "there must be objective criteria against which a party's efforts can be measured, whether the requirement is deemed to be implicit or explicit." (Timberline Dev. L.L.C. v Kronman, 263 AD2d 175, 178 [1st Dept 2000] [internal citations omitted]; see also Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc., 63 AD3d 647, 647 [1st Dept 2009], lv dismissed 14 NY3d 737 [2010]; Brown v Bus. Leadership Group, 57 AD3d 212, 212-213 [1st Dept 2008]; Strauss Paper Co. v RSA Exec. Search, Inc., 260 AD2d 570, 571 [2d Dept 1999].) It has been held that "where . . . [a court is] called upon to construe a clause expressly providing that a party is to negotiate in good faith, a clear set of guidelines against which to measure a party's efforts is essential to its enforcement." (2004 McDonald Ave. Realty, LLC v 2004 McDonald Ave. Corp., 50 AD3d 1021, 1022-23 [2d Dept 2008].)

However, there is also substantial authority that a "best efforts" provision may be

enforceable, notwithstanding that the contract itself does not set forth objective criteria by which to measure the best efforts. (See e.g. Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publ. Co., 30 NY2d 34, 46 [1972] [holding that publisher who agreed to use best efforts to promote author's work had right to produce competing works, but that activity of publisher was so manifestly harmful to author as to justify court below in finding a breach of the covenant to use best efforts], rearg denied 30 NY2d 880 [1972], cert denied 409 US 875 [1972]; see also StoreRunner Network, Inc. v CBS Corp., 8 AD3d 127, 128 [1st Dept 2004] [discussing adequacy of efforts to satisfy contract, although noting that contract did not specify objective criteria against which defendants' efforts could be measured]; Kroboth v Brent, 215 AD2d 813, 814 [3d Dept 1995] [finding that agreement to use "best efforts" – there, to obtain subdivision approval in connection with real estate transaction – requires more than good faith, and that "whether such obligation has been fulfilled will almost invariably . . . involve a question of fact"]; Ashokan Water Servs., Inc. v New Start, LLC, 11 Misc 3d 686, 689-690 [Civ Ct, Kings County 2006] [cataloging cases applying best efforts provision without articulated objective criteria in contract].)

Federal courts applying New York law to determine whether a party has fulfilled its obligations under a best efforts clause have described the law as "murky" (McDonald's Corp. v Hinksman, No. Civ. A.92-CV-3187 DGT, 1999 WL 441468 [US Dist Ct, ED NY 1999]) or as "far from clear." (Bloor v Falstaff Brewing Corp., 601 F2d 609, 613 n 7 [2d Cir 1979].) They have cited the governing standards as "'good faith in the light of one's own capabilities' and efforts as good as the 'average prudent comparable' performer." (McDonald's Corp., 1999 WL 44168, * 12, citing Bloor, 601 F2d at 609, n 7.)

In moving to dismiss, ALPA discusses only a few of the numerous cases on enforcement of best efforts provisions, and ignores the cases which determine whether such provisions have been breached even where the contracts fail to expressly articulate criteria for measuring the sufficiency of the efforts. The court concludes, based on its own review of the case law, that at least where a material question of fact exists as to whether best efforts have been made, a best efforts provision may be enforced in the absence of contractually articulated criteria. (See Van Valkenburgh, Nooger & Neville, Inc., 30 NY2d at 46; McDonald's Corp., 1999 WL 44168, * 12 [finding evidence in record insufficient to raise a "material question of fact" as to whether best efforts were made].)

In this case, it is undisputed that the 2001 and 2005 Agreements do not specify any guidelines or objective criteria by which ALPA was required to perform its obligation to use best efforts to obtain a success fee for Glanzer. However, a material issue of fact exists in this regard. As discussed above, the parties submit dueling affidavits as to whether ALPA's past practice was to negotiate the amount of the success fee before the ratification of an agreement, when US Airways allegedly had an incentive to pay the fee in return for other concessions. Notably, while ALPA claims that the amount of the fees was only discussed after negotiations were "concluded," it does not submit evidence or, indeed expressly claim, that the amount was deferred until after ratification of the collective bargaining agreement. (See generally Johnson Decl., ¶ 20; Pollock Decl., ¶ 12.)

Moreover, issues of fact exist as to ALPA's claim that any deviation from past practice was justified by US Airways' Second Bankruptcy and the prospect that the Bankruptcy Court would implement interim relief that would enable the Company to impose changes to pilot wages

and working conditions without ALPA's concurrence, putting pressure on ALPA to expeditiously reach an agreement. (See Pollock Second Decl., ¶ 9.) ALPA asserts that the time between the Bankruptcy Court's granting of interim relief on October 15, 2004 and the ratification vote on October 21 was "extremely limited" and that it no longer had leverage with the Company to negotiate a fee. (Id., ¶¶ 10, 12.) These conclusory assertions are insufficient to demonstrate that negotiations over the fee could not have been conducted in the six day period or, more generally, that reasonable best efforts to negotiate the amount of the fee were excused by the bankruptcy proceedings. Further, ALPA simply does not address Glanzer's claim that ALPA failed to use the America West negotiations in 2005 to attempt to negotiate the fee for LOA 93.

The court accordingly holds that triable issues of fact exist as to whether ALPA used its reasonable best efforts to obtain payment of a success fee for Glanzer for its work on LOA 93. The court further holds that Glanzer is not barred from maintaining this claim by what ALPA terms the "exclusionary proviso" in the 2001 Agreement, which provides for payment of the customary investment banking fee by "an entity or party other than ALPA." (2001 Agreement, § 4 [ii].) This argument misapprehends that Glanzer's claim is not for payment by ALPA of the success fee, but for damages for failure to use reasonable best efforts to obtain the fee from US Airways. The authorities that ALPA cites which uphold limitation of liability provisions do not support ALPA's argument, as they involve limitation of liability clauses that expressly bar damages. (See e.g. Metropolitan Life Ins. Co. v Noble Lowndes Intl., Inc., 84 NY2d 430 [1994], rearg denied 84 NY2d 1008.)

The branch of ALPA's motion for summary judgment dismissing Glanzer's first cause of

action for breach of contract for failure to use reasonable best efforts to obtain a success fee for Glanzer's work on LOA 93 should accordingly be denied.

Second Cause of Action – America West Merger

ALPA seeks dismissal of Glanzer's second cause of action for breach of contract for failure to use reasonable best efforts to obtain a success fee for Glanzer's work on the America West merger. ALPA asserts that Glanzer did not request that ALPA seek payment by US Airways of a customary investment banking fee for such services. (ALPA Memo In Support at 11.) However, in the legal argument section of its moving brief, ALPA appears to seek dismissal of this cause of action based on the "exclusionary proviso" contained in the 2001 Agreement (see supra at 17) and incorporated in the 2005 Agreement. (See ALPA Memo In Support at 13-15, 22-23.) Not until its reply does ALPA clearly assert, as an independent ground for dismissal, that ALPA was required to use reasonable best efforts to obtain a success fee only "where we and ALPA have agreed that payment of a fee and expenses to us will be sought" (2001 Agreement, § 4, incorporated in 2005 Agreement by § 1), and that ALPA and Glanzer never agreed on such a fee for Glanzer's America West merger work. (ALPA Reply Memo at 21-22.) Moreover, in support of this contention, ALPA relies on the wholly conclusory assertion of Jalmer Johnson, its general manager, that "ALPA and Glanzer never agreed that the transaction payment provision would be applicable for Glanzer's work related to the America West transaction." (Johnson Second Decl., ¶ 7.) Under these circumstances, the court holds that ALPA does not eliminate triable issues of fact on the second cause of action.

On its own motion for summary judgment, Glanzer also fails to eliminate issues of fact on this cause of action. In support of its motion, Glanzer initially mischaracterizes ALPA's

position on the second cause of action, claiming that ALPA does not dispute its obligation to use best efforts to obtain the fee for Glanzer's work on the America West merger. (Glanzer Memo In Opp. at 18.) Moreover, in his initial affidavit, Michael Glanzer does not unequivocally assert that he agreed with ALPA that ALPA would seek a success fee for his work on the merger. Rather, he states: "I advised Capt. Pollock that Plaintiff would extend its agreement with ALPA only if ALPA agreed to use its leverage in the merger transaction to negotiate a fee for Plaintiff's work on LOA 93. ALPA agreed, and, relying on this promise, I began negotiating a new retainer agreement with ALPA. Plaintiff would not have entertained ALPA's request, or negotiated a new agreement, if ALPA had not assured me that it would negotiate Plaintiff's unpaid fee." (Glanzer Aff., ¶ 56.) Only in his second declaration does Glanzer attest that he "had made clear that the only condition under which our firm was prepared to continue working for ALPA was if it undertook every effort to obtain the success fee in respect of the first transaction in 2004 and the requirement that it be obligated to use its best efforts to obtain a new success fee as well." (Glanzer Second Decl., ¶ 44.) Yet, even this statement stops short of affirmatively stating that Glanzer agreed with ALPA that ALPA would seek a success fee for Glanzer's work on the America West merger.

Given both parties' vagueness about their agreement with respect to a success fee for the America West merger, and their shifting legal arguments about whether the second cause of action should withstand dismissal, determination of the motions for summary judgment on this cause of action is not appropriate on this record.

Third Cause of Action – Breach of the Implied Covenant of Good Faith and Fair Dealing

Glanzer also claims that ALPA breached the implied covenant of good faith and fair

dealing. It is well settled that every contract contains an implied covenant of good faith and fair dealing. (Dalton v Educ. Testing Serv., 87 NY2d 384, 389 [1995]; Wieder v Skala, 80 NY2d 628, 634 [1992].) A cause of action for breach of the implied covenant will be dismissed as duplicative of a breach of contract cause of action where both claims arise from the same facts and seek identical damages. (Amcan Holding, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 [1st Dept 2010], lv denied 15 NY3d 704 [2010]; see MBIA Ins. Corp. v Merrill Lynch, 81 AD3d 419, 419-420 [1st Dept 2011].)

Here, the complaint alleges that ALPA breached the implied covenant by failing to negotiate a success fee prior to the ratification of LOA 93 and by representing to Glanzer that it would seek the success fee in order to obtain additional services from Glanzer. (Complaint, ¶¶ 107, 108.) The implied covenant cause of action should therefore be dismissed as duplicative of the breach of contract cause of action.

Fourth Cause of Action – Breach of Fiduciary Duty

This cause of action is also based on the allegation that ALPA breached a fiduciary duty to Glanzer "by refusing to negotiate a success fee for [Glanzer] from the Company as [ALPA] was obligated to do." (Complaint, ¶ 112.) It should also be dismissed as duplicative of the breach of contract cause of action.

Fifth and Sixth Causes of Action – Misrepresentation

Glanzer's fifth and sixth causes of action allege that a special relationship existed between Glanzer and ALPA because Glanzer was "entirely dependant [sic] upon [ALPA] to negotiate a success fee" for Glanzer. (Complaint, ¶¶ 115, 120.) It further alleges that ALPA made misrepresentations to Glanzer that it would negotiate the success fee if Glanzer refrained

from exercising an escalation provision under the 2001 Agreement (id., ¶ 116), or if Glanzer agreed to enter into the 2005 Agreement. (Id., ¶ 122.)

A commercial transaction between sophisticated parties does not give rise to a special or fiduciary relationship, even if one of the parties agrees to use "best efforts" to promote the other party's interests. (O'Hearn v Bodyonics, Ltd., 22 F Supp 2d 7, 12 [applying New York law]; Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publ. Co., Inc., 33 AD2d 766, 766 [1st Dept 1969], affd 30 NY2d 34 [1972], rearg denied 30 NY2d 880 [1972], cert denied 409 US 875 [1972].) These misrepresentation causes of action should therefore be dismissed.

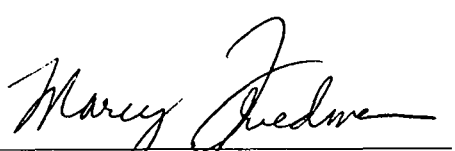
Accordingly, it is ORDERED that defendant Air Line Pilots Association, International's motion for summary judgment is granted to the extent of dismissing the third through sixth causes of action; and it is further

ORDERED that plaintiff Glanzer & Co., LLC's cross-motion for summary judgment is denied; and it is further

ORDERED that this action is set down for a pre-trial conference on January 24, 2014 at 11:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
October 24, 2013



MARCY S. FRIEDMAN, J.S.C.