UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN A. BREEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 05-00654 (RWR)
	)	
NORMAN Y. MINETA	)	
SECRETARY OF TRANSPORTATION	)	
DEPARTMENT OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiffs Kathleen A. Breen, et al., 834 Air Traffic Control Specialists employed by the Federal Aviation Administration ("FAA"), an Agency of the U.S. Department of Transportation, by and through undersigned counsel, hereby apply, pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Civil Rule 65.1, for an immediate Preliminary Injunction, and in support of this Application file the accompanying Memorandum in Support of Plaintiffs' Application for Preliminary Injunction.

This case raises serious questions about Defendants' treatment of its older employees, particularly those who, like Plaintiffs, have dedicated many years of faithful service to the federal government and the FAA in particular. Plaintiffs, all

of whom are 40 years of age or older, are highly trained and experienced public servants who are performing a vital and historically governmental function for the American people. Nevertheless, the FAA is discriminating against them based on their age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, 633a et seq., by terminating their federal employment and related benefits through a discriminatory Reduction-in-Force. The FAA's job eliminations, which will begin to take effect on October 3, 2005, will terminate the employment of all of the estimated 1,935 Air Traffic Control Specialists who work in the FAA's Automated Flight Service Stations in the continental United States, Hawaii, and Puerto Rico, 92 percent of whom are over 40 years of age.

As described in the accompanying Memorandum, there is a substantial likelihood Plaintiffs will succeed on the merits of their claim that Defendants are unlawfully discriminating against them on the basis of their age. Plaintiffs are likely to succeed on the merits of their claim because they are able to prove a prima facie case for age discrimination. Also, to the extent Defendants proffer any reasons for eliminating Plaintiffs' positions, Plaintiffs will show that age was both

a motivating and determining factor for Defendants' decision, and that Defendants' reasons are a pretext for discrimination. Alternatively, Plaintiffs are able to show that the RIF will have a significantly adverse and disproportionate impact on them as older employees, and Defendants are unable to prove the disparate impact was based on reasonable factors other than age.

Plaintiffs will also be irreparably injured if an injunction is not granted because there is no other adequate remedy and without an injunction, Plaintiffs will incur massive financial losses, severe and irreparable harm to their lives, and lose all of their various federal civil service protections and benefits, including retirement benefits. By contrast, no other party will be substantially harmed if a preliminary injunction is granted. Finally, the public interest supports granting the injunction.

A proposed Order also accompanies this Application. An Oral Hearing is requested within 20 days. See LCvR 65(d).

Respectfully submitted,

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July 26, 2005

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Defendants.	)	
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MEMORANDUM IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR PRELIMINARY INJUNCTION

INTRODUCTION

As Plaintiffs stated in their First Amended Class Action Complaint, they are all Automated Flight Service Station Controllers ("FS Controllers") who are 40 years of age or older and employed by the FAA, and they will all be permanently and adversely impacted by Defendants' decision to eliminate their federal employment and related benefits on October 3, 2005. Plaintiffs began receiving Reduction-in-Force ("RIF") notices on July 22, 2005. Plaintiffs contend, and intend to show at trial, that Defendants' decision to eliminate their jobs constitutes unlawful age discrimination in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, 633a et seq. Presently, Plaintiffs seek an

immediate Preliminary Injunction to prevent Defendants from implementing their discriminatory RIF and job eliminations, which will terminate all federal employment and related benefits for 1,935 FS Controllers, of which approximately 92 percent are older employees as defined by the ADEA (i.e., over 40). See 29 U.S.C. § 631(b).

Plaintiffs are likely to succeed on the merits of their claim of disparate treatment because they are able to prove a prima facie case for age discrimination. In addition, to the extent Defendants are able to proffer any legitimate, non-discriminatory reasons for targeting Plaintiffs' positions for elimination, Plaintiffs will show that age unlawfully motivated Defendants' decision. Plaintiffs are not only confident they will meet their minimum burden of showing that age was a motivating factor in the FAA's decision, but that they will also show it was a determining factor and that Defendants' reasons are a pretext for age discrimination. See McDonnell Douglas v. Green, 411 U.S. 792 (1973); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); and Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). See e.g., Rachid v. Jack In The Box, Inc., 376 F.3d 305 (5th Cir. 2004) (which analyzed post-Desert Palace ADEA claim under "a merging of the McDonnell Douglas and Price Waterhouse

approaches"). Once Plaintiffs have demonstrated that age motivated Defendants' decision to terminate their employment, Defendants will be unable to prove that the FAA would have made the same decision absent their discriminatory motivation.

Alternatively, Plaintiffs are likely to succeed on the merits of their claim of disparate impact because they can prove a prima facie case for age discrimination through statistical evidence, which shows that Defendants' mass RIF and job eliminations will have a substantial adverse impact on an estimated 1,935 FS Controllers outside Alaska, 92 percent of whom are over 40 years of age. Furthermore, Defendants' decision is not reasonable and is not based on any reasonable factor other than Plaintiffs' age.

FACTS

1. Plaintiffs' Background

Plaintiffs are 834 Air Traffic Control Specialists, each of whom works in the FAA's Flight Services division in one of its 58 Automated Flight Service Stations ("AFSS") in the continental United States, Hawaii, and Puerto Rico. See Decl. of Michael J. Sheldon (July 26, 2005), at ¶5, copy attached as Exhibit 1. The FAA employs about 1,935 FS Controllers (outside Alaska), and approximately 1,770 (92 percent) of them are 40 years of age or

older. See Ex. 1 at ¶5.

The AFSSs are an integral part of the FAA's air traffic system, and the FS Controllers who staff these facilities perform crucial functions for our country's aviation community, which are central to the core mission of the FAA and vital to our national security and the safety of our citizens. The primary duty of FS Controllers is to provide pre-flight, in-flight, and emergency assistance to airplane pilots on request, and to monitor weather and traffic conditions for pilots awaiting departure and preparing to land. See Decl. of Kathleen A. Breen, (July 26, 2005), at ¶8, copy attached as Exhibit 2; id. at Attach. A (Memorandum from NAATS to Senate Appropriations Committee Members (July 13, 2005)) at 1; see U.S. Office of Personnel Management, Position Classification Standard for Air Traffic Control Series, GS-2152 (June 1978) at 10-23, copy attached as Exhibit 3.

In addition to providing continuous forecasts and flight path information to pilots, FS Controllers also relay air traffic control instructions between Controllers and pilots, assist pilots in emergency situations, coordinate search and rescue services, and provide orientation services to lost aircraft. See Exs. 2 at ¶9; 3 at 10-23. Occasionally, they

direct activities for airports where there is no control tower or where the tower has been temporarily taken off-line.[1] See Exs. 2 at ¶9; 3 at 10-23. Once airborne, pilots rely on FS Controllers for briefings on hazardous weather conditions and guidance on temporary flight restrictions, which are constantly being updated and changed. See Exs. 2 at ¶10; 3 at 10-23. FS Controllers maintain communication with the pilots in the air to provide up-to-the-minute route adjustments to help them avoid severe weather conditions as well as prohibited, restricted, or special use airspace. See Exs. 2 at ¶10; 3 at 10-23. In addition to the services they provide the general aviation community, FS Controllers also work frequently and closely with commercial and military pilots, and they perform imperative national security functions.[2] See Exs. 2 at ¶11; 3 at 10-23.

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[1] The FS Controllers were the individuals responsible for operating the National Airspace System ("NAS") in 1981 during the strike by the Professional Air Traffic Controllers Organization ("PATCO"). See Keith Gunnell, "Lockheed Martin Wins Flight Service Contract," J. Fed. Aviation Admin. Managers Assoc., Managing the Skies, at 7-8 (January/February 2005), available at http://www.faama.org/news/mts/MTS0105.pdf, copy attached as Exhibit 4.

[2] The mission of the AFSSs is to collect, process, and deliver aeronautical and meteorological information to promote safe and expeditious flights. FS Controllers provide this information to a wide range of individuals and groups, including airline transport, commercial, private, student, and rec-

FS Controllers perform the vital security function of making pilots aware of the flight restrictions that are permanently established over and around the President of the United States, wherever he happens to be (in the air or on land). See Ex. 1 at ¶9. All safety and security directives relayed to the aviation community on September 11, 2001, were made through FS Controllers, and in the aftermath of that fateful day, FS and other Controllers were an essential human link between the pilots in the air and the FAA. See Ex. 1 at

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reational pilots; military, air taxi, and on-demand charter operators; domestic and international aviation interests; FAA organizations; federal, state, and local governments; and public safety and law enforcement agencies. See Federal Aviation Administration, AFSS Screening Information Request ("SIR") No. DFTFAAWAACA-76-001, §C.2.3.1 and 2 (May 3, 2004), available at http://www.faa.gov/aca/afss/documents.htm#, copy attached as Exhibit 5.

> [FS Controllers] get calls when dispatch centers go down. They help the military get moving when there is a deployment or when the Guard personnel are in training. The flight service stations along the border talk to commercial aircraft on a daily basis coming from Europe or Asia who need to know the weather patterns throughout the U.S. Commercial pilots call flight service stations looking for pilot reports when they are experiencing rough air and are looking for a smooth altitude in an alternate route. After 9/11 there has been an increase in corporate jets, and flight service stations provide weather and traffic information to them.

Ex. 2 at ¶11; id. at Attach A at 3.

¶10; see also Ex. 4, at 8.

In addition to their efforts on a national scale, FS Controllers utilize their local knowledge to service pilots on an individual basis. For example, the FS Controllers who work at the Bridgeport, Connecticut AFSS use their local knowledge to monitor and report on the local weather conditions over the Long Island Sound between New Jersey and Martha's Vineyard, the treacherous area where John F. Kennedy, Jr.'s plane crashed in 1999.[3] See Ex. 1 at ¶10.

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[3] The National Transportation Safety Board ("NTSB") concluded that Mr. Kennedy, who was flying at night and obtained his weather report from a private weather service provider (Weather Service International), crashed because of spatial disorientation due to his lack of visual reference clues. See Nat'l Transp. Safety Bd., Brief of Accident, No. NYC99MA178 (July 6, 2000), available at http://www.ntsb.gov/ntsb/GenPDF.asp?id=NYC99MA178&rpt=fi, copy attached as Exhibit 6; Nat'l Aviation Safety Data Analysis Ctr., Brief Report No. 20001212X19354, available at http://amelia.db.erau.edu/reports/misc/NYC99MA178.pdf, copy attached as Exhibit 7. See also Bruce Landsberg, "Landmark Accidents: Vineyard Spiral," AOPA Pilot (September 2000), available at http://www.aopa.org/asf/asfarticles/sp0009.html?PF, copy attached as Exhibit 8. Mr. Kennedy did not contact an AFSS before or during his flights, unlike many other new pilots who rely heavily on AFSSs like the one in Bridgeport. See id.; Ex. 1 at ¶10.

General Aviation pilots (and student pilots) are the subset of pilots with the greatest risk of fatalities, and they are the primary beneficiaries of Flight Services. See FAA, Administrator's Fact Book (March 2005), at 7 (NTSB 2002-2003 U.S. Transportation Fatalities (September 3, 2004)), available at http://www.atctraining.faa.gov/site/factbooks/mar05.pdf, copy

FS Controllers communicate with an estimated 3 million or more aircraft per year, and this level of activity is expected to remain stable through 2009. See Nat'l Assoc. of Air Traffic Specialists, "Report on the Future Structure of Flight Service," at 3.0 (citing FAA Aviation Forecasts, Fiscal Years 1998-2009), available at http://naatsalaska.org/NAATS_Report_Future_FSS.htm, copy attached as Exhibit 10. According to the FAA's Aviation Forecast, an estimated 27.7 million services were logged by AFSSs nationwide in 2003, and the forecast for 2007 is due to increase to 28.2 million.[4] See Ex. 9 at 22 (Aviation Forecast (March 31, 2004)); see also id. at 8 (FAA Air Traffic Activity (January 31, 2005)) (reporting 26,815 logged activities between January and December 2004). Each FS Controller works

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attached as Exhibit 9. Moreover, the FAA's National Aviation Safety Data Analysis Center reports that weather contributed to or caused more than one out of every five aircraft accidents between 1991 and 2001. See NASDAC, Office of System Safety, NTSB Weather Related Accident Study, 1991-2001, available at https://www.nasdac.faa.gov/aviation_studies/weather_study. Thus, without the vital experience and dedication of the present FS Controllers with localized knowledge, there is likely to be an increase in the number of weather-related accidents, along with a corresponding loss of life and property.

[4] AFSS services and activities include direct air-to-ground radio contacts with pilots, in-person briefings at the AFSS facilities, recorded telephone briefings, recorded weather advisories, and computerized interactions. See Ex. 1 at ¶5.

on an estimated 16,000 total services annually. See Ex. 10 at 8.0 (citing FAA Office of Policy and Plans projections); see also Office of Inspector General ("OIG"), U.S. Dep't of Transp., Memorandum from Alexis M. Stefani, Assistant Inspector Gen. for Aviation, to Federal Aviation Administrator re: Report of Automated Flight Service Stations: Significant Benefits Could be Realized by Consolidating AFAA Sites in Conjunction with Deployment of OASIS, AV-2002-0064 (December 7, 2001) ("OIG Report"), at 14 (citing independent determinations by Flight Services Architecture Core Group and the AFSS Restructuring Work Group), available at http://www.aopa.org/whatsnew/air_traffic/ig_report2.html, copy attached as Exhibit 11.

Historically, the duties of FS Controllers and the operations of all AFSSs have been considered an inherently governmental function, and before the FAA's contracting out, mass RIF, and job eliminations, no private sector company employed personnel who performed the services handled by the FAA's FS Controllers.[5] Contrast Exec. Order No. 13180 (December

[5] As the FAA states "Inherently governmental activities are those best provided by the government because they are so linked to the public good that they are required to be managed by government [and] [c]ommercial activities are those activities that can be performed by the private sector or a commercial vendor." See FAA, "Automated Flight Service Stations Preparing

7, 2000) with Exec. Order Amend. No. 13180 (June 4, 2002); see also Ex. 2 at ¶14.

FS Controllers are dedicated, experienced public servants, and their jobs require specialized training and experience. See Air Traffic Organization, FAA, "A Plan for the Future" (December 2004) at 59 ("In a profession where human error or lack of judgment in a complicated air traffic control situation can have tragic consequences, the importance of ... training ... cannot be overemphasized"), available at http://www.faama.org/General/WorkforcePlan.pdf, copy attached as Exhibit 14. FS Controllers are required to have a minimum of three years of work experience or four years of college before working with the FAA, and a

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for the Future" (September 2004), available at http://www.faa.gov/library/office_publications/a76/ view/a76_brochure.cfm, copy attached as Exhibit 12. Examples of inherently governmental functions are: the regulating "of space, oceans, navigable rivers and other natural resources;" activities that significantly affect the life, liberty, or property of private persons; national defense; and the management and direction of the Armed Services. See FAA, Procurement Guidance T.3.1.8 (March 2000), available at http://fast.faa.gov/archive/v0401/procurement_guide/ html/3-1-8.htm, copy attached as Exhibit 13. By contrast, commercial activities are "primarily ministerial in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services)." Id.

large number of them have previously served as Controllers in the military. See Exs. 2 at ¶12; 14 at 59-83; Bureau of Labor Statistics, Dep't of Labor, "Occupational Outlook Handbook, 2004-05 Edition: Air Traffic Controllers," available at http://www.bls.gov/oco/ocos108.htm, copy attached as Exhibit 15. To become FS Controllers, they must pass a thorough screening process, which includes aptitude tests and physical and psychological examinations. See id. They must complete three months of rigorous training at the FAA Academy in Oklahoma City, where they learn about FAA regulations, aircraft performance characteristics, Controller equipment, and airway system fundamentals. See id. They must also pass a written pre-employment examination, as well as a medical exam, drug screening, and security clearance. See id. Finally, FS Controllers are provided an additional two years of on-the-job training before they are able to attain their full performance level. See Ex. 2 at ¶12. On average, Plaintiffs have 15 to 18 years of experience, and they have undergone an estimated four years of specialized training. See Ex. 1 at ¶7.

In addition to their specialized training, the 834 Plaintiffs are long-time federal employees who have dedicated many years of faithful service to the federal government. On

average, Plaintiffs have more than 20 years of government service, of which 15 to 18 have been spent working for the FAA. See Ex. 1 at ¶7. In addition, 56 percent of the FS Controllers are veterans of the U.S. Armed Services. See Ex. 1 at ¶8. Of the 1,935 FS Controllers who will be adversely impacted by the FAA's discriminatory RIF and job eliminations, approximately 1,770 (92 percent) of them are 40 years of age or older. See Ex. 1 at ¶6. Plaintiffs' average and median age is 50. See Ex. 1 at ¶8.

As a direct result of the FAA's age-discriminatory plan, the FS Controllers will be severely harmed in multiple ways, including the termination of their jobs, the loss of retirement benefits, and disruption of their lives, relationships, and community ties. See infra, at 41-46, 56-64.

2. **FAA's Background**

The FAA has a long, documented history of treating its older employees poorly. See, e.g., Torres v. Mineta, Civil Action No. 04-0015 (GK) (D.D.C., filed Jan. 8, 2004). See also Dept. of Transportation, "No FEAR reporting requirements - Federal Aviation Administration - Only," (May 1, 2005) (reporting the FAA received 761 reported complaints of age discrimination during 2000-2005), available at http://www.dotcr.

ost.dot.gov/documents/ycr/nofear/faa_nofear.pdf, copy attached as Exhibit 16. It also has several policies and practices in place that explicitly curtail FS Controllers' careers on the basis of age. Most Controllers are required to retire at age 56. See FAA, Human Resource Policy Manual (HRPM) § EMP-1.20 (effective July 29, 2003), copy attached as Exhibit 17. But see Ex. 14 at 48 (citing findings that the likelihood of en route operational errors declines with age as a function of experience). See also Jim Gibbons, "Mandatory Retirements: Abolishing the FAA Age 60 Rule" (Test. of Rep. Jim Gibbons before Senate Committee on Aging) (September 14, 2004) (criticizing "the outdated, unnecessary, and discriminatory [FAA] 'Age 60 Rule'" for pilots because it's "not based on sound science, public safety or medical facts"), available at http://wwwc.house.gov/gibbons/about_bio.asp, copy attached as Exhibit 18. With few exceptions, FS Controllers are also restricted from transferring to other FAA Controller positions (Tower or En Route) if they are 31 years of age or older.[6] See Ex. 17.

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[6] Lockheed Martin Corporation, the private company selected by the FAA to assume responsibility for the functions presently performed by Flight Services, also has a poor record with respect to age discrimination. See Equal Employment Opportunity Commission, "EEOC and Martin Marietta (Lockheed Martin) Settle Major Class Action Lawsuit" (November 21, 1996) (reporting on

The FAA, which operates across nine Regional Boundaries, is comprised of 15 Offices, departments, or organizations that report to the Deputy Administrator or Chief Operating Officer, and under these various divisions are still more offices and services. See Ex. 2 at ¶13; FAA, FAA Organizational Chart (May 20, 2005), available at http://www.faa.gov/about/, copy attached as Exhibit 20. One such division, the FAA's Air Traffic Organization, is divided into 10 distinct Services and is responsible for operating the NAS, which it accomplishes through the dedicated work of Controllers, who are employed in one of three Services – Terminal or Tower, En Route, and Flight. See Ex. 3 at 5; FAA, "Air Traffic Control Specialist: Job Series 2152," available at http://www.faa.gov/careers/employment/AT2_008902.pdf, copy attached as Exhibit 21.

The FAA has approximately 47,329 employees, an estimated 16,858 of whom are Air Traffic Controllers. See Ex. 9 at 29 (FAA Employment (October 25, 2004)); id. at 31 (Major Workforce Employment (September 30, 2004)). As noted above, there are 1,935 FS Controllers who will be adversely impacted by

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the preliminary approval of a settlement for $13 million in backpay and 450 jobs to laid-off employees who were impacted by age discrimination), available at http://www.eeoc. gov/press/11-21-96.html, copy attached as Exhibit 19.

Defendants' actions, and approximately 1,770 of them are 40 years of age or older. See Ex. 1 at ¶6. There are also at least 8,000 Tower Controllers and 6,500 En Route Controllers. See Ex. 2 at ¶13. However, of the three Air Traffic Control services, Flight Services has by far the oldest workforce. See Ex. 2 at ¶13. The FS Controllers, as a group, are also much older than the employees in the FAA's other divisions. See Ex. 2 at ¶13. The FAA maintains records on its employees' ages and knew that its FS Controllers were older than its other employees. See generally, Ex. 14.

The FAA's "Plan for the Future," its business blueprint, anticipates large shifts in its personnel and speaks optimistically about hiring new employees. See Ex. 14 at 3-4. In fact, relying on its Plan for the Future, the FAA has demonstrated a preference for new employees over the older "displaced/surplus" FS Controllers in filling its Tower and En Route Controller openings. See FAA, "AFSS Employee Resource: FAQs - FAA Placement and Waiver Programs," at ¶2 available at http://www.faa.gov/aca/employee_resource/faq/placement.htm, copy attached as Exhibit 22. In response to a question concerning its decision to hire students from outside the FAA instead of reassigning displaced AFSS personnel, the FAA emphasized its

hiring "flexibility" and stated that while implementing its mass RIF and job eliminations for FS Controllers, it "must concurrently take those steps necessary to implement the 10-Year [Plan for the Future] Strategy for the Air Traffic Control Workforce." Id. (Q&A 2, 4/19/05).

3. **The A-76 Process**

The Federal Activities Inventory Reform ("FAIR") Act requires agencies to distinguish their "inherently governmental functions" from their "commercial activities."[7] See Pub. L. No. 105-270. The President's Management Agenda, as established by President George W. Bush in 2002, allows federal agencies to identify commercial activities that they perform which are suitable for contracting out, based on the Office of Management and Budget ("OMB") Circular A-76. See President's Management Agenda (2002), available at http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf; OMB Circular A-76 (revised May 29, 2003), available at www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. See also FAA, Acquisition Management Policy § 1.1, available at http://fasteditapp.faa.gov/amsdo_action?do_action=

[7] The FAIR Act "does not mandate that each agency contract out all commercial functions included on the Commercial Activities Inventory." See Ex. 13.

ListTOC&contentUID=4#3, copy attached as Exhibit 23. Exploiting the President's Management Agenda and Circular A-76 for the purposes of age discrimination, the FAA deviated from the spirit and purpose of both by arbitrarily classifying certain aspects (but not all) of Flight Services as commercial, by targeting it for an A-76 feasability study, and by manipulating the FAA's subsequent bidding process to contracting out the jobs performed by its older FS Controllers and terminating their federal employment through a RIF. See e.g., Decl. of Ronald Consalvo (July 26, 2005) at Attach. A (Memorandum from Human Resource Management Officer to Ronald Consalvo (July 19, 2005)), copy attached as Exhibit 24; see also Ex. 2 at ¶31.

On or around 2002, the FAA's Chief Financial Officer identified Flight Services (the FAA's AFSSs) as a candidate for an A-76 feasability study. See FAA, "AFSS A-76 Competition," available at http://www.faa.gov/aca/afss.htm, copy attached as Exhibit 25. The FAA then established the Office of Competitive Sourcing to manage the subsequent A-76 bidding process, which was announced on December 19, 2003, and began on May 3, 2004. See id. However, the FAA erroneously identified Flight Services as a commercial activity, arbitrarily exempted certain AFSSs from its A-76 feasability study and the subsequent RIF, and

deviated from established policies and practices in conducting its feasibility study and bidding process.

First, although FS Controllers perform duties that have a significant impact on the life and property of private citizens and national defense, the FAA revoked Flight Services' status as an inherently governmental function in 2000. See FAA, "Inventory of Commercial Activities" (March 31, 2000), available at www.dot.gov/ost/m60/fairact/faa2000.pdf, copy attached as Exhibit 26. In fact, Defendants listed the AFSSs on the FAA's Inventory of Commercial Activities again in 2001, despite Executive Order 13180, which established the Air Traffic Organization and expressly designated air traffic services as "an inherently governmental function." Compare FAA, "Draft Inventory of Commercial Activities" (March 31, 2001), available at www.dot.gov/ost/m60/fairact/faa2001.pdf, copy attached as Exhibit 27 with Exec. Order No. 13180 (December 7, 2000) (amended on June 6, 2002, 1.5 years later). Only after it had already revoked Flight Services' status as a governmental function did Defendants belatedly justify their decision by conducting the A-76 feasability study, which "indicated that the majority of the services offered by [AFSSs] are commercial in nature [and] can be provided by private industry." See Ex. 4 at 7.

Second, although 7,345 employees within the FAA were performing so-called commercial activities in 2000, only one workforce was targeted for the A-76 feasibility study and eventual job elimination – Flight Services. See Ex. 26. In clear contravention of both the spirit and purpose of the President's Management Agenda and Circular A-76, the FAA did not institute any system-wide studies of its various operations in an effort to identify those functions that were best suited for contracting out but, instead, targeted its largely older workforce in Flight Services. See Ex. 2 at ¶14.

Third, the FAA recognized that Alaska was not suitable for contracting out because of unusual environmental factors, see Ex. 2 at ¶14; 12, but in its zeal to eliminate the FS Controllers elsewhere, it overlooked the other large portions of the country that are also clearly unsuitable for the same reasons. For example, the OIG Report stated that both Hawaii and Puerto Rico present unusual geographical and topographical considerations, see Ex. 11, at 5, and the Great Lakes, Rocky Mountains, and Southeastern Atlantic Coast are other obvious examples. See e.g., Ex. 1 at ¶10 (discussing the unique weather conditions over the Long Island Sound). This and other similarly spurious decisions by the FAA are indicative of its

arbitrary, capricious, and pretextual actions. As late as 1999, some FS Controllers, like those working in the Great Lakes Region, were considered by the FAA to be performing an inherently governmental function, while others were deemed commercial. See Ex. 26. In 2000, the FAA considered the Alaska AFSSs eligible for contracting out, but by 2001 they were not. Contrast Ex. 26 with Ex. 27.

Fourth, to assure the age-discriminatory result it sought, the FAA completed its A-76 feasibility study in a manner that deviated from established policies and practices. The FAA's contractor, Grant Thornton LLP, completed the FAA's study on July 12, 2002, after only 30 to 40 days, and conducted only one survey. See Ex. 2 at ¶15. Contrary to established policies and practices, the FAA admits it took no steps to verify any of the data and information contained in the study, shrouding its conclusion in doubt. See Ex. 2 at ¶15; id. at Attach. B (Tr. Of September 24, 2002 Meeting with FAA Officials) at 3. This expedited, haphazard approach was taken over the objections of Lead Plaintiff and NAATS President Kathleen A. Breen and others, who recognized the significant impact this study and the subsequent job losses would have on the FS Controllers, the flying public, and national security. See Ex. 2 at Attach. B at

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Fifth, for over 30 years, our nation has committed itself to retirement and pension security. In 1974, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., was signed into law to provide protections for workers' retirement benefits. Congress concluded that the lack of protections was unfair, inequitable, and a threat to interstate commerce. See 29 U.S.C. §§ 1001, 1001a, 1001b. Among the protections established by ERISA is the Pension Benefit Guaranty Corporation ("PBGC") to insure the pensions of employees and retirees participating in private-sector employer-funded pensions. See 29 U.S.C. § 1302. However, the FAA ignores our nation's strong commitment to pensions and retirement, by simply eliminating Plaintiffs' hard-earned federal retirement benefits. Unlike private-sector employer-funded pensions, Plaintiffs' pensions are not insured, and therefore, their only recourse is the Courts.

The FAA claims its decision to implement the A-76 study and mass RIF of FS Controllers was prompted by conclusions reached in a report by the Department of Transportation's Office of the Inspector General ("OIG") (Report No. AV-20020064) in 2001. See Ex. 25. However, the OIG Report concluded only that current and

future flight service demands could be met with fewer AFSSs; it made no mention of contracting out Flight Services. See Ex. 11. Furthermore, several proposals were developed by personnel within the FAA that would have achieved the legitimate goal of consolidating the AFSSs without discriminating against the largely older FS Controllers.

The OIG Report made several recommendations regarding Flight Services, including the consolidation of the 61 existing AFSSs into 25 facilities. See Ex. 11 at 5,9. The OIG Report was issued after an audit on the deployment of the AFSS's new computer software, Operational and Supportability Implementation System ("OASIS"), which provides on-line access to services such as better weather displays and automatic flight plan processing. Ex. 11 at 1. It recommended that the FAA accomplish consolidation through gradual attrition. See Ex. 11 at 5, 9-10. Specifically, the OIG Report stated that the "reductions could be accomplished entirely through retirements and without a reduction in force since nearly half of the flight service specialist workforce is currently eligible to retire." See Ex. 11 at 5. See also Ex. 10 at 3.1 (citing FAA Flight Service Study (April 1998) (recommending consolidation after considering employees' quality of life and cost of living and the economic

cost to the FAA)); Ex. 11 at Ex. C (same).

Similarly, the National Association of Air Traffic Specialists ("NAATS") submitted a proposal to the FAA that would have consolidated the existing AFSSs into 25 facilities, had it been implemented.[8] See Ex. 10 at 2.1. The NAATS Proposal, which relied on data contained in the FAA's 1998 Flight Service Architecture Report, the OIG Report, and the FAA's 1998 Flight Service Study, also recommended using employee attrition to significantly reduce the number of FS Controllers without discriminating against the older employees. See Ex. 10 at 2.1, 8.0. See similarly, FAA, "Automated Flight Service Station, Redacted Version: PSP 3, Technical Evaluation Report ("TER"), App. B: Detailed Strengths and Weaknesses" (January 25, 2005), at 177-78 (noting that the FAA's Most Efficient Organization proposed in its bid to reduce the workforce with limited buyouts based on retirement assessments), copy attached as Exhibit 28.

These proposals would also have resolved several other concerns the FAA and NAATS both sought to address. For example, had it been implemented, the NAATS Proposal would have maximized

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[8] It should be noted that the OIG concluded that "any consolidation effort should include careful coordination with [NAATS] to ensure that impact on the workforce is minimal and that anticipated savings are fully realized." See Ex. 11 at 5.

efficiencies and produced an estimated savings of $600 million over seven years with a continued savings in excess of $84 million annually thereafter based on the FAA's Cost Accounting System figures and projections from the OIG Report. See Ex. 10 at 11.0. Likewise, the OIG Report, had it been implemented, would have saved the FAA almost $500 million. See Ex. 11 at 9. Both the OIG recommendations and the NAATS Proposal would have accomplished the FAA's stated goal without discriminating against older employees, but Defendants refused to implement either plan. In fact, the FAA never responded to either the NAATS Proposal or a draft copy of the OIG Report. See Exs. 10 at Note; 11 at 12 ("we do not understand the [FAA's] delay in providing a response"). Instead, it initiated the A-76 bidding process to ensure that its older FS Controllers would lose their federal employment and benefits.

On May 3, 2004, the FAA began collecting bids for contracting out Flight Services. See Ex. 25. The FAA's Most Efficient Organization ("MEO"), which was prepared and presented by FAA employees and managers who were familiar with Flight Services (see Ex. 12) Lockheed Martin, Computer Science Corporation, Northrop Grumman, and Raytheon were among the organizations that presented bids to the FAA management. See FAA, "AFSS

A-76 Performance Decision," available at http://www.faa.gov/aca/perf_decision/Dennis%20DeGaetano.pdf, copy attached as Exhibit 29. However, it is clear from the numerous prejudicial errors in the bidding process that the FAA decided to select Lockheed Martin as its service provider because that proposal would have the most detrimental impact on the older FS Controllers.[9]

As part of its bidding process, the FAA was required to use separate, independent Technical Evaluation Team ("TET") Factor Teams to assess each proposal, which reported their findings to the FAA's Source Selection Evaluation Board ("SSEB"). See Ex. 5 at § M.3.1; FAA, "AFSS A-76 Announcement Information Packet" (January 21, 2005) at 18, available at http://www.faa.gov/aca/employee_resource/packet/EmployeeInformationPacket%20v12106.pdf, copy attached as Exhibit 30. The TET identified 41 discernable strengths in the MEO proposal, and only seven purportedly "influential weaknesses." See Ex. 2 at ¶16; see e.g., Ex. 28 at 177-84, 189-194, 218-19.

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[9] The procedural and substantive irregularities in the FAA's bidding process are so severe that it has been contested in an unrelated confidential administrative action on several factors that because of their confidential nature cannot be discussed herein. See Ex. 2 at ¶16.

According to the TET, the MEO proposal had the unique benefit of the "Retention of Incumbent Workforce," "resulting in a high probability of retaining the necessary incumbent work-force," thus assuring "a seamless and effective transition of services." See Ex. 28 at 178. This strength derived from the fact that under the MEO proposal, the FS Controllers, most of whom are older, would have continued working for the FAA, and would have received their federal retirement benefits. See id.

The MEO proposal was also credited with an "Understanding of Workload Fluctuations" and an "Ability to Secure Staff." See Ex. 28 at 179-80, 184. The TET's detailed findings also noted that the MEO proposal had six additional strengths, such as its "Use of Experienced Maintenance Workforce," "Local Area Know-ledge," "Use of [Collegiate Training Initiative] Schools," "Proactive Change Management Approach," "Strong Partnership Program," and its ability to "Maintain Proficiency During Transition." See Ex. 28 at 181, 189, 190-94. According to the TET, the MEO proposal demonstrated a comprehensive understanding of workload fluctuations, which would result in a high probability of precisely projecting staffing requirements, and

substantiated its ability to retain the existing workforce.[10] See Ex. 28 at 179-80.

By contrast, Lockheed Martin will need to assemble a new workforce and create a new organization from scratch. The attempt to create a whole-sale replacement for a major portion of our nation's NAS is without precedent. As noted above, no private sector company, including Lockheed Martin, employed personnel who performed the services handled by the FAA's FS Controllers who provide pilots with decades of experience and

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[10] The TET concluded that:

> "The [MEO] is uniquely positioned to retain the necessary staff for its proposed approach. The [MEO] should have little trouble recruiting and retaining the necessary staff to relocate to its proposed new locations. This should enable the [MEO] to provide a seamless transition from initial contract award, through Phase-In and Transition into the End-State period. The possibility of continued employment with Federal Gov't will encourage current AFSS federal employees to remain with the [MEO]."

See Ex. 28 at 184. The contracting out will occur in three stages, (1) the Phase-In, which will end on October 1, 2005, and after which FS Controllers will become "displaced/surplus" and will be terminated from their federal positions through a RIF; (2) the Transition, which can take up to 18 months, but is estimated to occur quickly, during which the AFSSs will begin to be closed; and (3) the End-State, which as its name suggests is the end of the process. See Exs. 24 at Attach. A; 30 at 21; see also Lockheed Martin, "Comparison of LMC & MEO Offerings," available at http://www.lmafsshr.com/compare.asp, copy attached as Exhibit 31.

judgment which the pilots can draw on to ensure that they will remain safe and on course. Currently, the nearest analog in the private sector is cold compilation of data delivered by machines without aids to interpretation for the novice or inexperienced pilot. See e.g., Ex. 6. The remaking of Flight Services is by any measure a daunting task, and one, moreover, that must be completed in a short time-period and that will be terribly unforgiving of error on the part of the private contractor engaged to undertake it.

The MEO and Lockheed Martin proposed nearly identical transition timetables and similar consolidations in the workforce by End-State. See Ex. 31 (MEO – 18 months; 966 employees; Lockheed Martin – 18 months; 1,000 employees); see similar Ex. 2 at ¶16 (MEO proposed an End-State workforce of about 1,050 Controllers). However, unlike the MEO proposal, the Lockheed Martin proposal was not subjected to a rigorous critique, which is apparent from the FAA's claim that it was not able to identify a single weakness or risk in the entire Lockheed Martin proposal even though the proposal relies on untested and uncertified technology.[11] See Ex. 2 at ¶16. In

[11] On information and belief, the Lockheed Martin proposal relied of software that FAA staff found to be inoperable.

fact, despite its obvious flaws, the Lockheed Martin proposal was the only bid that was considered to be without a single "influential weakness," or assessed technical or cost risk. See Ex. 2 at ¶17.

The FAA's bias is clear in its assessment of the risks attributable to the unionization of the FS Controllers. Despite the TET's conclusion that there was a "low probability that [MEO's proposed] Transition schedule will be negatively affected by staffing issues," the FAA claimed the existence of NAATS was an "influential weakness" in the MEO proposal. See Ex. 28 at 182-83, 191-92. By contrast, the FAA attributed no analogous risk to the Lockheed Martin proposal and blithely ignored the fact that FS Controllers could be (and subsequently were) approached by union organizers and encouraged to unionize within Lockheed Martin. See Ex. 2 at ¶17.

There were similar biases evident in the FAA's assessment of proposed technologies. The MEO proposed "a highly viable solution" for the transition of technology by retaining current "software and critical NAS interfaces [and] incorporating low-risk enhancements." See Ex. 28 at 218-19. By contrast, Lockheed Martin proposes to use new, untested voice switches at each of its new Hubs and AFSSs that are not used in the United States

and have never been approved for use in the NAS. See Ex. 2 at ¶16. Inexplicably, the FAA awarded Lockheed Martin the highest available rating on Technical Factors. See Ex. 2 at ¶20. It also refused to assess any risks of cost escalations or delays against the Lockheed Martin proposal attributable to the testing, installation, and training that will be needed to implement the new, untested technology. See Ex. 2 at ¶18.

Despite the positive assessment of the strengths of the MEO proposal, and as a result of the bias in the comparative assessments, the FAA chose to award its contract to Lockheed Martin, which assured that the largely older FS Controllers would be irreparably harmed. See Ex. 29.

4. **FAA's Chosen Job Elimination Plan**

On February 1, 2005, the FAA announced that Lockheed Martin was awarded the contract to take over Flight Services for the next five years at a cost to the federal government and the taxpayers of $1.9 billion, with an option of five additional years. See Ex. 29. This decision, which is scheduled to take effect on October 1, 2005, is certain to cause high turnover among the current FS Controllers, allowing the FAA to replace its older, dedicated, experienced FS Controllers with new, younger workers as Lockheed Martin contractors.

The FAA's plan will consolidate the 58 existing AFSSs (excluding Alaska) into 17 stations located in existing facilities ("Legacy sites") and three new Hubs located in Arizona, Texas, and Virginia. See Ex. 29.[12] This process is expected to be completed within the first six months of the 18-month Transition. See Ex. 1 at ¶11.

In turn, the FAA's mass RIF and job eliminations will result in an immediate and significant reduction in the number of employees, which will have a detrimental impact on the FS Controllers (outside Alaska), 92 percent of whom are older employees. As an initial matter, all of the FS Controllers soon will be separated from federal service and lose their federal retirement benefits and health insurance. See FAA, "HR Placement

[12] The FAA's consolidation plan, which dismisses the importance of local knowledge, will severely reduce the number of AFSSs. For example, together the New England and Eastern Regions (which represent the airspace over Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia) will have only one AFSS in New York to provide assistance exclusively to New York City and a HUB located in Virginia, which will monitor and assist the entire East Coast. See Exs. 1 at ¶12; id. at Attach. A (Map of proposed AFSS and Hubs); 9 at 27 (Map of FAA Regional Boundaries). As a result, the FS Controllers in the Virginia HUB will be responsible for assisting pilots who will be navigating distant locations like Maine, New Hampshire, Vermont, and Cape Cod. See Ex. 1 at ¶12.

FAQs," available at http://www.faa.gov/ahr/competitive/placement faqs.cfm, copy attached as Exhibit 32. Under the RIF, the AFSS's current workforce of about 1,935 FS Controllers will also be reduced to only 1,000 Lockheed Martin controllers ("LM contract personnel") by the End-State period. See Ex. 31.

As a result of the mass RIF, almost half of the FS Controllers will completely lose employment and become unemployed. See Exs. 2 at ¶26; 31. Although the FAA claims it will provide some of these men and women Controller positions elsewhere in the FAA, this claim is disingenuous. First, the FAA is offering only 65 such positions. See Ex. 2 at ¶26; id. at Attach. D (Air Traffic Controller Hiring Summary FY 04 through FY 05 (June 30 2005)); Ex. 22 at ¶8. Second, these positions have not been reserved exclusively for the soon-to-be former FS Controllers, and the FAA has already begun to select new, younger Controllers from outside the FAA to fill these positions. See Ex. 22 at ¶2; Decl. of Homer McCready (July 21, 2005) at ¶6, copy attached as Exhibit 33. In fact, the FAA is projecting it will hire 436 Controllers through September 2005, and in contrast to the 65 FS Controllers it plans to hire, it has offered 208 of those positions to younger students. See Ex. 2 at Attach. D. Third, the FAA will not allow the FS

Controllers to retain their present salaries. See Ex. 1 at ¶14; Decl. of Milton J. Torres, III (July 6, 2005) at ¶5, copy attached as Exhibit 34.

Also as a result of the mass RIF and job eliminations, the employment of the remaining FS Controllers (the estimated 1,000 LM contract personnel) is in jeopardy because of several mechanisms that were intentionally built into the plan for the purpose of harming older employees.

First, because the plan will close 38 of the AFSSs beginning on October 1, 2005, the FS Controllers who work in those facilities will lose their jobs unless they have agreed to move to Arizona, Texas, or Virginia, and did so with less than eight days notice. See Ex. 1 at ¶16; Lockheed Martin, "Ask Us – Frequently Asked Questions" (Q&A 4, 2/10/05), available at http://www.lmafsshr.com/faq/, copy attached as Exhibit 35. On February 1, 2005, when the FAA awarded the contract, Lockheed Martin informed the FS Controllers that approximately 300 Controllers from the soon-to-be-closed facilities would be allowed to transfer to one of the new Hubs in Arizona, Texas, and Virginia. See Ex. 1 at ¶15. However, these positions were filled on a first-come, first-serve basis. See Ex. 35 (Q&A 1, 2/8/05). The FS Controllers were required to fill out and

submit an Employee Questionnaire beginning on February 1, 2005, indicating they were willing to transfer and ranking the three Hubs in order of preference. See id.; Lockheed Martin Employee Questionnaire, available at http://www.lmafsshr.com/resume/#fcfs, copy attached as Exhibit 36. As a result, within eight days, Lockheed Martin had all the Questionnaires it needed to fill its HUB openings. See Ex. 1 at ¶16.

The FAA is assuming that its older FS Controllers are not likely to move. See e.g., Ex. 11 at 10 ("since such a large percentage of the [Flight Services] workforce is already eligible to retire, it is unlikely that many specialists would choose [to relocate]"). They are even less likely to move if they had to chose to do so in less than eight days. Thus, the expedited process benefitted younger employees, many of whom are not married, have no children, and have less established ties to their communities, and as a result, were able to make such a life-altering decision in a few short days. See Ex. 1 at ¶16. Unlike their younger colleagues, the older FS Controllers typically needed more than eight days to weigh their options before deciding to move. See Ex. 1 at ¶16.

Second, according to the Screening Information Request ("SIR"), the primary document that sets forth the parameters for

the bidding, Lockheed Martin is required to offer the FS Controllers who "will be adversely affected or separated as a result of award of this contract the right of first refusal [("ROFR")] for employment openings under the contract." See Ex. 5 at § I.4. However, the FAA and Lockheed Martin have treated the employees' ROFR as little more than a procedural nicety. As an initial matter, the FAA appears to have ceded its authority over the Controllers' ROFR to Lockheed Martin. See e.g., FAA, "FAQs - Right of First Refusal" ("Questions as to how the [ROFR] list is being used by Lockheed Martin, in conjunction with their site visits, would have to be answered by them"), available at http://www.faa.gov/aca/employee_resource/faq/rofr.htm, copy attached as Exhibit 37. For example, when asked how long the ROFR would last, the FAA responded that: "It is our understanding that Lockheed Martin is resolved to contact all employees entitled to ROFR. Lockheed Martin will determine the timeframe during which administration of ROFR will occur." Id. It is now clear, that as of July 1, 2005, Lockheed Martin is no longer allowing the FS Controllers to avail themselves of their ROFR. See Ex. 35 (Q&A 4, 7/7/05 and Q&A 1, 5/12/05).

Moreover, the FS Controllers were expected to execute their ROFR and commit to working with Lockheed Martin while vital

information was being withheld. For example, Lockheed Martin claims that certain policies and procedures, like the costs employees must contribute toward benefits are "proprietary information," and has withheld this information from the FS Controllers who have been trying to make informed decisions regarding their futures. See Ex. 35 (Q&A 5, 4/5/05). Lockheed Martin has agreed to share this and other similar information with the FS Controllers only after the July 1, 2005 ROFR deadline passes and they commit to work for Lockheed Martin. See id. (Q&A 7, 2/25/05 and Q&A 1, 2/16/05 (stating information regarding discipline, vacation schedules, and other policies will be revealed during Lockheed Martin's third visits); Lockheed Martin, "AFSS Timelines Relative to HR Activities" (scheduling Lockheed Martin's third visits between August 22 and September 23, 2005), available at http://www.lmafsshr.com/hr/timelines.asp, copy attached as Exhibit 38.

Third, despite Defendants' assurances that all displaced FS Controllers would be offered permanent positions with Lockheed Martin in accordance with their ROFR, that guarantee extends for only three years, and applies only "to employees assigned to or projected to be assigned to one of the 17 Legacy sites or the three HUBs." See Ex. 30 at 20. Contrast Lockheed Martin Info-

rmation Packet (February 1, 2005), available at http://www.faa.gov/aca/employee_resource/packet/FAA%20AFSS%20A-76%20Announcement%20Information%20Packet%20-%20Lockheed%20Martin.pdf, copy attached as Exhibit 39, with Ex. 35 (Q&A 4, 2/4/05 and Q&A 3, 2/8/05 ("we are unable to guarantee employment past the three (3) year time frame from your date of hire")).

In other words, the FS Controllers who can remain with Lockheed Martin are only guaranteed temporary employment for three years, after which they no longer have any job security and face the prospect of losing their jobs even though their positions will continue to exist. In fact, Lockheed Martin has emphasized to the soon-to-be-former FS Controllers that they will be only "at-will" employees, a significant change from their status as members of the federal civil service. In its initial offer letters to employees at the facilities slated for closure, it has stressed that:

> This offer letter does not constitute and shall not be construed as a commitment of employment, or employment agreement for any specific duration. In addition, in the event that the FAA, in its sole discretion determines that you are no longer suitable for employment on the FAA AFSS contract, Lockheed Martin may terminate your employment. Your employment with Lockheed Martin will be "at-will" meaning that you can leave the company, or the company can require that you leave its employ, for any reason at any time.

See Ex. 1 at ¶20; see also id. at Attach. B (Letter from James T. Sturm to Michael J. Sheldon (May 11, 2005)). Also, upon becoming Lockheed Martin employees, incumbent Controllers will not be permitted to apply for available LM contract personnel openings within Lockheed Martin unless they first receive permission from their new supervisors. See Ex. 35 (Q&A 2, 3/15/05).

Moreover, during an orientation given on February 24, 2005, officials from Lockheed Martin stated that new employees from outside the current FS Controller workforce could be hired to fill some of the 1,000 available LM contract personnel positions during the 18-month Transition. See Ex. 1 at ¶19. This admission shows that Defendants do not believe the FS Controllers will utilize their ROFR, and that it intends to fill the LM contract personnel positions with new, younger employees. In the end, the limited, three-year guarantee and lack of job security benefits younger employees. Unlike their younger colleagues, older FS Controllers are less likely to uproot their families and leave established ties within their communities to pursue temporary jobs. See Ex. 1 at ¶17.

Fourth, in direct contradiction to prior assurances by the FAA, the plan does not guarantee that all Controllers will

receive salaries at their positions' Full Performance Level ("FPL") (which is equal to the salary of a GS-12 Step 5 level) as required in the SIR. See Ex. 5 at § M.3.5.1. During the bidding process, the FAA had promised to "assess the realism of the proposed labor mix and rates using the incumbent wage rates for a [FPL] AFSS Specialist" and admitted that an old Wage Determination for GS-9 "Air Traffic Specialists" was too low. See Exs. 2 at ¶19; 5 § M.3.5.1; 32. However, in violation of bidding practices, the FAA did not request a new Wage Determination from the Department of Labor and attach it to the SIR. See Ex. 2 at ¶19. Nor did it assess Lockheed Martin's bid according to FPL salaries of the FS Controllers. See Ex. 2 at ¶19. Instead, it reversed itself and allowed Lockheed Martin to propose any labor mix and labor rates it deemed appropriate below the FPL with no assessment or adjustment. See Exs. 2 at ¶19; 32.

The FAA has admitted that it did not evaluate the Lockheed Martin proposal in accordance with SIR § M.3.5.1 and did not treat proposals that included wages lower than a GS-12 Step 5 as unrealistic and adjust the costs accordingly. See Ex. 2 at ¶20. As a result, the FAA will allow Lockheed Martin to hire new, younger LM contract personnel for wages as low as (and

possibly lower than) a GS-9 despite earlier assurances to the contrary. In fact, during the February 24, 2005 orientation, Lockheed Martin officials stated that the new employees it will hire during Transition and beyond will be offered much lower salaries than the incumbent FS Controllers. See Exs. 1 at ¶5; 32. By allowing Lockheed Martin to offer lower salaries, the FAA is encouraging the hiring of new, younger controllers. Furthermore, unlike their younger colleagues, older FS Controllers are less likely to pursue a lower paying controller position with Lockheed Martin, particularly if doing so would require them to relocate. See Ex. 1 at ¶18.

These mechanisms were designed to assure that the FAA would obtain a newer, younger workforce as LM contract personnel, and both the FAA and Lockheed Martin are operating under the assumption that the largely older FS Controllers will be replaced. As noted above, both the FAA and Lockheed Martin intend to hire LM contract personnel from outside the older FS Controller workforce, and they intend to pay these younger LM contract personnel less than the incumbent FS Controllers.[13] By

[13] It is worth noting that the Total Evaluated Cost ("TEC") for the Lockheed Martin proposal ($1.9 billion) was lower than the MEO proposal ($2.06 billion) despite the fact that they both planned to employ approximately the same number of Controllers

contrast, the OIG Report and NAATS Proposal would not have done this, yet reduced the FS workforce by attrition through retirement. See Exs. 10 at 8.0; 11 at 5. Similarly, the MEO would have reduced the size of FS Controllers to about the same number using buyouts based on retirement assessments, and the remaining FS Controllers would have continued as federal employees. See Exs. 28 at 177-78; 32.

Because of the elimination of their federal employment, the FS Controllers, even those who are able to secure employment as LM contract personnel, will suffer the loss of their retirement benefits. They will lose their annuities completely, or at the very least, their annuities will be severely reduced as a result of being forced out of their positions. Additionally, the benefits available to individuals who do not qualify for immediate annuities are so low in comparison, that they do little to mitigate the harm inflicted on the Controllers. Without a pension, retirees have little else to cover the costs of living; as a result, they will need to work longer in order

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at the End-State. See Exs. 2 at ¶21; 31. This disparity is attributable to Lockheed Martin's intention to hire new, younger LM contract personnel from the outside, and the FAA's refusal to compare that proposal against two Independent Government Cost Estimates to assess the realism of the selected plan. See Ex. 2 at ¶21.

to retire, and in many instances they will need to rely on public benefits to cover their living expenses.

FS Controllers contribute 1.3 percent of their incomes to their retirement instead of the 0.8 percent contributed by other civilian federal employees. See FAA, "Air Traffic Controller Retirement," available at http://www.faa.gov/ahr/policy/hrpm/emp/emp_ref/atcretire.cfm, copy attached as Exhibit 40. The years spent as a Controller are termed "good time." See id.; Public Law 92-297 (May 16, 1972). As a result of this increased contribution, they may retire with an immediate annuity if they are over 50 years old and have 20 years of good time, or at any age with 25 years of good time. See 5 U.S.C. § 8336(e); 5 U.S.C. § 8412(e); 5 C.F.R. § 842.207.

If an FS Controller is able to retire with an immediate annuity, their annuity is calculated at 1.7 percent of their High-Three[14] for each of their first 20 years of service and 1 percent for each additional year. See id. Additionally, they receive health insurance during retirement. See 5 U.S.C. § 8901

[14] "High-Three" refers to a federal employee's highest three years of earnings, which is a base calculation for determining the employee's annuity at retirement. Generally, the longer federal employees work, the higher their pay will be at retirement, so employees who retire with higher pay receive a higher annuity.

et seq.; 5 C.F.R. § 890 et seq. If FS Controllers do not have the requisite amount of good time, but have 30 years overall of government service, they qualify for an immediate annuity, but at a lower amount. See OPM "CSRS/FERS Comparison Table," available at http://www.opm.gov/fers_election/fersh/h_spec12.htm, copy attached as Exhibit 41. They will receive 1 percent of their High-Three for each of their total years of service, and also receive health insurance during retirement. See id.; 5 U.S.C. § 8901 et seq.; 5 C.F.R. § 890 et seq.

Even if the soon-to-be former FS Controllers find other jobs in the federal government, they will lose all of the additional 0.5 percent contributions they made into the federal retirement fund over the years at the 1.3 percent rate, which the FAA and the U.S. Office of Personnel Management ("OPM") will not refund. See FAA, "FAQs - Government Entitlements, Benefits, and Services," available at http://www.faa.gov/aca/employee_resource/faq/entitle.htm, copy attached as Exhibit 42.

Hundreds of Plaintiffs will be denied an immediate annuity, and because of their age it will be extremely difficult if not impossible to earn a similar level of retirement benefits and years of retirement credit in another career. Furthermore, even though some FS Controllers are eligible for an immediate

annuity, the FAA is still adversely affecting their annuities by forcing them out of their jobs prematurely, which freezes their High-Three's in the current timeframe. See Decl. of Mark Jaffe (July 10, 2005) at ¶5, copy attached as Exhibit 43; Decl. of John O'Connell (July 7, 2005) at ¶5, copy attached as Exhibit 44. By denying their pensions the opportunity to vest in such a discriminatory and callous manner, the FAA is able to reap a massive windfall (Plaintiffs' extra contributions), while the FS Controllers must begin planning for their retirement all over again in their forties and fifties. In fact, less than half of all FS Controllers are now eligible to retire. See Ex. 1 at ¶8. Additionally, many FS Controllers' pensions would have vested in less than three years from now. See Exs. 1 at ¶22; 25 at ¶4; Decl. of Terry Holaman (July 6, 2005) at ¶4, copy attached as Exhibit 45; Decl. of Ned Kramer (July 5, 2005) at ¶4 (pension would have vested in December 2005), copy attached as Exhibit 46; Decl. of Becky McDaniel (July 5, 2005) at ¶4, copy attached as Exhibit 47; Decl. of Darrell Mounts (July 7, 2005) at ¶5, copy attached as Exhibit 48.

If no immediate annuity is available, there are several other types of benefits available: severance pay, discontinued service retirement, and deferred retirement. However, these do

not equal anything close to the amount the FS Controllers would receive if they were not being discriminatorily terminated and were allowed to continue federal service to earn their immediate annuities. Severance pay is calculated at one week of severance pay for every year prior to 10 years of service as an FS Controller, two weeks for every year thereafter, and an additional 10 percent per year if over 40 weeks. See NAATS Collective Bargaining Agreement, Art. 61 (February 8, 2004), copy attached as Exhibit 49. Discontinued service retirement is available for FS Controllers with 20 years of federal service if they are over 50 years old, or 25 years of federal service at any age. See Ex. 41. With discontinued service retirement, retirees get an annuity calculated at 1 percent of their High-Three's multiplied by their years and months of service as well as insurance. See id. Few Plaintiffs qualify for this reduced form of retirement benefits. See Ex. 2 at ¶28.

If an FS Controller satisfies neither type of immediate annuity and has at least five years of federal service, he/she qualifies for a deferred retirement. See Ex. 30 at 8. But, they must wait until they are 62 years old before they are eligible to collect this money, and they will only receive a meager amount (around $400.00 a month), which does not include any

insurance benefits. See Ex. 1 at ¶21. While severance pay, discontinued service retirement, and deferred retirement might be better than nothing, they do little to mitigate the loss of the FS Controllers' valuable annuities. For instance, severance pay only assists individuals for a short period of time. On the other hand, many FS Controllers will need to wait over a decade to receive their meager monthly deferred retirement stipend. Lastly, discontinued service retirement benefits are not only far lower than an immediate annuity, but they are also not available to many hundreds of FS Controllers, because they cannot satisfy the requirements.

By contrast to these severe financial and economic harms caused by the impact of the RIF will have on the FS Controllers' benefits, had the FAA implemented either the NAATS Proposal or its own MEO bid, the vast majority of FS Controllers would have remained federal employees, and their benefits would have been preserved.

5. **FAA's Stated Reason:**

The FAA's purported reason for initiating the mass RIF and job eliminations and awarding the AFSS contract to Lockheed Martin "was to find a solution which reduced [the FAA's] costs and at the same time modernized the AFSS service, thereby

improving responsiveness to pilots." See Ex. 29. However, this reason and the FAA's seven similarly frivolous excuses are false and do not justify the irreparable harm the mass RIF will have on the older FS Controller workforce.

First, the FAA has stated that its plan is justified because the FS Controllers are a "Retirement Eligible Work-force." See FAA, "Background on AFSS," available at http://www.faa.gov/aca/afss/afss.html (last accessed, Feb. 1, 2005), copy attached as Exhibit 50. However, the FAA has used the phrase "retirement eligible workforce" as a proxy for age, and the FAA's plan has no relation to the FS Controllers' retirement eligibility.

It is clear from the FAA's statements the so-called "retirement eligible workforce" is actually a proxy for age. In one statement, FAA Administrator Marion C. Blakey tried to excuse the FAA decision by noting that "[a]lmost 40 percent of flight service employees [are] eligible to retire," but in the same prepared, videotaped statement equated the older, so-called "retirement eligible workforce" with one that needs to be upgraded. See Tr. of Video "FAA Administrator Blakey Explains Changes to the FSS System" (July 6, 2005), copy attached as Exhibit 51. Specifically, Ms. Blakey identified and discussed

three "dilemma[s]" the mass RIF and job eliminations supposedly solve – operation costs, aging facilities/equipment, and the retirement eligible workforce – and in a paralleled summary, asked: "how can we save money and upgrade our equipment and our services to [the public] at the same time?" Id. The FAA's answer to these apparently incompatible goals was the elimination of its older employees.

The FAA concedes that FAA Controllers do not typically retire within the first few years of eligibility. In fact, 45 percent of retirement eligible Controllers continue to work into the seventh year of their eligibility. See Ex. 14 at 36. This fact immediately suggests that the FAA's purported concern over "retirement eligibility" is groundless, and underscores the harm to the FS Controllers of being forced into premature retirement. The FAA's actual motive is driven by its stereotyped views of older employees. In its Plan for the Future, the FAA has detailed how it intends to hire 12,500 new Controllers over the next 10 years and emphasized the need for "workforce flexibility" and "enhanced productivity." See Ex. 14 at 3-4.

Moreover, the RIF has no relation to the FS Controllers' retirement eligibility. Unlike the NAATS Proposal and the OIG Report, the FAA's plan does not use attrition, which would

utilize the FS Controllers' future retirement to achieve consolidation. See Exs. 10 at 8.0; 11 at 5. To the contrary, under the FAA's plan, a vast number of older FS Controllers will lose their jobs and have no source of income, while a few retirement eligible FS Controllers will be able to collect their vested federal retirement benefits while simultaneously working for Lockheed Martin. See Ex. 35 (Q&A 5, 2/4/05). This gross inequity is clearly unnecessary because the FAA has shown it is quite capable of adjusting to any future attrition rates attributable to causes like retirement, resignations, promotions, removals, and death. See generally, Ex. 14. In fact, the FAA is doing precisely that for the younger Controllers in its Terminal and En Route Services. See id.

Second, as noted above, the FAA has tried to rely on the OIG Report as an excuse for its decision, but that rationale does not justify its chosen course of action. See Ex. 50. The OIG Report recommended the consolidation of the AFSSs, but it and the NAATS Proposal would have accomplished this same end without discriminating against the largely older FS Controllers, unlike the FAA's plan. See supra, at 22-23. Moreover, if consolidation was the FAA's true objective, it would have chosen to implement the MEO proposal, which proposed to consolidate the

existing AFSSs into only four facilities as opposed to Lockheed Martin's bid. See Ex. 31.

Third, the FAA has cited the President's Management Agenda and OMB Guidelines as reasons for selecting Lockheed Martin as its contractor. See Ex. 50. As an initial matter, neither the President's Management Agenda nor OMB Circular A-76 requires the FAA to initiate a mass RIF. See Ex. 23. In fact, under the FAIR Act, the FAA has the discretion to distinguish between its governmental functions and commercial activities (significantly, and inexplicably, the FAA excluded the Alaska AFSSs from the A-76 process). See Pub. L. No. 105-270 §314 (1998).

Moreover, even if any job eliminations were necessary, nothing in the President's Management Agenda or Circular A-76 required the FAA to choose a discriminatory plan over other non-discriminatory alternatives. Finally, as noted above, in clear contravention of both the spirit and purpose of the President's Management Agenda and Circular A-76, the FAA chose not to institute system-wide studies of its various operations in an effort to identify those functions that were best suited for privatization. Instead, it targeted its older employees in Flight Services.

Fourth, the FAA is also trying to rely on unnamed "FAA

studies" to justify its decision. See Ex. 50.[15] However, several of the alternative proposals and recommendations the FAA rejected, such as the OIG Report and the NAATS Proposal, relied on and cited FAA data and studies, but advocated nondiscriminatory alternatives to the RIF. See e.g., Exs. 10 at 2.1; 11 at Ex. A,C.

Fifth, the FAA has also cited its aging facilities/ equipment and an imbalanced workload to justify its plan. See Ex. 50. However, these excuses are little more than red herrings because, as noted above, the FAA had many nondiscriminatory options at its disposal to rectify these issues, rather than implementing its age-discriminatory plan. For example, both the OIG Report and the NAATS Proposal would have reduced the number of FS Controllers and merged the uneven workforce, and the MEO proposal, like the NAATS Proposal, advocated the elimination of outdated facilities. See generally, Exs. 10; 11.

Sixth, the FAA claims that its mass RIF will rectify "inadequate funding of AFSS related programs" and claims the Lockheed Martin contract will save the government $2.2 billion. See Exs.

[15] The FAA has not seen fit to cite specific studies or reports, which suggests that these so-called "FAA studies" may not exist or may not justify Defendants' ultimate decision. See Ex. 50.

29; 50. But see NAATS, "FAA Misleading Pilots," available at http:// www.naats.org/pressreleases/npr_mislead.htm, copy attached as Exhibit 52; David Safavian, "Competitive Sourcing Expected to Save FAA $1.7 Billion," available at http://www.whitehouse.gov/results/agenda/fy05q2-cs. pdf, copy attached as Exhibit 53; see also OIG Report No. FI-2002-065 (December 11, 2001) (criticizing the FAA's cost accounting system), available at http://www.aopa.org/whatsnew/air_traffic/ig_report1.html, copy attached as Exhibit 54.

However, this claim is false. The FAA, which has not provided a single document to the public outlining how the supposed savings will be achieved, has inflated its estimated savings in several ways. See Ex. 2 at ¶24; id. at Attach. C (Memorandum from Kate Breen to David Lichtenfeld (July 6, 2005)) at 2. For example, the FAA, which has agreed to pay Lockheed Martin $1.9 billion, is calculating its supposed savings based on the total $555,827,460 operating costs of Flight Services for FY2003, but this figure includes costs the FAA will continue to pay, such as the operating costs for the Alaska AFSSs ($53,502,910) and the FAA regional and headquarters offices and staff ($65,615,349). See Ex. 2 at ¶24; id. at Attach. C at 2. The FAA also fails to consider the cost of the A-76/acquisition,

which was about $20 million, or the cost associated with establishing the Office of Competitive Sourcing, which included office space, salaries, and awards. See id.

In truth, the actual cost of the services being taken over by Lockheed Martin is between $259 and $300 million a year, and based on the true cost of the services the FAA is contracting out, which is approximately $1.5 billion over five years, Defendants are not saving any money. See id. The FAA's calculations have been so erroneous, it was recently forced to revise its estimates, and it now claims the projected savings from its job eliminations will be $1.7 billion over 10 years. See Ex. 2 at ¶23; id. at Attach. C at 2.

Also, the FAA's manipulation of the bidding process inaccurately skewed the bids in Lockheed Martin's favor. For example, as noted above, differences in the Lockheed Martin and MEO TECs are attributable to the fact that the MEO planned to pay its Controllers' salaries at the FS Controllers' Full Performance Level as required by SIR § M.3.5.1, but Lockheed Martin's salary estimate was lower and the FAA did not evaluate the proposals in accordance with the SIR. See supra at 39-40.

Moreover, the FAA had alternative cost-saving measures that it chose not to utilize. For example, the proposal contained

in the OIG Report would have saved the FAA an estimated $500 million, and the NAATS Proposal calculated a savings of about $600 million. See Exs. 10 at 10.0; 11 at 1. Similarly, on information and belief, the bid prepared by the Computer Science Corporation would have cost the FAA less than the contract it awarded to Lockheed Martin. See Ex. 2 at ¶22.

Seventh, the FAA claims that selecting Lockheed Martin has the potential for efficiencies. See Ex. 50. As an initial matter, this vague claim presupposes that Flight Services' current operations are inefficient. But see Ex. 2 at ¶25; id. at Attach. A at 3 (citing Airline Owners Pilots Association ("AOPA") Survey: Importance and Satisfaction of Flight Service (June 9, 2004)). However, according to a survey by AOPA conducted during the A-76 process, which asked its members "[h]ow important is in-flight (air to ground) flight service to you and what is your satisfaction with that service," 87 percent of student pilots responded that it is important and 90 percent are satisfied. See id. Also, the responses from more experienced pilots indicate that 82 percent of them believe Flight Services is important, and of those, 85 percent are satisfied with the services provided by the FS Controllers. See id.

Regardless, the FAA's claims concerning efficiency are

false when juxtapositioned with the losses the FAA will suffer and the risk to the citizens of our country if the mass RIF goes forward. See Ex. 5 at § M.2 ("Best value will be the combination of the impact of the overall benefits, risk, and cost for the delivery of effective flight services to support safe and efficient flight"). In making this claim, the FAA is ignoring numerous factors that will decrease the efficiency of Flight Services' operations. For example, the FAA will lose the benefits that come from having an experienced, dedicated, well-trained staff of senior FS Controllers. See Exs. 1 at ¶13; 14 at 59. With the mass RIF and job eliminations, the FAA will no longer have the FS Controllers' intimate local knowledge that is so vital to their performance. See Ex. 1 at ¶13. After the mass RIF, the fewer, consolidated AFSSs will no longer operate 24 hours a day, seven days a week. Instead, they will close and open on a changing basis. See Ex. 35 (Q&A 3, 2/25/05). Also, as noted above, the FAA has chosen not to account for the risks of cost escalations or delays that are likely to occur as a result of the testing, installation, and training needed to implement the new, untested technology Lockheed Martin intends to use. See Ex. 2 at ¶18. Finally, the FAA has not considered the human cost of its plan, which will manifest itself in severe

harms to the FS Controllers.

6. **Harms to Plaintiffs**

The FAA's RIF and job eliminations will have concrete, adverse effects on the careers of the FS Controllers. First, the 1,935 current FS Controllers, including the 834 Plaintiffs, will be severely injured by the termination of their federal jobs and the loss of their job security. The FAA's mass RIF will have the effect of terminating the FS Controllers' positions with the FAA, erasing their years of retirement credit, eliminating or reducing their pay, and prematurely ending their federal careers on October 3, 2005, the conclusion of the Phase-In.

The FAA's mass RIF will cause massive job losses for career FS Controllers with the elimination of 38 facilities and the cutting of approximately 900 jobs. See Ex. 29. Lockheed Martin only promises three years of guaranteed employment to those Controllers who are retained at or move to the 20 new, consolidated facilities (17 Legacy sites and 3 new Hubs). See Ex. 35 (Q&A 1, 2/25/05). Thus, these long-term civil service employees will be stripped of all their federal civil service protections, lose their various Union-negotiated rights, and

have "at-will" employment unilaterally imposed on them.[16] See Ex. 1 at ¶21; id. at Attach. B. No longer will the FS Controllers receive yearly cost-of-living adjustments that fend off inflationary pressures, termination only for cause, and other civil service protections. See id. In addition, those who become LM contract personnel will lose the majority of their sick leave benefits and holiday bonus pay, and their health insurance will skyrocket to as much as $500.00 per month or more. See Ex. 2 at ¶27; id. at Attach. A at 3. The FS Controllers will also lose their right to seek redress in a court of competent jurisdiction for violations of their employment rights. See Ex. 35 (Q&A 1, 7/7/05). After the mass RIF, they will be required to submit all of their claims to arbitration, and not a jury. See id. (signing an arbitration agreement is a condition of employment). Additionally, it is unclear whether their positions with Lockheed Martin will remain Air Traffic Controller positions. Although they have been

[16] As a result of the mass RIF, the FS Controllers will also lose their Union-negotiated rights as delineated in the Collective Bargaining Agreement ("CBA"). For example, the CBA provides them with bargaining rights over terms and conditions of employment, greater involvement in the disciplinary and grievance procedures, and clarity in the nature of the employee-employer relationship. See Ex. 49 at Art. 1, 6.

assured that “incumbent salaries will not be lowered as long as the employee remains employed with Lockheed Martin in the position as hired,” the FS Controllers have not been guaranteed that they will remain in their same Controller positions. See id. (Q&A 6, 2/4/05 and Q&A 10, 2/4/05). Also, as previously stated, the new Hub positions were filled within eight days of the announcement of the contract, and therefore, the so-called ROFR did little to mitigate the massive job losses to come. Overall, only a limited number of FS Controllers will find permanent jobs with Lockheed Martin, and those who do will have little job security.

The FS Controllers have only minimal opportunities to continue their employment with the FAA. The FAA has created an narrow exception to its requirement that individuals must be 30-years-old or younger to be appointed to Terminal or En Route facilities. See FAA, “Information for Employees on Policy Bulletin #30,” available at http://www.faa.gov/aca/employee_resource/packet/Implementation%20of%20Age%2031%20and%20Preferred%20Placement.pdf, copy attached as Exhibit 55. However, this exemption does little to mitigate the massive job losses the FAA is imposing on the FS Controllers. The FAA intends to hire only 65 Controllers out of the 1,935 FS Controllers (or 3 percent)

who will lose their federal jobs. See Ex. 2 at Attach. D. The FAA also changed the process by which applicants are evaluated for transfers within the FAA and has withheld the new criteria it used from the FS Controllers. See Exs. 1 at ¶14; 33 at ¶6; 34 at ¶5; Information Request from Scott A. Malon to Melvin Harris (May 25, 2005), available at http://www.naats.org/docs/050525_Info%20Rqst_Placement.pdf, copy attached as Exhibit 56. Few Plaintiff applicants successfully apply for these positions. Indeed, despite their ample qualifications, even those who were not barred by the maximum age requirement have seen their scores from prior entry assessments inexplicably decline in more recent assessments. See Ex. 33 at ¶6. For example, one applicant who had previously earned a score of 66, received a 9.5 in 2005. See Ex. 33 at ¶6; see also Roberts v. Gadsden Mem'l Hosp., 835 F.2d 793, 798 (11th Cir. 1988) ("secretive ... hiring ... decision processes tend to facilitate the consideration of impermissible criteria"). Moreover, the FAA requires transferees to have specific ratings or certifications, which further limits the availability of this option for many FS Controllers. See Exs. 1 at ¶14; 55 at ¶4. Also, the FAA refuses to consider incumbent FS Controllers' seniority, veterans status, or disability status. See Ex. 1 at ¶14; Decl. of Tom Domingo (July

7, 2005) at ¶7, copy attached as Exhibit 57. Finally, the FS Controllers who receive FAA positions will not receive "save-pay" or "pay retention"[17]; rather, they will be paid less as "developmental employees" for up to three years. See Exs. 1 at ¶14; 34 at ¶5. In reality, few Plaintiffs have been able to successfully bid for these 65 FAA positions, and in some circumstances the FAA has hired younger employees to fill these positions. See Ex. 33 at ¶6.

Second, as described above, the FS Controllers will be irreparably harmed by the impact the FAA's plan will have on their retirement credits and benefits. See supra at 41-46. Most of FS Controllers who lose their jobs or are forced to accept positions with Lockheed Martin will lose their hard-earned retirement credits and benefits and, most likely, future earnings. See id.

Third, because of the FAA's discriminatory RIF and job eliminations, the FS Controllers will also suffer devastating effects on their lives. The FS Controllers will be forced to endure immense hardships, including but not limited to issues

[17] "Save pay" or "pay retention" refers to when an employee whose rate of basic pay otherwise would be reduced as a result of a management action is entitled to retain his or her rate of basic pay. See 5 C.F.R. § 536.101 et seq.

involving medical care, child custody, parental care, spouse's careers, and family businesses.[18]

Because of the FS Controllers' ages, they are at a point in their lives where many are caring for both their parents and children at the same time. See Exs. 24 at ¶5; 33 at ¶5; 57 at ¶5-6; Decl. of Angela Bowman (July 16, 2005) at ¶5, copy attached as Exhibit 58; Decl. of John Volkmuth (July 6, 2005) at ¶5, copy attached as Exhibit 59. In many of these instances, they face a future plagued by uncertainties, because relocation may mean losing all or some of their child's or parent's benefits. See Exs. 24 at ¶5; 57 at ¶5-6; 59 at ¶5. Some FS Controllers will have no choice but to place their parents completely in the hands of someone else, such as a nursing home. See Exs. 1 at ¶23; 33 at ¶5; 45 at ¶5; 59 at ¶5. This concern is amplified for parents of children with special needs. Such children often have multiple professionals responsible for their

[18] These harms are representative of all 834 Plaintiffs as a class, and while not all Plaintiffs share identical hardships, the list above represents typical hardships all Plaintiffs will suffer. In light of Defendants' Motion to Stay Plaintiffs' Motion for Class Certification (See Docket No. 5), should the Court deem it necessary, Plaintiffs will prepare Individual Applications for Preliminary Injunction for each of the 834 named Plaintiffs, but would require additional time to prepare these Applications.

care plans and specialized education. <u>See</u> Exs. 24 at ¶5; 59 at ¶5; Decl. of Angela Riley (July 7, 2005), copy attached as Exhibit 60; Decl. of Steven Sims (July 1, 2005) at ¶6, copy attached as Exhibit 61. A relocation would require parents to spend years rebuilding a support network and understanding a new system of benefits and educational programs. <u>See</u> Exs. 24 at ¶5; 33 at ¶5; 47 at ¶5; 57 at ¶ 6; 59 at ¶5; 60 at ¶5; 61 at ¶6. These concerns are also amplified when a loved one suffers from mental illness. It can take patients years to get back on track, and requiring them to find a new therapist can be as devastating as the illness itself. <u>See</u> Ex. 24 at ¶5. Relocation would require people to leave behind particularized medical and hospital-specific programs. <u>See</u> Exs. 24 at ¶5; 57 at ¶5; 61 at ¶6. In fact, separation from such facilities can carry a risk of death or relapse. <u>See</u> Exs. 24 at ¶5; 61 at ¶6; Decl. of Jeffrey Huie (July 7, 2005) at ¶5, copy attached as Exhibit 62.

Some FS Controllers are single parents, and are likely to be forced to separate their children from the children's other parent and/or siblings or leave their child behind in order to find employment. <u>See</u> Exs. 24 at ¶5; 60 at ¶5; Decl. of Jerry VanVacter (July 5, 2005) at ¶5, copy attached as Exhibit 63. In other circumstances, they will be forced out of Air Traffic

service in general, because their situations do not permit them to separate a child from his or her other parent or siblings. See Ex. 46 at ¶5. In some cases, financial necessity will compel individuals to move away from their spouses and children. See Ex. 34 at ¶5.

When families need to relocate, they often cannot take their businesses along, particularly when such businesses are tied to the land, as are farms. See Exs. 33 at ¶5; 47 at ¶5; 58 at ¶5; 63 at ¶5. For example, one Plaintiff, Jerry VanVacter, will be forced to sell the family Christmas Tree farm. See Ex. 63 at ¶5. Also, the option to relocate is not an option at all, if the family relies on two incomes, and the spouse will need to give up his or her career. See Exs. 33 at ¶5; 34 at ¶5; 59 at ¶5. In sum, the FAA's mass RIF and job eliminations will cause families to be torn apart, wreak havoc on people's complex medical support systems, and cause severe financial distress and risk and unfathomable pain.

In addition to these irreparable harms to the individual Plaintiffs, the FAA's mass RIF will damage national security and the safety of the general public will suffer. In a bipartisan statement to FAA Administrator Blakey, Senators and Representatives have spoken out on this issue, noting that "aviation

safety and security considerations should be addressed by federal government employees working locally, and not subject to private sector pressures." See Press Release from Office of Senator Joe Lieberman, "Privatization of Air Traffic Specialists Jeopardizes Aviation Safety," available at http://lieberman.senate.gov/newsroom/release.cfm?id=238451, copy attached as Exhibit 64.

STANDARD OF REVIEW

The purpose of a Preliminary Injunction is to maintain the status quo. See Wagner v. Taylor, 836 F.2d 566, 574-75 (D.C. Cir. 1987). In deciding whether to grant an Application for a Preliminary Injunction, the Court must consider whether: (1) there is a substantial likelihood Plaintiffs will succeed on the merits; (2) Plaintiffs will be irreparably injured if an injunction is not granted; (3) no other party will be substantially harmed if the injunction is granted; and (4) the public interest supports granting the injunction. See Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 110 (D.C. Cir. 1986). Plaintiffs meet all four of the applicable criteria.

These factors are balanced against each other and "if the

arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." Serono, 158 F.3d at 1318 (quoting CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)); Int'l Ass'n of Machinists & Aero. Workers v. Nat'l Mediation Bd., 2005 U.S. Dist. LEXIS 11881 (D.D.C. June 20, 2005) (citing CityFed Fin. Corp., 58 F.3d at 747 ("An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.")).

Courts may base a Preliminary Injunction on less formal procedures and on less extensive evidence than in a trial on the merits. See Cobell v. Norton, 391 F.3d 251, 261 (D.C. Cir. 2004) (citing Natural Res. Def. Council v. Pena, 147 F.3d 1012 (D.C. Cir. 1998). To wit, this Court "may rely on the sworn declar-ations in the record and other credible evidence in the record" that may not be admissible at a trial. See AFGE v. District of Columbia, 2005 U.S. Dist. LEXIS 8326, *10 (May 2, 2005) (citing Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981)). If there are genuine issues of material fact raised in opposition to an Application for Preliminary Injunction, it is an abuse of discretion for a Court to decide the Application on the

documents without an evidentiary hearing. See id. (citing Prakash v. Am. Univ., 727 F.2d 1174, 1181 (D.C. Cir. 1984)).

ARGUMENT

I. PLAINTIFFS WILL PREVAIL ON THE MERITS BECAUSE THE FAA IS DISCRIMINATING AGAINST THEM ON THE BASIS OF THEIR AGE.

To obtain a Preliminary Injunction, Plaintiffs need only show "a substantial case on the merits." Megapulse, Inc. v. Lewis, 672 F.2d 959, 970, n. 56 (D.C. Cir. 1982). Plaintiffs have a substantial case on the merits, and it is apparent from the facts that the FAA is violating the ADEA through its mass RIF and job eliminations. The facts show that the FAA undertook contracting out and its mass RIF in order to eliminate its older AFSS workforce, and on the merits of both their disparate treatment and disparate impact claims, Plaintiffs are able to show that Defendants' actions are discriminatory.[19]

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[19] Courts have long distinguished between "disparate treatment" and "disparate impact" theories of employment discrimination.

> Disparate treatment ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their [age]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment...
>
> [C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in

A. Plaintiffs Will Prevail on Their Disparate Treatment Claim.

The burden of proof in an ADEA disparate treatment claim is governed by a modified McDonnell Douglas analysis. See e.g., Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (applying the mixed-motives analysis used in post-Desert Palace cases to the ADEA under "a merging of the McDonnell Douglas and Price Waterhouse approaches"); Machinchick v. PB Power, Inc., 398 F.3d 345, 352 (5th Cir. 2005). Plaintiffs have the initial burden of proving a prima facie case for age discrimination, and Defendants must proffer a legitimate, non-discriminatory reason for undertaking the mass RIF and job eliminations. See Rachid, 376 F.3d, at 312. Plaintiffs must then show (1) that Defendants' reasons are not true, but instead a pretext for discrimination; or (2) that Defendants' reasons,

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> their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive ... is not required under a disparate impact theory.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quoting Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977)). Both the disparate treatment and the disparate impact theories are available under the ADEA. See Hazen Paper, 507 U.S., at 609; Smith, et al. v. City of Jackson, et al., 544 U.S. ___, 125 S.Ct. 1536 (2005).

although true, are only one of the reasons for their conduct, and another "motivating factor" is Plaintiffs' ages. Id. If Plaintiffs demonstrate that age was a motivating factor in FAA's plan, Defendants must prove that its decision would have been made regardless of discriminatory animus. Id.

1. Plaintiffs Can Establish a Prima Facie Case of Age Discrimination.

"In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." Hazen Paper, 507 U.S., at 610 (citing U.S. Postal Service v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-78 (1978)). The McDonnell Douglas framework is appropriate for assessing Defendants' actions under the ADEA. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000) (citing Hall v. Giant Food, Inc., 175 F. 3d 1074, 1077-1078 (D.C.Cir. 1999)); see also O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996).

Under McDonnell Douglas, Plaintiffs have the initial burden of showing a prima facie case of discrimination, but this burden is not meant to be onerous. See Burdine, 450 U.S. at 253. The

Supreme Court has explained that the elements are flexible, and were "never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). See also McDonnell Douglas, 411 U.S. at 802 n.13; Burdine, 450 U.S. at 253-54 n.6. Plaintiffs' prima facie burden is to simply proffer "'*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion*.'" O'Connor, 517 U.S. at 312 (emphasis in original) (quoting Teamsters, 431 U.S. at 358).

The D.C. Circuit has "made clear" that Plaintiffs can make out a prima facie case of disparate treatment by establishing that: (1) they are members of a protected class; (2) they suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. See George v. Leavitt, 407 F.3d 405, 412 (D.D.C. 2005) (quoting Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999)).[20]

The Plaintiffs here are able to carry their prima facie

[20] To establish a prima facie case, Plaintiffs do not need to show they were treated differently from similarly situated employees who are not part of their protected class. Id. See also O'Connor, 517 U.S. at 312. Nor do they need to show that their positions have been filled by someone outside their protected class. See Carter v. George Wash. Univ., 387 F.3d 872, 882-83 (D.C.Cir. 2004).

burden. They are all 40 years of age or older, and therefore are members of a protected class under the ADEA. See 29 U.S.C. § 631(b); Ex. 1. By virtue of the FAA's mass RIF and job eliminations, Plaintiffs will also suffer adverse employment actions. See supra, at 41-46, 56-64. They are slated for termination from federal employment and are losing their federal benefits effective October 3, 2005. See Exs. 24, Attach. A; 32. Many will lose their sole source of income, while still others are being forced to uproot their families and their lives in order to accept three years' temporary employment with Lockheed Martin or other federal employment for lower salaries.

Finally, several factors surrounding the implementation of the mass RIF and job eliminations give rise to an inference of age-discrimination. First, the FAA has stated in no uncertain terms that it took this action because the largely older FS Controllers are supposedly a retirement eligible workforce. See Exs. 50; 51. On its face, this admission raises the specter of age discrimination.[21] Not only are the FS Controllers' ages

[21] Defendants will likely try to rely on the Supreme Court's holding in Hazen Paper to excuse their actions, but as Plaintiffs explain below, the facts of this case place it squarely within the realm of cases the Court explicitly excluded from its holding in Hazen Paper. See infra at 81-83.

critical for determining their eligibility for retirement, but Administrator Blakey showed how the FAA uses "retirement eligibility" as a proxy for age when she equated the older workforce with one that is in need of an "upgrade." See Threadgill v. Spellings, 2005 WL 1655006 *7 (D.D.C. July 15, 2005) ("When one with a discriminatory animus participates in the decision making process together with others, the court cannot say conclusively that those others were completely insulated from this influence"); see also Hazen Paper, 507 U.S. at 610 ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age").

The FAA's Plan for the Future also states that Defendants' objective is to hire 12,500 new Controllers. See Ex. 14 at 3-4. To accomplish this end, the FAA has established a business plan that emphasizes "workforce flexibility" and "enhanced productivity," stereotypical remarks that are often associated with younger employees. See Ex. 14 at 3-4; Machinchick, 398 F.3d at 353 (noting that "age stereotyping remarks" and "purely indirect references to an employee's age" give rise to an inference of age discrimination); see also Threadgill, at *6-7 (finding in light of surrounding circumstances a factfinder could infer

discrimination from the words "new blood"). Moreover, the FAA has explicitly invoked its Plan for the Future to justify hiring new, younger students rather than older, experienced FS Controllers whose federal jobs with Flight Services are being terminated. See Ex. 2 at Attach. D. Together, the FAA's Plan for the Future and its emphasis on the FS Controllers' supposed retirement eligibility status implicates the issue of age discrimination.

Second, the mass RIF and job eliminations have a clear and statistically probative disparate impact on the FAA's older employees. Flight Services is the FAA's oldest workforce, with 92 percent of the FS Controllers being 40 years of age or older. It was also the only workforce the FAA targeted for contracting out, and this disparate impact can be used to show its discriminatory intent. See Ex. 26. The Supreme Court long ago made clear that "statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." Teamsters, 431 U.S., at 339. See Walther v. Lone Star Gas Company, 952 F.2d 119, 125 (5th. Cir. 1992) ("We can imagine cases in which the statistical proof will support a finding of age discrimination by itself"). Ultimately, the FAA knows its employees' ages, and it must be

presumed that Defendants intended the negative effects of their actions. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (holding that employers are held responsible for the consequences of their actions); Radio Officers' Union of Commercial Tel. Union v. NLRB, 347 U.S. 17, 45 (1954) (citing the common-law rule that a man is held to intend the foreseeable consequences of his conduct).

Third, the FAA deviated from established policies and practices to undertake the mass RIF and job eliminations. As an initial matter, Defendants wrongly revoked Flights Services' status as an inherently governmental function despite the fact that FS Controllers' duties have a significant impact on the life and property of private citizens, as well as national defense. See Exs. 26; 13 (noting that inherently governmental functions include the regulating of space and other natural resources, activities that significantly affect the life or property of private persons, national defense, and the management and direction of the Armed Services). In listing the AFSSs on its Inventory of Commercial Activities in 2001, the FAA contravened Executive Order 13180, which established the Air Traffic Organization and expressly designated air traffic services as "an inherently governmental function." Compare Ex.

26 with Exec. Order No. 13180 (December 7, 2000) (amended on June 6, 2002, 1.5 years later). In fact, the FAA actually began listing some AFSSs on its Inventory of Commercial Activities in 2000, 2.5 years before Defendants belatedly justified their decision by conducting the A-76 feasability study, which "indicated that the majority of the services offered by [AFSSs] are commercial in nature [and] can be provided by private industry." See Ex. 4 at 7. Such a post hoc rationalization "carries the seeds of its own destruction." See Townsend v. WMTA, 746 F.Supp. 178, 186 (D.D.C. 1990) (quoting Bishopp v. D.C., 788 F.2d 781, 789 (D.C.Cir. 1986)).

In a dizzying display of abuse of discretion, the FAA also arbitrarily identified certain AFSSs as commercial while simultaneously labeling other AFSSs as inherently governmental, and it slated most AFSSs for contracting out while excepting others, like those in Alaska. Contrast Ex. 26 with Ex. 27. In direct contravention of the spirit and purpose of the President's Management Agenda, the FAA conducted a precipitous, unverified feasability study, and it targeted Flight Services for the mass RIF and job eliminations instead of completing a thorough agency-wide assessment of its various services to identify all of the areas of its operations that were suitable

for private bidding. See Ex. 2 at ¶14.

To accomplish the mass RIF and job eliminations, the FAA also prejudicially assessed the A-76 bids and disregarded the SIR. For example, no risk assessment was levied against the Lockheed Martin bid despite the fact that it proposed to use untested and uncertified technology. See Ex. 2 at ¶16. Similarly, the MEO was assessed with a risk attributable to the unionization of the FS Controllers, but no analogous risk was imposed on Lockheed Martin despite the fact that Controllers can (and likely will) unionize in the private sector as they did in the federal sector. See Exs. 2 at ¶17; 28. Also, the FAA failed to assess the Lockheed Martin bid in accordance with the SIR, which states that the "realism" of all proposed labor mix and rates would be assessed "using the incumbent wage rates for a [FPL] AFSS Specialist." Ex. 5 at § M.3.5.1. Instead, the FAA is allowing Lockheed Martin to hire new, younger employees at lower salaries than those of the incumbent FS Controllers. See Exs. 1 at ¶19; 31. The fact that Defendants deviated from established policies and practices is persuasive proof that the FAA is acting in an age-discriminatory manner. See Lathram v. Snow, 336 F.3d 1085, 1093-94 (D.C. Cir. 2003) (holding that a discriminatory inference may be drawn when an agency departs

from normal process without justification); Johnson v. Lehman, 679 F.2d 918, 922 (D.C. Cir. 1982) (stating that adherence to or departure from operating procedures may be probative in determining a defendant's true motivation).

Fourth, the FAA believes that its plan will significantly reduce the number of older, over-40 FS Controllers. For example, the FAA assumes that a large percentage of FS Controllers will choose not to relocate because they are old enough to retire. See Ex. 11 at 10. The OIG Report reached this conclusion, and recommended that the FAA consolidate its AFSSs "entirely through retirements and without a reduction in force." Ex. 11 at 5, 10. However, the FAA has rejected that recommendation and has chosen to implement the mass RIF, which will cause approximately 900 terminations and require many of the remaining FS Controllers to move to Arizona, Texas, or Virginia to save their jobs. See Exs. 1 at ¶16; 35. Similarly, the FAA allowed the ROFR to be manipulated in such a way that the FS Controllers are only being guaranteed temporary employment with Lockheed Martin, and they had to agree to work for Lockheed Martin before they were allowed to know the company's policies and procedures. See Ex. 35. Thus, it is indisputable that the FAA made discriminatory assumptions and acted on those assumptions.

Fifth, the FAA has implemented the mass RIF and job eliminations despite the availability of equally (and/or more) effective, nondiscriminatory alternatives. The FAA had several alternative proposals that, if implemented, would have achieved its stated goal of consolidating the AFSSs and saving money, but it rejected these proposals without explanation. For example, had the FAA implemented the recommendations of either the OIG Report or the NAATS Proposal, the 61 existing AFSSs would have been consolidated into 25 facilities. See Exs. 10 at 2.1; 11 at 5,9. Similarly, both of these alternatives would have saved the FAA an estimated $500 million and $600 million a year, respectively. See Exs. 10 at 11.0; 11 at 9. Likewise, the MEO bid proposed to consolidate the AFSSs into only four facilities, see Ex. 31; and contracting with the Computer Science Corporation would have cost the FAA less than the contract it awarded Lockheed Martin. See Ex. 2 at ¶22. Nevertheless, the FAA rejected each of these proposals in favor of the mass RIF and job eliminations that indisputably will have a severe discriminatory impact on the older FS Controllers. In sum, the FAA's rejection of less discriminatory alternatives clearly shows Defendants' discriminatory intent. See Rudder v. D.C., 890 F. Supp. 23, 46 (D.D.C. 1995) (citing Wards Cove Packing Co. v.

Atonio, 490 U.S. 642, 660 (1989)).

2. The FAA's Purported Reasons for Undertaking the Mass RIF Are Not True and Are a Pretext for Discrimination.

Once Plaintiffs have proffered a prima facie case of discrimination, the burden shifts to Defendants to "produce admissible evidence that, if believed, would establish that [its] action was motivated by a legitimate, nondiscriminatory reason." Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1151 (D.C. Cir. 2004). See also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); Rachid, 376 F.3d at 312. Defendants' burden is one of production, but their explanation must still be "clear and reasonably specific" to afford Plaintiffs "a full and fair opportunity to demonstrate pretext." Burdine, 450 U.S. at 254-55, 258. If Defendants are successful, Plaintiffs must then carry their "ultimate burden" of proffering evidence from which a reasonable trier of fact can infer intentional discrimination. Id. at 256; Hicks, 509 U.S., at 508; see also Teneyck, 365 F.3d at 1154 ("Once the defendant has responded with rebuttal evidence, the factfinder normally proceeds to the ultimate issue on the merits to determine whether the employer intentionally discriminated against the plaintiff").

Relying on circumstantial evidence, Plaintiffs may carry

their burden by proving Defendants' stated explanations were not its true reasons, but rather a pretext for age discrimination. See Reeves, 530 U.S. at 143; id. at 133 (quoting Rogers v. Mo. Pacific R. Co., 352 U.S. 500, 508, n. 17 (1957) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence")); Desert Palace, 539 U.S. at 91 (noting that the Court has "often acknowledged the utility of circumstantial evidence in discrimination cases"). Plaintiffs may accomplish this by showing that the FAA's reasons are too vague, are not credible, are internally inconsistent, or do not contradict the prima facie case, and the Court should assess Plaintiffs' case in light of the total circumstances. See Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1291 (D.C.Cir. 1998) (en banc). It is also expected to examine all of the available evidence, including the strength of Plaintiffs' prima facie case, the probative value of the proof that Defendants' explanations are false, and any other evidence that supports or undermines Defendants' case. See Reeves, 530 U.S. at 147-49. See also Teneyck, 365 F.3d at 1151 ("The ultimate question ... is whether intentional discrimination may be inferred from all the evidence before the trier of fact [including] (1) plaintiff's prima facie case; (2) any

evidence plaintiff presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination that may be available to plaintiff").

Defendants have offered seven reasons for implementing the mass RIF, but these reasons are neither legitimate nor the real reasons, and are a pretext for discrimination. Defendants' reasons are purportedly based on: (1) a retirement eligible workforce; (2) the President's Management Agenda and OMB Guidelines; (3) the OIG Report; (4) FAA Studies; (5) aging facilities/equipment and workload imbalances; (6) inadequate AFSS funding; and (7) potential for efficiencies. See Ex. 50.

a. Retirement Eligible Workforce.

As noted above, the very notion that the FAA is using the FS Controllers' supposed eligibility for retirement to support its mass RIF and job eliminations raises the specter of age discrimination. However, in addition to determining whether this reason is discriminatory or not, the Court must also consider whether Defendants' excuse is legitimate. Plaintiffs contend that it is not. It is simply untenable for the FAA to reap a massive financial windfall by denying the current FS Controllers their hard-earned retirement credits and benefits, and Defendants should not be permitted to claim this as a

legitimate reason for terminating Plaintiffs' employment.

The FS Controllers have devoted many years of faithful service to the federal government and the FAA in particular, and they had a reasonable expectation that their hard work would be justly compensated through their retirement benefits to which they have contributed 1.3 percent of their income (0.5 percent more than other civilian federal employees). See Ex. 40; Robinson v. D.C., 1997 WL 607450, *8 (D.D.C. July 17, 1997). However, the FAA will callously strip these men and women of their retirement benefits on October 3, 2005, just as they begin to vest (some within mere days and weeks of vesting). If the FAA were a private employer, its actions would be suitable for a challenge under the ERISA, see Hazen Paper, 507 U.S. at 604, and it is against public policy to allow Defendants to claim the FAA's indefensible actions are legitimate for purposes of the ADEA.

Turning to the issues of discrimination, the FAA's reason fails because age is a critical factor in determining an FS Controller's retirement eligibility, and because the phrase "retirement eligible workforce" has been used by the FAA as

merely a proxy for age and has no relation to the mass RIF.[22] See Ex. 50.

First, Plaintiffs' retirement benefits are closely aligned to the FS Controllers' ages, not just their years of service. By statute, FS Controllers may retire with an immediate annuity if they are over 50 years old and have 20 years of good time or at any age with 25 years good time. See 5 U.S.C. § 8336(e); 5 U.S.C. § 8412(e); 5 C.F.R. § 842.207. Thus, the FAA's retirement plan is most aptly viewed as "a hybrid of age and years of service." Huff v. UARCO Inc., 122 F.3d 374, 388 (7th Cir. 1997). The first method of retirement (50/20) is explicitly linked to age, and the second (25 years) is virtually never employed.[23] See

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[22] Although Defendants will certainly try to rely on the Supreme Court's decision in Hazen Paper, that case does not apply to the present facts. See 507 U.S. at 612-13 (holding that without more, discharging an older employee to prevent his years-in-service pension benefits from vesting does not necessarily violate the ADEA). The Court stated quite clearly that its holding does not preclude liability under the ADEA where employees' pensions are closely tied to age, or where employers use pension status as a proxy for age, or where plaintiffs proffer additional evidence inferring defendant's discriminatory motive. See id.

[23] Hypothetically, if a 21-year-old became an FS Controller, s/he could not retire until age 46 at the earliest. However, neither the NAATS President nor the NAATS New England Regional Director are able to identify a single FS Controller who has retired with 25 years good time who was not at least 50 years of age. See Exs. 1 at ¶8; 2 at ¶27. Moreover, because FS

similarly Adams, et al. v. Ind. Bell Tel. Co., 231 F.3d 414, 420 (7th Cir. 2000) (distinguishing Hazen Paper where pensions were "available to an employee who was either 65 years old with 10 years of service, 55 years of age with 20 years of service, 50 years old with 25 years of service, or any age with 30 years of service").

Second, the evidence shows that the FAA is merely using "retirement eligibility" as a proxy for age. As noted above, the FAA likens its older, retirement eligible workforce to one that is in need of an "upgrade," and its Plan for the Future entails hiring 12,500 new, younger Controllers. See Exs. 14 at 3-4; 51. It has also underscored its wish to increase its "workforce flexibility" and obtain "enhanced productivity," which are stereotypical remarks often associated with discrimination against older employees. See Ex. 14 at 3-4; Machinchick, 398 F.3d at 353. Despite Defendants' claims to the contrary, the FAA's mass RIF has no relation to the FS Controllers' retirement eligibility. See Ex. 14 at 36. As an

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Controllers must have a minimum of three years of work experience or four years of college before working with the FAA (and because a large number have had prior military careers), they cannot retire under the second method (25 years) before they are well past 40 years of age.

initial matter, the FAA admits that 45 percent of retirement eligible Controllers continue to work into the seventh year of their eligibility. See id. Also, Defendants' Plan for the Future shows that the FAA can (and will) deal with the high retirement rates of their younger Controllers in the Terminal and En Route Services. See generally, Ex. 14. Finally, were the FAA truly concerned about the retirement eligibility of the FS Controllers, it would use their future retirements to achieve its stated goal of consolidating the AFSSs as recommended by both the OIG Report and NAATS Proposal. See Exs. 10 at 8.0; 11 at 5; but see Ex. 35 (Q&A 5, 2/4/05). Ultimately, this is an instance in which Defendants observed a correlation between the FS Controllers' ages and their retirement eligibility, and are taking advantage of that correlation to purge the FAA's older employees. See Hazen Paper, 507 U.S., at 613.

b. President's Management Agenda and OMB Guidelines.

Defendants have cited the President's Management Agenda and OMB Guidelines to justify their mass RIF, but the FAA's reliance on these initiatives is misplaced. First, neither the President's Management Agenda nor OMB Circular A-76 requires the FAA to contract out Flight Services and conduct a mass RIF and job eliminations. See Ex. 23. Also, nothing in these initiatives

required the FAA to choose a discriminatory plan over other non-discriminatory alternatives. Second, under the FAIR Act, the FAA is responsible for labeling its various functions as either inherently governmental or commercial. See Pub. L. No. 105-270 §314 (1998). The FAA mis-categorizing Flight Services as a commercial activity and inexplicably exempting Alaska AFSSs from the A-76 process. See Exs. 2 at ¶14; 12. Third, as noted above, the FAA contravened both initiatives by failing to conduct a thorough assessment of its entire operations, preferring instead to target its older FS Controllers. See Ex. 2 at ¶14.

Fourth, the FAA exploited the President's Management Agenda and Circular A-76 to its discriminatory advantage, by manipulating its bidding process to select a plan that would eliminate its older FS Controller workforce. The facts show that the FAA violated established policies and practices in preparing its A-76 feasability study, disregarded the SIR, and conducted a highly suspect and prejudicial bidding process. The FAA completed its feasibility study in only 30 to 40 days, over the objections of individuals like the NAATS President, and it took no steps to verify any of the data and information contained therein. See Ex. 2 at ¶15; id. at Attach. B at 3. This slipshod review is not only contrary to the established

policies and practices of the federal government, but when the FAA's perfunctory effort is juxtaposed with the massive impact the RIF has had and will have on the nearly 2,000 FS Controllers, its pretextual nature is self-evident. The fact that Defendants deviated from established policies and practices supports Plaintiffs' claims of age discrimination on a massive scale. See Lathram, 336 F.3d at 1093-94.

c. OIG Report and Unnamed FAA Studies.

In a brazen illustration of hubris, Defendants are trying to rely on the OIG Report and unnamed FAA studies as reasons for taking its discriminatory actions when, in fact, the FAA failed to respond to the OIG Report when it was first issued, and refused to implement the recommendations contained therein, which were supported by FAA studies. See Ex. 11 at 12, Ex. C. The FAA's defense fails for three reasons. First, the OIG Report made absolutely no recommendations regarding contracting out the AFSSs, and concluded only that current and future Flight Service demands could be met with fewer facilities. See Ex. 11.

Second, although the OIG Report concluded that the AFSSs should be consolidated, it recommended that the consolidation be accomplished "entirely through retirements and without a reduction in force since nearly half of the flight service

specialist workforce is currently eligible to retire," and the FAA rejected this recommendation. See Ex. 11 at 5. See similarly Ex. 10 at 3.1. Instead of heeding the counsel of the OIG Report on which it now vainly relies, the FAA initiated the A-76 bidding process and undertook its discriminatory mass RIF. Because the FAA never saw fit to responded to the OIG Report and refused to implement the OIG's recommendations, its current reliance on the OIG Report is a post hoc rationalization, the use of which this Court should not condone. See Townsend, 746 F.Supp. at 186; cf. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (defendant many not proffer a reason that "did not motivate it at the time of the decision").

Third, the FAA has not identified any specific studies to support it decision. See contra Burdine, 450 U.S. at 255 (the proffered explanation "must be clear and reasonably specific"). Such vagueness and lack of specificity not only denies Plaintiffs a reasonable opportunity to rebut Defendants' purported explanation, but supports Plaintiffs' claim that the FAA was actually moved by an age-discriminatory motive. The Court may infer from Defendants' failure to proffer specific studies that the so-called "FAA Studies" do not exist or that they do not justify Defendants' decision to eliminate

Plaintiffs' federal positions. Indeed, the OIG Report on which the FAA now relies cited several FAA studies in support of its nondiscriminatory recommendations, which the FAA rejected in favor of its plan. See Ex. 11 at Ex. A,C. It cited and discussed the FAA's June 1996 Flight Service Study, the FAA's March 1997 FAA Flight Service Study, and the FAA's April 1998 Flight Service Study. See id. at Ex. C. These studies and reports, some of which are also cited in the NAATS Proposal, were used by both the OIG and NAATS to support their nondiscriminatory alternatives.

d. Aging Facilities/Equipment and Workload Imbalances.

The FAA's argument that aging facilities and equipment and an imbalanced workload required it to select the Lockheed Martin proposal is obviously untrue because each of the proposed alternative plans, including the OIG Report, the NAATS Proposal, and the MEO bid, would have rectified these concerns. All of the internal and external proposals that were available to the FAA, had they been implemented, would have consolidated the AFSSs, thus abandoning any outdated facilities, updating any outmoded equipment, and correcting any workload imbalances. See generally, Exs. 10; 11; 28. In fact, the MEO proposed an

aggressive consolidation down to four facilities. Thus, Defendants' reliance on these reasons is a shallow attempt to misdirect the Court's attention from the fact that the FAA chose to implement the most age-discriminatory option available to it.

e. Inadequate AFSS Funding.

Without providing the public a single document outlining how any savings will be achieved, the FAA has claimed that the mass RIF will save the government money. However, the FAA has relied on inflated cost-saving estimates, and Defendants have been forced to revise their estimates after subsequent scrutiny revealed their falsity. Specifically, Defendants initially claimed the FAA's contract with Lockheed Martin would save the government $2.2 billion, thus resolving the inadequate funding of AFSS-related programs. See Exs. 29; 50. But see Exs. 52; 53. However, the FAA has now lowered its supposed savings to approximately $1.7 billion, and the evidence shows that the FAA is actually losing money. For example, Defendants have refused to consider the cost of the acquisition, which was about $20 million, or the cost associated with establishing the Office of Competitive Sourcing in its estimate. See Ex. 2 at ¶23; id. at Attach. C at 2.

The falsity of Defendants' stated reason is one form of

circumstantial evidence that is probative of intentional discrimination and supports Plaintiffs' claim. See Reeves, 530 U.S. at 148-49. As the Supreme Court has stated:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt... Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Id. (internal citations and quotation marks omitted). See also Aka, 156 F.3d at 1292 (noting that "events have causes" so "when the plaintiff rebuts the employer's own explanation of its challenged acts, this eliminates the principal nondiscriminatory explanation for the employer's actions").

In addition to being false, the FAA's estimates are based on a plan that will discriminatorily eliminate the older FS Controller workforce and replace them with the younger contract personnel to whom Lockheed Martin proposes to pay lower salaries. As noted above, the differences between the Lockheed Martin and MEO TECs are attributable to the fact that the MEO planned to pay salaries at the FS Controllers' FPL as required

by SIR § M.3.5.1. Because the FAA did not evaluate the proposals in accordance with the SIR, it did not consider that Lockheed Martin's estimate was lower based on using incorrect salary figures. See supra at 39-40. It would be a perversion of the ADEA to allow Defendants to use the outcome of a deceptive and discriminatory plan to justify that very plan.

Finally, the FAA had alternative, nondiscriminatory cost-saving measures that it chose not to utilize. The OIG Report, had it been implemented, would have saved the FAA an estimated $500 million and the NAATS Proposal calculated a savings of about $600 million. See Exs. 10 at 10.0; 11 at 1. Similarly, on information and belief, the bid prepared by the Computer Science Corporation would have cost the FAA less than the contract it awarded Lockheed Martin. See Ex. 2 at ¶22. The FAA's refusal to employ these less discriminatory alternatives is further proof that it intended to harshly discriminate against its older FS Controllers. See Rudder, 890 F. Supp. at 46.

f. Potential for Efficiencies.

The FAA's reliance on the supposed efficiencies of its plan fails on three counts. First, it is based on the false premise that Flight Services' current operations are inefficient. In

fact, the AFSSs are operating efficiently. See Ex. 2 at ¶25; id. at Attach. A. To the extent they need to be more efficient, the OIG Report, the NAATS Proposal, and each of the other A-76 bids the FAA rejected would have accomplished this goal had they been implemented. Second, the notion of efficiency is subjective, and as such, it should be viewed with "caution, since employers can easily use such criteria to 'mask discrimination.'" Carter, 387 F.3d at 179 (quoting Aka, 156 F.3d at 1298).

Third, the FAA's claims regarding efficiency fail to account for "the overall benefits, risk, and cost" in the context of safety and efficiency, as required by SIR § M.2. For example, the FAA has not accounted for the risks of cost escalations or delays that are likely to occur as a result of the testing, installation, and training needed to implement the untested and uncertified technology Lockheed Martin intends to use. See Ex. 2 at ¶18. Nor has it justified the risks associated with contracting out the national security functions of FS Controllers, who make pilots aware of the flight restrictions over and around the President of the United States, coordinate search and rescue operations, communicate with commercial pilots flying into U.S. airspace from other countries, and routinely assist military and Air National Guard

personnel. See Ex. 2 at ¶11. The FAA has also not calculated the human cost of its plan as recommended by the OIG Report. See Ex. 11 at 5 ("any consolidation effort should include careful coordination with [NAATS] to ensure that impact on the workforce is minimal and that anticipated savings are fully realized"). Finally, the FAA is neglecting the loss to the nation that will occur when it eliminates the senior FS Controllers and the experience, training, and dedication they bring to their jobs. Defendants' failure to consider issues that should clearly be an integral part of any legitimate decision-making process is further evidence of pretext.

3. Plaintiffs' Ages Are One of Defendants' Motivating Factors in Deciding to Undertake the RIF.

If Plaintiffs are able to show by a preponderance of the evidence that age was a motivating factor in Defendants' decision, they are entitled to a liability verdict, even if Defendants' conduct was also motivated by some other lawful reason (mixed-motive). See Desert Palace, 539 U.S. at 90. Moreover, direct evidence of discrimination is not required for Plaintiffs to prevail; they can establish a violation of the ADEA by simply showing through a preponderance of evidence that age played "a motivating factor" in Defendants' decision. Id.

at 101-02.

As previously stated, the evidence conclusively demonstrates that Defendants were motivated by the FS Controllers' ages in deciding to undertake the FAA's mass RIF and job eliminations. First, Defendants admit that one of the primary reasons for their decision is that the FS Controllers are a retirement eligible workforce, which serves as a proxy for age. See Ex. 51. The FS Controllers' eligibility to retire is largely controlled by their ages because they may retire with an immediate annuity if they are over 50 years old and have 20 years of good time or at any age with 25 years good time, and in practice FS Controllers are not able to retire until they are well into their mid to late 40s. See 5 U.S.C. § 8336(e); 5 U.S.C. § 8412(e); 5 C.F.R. § 842.207. Also, in a prepared, videotaped statement, the FAA Administrator equated the so-called "retirement eligible workforce" with one that is in need of an "upgrade." See Ex. 51.

Second, the FAA's Plan for the Future, which employs stereotypical euphemisms for age, is driven by Defendants' intentions to hire 12,500 new, younger Controllers. See Ex. 14 at 3-4. In fact, the FAA has explicitly invoked its Plan for the Future to justify hiring younger students instead of the

experienced FS Controllers whose jobs its has chosen to eliminate. See Ex. 14. The FAA is projecting it will hire 436 Controllers through September 2005. However, only 65 of its new Controllers will be former FS Controllers, while 208 will be younger students. See Ex. 2 at ¶26; id. at Attach. D. Under the weight of such evidence, it is clear that the FAA was motivated, at least in major part, by age.

4. Defendants Are Unable to Prove the RIF Would Be Implemented Absent Their Discriminatory Animus.

Once Plaintiffs have shown that age was a motivating factor in Defendants' decision to implement the mass RIF, the burden shifts to the FAA to prove that it would have proceeded with this course of action even absent its discriminatory animus. See Rachid, 376 F. 3d at 312. The Defendants, not the Plaintiffs, have the burden of proof on this point. See id.

Of the seven reasons proffered by Defendant and discussed above, only three seem to be central, primary reasons for the FAA's decision to implement its plan – retirement eligible workforce, operation costs, and aging facilities/equipment. See Ex. 51. These three reasons are the excuses on which the FAA

has continuously and uniformly relied to justify its decision.[24] See Exs. 50; 51. However, as Plaintiffs have already shown, none of them individually or collectively excuse the the FAA's age-discriminatory plan, and Defendants are unable to prove otherwise.

As an initial matter, the FAA has never relied on any single reason to justify its decision, which suggests that no one reason alone would be sufficient. Moreover, Defendants' two remaining reasons (excluding retirement eligible workforce) are either false or misleading. With respect to the supposed cost-savings, the FAA has had to concede its estimates were exaggerated, and Plaintiffs have demonstrated that Defendants' estimates fail to consider the costs and risks attributable to factors like the implementation of the untested and uncertified technology Lockheed Martin intends to use. Given the falsity of the FAA's estimates, it is clear Defendants could not rely on this reason to justify its decision.

Nor can the FAA rely on its aging facilities and equipment

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[24] Plaintiffs demonstrated above that the FAA's four other reasons – the President's Management Agenda and OMB Guidelines; the OIG Report; the unnamed FAA Studies; and potential for efficiencies – are individually and collectively insufficient to justify Defendants' decision. See supra at 80-93.

argument to excuse its decision. It is understood that the AFSSs' equipment and facilities need to be updated. In fact, the impetus behind the OIG Report was the OIG's recommendation that Flight Services be consolidated while the FAA retrofitted its new software program – OASIS. See Ex. 11 at 1. Hence, the issue of the AFSSs' aging facilities and equipment was being resolved (and would continue to have been resolved) irrespective of the FAA's mass RIF. Clearly, the FAA relies on this point to obfuscate its discriminatory motives. The FAA's actions were clearly manifested in its decision to reject recommendations by the OIG and NAATS that would have resolved its facility and equipments needs, in favor of its age-discriminatory plan. Ultimately, Defendants are unable to prove the FAA would still be implementing the mass RIF notwithstanding Defendants' discriminatory animus.

B. Plaintiffs Will Prevail on Their Disparate Impact Claim

The ADEA "focuses on the effects of [an employment] action on the employee rather than the motivation for the action of the employer," Smith, 125 S.Ct. at 1542, and "prohibits such actions that 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." Smith, 125 S.Ct. at 1542 (quoting

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988)). Thus, as the Supreme Court recently held, the disparate impact theory of recovery announced in Griggs is cognizable under the ADEA. See Smith, 125 S.Ct. at 1541 (citing Griggs, 401 U.S. at 424). More specifically, the Wards Cove, pre-1991 interpretation of Title VII of the Civil Rights Act of 1964 applies to disparate impact claims under the ADEA, see Wards Cove, 490 U.S. at 642, and as a result, good faith does not redeem employment actions that negatively impact older employees.

In order to prevail on their disparate impact claim, Plaintiffs must only show: (1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular age produced by Defendants' facially neutral acts or practices. See Pottenger v. Potlatch Corp., 329 F.3d 740, 749 (9th Cir. 2003). If Plaintiffs are able to establish the existence of these two factors, the burden of proof shifts to Defendants, who must demonstrate that the disparate impact was based on "reasonable factors other than age." See 29 U.S.C. § 623(f)(1); Smith, 125 S.Ct. at 1541.

1. Plaintiffs Can Establish a Prima Facie Case Because They Can Show That Defendants' RIF Will Have a Significantly Adverse and Disproportionate Impact on Them.

To meet their prima facie burden, Plaintiffs need only identify a specific, outwardly neutral employment practice that has an adverse impact on older workers. Smith, 125 S.Ct. at 1545 (quoting Wards Cove, 490 U.S. at 656 (noting that employees are "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities")). Plaintiffs can carry this prima facie burden.

First, Plaintiffs have identified the FAA's termination of their employment, which will be effectuated through a mass RIF as the specific outwardly neutral employment action that will have an adverse impact on them. Cf. EEOC v. D.C. Pub. Schs., 2003 U.S. Dist. LEXIS 16694 (D.D.C. July 1, 2003); Murray v. Gilmore, 231 F. Supp. 2d 82 (D.D.C. 2002); See also Pottenger, 329 F.3d at 749 (holding that a RIF action constitutes a specific business practice for purposes of a disparate impact claim) (citing Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990)). The FAA arbitrarily categorized Flight Services as a commercial activity, and it slated most AFSSs for

contracting out while excepting others, like those in Alaska. Contrary to the purpose of the President's Management Agenda and Circular A-76, the FAA conducted only one precipitous and unverified feasability study, and it targeted Flight Services for contracting out instead of completing a thorough agency-wide assessment of its various operations. Finally, to assure its discriminatory plan was effectuated, the FAA prejudicially assessed the A-76 bids and disregarded the SIR. See Ex. 5 at § I.4.

As a result of Defendants' discriminatory actions, older FS Controllers will suffer adverse employment actions and irreparable harm. They have been slated for termination from federal employment, and they will be lose their federal benefits. Many will lose their sole source of income, while others are being forced to uproot their families and their lives in order to pursue temporary employment with Lockheed Martin or other federal employment for lower salaries.

Second, the adverse employment action Plaintiffs will suffer will have a disproportionate impact on them as older FS Controllers. The FAA, which operates 15 Offices and organizations (and even more lower-level divisions and services) across nine Regions, employs an estimated 47,329 people, including

16,858 Controllers in its three Air Traffic Control Services (Tower, Route, and Flight). See Ex. 9 at 29. However, the FAA targeted only one division – Flight Services – for a RIF, and as a result, an estimated 1,935 FS Controllers will be terminated from their federal employment on October 3, 2005. See Ex. 1 at ¶6. Of those FS Controllers, approximately 1,770 (92 percent) are 40 years of age or older, and they are by far the oldest workforce within the FAA. See Ex. 1 at ¶6. This disparity in age will cause the FS Controllers to suffer a significantly disproportionate impact as a result of Defendants' discriminatory plan.

2. Defendants' Decision Is Not Reasonable and Is Not Based on Any Factor Other than Plaintiffs' Age.

Once Plaintiffs have identified a specific, outwardly neutral employment practice and demonstrated that it will have an adverse impact on older workers, the burden of proof shifts to Defendants to show that its actions were based on some reasonable factor other than age. See 29 U.S.C. § 623(f)(1); Smith, 125 S. Ct. at 1542. Although the ADEA permits a defendant to engage in an "otherwise prohibited" action where it is able to meeting this burden, the FAA's purportedly nondiscriminatory reasons for initiating the mass RIF are neither true nor

reasonable. As Plaintiffs demonstrated above, each of the seven reasons proffered by the FAA to justify its actions are false, lack all credibility, and are a pretext for discrimination. As such, they are also simply not reasonable, and Defendants are unable to prove otherwise.

II. PLAINTIFFS WILL SUFFER EXTRAORDINARY IRREPARABLE INJURIES IN THE ABSENCE OF INJUNCTIVE RELIEF

The Supreme Court, in a case not involving discrimination, has held that a federal employee must demonstrate that an "extraordinary irreparable injury," as opposed to the lesser "irreparable injury," will occur before a court can grant a preliminary injunction. Sampson v. Murray, 415 U.S. 61, 83-84 (1974). The D.C. Circuit has never expressly held that this standard applies in the context of an employment discrimination action, and there is no consensus among the members of this Circuit as to whether it applies. See Moore v. Summers, 113 F. Supp. 2d 5, 18 (D.D.C. 2000) (Roberts, J.) (declining to select either standard and applying both); but see Jordan v. Evans, 355 F. Supp. 2d 72, 77 (D.D.C. 2004) (Leon, J.) ("a plaintiff ... must make a more stringent showing of irreparable injury"). Regardless of which standard this Court applies here, Plaintiffs have met both the normal and heightened standards for showing

that preliminary injunctive relief should be granted.

Plaintiffs meet the requisite “extraordinary irreparable injury” standard because there is no adequate remedy in the absence of a preliminary injunction. If this Court declines to issue an injunction, they will incur massive financial losses, severe and irreparable harm to their lives, lose their many years of hard-earned retirement credits, and lose all of their various federal civil service protections and benefits and negotiated protections from their Collective Bargaining Agreement.

A. There Is No Adequate Remedy in the Absence of a Preliminary Injunction

The most important criterion for determining whether irreparable harm exists is whether a plaintiff may obtain “adequate compensatory or other corrective relief at a later date” without an injunction. O’Donnell Const. Co. v. D.C., 963 F.2d 420, 428 (D.C. Cir. 1992) (citing Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)). The remedial scheme established by the ADEA is insufficient to compensate Plaintiffs for their damages and losses resulting from the FAA’s discriminatory plan. Therefore, absent a preliminary injunction, Plaintiffs will be unable to be made

whole for their suffering and losses at the close of a successful trial, which weighs heavily in favor of a claim of extraordinary irreparable harm. See Sampson, 415 U.S. at 90; O'Donnell, 963 F.3d at 428-29; Nat'l Maritime Union of Amer. v. Commander, MSC, 824 F.2d 1228, 1236-38 (D.C. Cir. 1987) (where damages cannot adequately compensate for a harm, relief must be equitable). That is, after the close of a successful trial on the merits, the remedies available under the ADEA are not sufficient to compensate Plaintiffs for the damages they will sustain as a result of the FAA's discriminatory plan.

Under the ADEA, courts are only authorized to award prevailing Plaintiffs injunctive relief, backpay, reinstatement, declaratory judgment, attorney's fees, liquidated damages, front pay, and other equitable relief. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357-58 (1995) (citations omitted). However, because the FAA is an agency of the federal government, Plaintiffs cannot be awarded liquidated damages. See Rattner v. Bennett, 701 F. Supp. 7, 9 (D.D.C. 1988). The ADEA also does not allow compensatory damages for injured employees. See id. While the ADEA is similar in many respects to Title VII, ADEA Plaintiffs cannot obtain relief for "future pecuniary losses, emotional pain, suffering, inconvenience, mental

anguish, loss of enjoyment of life, and other nonpecuniary losses." Landgraf v. USI Film Prods., 511 U.S. 244, 253 (1994) (citing Section 102(b)(3) of the Civil Rights Act of 1991, 42 U.S.C. § 1981a). Thus, assuming a price tag could be placed on the injuries Plaintiffs will sustain when their families are separated, parents are institutionalized, ill loved ones' medical conditions grow more severe, and/or business and properties are lost, in the wake of the FAA's discriminatory RIF, these are not redressable under the ADEA.[25]

While reinstatement is available under the ADEA, it is not a realistic remedy for most Plaintiffs. First, reinstatement will do nothing to redress Plaintiffs for the severe hardships that have been forced upon them, but are not compensable under the ADEA. Second, if the FAA is permitted to move forward with its mass RIF and job eliminations, despite the ongoing litigation, there will be no FAA FS Controller positions for

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[25] In a decision by Judge Lamberth in a case under Title VII, he noted that limitations on compensatory damages in federal employment actions make the harms caused by discriminatory RIFs that much more irreparable. See Bonds v. Heyman, 950 F. Supp. 1202, 1215 n.15 (D.D.C. 1997). But, because that case was decided pursuant to Title VII, the plaintiff, unlike the Plaintiffs in this case, was entitled to request $300,000.00 in compensatory damages. See id. The fact that the Plaintiffs here can be awarded no compensatory damages at all makes Judge Lamberth's comment that much more compelling.

Plaintiffs to return to should they prevail on the merits of their claims. Since the contract with Lockheed Martin is for five years with an option for five additional years, the earliest that any of Plaintiffs' positions may be available is October 1, 2010. See Ex. 29. Such a delay makes reinstatement completely impracticable.

Third, Plaintiffs who do not obtain similar positions in the FAA or at Lockheed Martin will stagnate and lose their skill levels, particularly because there is no private-sector equivalent to the duties Plaintiffs perform. At that point, Defendants may deny these employees reinstatement on the grounds that they are no longer qualified because they have been out of work for so long. See Robinson, at *7 (citing Gately v. Massachusetts, 2 F.3d 1221, 1234 (1st Cir. 1993) ("time spent away from the force would impair the plaintiffs' ability to stay in touch with new developments ... thus impairing their effectiveness and that of the State Police as a whole, if and when they are ultimately reinstated").

Fourth, "reinstatement would not be an available remedy for those plaintiffs who, at the close of a successful trial on the merits, would have reached the new retirement age, and, as a result of their earlier discharge, would lose their twilight

years of employment." Gately, 2 F.3d at 1234. Generally, Plaintiffs are required to retire from career Controller positions at the age of 56. See 5 USC § 8335(a); 5 USC § 8425(a). There is an exemption for employees who have not yet achieved 20 years of service, but this is not likely to be practicable considering that the longer the individual is not an FS Controller, the harder it will be to return.

Fifth, front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Pollard v. E. I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). Thus, while front pay can make up for much of the impracticalities of reinstatement in this case, it will do nothing to afford Plaintiffs any type of redress for the loss of their years of hard-earned early retirement credits and the severe hardships that will be inflicted upon them as a result of Defendants' mass RIF and job eliminations.

B. Plaintiffs Will Suffer Severe Economic Harm

By virtue of the FAA's discriminatory mass RIF, all Plaintiffs will be terminated from their federal positions effective October 3, 2005, which will have devastating economic consequences for Plaintiffs. See Ex. 29.

1. Loss of Jobs

Many Plaintiffs are unable to relocate to the few available FAA positions or the openings in the new Lockheed Martin Hubs, because of very serious hardships. See supra at 56-64. Second, for those who are able to relocate, there are few options because the FAA has not reserved sufficient Tower and En Route Controller positions for former FS Controllers, and very few Plaintiffs have had successful applications for these openings. See Exs. 2 at ¶26; 22 at ¶¶2,8; 33 at ¶6. Moreover, the FAA will not allow these former FS Controllers who stay with the FAA to retain their present salaries. See Exs. 1 at ¶14; 34 at ¶5.

While some Plaintiffs are able to relocate to the Hubs and work for Lockheed Martin, not all of them have received offers, and for those who have, there are no guarantees that their positions will last beyond the three years of promised employment. See Exs. 5 at § I.4; 30 at 20; 35 (Q&A 4, 2/4/05 and Q&A 3, 2/8/05). Plaintiffs' employment with Lockheed Martin is only "at-will," notwithstanding the three-year promise. See Ex. 1 at ¶20; id. at Attach. B. That is, Lockheed Martin retains the discretion to terminate its Controllers and has given them no indication of the standard (if any) it will use to evaluate their conduct or performance (e.g., "for cause"). See Ex. 1 at

¶20; id. at Attach. B. Moreover, there are no guarantees that the new LM contract personnel from the FAA will continue to be assigned to Controller positions, and therefore, there is no guarantee that they will be allowed to retain their salaries. See Ex. 35 (Q&A 6, 2/4/05 and Q&A 10, 2/4/05).

The fact that some Plaintiffs are able to transfer to and work at a Lockheed Martin HUB does not mitigate the extraordinary irreparable injury that they will be forced to incur. The LM contract personnel positions are not comparable to Plaintiffs' current federal positions. As stated above, Lockheed Martin is offering Plaintiffs few guarantees of continued employment, Plaintiffs will lose their many years of hard-earned retirement credits and early retirement benefits and will have a much lower pension with the company, their health insurance premiums will skyrocket, and they will no longer have their valuable government benefits such as holiday bonus pay and significant sick leave benefits. See supra at 57. Giving Controllers sufficient leave to be sure they are healthy, rested, and alert is obviously good policy.

2. Harm to Pensions

As a result of their terminations from federal service, Plaintiffs who are not eligible to retire with an immediate

annuity in their early retirement program will lose almost everything they contributed to their pensions. <u>See</u> <u>supra</u> at 41-46. Because FS Controllers' retirement contributions are a higher percentage of their income than almost any other federal employee, they will lose more money than federal employees who do not earn "good time." <u>See</u> Ex. 2 at ¶32; 40; P.L. 92-297. Additionally, the federal government will receive an unfair windfall as a result of the FAA's mass RIF, while many Plaintiffs, who are close to retirement, will be left with only a meager deferred retirement and no health insurance. <u>See</u> Ex. 1 at ¶21; 2 at ¶34; 30 at 8.

Those who are eligible to retire, approximately 40 percent of FS Controllers, <u>see</u> Ex. 51, are still being forced out before they originally planned on retiring. This means they will receive less money than expected from their Thrift Savings Plans, and their High-Threes for annuity calculation will be lower than if they would have remained in federal service for more years. <u>See</u> Exs. 43 at ¶5; 44 at ¶5. Those Plaintiffs who find other federal employment that does not qualify as "good time" will need to work for a total of 30 years to receive a full (albeit smaller) pension, and none of their extra contributions during their tenure as FS Controllers will be

refunded or credited. See Ex. 41. Again, the federal government will earn an unfair windfall at the expense of the employees.

3. Harm to Benefits and Rights

Plaintiffs will lose all of their federal benefits and benefits arising from their Collective Bargaining Agreement. Of those Plaintiffs who are selected by Lockheed Martin, none will have the expansive federal civil service protections such as termination for cause and cost of living allowance increases. See Ex. 1 at ¶20. Among the many rights and benefits emanating from their CBA that they will lose, employees will lose their negotiated grievance procedure, and be subject only to the whim and caprice of Lockheed Martin. See Ex. 49 at Art. 1, 6. Additionally, because Lockheed Martin require employees to sign an arbitration agreement as a condition of their employment, former FS Controllers who become LM contract personnel will no longer be able to seek redress for violations of their employment rights in a court of law. See Ex. 35 (Q&A 1, 7/7/05). Also, Plaintiffs' lost years of retirement credit is irreplaceable. That is, because retirement credit has no application outside of federal service, Plaintiffs' many years of credit simply vanish. Plaintiffs are forced to begin accruing a retirement all over again, and options such as early retirement

and disability retirement will no longer be available.

C. Importance of the FS Controller Position to Plaintiffs

The complete extent of the FAA's discriminatory plan cannot be truly understood without an understanding of how important the FS Controller positions are to Plaintiffs. Plaintiffs are being discriminatorily terminated from their career positions for which the FAA trained and nurtured them, and their connection to their positions is not "entirely measurable in monetary terms." See Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (Friendly, J.) ("the Semmes want to sell automobiles, not to live on an income from a damages award"); Bonds, 950 F. Supp. at 1215; McVeigh v. Cohen, 983 F. Supp. 215, 221 (D.D.C. 1998) ("Having served honorably for the last 17 years, Plaintiff will be separated from a position which is central to his life").

In Bonds, the federal government argued that the fact that the plaintiff was able to retire with a high pension and benefits mitigated any finding of irreparable injury. See Bonds, 950 F. Supp. at 1215. In a similar vein, the FAA believes that the fact that many Plaintiffs are retirement eligible somehow softens the blow that they incur as a consequence of their termination. See Ex. 51. While less than half of the Plaintiffs

are retirement eligible, "the fact that ... [some Plaintiffs] could retire and be nearly as well off financially without having to lift a finger, shows just how much of ... [their] life is tied into ... [their] career[s]." See Bonds, 950 F. Supp. at 1215. Judge Lamberth explained that "[r]ather than merely proffering or alleging an injury to her livelihood, Bonds has demonstrated it by her very actions" through the fact that she stayed at her job and maintained a high performance level. Id. The same can be said for the Plaintiffs here, who have an average of about 15 to 18 years of service to the FAA and more than 20 years of government service.

III. NO OTHER PARTY WILL BE SUBSTANTIALLY HARMED IF THE INJUNCTION IS GRANTED.

Courts balance the respective hardships imposed upon the parties when evaluating whether other parties would suffer if a preliminary injunction is granted. See O'Donnell, 963 F.2d at 429. As stated above, Plaintiffs will suffer extraordinary irreparable harm if a preliminary injunction is not issued. On the other hand, a preliminary injunction will not substantially harm the FAA. There is no imminent need for the FAA's mass RIF. That is, there is no legislation or Court Order eliminating the AFSSs, and requiring the FAA to eliminate all of the FS

Controller positions. Additionally, the FAA remains free to perform A-76 studies, seeking ways to reduce spending in accordance with the President's Management Agenda, and would only be precluded from reducing spending through its discriminatory actions. The FAA claims that it may have to pay a $350 million termination penalty if the contract is canceled, but the FAA cannot provide any explanation, rule, regulation or otherwise, that requires it to pay liquidated damages. See Ex. 2 at ¶30; id. at Attach. A at 2. Plaintiffs concede that the FAA might have to pay Lockheed Martin the costs of bid preparation or Lockheed Martin's budget for the year, but these are a far cry from $350 million. See id.; Ex. 5 at § H.6 ("The Government shall be liable for all reasonable and allowable costs incurred by the [contractor] in the performance of the work prior to notice of termination plus reasonable and allowable termination costs, up to the ceiling of the respective [Contract Line Item Number]"). Further, a preliminary injunction will not substantially harm Lockheed Martin. While Lockheed Martin will lose any investment it made preparing its bid, such a loss would occur regardless of whether Lockheed Martin won the bid or not. That is, all parties which submitted bids for the AFSSs lost their investment if they did not win.

Lockheed Martin will be in the same situation as a contractor that did not win its bid, but may in fact be able to recoup its costs from the FAA. See id. Lastly, any loss felt by Lockheed Martin and the FAA pales in contrast to the extraordinary irreparable harm that Plaintiffs will experience if this preliminary injunction is not granted. See Friends for all Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 838 (D.C. Cir. 1984).

The imposition of a preliminary injunction will not substantially harm other AFSS employees affected by the FAA's discriminatory RIF and job elimination plan. These employees are non-plaintiff FS Controllers, supervisors, and other staff members. A preliminary injunction would preserve their status quo, and therefore, such individuals could not reasonably argue that they are "substantially harmed" by retaining their federal position along their salary and benefits. Although some of these employees may be preparing for the imminent RIF and job eliminations,[26] they will not be substantially harmed by a

[26] Under 5 U.S.C. § 8335(a), Air Traffic Controllers (including FS Controllers) must retire when they reach 56 years of age. This mandatory retirement age would not apply to employees of Lockheed Martin. However, because all Air Traffic Controllers (including FS Controllers) are well aware of the mandatory retirement age, they have no expectation of serving

temporary injunction.

IV. THE PUBLIC INTEREST LIES IN FAVOR OF PRESERVING THE STATUS QUO AND ISSUING THE INJUNCTION.

The interests affected by the FAA's mass RIF and job eliminations extend far beyond the 1,935 FS Controllers who will be harmed by Defendants' plan. The public interest will be served by the requested preliminary injunction for two reasons. First, the public has a strong interest in the effective enforcement of the ADEA. See Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985). Among the stated purposes of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The federal government's interests represented in the President's Management Agenda and A-76 Circular are not compromised, because neither trump this nation's interest in combating age discrimination. Further, the preliminary injunction sought would not prevent the FAA from exercising its legitimate authority to make personnel

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longer and cannot claim that an elimination of a prospective right as a potential Lockheed Martin employee constitutes "harm," let alone "substantial harm."

decisions and other types of restructuring. Rather, it would merely stop Defendants from effectuating such decisions through blatantly age-discriminatory means.

The public has a strong interest in aviation safety and security, as shown by the many members of the House of Representatives and Senate who have spoken out against the FAA's current plans for the Automated Flight Service Stations. See e.g., Ex. 65. In a letter addressed to Defendant Blakey, all of Connecticut's Senators and Representatives argue that "aviation safety and security considerations should be addressed by federal government employees working locally, and not subject to private sector pressures. See id. ("Knowledge about local conditions, weather, and geographic considerations are an instrumental part of providing aviation safety and security services"). Clearly, safety and the public interest are not served when the FAA manipulates the A-76 process to impose a discriminatory job elimination plan.

This dispute involves issues that affect all Americans: maintaining the federal government's commitment to root out age discrimination and to keep the skies safe and secure. Without the federal government's commitment to ending age discrimination and commitment to the mission of the FS Controllers, the public

interest will be irreparably harmed. Plaintiffs' likelihood of success on the merits, combined with the extraordinary irreparable harm they will suffer if the preliminary injunction is not granted, the vast disparities in harm Plaintiffs will suffer compared to any possible harm to other parties, and the public interests that a preliminary injunction will vindicate in this action, strongly support a preliminary injunction to enjoin the FAA from moving forward with its discriminatory plan.

V. A NOMINAL SECURITY BOND WOULD SATISFY THE REQUIREMENTS OF RULE 65(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 65(c) of the Federal Rules of Civil Procedure requires applicants for preliminary injunctions to post a security bond before obtaining the injunction. See Fed. R. Civ. P. 65(c); but see Thermex Co. v. Lawson, 25 F. Supp. 414, 415 (D.C.Ill. 1938) (clarifying that until the court grants the injunction, no security is required). The specific amount of the bond required for an injunction is within the discretion of the court. See Amer. Juris., Injunction § 283. See also Fed. R.Civ.P. 65(c) ("such sum as the court deems proper").

However, for some time now courts have held that bonds are "not necessary where requiring security would have the effect of denying the plaintiffs their right to judicial review of

administrative action." Natural Res. Def. Council, Inc., et al. v. Morton, 337 F.Supp. 167, 168 (D.D.C. 1971). This has proven particularly true for cases of public interest involving individuals or groups that are attempting to "enjoin the government ... from engaging in activities that allegedly will cause irreparable injury to some general social policy – for example, to public safety or the environment." 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc., Civ. 2d. § 2954. Thus, although the purpose of the security requirement is "to cover the costs and damages suffered by the party wrongfully enjoined, ... it would be a mistake to treat revenue loss to the Government the same as pecuniary damage to a private party." NRDC v. Morton, 337 F.Supp at 169; see also Armstrong v. Bush, 807 F. Supp. 816, 823 (D.D.C. 1992).

Moreover, courts have held that a nominal bond may be the only requirement when balancing the possible loss to the enjoined party with the hardship that the bond requirement would impose on the applicant. See Wright & Miller, § 2954. See e.g. Warner v. Ryobi Motor Prods. Corp., 818 F.Supp. 907, 909 (D.S.C. 1992) (setting the bond nominally at $250 in a case where plaintiffs would potentially suffer life-threatening consequences were an injunction not granted). For example, this Court

required a class of tenants challenging the conversion of a low-rent apartment complex under the Fair Housing Act to pay a nominal bond of only $500. See Brown v. Artery Org., Inc., 691 F.Supp. 1459, 1462 (D.D.C. 1987). Like the plaintiffs in Brown, without an injunction the FS Controllers may be precluded from obtaining judicial review of Defendants' actions until after the irreparable injury occurs, and the status quo will in all likelihood never be restored. See id. Thus, requiring anything more than a nominal bond from Plaintiffs will "effectively deny them the relief to which they may be entitled." Id. Plaintiffs have limited means, and they seek this injunction in order to protect what means they have. To require anything more than a nominal bond would effectively deny them their day in court.

CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request that this Court grant their Application and enter a Preliminary Injunction enjoining Defendants from terminating the employment of its FS Controllers until this case can be decided on the merits.

REQUEST FOR HEARING

Pursuant to Local Rule 65(d), Plaintiffs respectfully request that the Court schedule an Oral Hearing on the merits

of their Application within 20 days. See LCvR 65(d). An early injunction hearing as provided by the Court's Local Rules will not prejudice Defendants. After Department of Justice attorney Marcia Berman's entry of appearance on April 19, 2005, Defendants have now had 98 days to study this case. Upon information and belief, Plaintiffs' counsel believes that the Department of Transportation's attorneys have been following this case since February 8, 2005, when undersigned counsel first spoke with DOT attorney Andrea Armstead about the case and provided her with a copy of the initial notice filed at the EEOC.

Respectfully submitted,

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GLOSSARY OF TERMS

A-76	Programs developed or implemented in accordance with Office of Management and Budget Circular A-76 (revised May 29, 2003)
ADEA	Age Discrimination in Employment Act
AFSS	Automated Flight Service Station
AOPA	Aircraft Owners and Pilots Association
CBA	Collective Bargaining Agreement
COLA	Cost of Living Allowance
CSRS	Civil Service Retirement System
CTI	Collegiate Training Initiative
DOT	U.S. Department of Transportation
EEOC	U.S. Equal Employment Opportunity Commission
FAA	Federal Aviation Administration
FAIR Act	Federal Activities Inventory Reform Act
FAQs	Frequently Asked Questions
FERS	Federal Employees Retirement System
FPL	Full Performance Level
FS Controllers	Flight Service Air Traffic Control Specialists
LM contract personnel	Lockheed Martin Flight Service controllers
MEO	Most Efficient Organization
NAATS	National Association of Air Traffic Specialists
NAS	National Airspace System
NASDAC	National Aviation Safety Data Analysis Center

No FEAR Act	Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002
NTSB	National Transportation Safety Board
OASIS	Operational and Supportability Implementation System
OIG	Office of the Inspector General, U.S. Department of Transporation
OMB	Office of Management and Budget
OPM	U.S. Office of Personnel Management
PATCO	Professional Air Traffic Controllers Organization
RIF	Reduction-in-Force
ROFR	Right of First Refusal
SIR	Screening Information Request
SSEB	Source Selection Evaluation Board
TEC	Total Evaluated Cost
TER	AFSS Technical Evaluation Report
TET	Technical Evaluation Team
Title VII	Title VII of the Civil Rights Act of 1964, as amended

LIST OF EXHIBITS

Plaintiffs' Background

1. Declaration of Michael J. Sheldon (July 26, 2005).
   a. Attachment A: Map of proposed AFSS and Hubs
   b. Attachment B: Letter from James T. Sturm to Michael J. Sheldon (May 11, 2005).

2. Declaration of Kathleen A. Breen (July 26, 2005).
   a. Attachment A: Memorandum from NAATS to Senate Appropriations Committee Members (July 13, 2005).
   b. Attachment B: Tr. Of September 24, 2002 Meeting with FAA Officials.
   c. Attachment C: Memorandum from Kate Breen to David Lichtenfeld (July 6, 2005).
   d. Attachment D: Air Traffic Controller Hiring Summary FY 04 through FY 05 (June 30 2005)

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   b. Section M 2; 3.1; 3.5.1.
   c. Section I 4.
   d. Section H 6.

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   b. Fact Book at 22 (Aviation Forecast (March 31, 2004)).
   c. Fact Book at 8 (FAA Air Traffic Activity (January 31, 2005)).
   d. Fact Book at 29 (FAA Employment (October 25, 2004)).
   e. Fact Book at 31 (Major Workforce Employment (September 30, 2004)).
   f. Fact Book at 27 (FAA, Map of Regional Boundaries).

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FAA's Background

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    b. TER at 179-80 (Strength: Understanding of Workload Fluctuations).
    c. TER at 181 (Strength: Use of CTI Schools).
    d. TER at 182-83 (Weakness: Bargaining with an Existing Union).
    e. TER at 184 (Strength: Ability to Secure Staff).
    f. TER at 189 (Strength: Local Area Knowledge.
    g. TER at 190 (Strength: Maintain Proficiency During Transition).
    h. TER at 191-92 (Strength: Proactive Change Management Approach).
    i. TER at 193 (Strength: Use of Experienced Maintenance Workforce).
    j. TER at 194 (Strength: Strong Partnership Program).
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58. Declaration of Angela Bowman (July 16, 2005).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiffs' Application for Preliminary Injunction, Memorandum in support thereof, Exhibits 1-64, and a proposed Order was served this 26th day of July, 2005, via both electronic case filing through the Court (in its entirety) and facsimile (without Exhibits), upon counsel for Defendant as follows:

Marcia Berman, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
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/s/

JOSEPH D. GEBHARDT