BEFORE THE DELTA AIR LINES'
PILOT SYSTEM BOARD OF ADJUSTMENT

Delta Air Lines,	**)**	
	)	
COMPANY,	**)**	
	)	
and	**)**	**Grievance No. ATL 18-14**
	)	**(Michael Danford)**
Air Line Pilots Association, Int'l,	**)**	
	)	
UNION.	**)**	

ARBITRATOR MARK BURDETTE – IMPARTIAL NEUTRAL
BRIAN PICKETT– COMPANY BOARD MEMBER
MIKE DOYLE – COMPANY BOARD MEMBER
KEVIN MORRIS – ASSOCIATION BOARD MEMBER
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POST-HEARING BRIEF OF THE COMPANY

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

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I. PRELIMINARY STATEMENT

As a participant in the Delta Pilots Assistance Committee ("DPAC") substance abuse program the Grievant signed a contract where he agreed to completely abstain from alcohol. He did not abstain. Now, he invites this Board to ignore three positive alcohol tests, turn a blind eye to his various misrepresentations and undermine the DPAC program by preventing the Company from enforcing a contract that exists to protect public safety. He makes these requests without producing a shred of evidence that any errors were made on the alcohol tests administered to him by the Program or that the DPAC policy was implemented in the way that Delta Air Lines (the "Company" or "Delta") and the Air Line Pilots Association (the "Association" or "ALPA") did not fully intend. The Board must decline the invitation.

On September 13, 2017, the day before he completed initial treatment for alcohol dependency, Grievant signed a Delta Pilot Alcohol and Drug Recovery Program Aftercare Contract (his "Contract A"). In his Contract A, Grievant agreed to completely abstain from all mood-altering drugs, including alcohol. He also agreed to random alcohol testing while acknowledging that strict compliance with the terms of his Contract A was mandatory and that noncompliance on his part could result in disciplinary action, up to and including termination.

On May 1, 2018, Grievant tested positive for ethyl glucuronide ("EtG"), a biomarker

indicating alcohol consumption, at a level of 117 nanograms per milliliter ("ng/ml"). The test was negative for ethyl sulfate ("EtS"), another biomarker for alcohol, which is not uncommon with a positive EtG result close to the 100 ng/ml cutoff. When a pilot has a split test (a positive EtG but negative EtS or vice versa), it is understood that the result could be from drinking alcohol but there is also a chance it was from incidental exposure to ethanol-containing products. Thus, pilots with split tests like Grievant are given a blood test for phosphatidylethanol ("PEth"), another biomarker for alcohol that is not affected by incidental exposure and only appears after the donor consumes alcohol. On May 9, 2018, Grievant gave a dried blood spot ("DBS") sample for a PEth test. The May 9 PEth test was positive at a concentration of 98 ng/ml (well above the 20 ng/ml cutoff) confirming he had relapsed. Pursuant to Delta and ALPA's jointly negotiated Substance Abuse Policy and over 30 years of continuous past practice, instead of termination, Grievant was given the opportunity to undergo retreatment and upon successful completion, return to flight status. He denied using alcohol and refused retreatment. The Company listened to Grievant's denials and thoroughly investigated the Company-directed tests to ensure that they were performed correctly and the results were accurate. The Company concluded Grievant's positive EtG and PEth tests established Grievant had relapsed.

Unable to accept the significant risk of allowing a relapsed, alcohol-dependent pilot to continue to fly without first reestablishing a commitment to complete abstinence in retreatment, the Company informed Grievant that it intended to terminate his employment. Through the grievance process, on July 30, 2018 Grievant was given an initial hearing where he could provide any relevant evidence. He presented only the negative results of one self-directed EtG hair test and two self-directed PEth tests he claims to have taken a week after his positive PEth test was administered. Tests outside of the DPAC program are not considered, but as the

Company proved at the System Board hearing, even if the tests Grievant presented were considered they did nothing to alter his two positive tests. As it turns out what was most remarkable about the initial hearing, was the evidence that Grievant deliberately withheld. Unbeknownst to the Company, on June 20, 2018, Grievant took an EtG hair test that was positive and entirely consistent with the Company administered positive EtG and PEth tests. Try as he might, Grievant cannot run from his attempt to hide his third positive alcohol test or the different misrepresentations he made to the Federal Aviation Administration ("FAA") and medical professionals. Besides the objective evidence of positive tests, his conduct provides the Board with every reason to disbelieve his claims of abstinence.

Grievant was terminated and the System Board was convened to hear his appeal. The Company presented a detailed case showing that Grievant's case was handled exactly as the Delta and ALPA architects of the Substance Abuse policy intended. The unrebutted evidence showed the well-reasoned basis for the random testing program, why the layered approach using both the EtG and PEth tests to monitor abstinence was implemented, and why quickly identifying relapsed pilots and getting them help was critical to public safety and the pilot's health. The Company also presented exhaustive evidence of Grievant's positive May 1 and May 9 tests and the forensic process utilized by both labs to ensure accuracy and defend against litigation challenges. PEth testing in particular was covered comprehensively; the Company presented unrebutted evidence regarding the validation data for the test conducted by USDTL to find PEth in Grievant's sample, the operating procedures for the laboratory, and the extensive regulatory oversight to which the laboratory is subject. Finally, the Company explained that the objective evidence in the form of two positive tests taken pursuant to the DPAC random testing protocol could not be ignored and concluded that Grievant had relapsed. Because Grievant

refused to enter retreatment, his employment was terminated.

Grievant's case, on the other hand, was long on rhetoric but short on substance. He opted for the scattershot approach hoping that the sheer volume of information, no matter how irrelevant, would distract the Board from noticing he offered no evidence of laboratory errors on his positive tests. The "experts" he produced were notable for a few reasons - none that are positive for Grievant. The first, Dr. Gregory Skipper, wrote a paper advocating the use of PEth tests as a follow up to a positive EtG test to confirm alcohol consumption, which is quite literally the protocol DPAC adopted and used in Grievant's case and the one that Grievant now complains mightily about. A mere month after meeting with Grievant, Dr. Skipper appeared at a national HIMS conference extolling the virtues of PEth testing. Another "expert" appearing on behalf of Grievant, Theodore Shults, wrote a report where he concluded that laboratory error occurred in Grievant's positive PEth test, but then admitted that the basis of his conclusion was pure speculation because he had not reviewed either the litigation package for Grievant's PEth test or USDTL's validation studies or Standard Operating Procedures. That hardly inspires confidence. In sharp contrast the Company expert, Dr. Howard Taylor, did not need to speculate about anything. He was retained by Delta during its investigation to review the positive tests and actually inspected the laboratory at USDTL before opining. His testimony was based largely on peer reviewed scientific research which he explained to the Board. To the extent Grievant placed research papers into evidence, often with no real explanation of why, it was left to Dr. Taylor to explain why the article was either irrelevant or misrepresented by Grievant's witness.

For these reasons, and others detailed more fully below, the Company asks the System Board to conclude it had just cause to terminate Grievant for failure go to retreatment after he failed to maintain abstinence as required by his Contract A.

II. STATEMENT OF THE ISSUE

Did the Company have just cause to terminate Grievant for failing to maintain abstinence in violation of his Contract A terms? If not, what is the appropriate remedy?

III. STATEMENT OF THE FACTS

A. The DPAC Substance Abuse Program

1. The Purpose Of The DPAC Program

Without a doubt, the DPAC Program is one of the most important safety programs at Delta. Tr. 437. The Company, the Association and the FAA cooperatively administer and participate in the program, which allows pilots who are substance dependent to be identified, treated, supported, and monitored. Tr. 437.

Captain Chris Storbeck, a former member of the National HIMS Advisory Board and ALPA National HIMS Chairman, served as the ALPA DPAC Committee Chairman for over thirteen years.[1] Tr. 221-222. He noted that the DPAC Committee is an ALPA committee formed to support pilots who suffer from chemical dependency (alcohol and/or drugs). Tr. 220. The Association has recognized the "substantial" risk to the Company and the traveling public of continuing to employ a pilot who has substance abuse issues. Tr. 223, 236-37. One goal of the DPAC Committee is to provide an environment in which pilots who are struggling with substance abuse issues or addiction can receive support and treatment that will allow them to save their jobs.[2] Tr. 222-23. That goal is served by managing the risk that pilots who are in the

[1] In 1990, Captain Storbeck entered into the DPAC Program as a participant. Tr. 221. In 1991, after he had completed initial treatment and a year of monitoring, he began to work with the DPAC committee as a pilot peer monitor. Tr. 221. In 1995, Captain Storbeck was selected to be the domicile committee chairman of the ALPA Atlanta DPAC committee. Tr. 221. In 1999, Captain Storbeck became the chairman of the ALPA DPAC committee, and he remained in that position until 2012. Tr. 221-22. In addition to his role on the Association's DPAC committee, he has also served on the National HIMS Advisory Board and as the ALPA National HIMS Chairman from 2011 to 2014. Tr. 222.

[2] For many years, it was common for airlines to terminate pilots who had addiction issues as there was no framework to manage the safety risk of impaired pilots flying aircraft. Tr. 236, 438. The HIMS program created a

DPAC Program may relapse. Tr. 236-37. "[I]t's important for the program itself, both the pilot participants and … the [Association] and for everyone to manage their recovery in such a way that risk is minimized and that the program is available for pilots that receive that diagnosis in the future." Tr. 237. The DPAC Committee's goal for each pilot who participates in the DPAC Program is that the pilot will learn to accept that he/she has a chronic illness and the best way to manage that illness is to embrace recovery and establish long-term sobriety. Tr. 223.

2. The Substance Abuse Policy

Prior to 2010, the DPAC Program did not have a written policy, but instead relied on institutional memory and past practice. Tr. 232. In 2010, Captain Steve Dickson, then the Vice President of Flight Operations, asked Captain Storbeck to take the lead on drafting a substance abuse policy for the DPAC Program. Tr. 233. Captain Storbeck worked with the Company and he wrote the Substance Abuse Policy that became effective on November 30, 2010.[3] Tr. 233; CX 16. The Substance Abuse Policy in the present case became effective on September 9, 2014 and reflects only minor modifications to the original. Tr. 234; CX 4.

The Substance Abuse Policy is a cooperative policy between the Company and the Association:

> The Senior Vice President of Flight Operations is responsible for the development and maintenance of this Substance Abuse Policy with the cooperation and involvement of the Air Line Pilots Association and the Delta Pilot Assistance Committee (DPAC). The SVP of Flight Ops acknowledges the cooperative nature of this process, and changes to this policy will be mutually agreed upon and coordinated with the DPAC steering committee. The DPAC maintains responsibility and will manage content accuracy.

CX 4.

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framework for the FAA, air carriers, and unions to work together to allow pilots to receive treatment and continue with their airline pilot careers while maintaining the highest safety standards required of air carriers. Tr. 236.

[3] The Substance Abuse Policy became the template for many other carriers' substance abuse programs. Tr. 237.

Treatment facilities are agreed upon by the Company and ALPA and initial treatment is generally provided by the Talbot Recovery Campus ("TRC") in Atlanta. Tr. 239, 440; CX 4 at §VI.B.1. The Company covers 100 percent of a pilot's initial treatment expenses and, while at TRC, the pilot is given a pilot sponsor and assigned a doctor who serves as the HIMS Aviation Medical Examiner ("HIMS AME"). Tr. 440; CX 4 at §VI.D.

When a volunteer pilot successfully completes treatment, the pilot is offered the opportunity to return to work under the provisions of a Delta Pilot Alcohol and Drug Recovery Program Aftercare Contract, referred to as a "Contract A."[4] Tr. 238, 440, 936; CX 4 at §VI.E. In the Contract A the pilot agrees to completely abstain from mood altering drugs, including alcohol and to be available for random alcohol tests, specifically including EtG tests and PEth tests. CX 4 ¶¶ 2, 13. Captain Storbeck thought it was important to include a "random robust testing program" that would aid pilots in maintaining sobriety by creating a question in their minds regarding whether their drinking would be discovered if they were subject to random tests. Tr. 245, 260. He also knew that there were pilots in the DPAC Program who had relapsed, but their relapse had gone undetected.[5] Tr. 244-45.

3. The DPAC Program decided to use EtG and PEth tests to monitor abstinence.

With respect to the types of tests that would be used in the DPAC Program to monitor alcohol abstinence, the goal was to use tests that would allow an early detection of a relapse and also be able to confirm whether a relapse had actually occurred. Tr. 249, 261-62. Both EtG and

[4] Pilots entering the DPAC program are classified as volunteers or non-volunteers. CX 4. The Grievant in this case was considered a volunteer. Tr. 444. A non-volunteer pilot, typically one who tests positive while on duty, may return to duty under the terms of a Last Chance Agreement, also referred to as a Contract B. CX 4. The Contract B, incorporates the Contract A. CX 4.

[5] Before the DPAC random testing program was implemented it was common knowledge that some HIMS AMEs subjected pilots to predictable testing schedules on a certain day of the month, allowing pilots to anticipate when they would be tested and plan their consumption of alcohol accordingly. Tr. 230-31.

PEth tests met the DPAC Program's goals. Tr. 249.

Ethyl Glucuronide ("EtG") is a metabolite that is left behind as the body processes ethyl alcohol. CX 18; CX 32; UX 52. It is formed in the liver by combining alcohol with the liver's natural glucuronic acid. CX 18; CX 32. Depending on how much alcohol was consumed, EtG tests can provide a look back period of up to five days. UX 52; UX 78. Ethyl Sulfate ("EtS") is another metabolite formed as the body metabolizes ethyl alcohol and is tested for when EtG is present. CX 18; UX 78. Delta and ALPA were aware that drinking an alcoholic beverage would definitely produce EtG, but research showed that at lower levels it could sometimes come about through incidental exposure (e.g., hand sanitizer). Tr. 266. Additionally, so called "split tests" - tests that showed EtG but not EtS (or vice versa) - could show alcohol consumption but may also result from incidental exposure. Tr. 445, 465. For that reason, the DPAC program instituted "a layered approach" to testing advocated by many experts and began using Phosphatidylethanol ("PEth") tests to confirm whether a positive EtG test was in fact from alcohol consumption. Tr. 246, 249, 265-66; CX 18; CX 19.

PEth is a series of abnormal phospholipids that are formed only in the presence of ethanol, making PEth a long-term direct ethanol biomarker. Tr. 32, 290-91, 897; CX 13; CX 28 at pp. 1635, 1638; UX 82. After ingestion of ethanol, PEth attaches to fatty acids present in an individual's body. Tr. 33-34; CX 13. When PEth forms, it is incorporated into the phospholipid membrane of red blood cells. Tr. 34-35; CX 13; CX 28 at p. 1635. Scientific studies have found positive PEth tests over 20 ng/ml[6] to be a reliable indicators of alcohol consumption. According to a Critical Review authored by William Ulwelling and Kim Smith:

> A "positive" PEth finding (>20 ng/ml) in the lower range (e.g., 20-80 ng/ml) indicates that the person has very likely consumed at least 2.5 or more standard drinks for several days prior to the test or had binged rather heavily. While a low

[6] The units of measurement for PEth tests are nanograms per milliliter ("ng/ml"). Tr. 56.

> PEth value does not reveal the pattern of consumption, **the unassailable conclusion is that the employee has consumed alcohol within the past month or so**.

CX 28 at p. 1638 (emphasis added). See also CX 18 at p. 1583 ("PEth is only possible following significant alcohol use."). Positive PEth results have been used to demonstrate non-abstinence in legal disputes, including in both administrative and court hearings.[7] Tr. 48-49; CX 28 at p. 1638.

When making his recommendation to the ALPA Master Executive Committee ("MEC") to include both EtG and PEth testing in the DPAC Program, Captain Storbeck informed the MEC:

> In general terms, I believe that robust testing programs, which … in the case of Delta Air Lines and the [DPAC Program] we construed to include both EtG and PEth testing … and off-duty testing as well as on-duty testing was an important component in terms of supporting the pilot's sobriety. And so what that meant was that it was in the interest of the individual pilot's health, long-term health. It was … important in terms of helping this Company identify a relapse pilot who would represent … an inappropriate risk to the Company, and it would also help [engender] support overall for the Program if there was this, by having a … robust effective program, the likelihood would be that both that the Program would continue to the future and be available for other pilots.

Tr. 261-62.

Delta and ALPA deliberately agreed to use a low cutoff for EtG testing (100 ng/ml) to ensure that all pilots who may have relapsed would be identified. Tr. 266-67. Due to the sensitivity of the EtG test, in situations in which a positive EtG test did not clearly demonstrate a relapse, or where a split test occurred, the Company and ALPA agreed a PEth test would be used to verify whether a pilot who tested positive on an EtG test had in fact been drinking alcohol. Tr. 266, 466-67.

[7] Dr. Gregory Skipper, who testified on behalf of Grievant claimed that PEth tests have been restricted to clinical use and have not been used for forensic purposes. Tr. 522. As documented in the Ulwelling Critical Review, and as shown by the testimony Matthew Stepanian and Amy McDougal, both of whom testified on behalf of Grievant, this is an inaccurate assertion. CX 28 at p. 1638.

4. Relapse is a part of the disease.

Pilots are required to comply with the terms of their Contract A. Paragraph 18 of the Contract A states:

> I understand that strict compliance with all these provisions is mandatory, and noncompliance with any responsibility on my part may result in disciplinary action, up to and including termination by Delta. I will comply with all requirements of my FAA special issuance. Any violation of any drug or alcohol restriction association with my Airman's Medical Certificate will constitute a violation of this agreement.

CX 4.

The DPAC Program recognizes that relapse is part of the disease of alcoholism. Tr. 240, 442; CX 4. The Substance Abuse Policy defines a relapse as, "Any prohibited use of alcohol or drugs subsequent to receiving a Special Issuance Medical Certificate related to a diagnosis of alcohol or drug dependence." CX 4 at §IV.T. If a pilot in the DPAC Program relapses, the pilot is removed from flight status, and offered retreatment. Tr. 241, 243, 257, 945. A pilot must undergo retreatment to be returned to his/her pilot position. Tr. 443, 945. This long standing and unbroken practice has been in place since Captain Storbeck first became involved in the Program over 30 years ago.[8] Tr. 257. Retreatment after a relapse is critical because, according to Captain Storbeck, it is "important to reestablish sobriety and … promote a continued commitment to … that sobriety. And that was best accomplished by sending a pilot to retreatment." Tr. 243-44. Captain Graham testified similarly: "There is a requirement to go through retreatment [after a relapse] so that once again the abstinence can be validated and that … the relapse[d] pilot is supported appropriately. There's really no way to ensure that the pilot

[8] The requirement to undergo retreatment after relapse is not outlined in the Substance Abuse Policy because, according to Captain Storbeck, he was unaware of any situation in which the FAA had reinstated a Part 121 pilot's medical certificate without the pilot first completing retreatment. Tr. 258. Dr. Joseph Tordella, a HIMS AME who testified on behalf of Grievant, also testified the FAA requires pilots who fly for Part 121 carriers to complete retreatment after a relapse. Tr. 381.

is maintaining the abstinence without going through retreatment." Tr. 443. If a Delta pilot needs retreatment, the pilot generally goes to the mutually agreed upon Metro Atlanta Recovery Residence ("MARR").[9] Tr. 244, 443-44; CX 4 at §VI.B.2.

Captain Graham testified the Company has had tremendous success with its DPAC Program:

> [W]e have a very defined program for meeting and providing that support as well as a testing protocol … that's outlined in Contract A. And … our pilots adhere to that. They understand what the stakes are. They also, while the support is important and the ability to … have someone that they can reach out to whether it'd be a doctor or whether it be a mentor or monitor is important.
>
> There also has to be a backstop or … some stakes … that they have in the game and that is to maintain their jobs. So we always want to be able to return the pilot to the flight deck. But we have to ensure that the … abstinence is guaranteed, and the only way to do that is through full participation in the program.

Tr. 441-42.

B. Grievant enters the DPAC Program on a Contract A.

On January 5, 2017, Grievant was arrested for Operating While Intoxicated ("OWI") in the state of Wisconsin. Tr. 444, 656; CX 11. His blood alcohol content at the time of his arrest was 0.229.[10] Tr. 722; CX 11. Grievant claims he informed his AME of the arrest, and his AME advised him, since his medical certificate had just been renewed, nothing else needed to be done until it was time to renew his medical certificate again. Tr. 657. It was not until June 2017, when it was time to renew his medical certificate that Grievant claims his AME reported that he could not renew it because Grievant's blood alcohol content at the time of the January 2017 arrest was too high. Tr. 657. In June 2017, Grievant was referred to DPAC and told that

[9] After a relapse and successful retreatment, a pilot is required to sign a Contract B before returning to flight duty. CX 4 at §IV.G.1.

[10] Grievant's BAC at the time he drove his truck into another vehicle was higher than when he was later tested. He testified that it took "a long time" for the police to arrive on the scene of the wreck, which he believes occurred at approximately 4:45 local time. He was not given a blood test until 7:04 p.m. Tr. 721; CX 11.

because his BAC was so high he would need to attend an inpatient rehabilitation program. Tr. 659.

Grievant entered the TRC August 1, 2017 and was diagnosed with alcohol use disorder severe. Tr. 444, 665, 723. Grievant signed his Contract A on September 13, 2017 and agreed to completely abstain from all mood altering drugs, including alcohol. Tr. 723; CX 3, ¶ 2. Grievant also agreed that he was subject to random EtG and PEth tests, that "strict compliance" with the terms of his Contract A was mandatory, and any noncompliance could result in disciplinary action, up to and including termination. CX 3, ¶¶ 13, 18.

Grievant was discharged from the TRC on September 14, 2017. Tr. 660, 723; UX 63. After being discharged from the TRC, Grievant was monitored by his HIMS AME, Dr. Charles Harper, and was subject to neuropsychology, psychiatric evaluations, and random alcohol and drug tests.[11] Tr. 666.

Grievant received his special issuance medical certificate on February 26, 2018 and contacted the Company to inquire about returning to duty. Tr. 668, 725; UX 64. The Company placed Grievant into a training class within a couple of weeks of his call and after completion of his training he was returned to line flying. Tr. 668, 725-26.

C. Grievant tests positive for alcohol on a random test in violation of his Contract A.

1. Grievant tests positive for alcohol on a random EtG test.

Once he was discharged from TRC in November, as set forth in his Contract A, Grievant was given periodic random alcohol tests. Tr. 725-26; CX 1. On April 26, 2018 he tested negative on a urine test, and that test was followed shortly by another on May 1. Tr. 725-26; CX 1. On May 1, 2018, Grievant went to Any Lab Test Now in Marietta, Georgia to submit a urine

[11] Grievant originally had Dr. Harper Sr. as his HIMS AME. When Dr. Harper Sr. passed away, his son Dr. Charles Harper Jr. took over.

sample for a 50.2K-3-EtG1 test, which screens for a 10-panel drugs of abuse and EtG. Tr. 317-18, 669; CX 9 at p. 6. The collector verified Grievant's identity and collected the urine sample. Tr. 671-72; CX 10 at p. 6. The collector signed certifying that the urine sample was "collected, labeled, sealed, and released to the Delivery Service noted in accordance with applicable requirements." CX 10 at p. 6. Grievant also signed certifying, "I certify that I provided my specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and the information and numbers provided on this form and on the label affixed to each specimen bottle is correct." CX 10 at p. 6.

Grievant's urine sample was sent to Quest Diagnostics for analysis. Tr. 316. The Custody and Control Form was signed, verifying that the bottle seal was intact on the specimen when it was received by Quest on May 3, 2018. Tr. 318-19; CX 9 at p. 6. The sample was logged into the laboratory computer system, and automatically assigned a laboratory accession number. Tr. 317-18. The sample was then transferred to aliquoting. Tr. 319.

Aliquots were taken from the sample for the drug panel test and for the EtG test.[12] Tr. 319. As part of the 10-panel drug test, Quest performed tests for specimen validity, including checking the creatinine and pH of the specimen, and the tests showed the specimen to be valid and acceptable. Tr. 319-20; CX 9 at p. 1. The results of the 10-panel drug test were negative. Tr. 319.

With regard to the EtG test, the aliquot of Grievant's urine sample was analyzed by liquid chromatography/tandem mass spectrometry. Tr. 342. The result of the initial EtG test was 126 ng/ml, over the 100 ng/ml cutoff. Tr. 320; CX 9 at p. 63. The analyst who reviewed the testing data, however, scheduled the specimen for reanalysis due to the chromatograms not being

[12] Aliquot refers to a portion of a larger sample. Tr. 61.

symmetrical. Tr. 321. Barry Sample, Ph.D., the Senior Director of Science and Technology at Quest, testified that it is not at all unusual to have other substances in a urine sample that may cause the chromatography to not be as symmetrical as desired.[13] Tr. 321. The issue is easily resolved by diluting the sample and performing a reanalysis. Tr. 321. After reanalysis, Grievant's sample tested positive for EtG at 116 ng/ml. Tr. 322; CX 9 at p. 76. At this point, Quest considered the sample to be presumptively positive for EtG. Tr. 322.

After a presumptive positive, Quest performs a confirmation test on a new aliquot taken from the original sample. Tr. 322. During the confirmation test, Quest tests for EtG and EtS. Tr. 322-23. On the confirmation test, Grievant's specimen tested positive for EtG at a concentration of 117 ng/ml. Tr. 323; CX 9 at p. 107. The sample tested negative for EtS. Tr. 323. Because the EtG was confirmed as being over 100 ng/ml, Grievant's sample was a confirmed positive result for EtG. Tr. 323. The certifying scientist reviewed the results and certified them as positive. CX 9 at p. 111.

On May 9, 2018, Quest reported Grievant's positive EtG result of 117 ng/ml to the Company.[14] Tr. 324; CX 9 at p. 111. Dr. Sample testified:

> [T]here is no doubt that the specimen identified as being provided by Mr. Danford was reported positive EtG concertation of 117 nanograms per ml. And both the laboratory, as well as my subsequent review of the documentation package indicates that it was all done in compliance with the applicable policies and procedures.

Tr. 324. Grievant's own expert witness, Dr. Gregory Skipper, testified Grievant's EtG test was

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[13] Dr. Sample holds a Ph.D. in Pharmacology. CX 14. Dr. Sample has worked for Quest since 1991, during which time he has held the positions of Director of Forensic Toxicology, Director of Science & Technology, and Senior Director of Science & Technology. Tr. 313; CX 14. As the Senior Director of Science & Technology, Dr. Sample is responsible for leading research and development efforts. Tr. 313. He also serves as the laboratory director under the College American Pathologist Forensic Drug Testing Accreditation Program and the CLIA laboratory director. Tr. 314.

[14] Dr. Sample testified that Quest reports the results of the confirmation test. Tr. 324.

positive.[15] Tr. 520.

On May 9, 2018, Captain Harry Miller, then the International Chief Pilot for Atlanta, was notified of Grievant's positive EtG test. Tr. 951. Upon receiving the results and understanding a relapse may have occurred, in the interest of safety, Captain Miller immediately removed Grievant from flying. Tr. 951. Because Grievant tested positive for EtG but negative for EtS (colloquially known as a "split sample"), under the DPAC Program protocol Grievant was required to undergo a PEth test to confirm whether the positive EtG test was the result of consuming alcohol. Tr. 445-46, 465-66, 951. Captain Miller called Grievant to report the results and to inform Grievant, because the EtG was positive but the EtS was negative, he would need to take a PEth test. Tr. 951.

2. Grievant tests positive for alcohol on a PEth test.

On the morning of May 9, 2018, Grievant went to Any Lab Test Now in Marietta, Georgia to submit a dried blood spot sample for PEth testing. Tr. 680; CX 10 at p. 5. The collector verified Grievant's identity and collected the dried blood spot sample. Tr. 680; CX 10 at p. 5. The collector signed the custody and control form certifying that the sample was collected, labeled, sealed, and released to the delivery service in accordance with applicable requirements. Tr. 160; CX 10 at p. 5. Grievant also signed certifying, "I certify that I provided my specimen to the collector; that I have not adulterated it in any manner; each specimen was sealed with a tamper-evident seal in my presence; and that the information and numbers provided on this form and on the label affixed to each specimen is correct." CX 10 at p. 5.

On May 10, 2018, Grievant's dried blood spot specimen was received by USDTL for PEth testing. CX 10 at pp. 3, 5. Upon receipt, USDTL certified that the specimen was sealed in

[15] Dr. Skipper is not a toxicologist. UX 55. While Dr. Skipper holds a M.D., he has never practiced aerospace regulatory medicine. Tr. 541-42. Dr. Skipper has also never served as an AME or a HIMS AME. Tr. 541-42.

an appropriate container with the seal intact, the identification number and name on the form matched that on the specimen, and the specimen was transferred to temporary laboratory storage. Tr. 79; CX 10 at p. 5.

On the afternoon of May 10, 2018, Grievant's sample was aliquoted for initial testing and placed in a batch with 20 other samples, which included control samples.[16] Tr. 79-80; CX 10 at p. 8-9. The aliquot of Grievant's sample was subject to liquid extraction and to analysis. Tr. 80-81; CX 10 at p. 11. On the initial test, which used a cutoff of 20 ng/ml, Grievant's specimen was positive at a result of 69.6756 ng/ml. Tr. 76, 88; CX 10 at p. 2-3, 22-23. Because Grievant's result was greater than 20 ng/ml, it was considered a presumptive positive and subject to confirmation testing. Tr. 89.

For the confirmation test, Grievant's specimen was again aliquoted and included in a batch with 14 other presumptive positive specimen and controls.[17] Tr. 89-90; CX 10 at p. 27-29. On the confirmation test, which used a cutoff of 20 ng/ml, Grievant's specimen was positive at a result of 98.8857 ng/ml. Tr. 76, 94-95; CX 10 at pp. 2-3, 42-43. At this point, Grievant's result was a confirmed positive. Tr. 95.

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[16] Each batch of initial tests has a set of calibrators and controls, and the performance of those calibrators and controls determines whether the results of a batch are valid. Tr. 66, 1024. If a batch fails, the process starts over with new aliquots. Tr. 66. If a batch is valid, each individual specimen is subject to specific criteria to determine its accuracy, including chromatic graphic appearance, signal-to-noise requirements, mass ratio, and relative retention time. Tr. 66. For Grievant's initial test, the testing instrument was calibrated to 20 ng/ml. Tr. 81-83; CX 10 at p. 12. Mid, low, high, and negative control tests were performed and were within the required limits. Tr. 84-88; CX 10 at pp. 14-21. At the conclusion of the testing of the batch, a mid control sample was tested to ensure that the testing instrument was performing properly throughout the entire batch, and that result was within the required limits. Tr. 88-89; CX 10 at p. 24-25.

[17] During a confirmation test, the analysis is geared toward quantitative results, and samples are subject to quantitative tolerances that are not imposed on initial tests. Tr. 63-64, 96. As with initial tests, each batch of confirmation tests are performed with three controls and a certified negative. Tr. 1024. Additionally, during confirmation tests, a blank solvent is inserted in between each confirmatory test, ensuring that there is no carryover contamination from one sample to another. Tr. 1020-21. For Grievant's conformation test, the testing instrument was again calibrated to 20 ng/ml. Tr. 91; CX 10 at p. 32. Mid, low, high, and negative controls tests were performed and were within the required limits. Tr. 92-94; CX 10 at p. 34-41.

D. Grievant refuses to go to retreatment and the Company investigates.

On May 14, 2018, Grievant's positive PEth result was reported to Captain Miller. Tr. 951; CX 10 at p. 3. Because the Company had confirmed that Grievant had not maintained sobriety pursuant to his Contract A, under the DPAC Program protocol, Grievant was required to undergo retreatment. Tr. 443. On May 14, 2018, Captain Miller informed Grievant he had tested positive on the PEth test and he was required to go to treatment at MARR. Tr. 694, 951. Grievant denied he had relapsed and refused to go to retreatment. Tr. 952.

After Grievant refused to go to retreatment, the Company began an investigation. Tr. 487-89. At Delta potential discipline cases are placed into a centralized process known as DEALs and investigations such as this one are overseen by the Managing Director of Flying Operations. Tr. 487-88. In May 2018, that position was held by Captain Patrick Burns. Tr. 487-88. Captain Burns got input from several sources and was assisted by Captain Wayne Cochran, the Director and Chief Pilot in Atlanta, legal counsel and the Human Relations department. Tr. 487-88.

After Grievant's positive PEth test, Captain Miller met with him several times and listened as Grievant claimed he did not relapse. Tr. 952. Captain Miller was well aware that denial is a part of the disease of alcohol dependence. Tr. 952-53; CX 4. Thinking objectively and understanding that Grievant had two positive alcohol tests, Captain Miller believed that Grievant had relapsed and was in denial. Tr. 952-53. He explained, if Grievant refused retreatment, Delta would terminate his employment. Tr. 694, 952. During their conversations Captain Miller encouraged Grievant to go to retreatment, but Grievant continued to refuse. Tr. 702, 758, 952. Captain Miller testified he discussed the situation with Grievant on several different occasions because he did not want to see Grievant lose his job. Tr. 952, 969. Each time Captain Miller spoke with Grievant, he reported the content of the conversation to Captain

Cochran. Tr. 953.

Grievant also spoke with then DPAC Committee Chair Captain Warren Mowry, who urged Grievant to go to retreatment.[18] Tr. 754-55. Moreover, after testing positive on the PEth test, Grievant reached out to his HIMS AME, Dr. Harper, Jr., to discuss the positive result. Tr. 702. Like Captains Miller and Mowry, Dr. Harper, Jr. listened to Grievant's denials and advised Grievant that he needed to go to retreatment. Tr. 702, 753. On May 18, 2018, after learning that Grievant was refusing to go to retreatment, Dr. Harper, Jr. notified the FAA and Delta that he was withdrawing his sponsorship of Grievant. CX 1; Tr. 447, 710. Also on May 18, 2018, the FAA withdrew Grievant's special issuance medical certificate. CX 1; Tr. 447.

On June 28, 2018, the Company reached out to Dr. Howard Taylor, a forensic toxicologist, to discuss the results of Grievant's May 1, 2018 positive EtG test and May 9, 2019 positive PEth test.[19] Tr. 1015, 1089. The Company asked Dr. Taylor to review the litigation package for the May 1 EtG test (Company Exhibit 9) and the litigation package for the May 9 PEth test (Company Exhibit 10). Tr. 1015. Dr. Taylor reviewed both for scientific validity and accuracy, chain of custody, quality control, and the appropriate analytical techniques. Tr. 1015-16. After reviewing the litigation packets, and speaking with Dr. Joseph Jones, Ph.D., Chief Operating Officer and Executive Vice President of USDTL,[20] on one question, Dr. Taylor concluded that the PEth test results were scientifically valid. Tr. 1016.

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[18] Captain David Dodge, Grievant's peer monitor in the DPAC Program, testified he spoke with Captain Mowry about Grievant, and Captain Mowry believed Grievant had relapsed. Tr. 604-05.

[19] Dr. Taylor is a forensic toxicologist who holds a Ph.D. in Biochemistry. Tr. 1010; CX 15. Dr. Taylor is board certified in both forensic and clinical toxicology by the American Board of Forensic Toxicology and the American Board of Clinical Chemistry. Tr. 1012-13. Dr. Taylor has been appointed as an expert in over 200 military courts-martials and has been qualified as an expert in approximately 25 civil trials. Tr. 1014.

[20] Dr. Jones is a forensic toxicologist who holds a Ph.D. in Public Health, specializing in epidemiology. Tr. 23; CX 12. Dr. Jones has 30 years' experience in the toxicology industry and is accredited by the National Registry of Certified Chemists as a Toxicological Chemist. Tr. 23-24; CX 12. Dr. Jones has served as an inspector for the College of American Pathologists. Tr. 24; CX 12.

Approximately one to two weeks later, Dr. Taylor had a telephone conversation with representatives from Delta's Flight Operations Department. Tr. 1016, 1090. With respect to the May 1 positive EtG test result, Dr. Taylor informed the Company representatives the litigation package was scientifically valid and the EtG test result was positive. Tr. 1017. With respect to the May 9 positive PEth test result, Dr. Taylor told the Company representatives the PEth test was positive, and the positive PEth test result was consistent with the positive EtG test result. Tr. 1017-18. Dr. Taylor informed the Company, in his opinion, Grievant had consumed alcohol within the two weeks prior to the May 9 PEth test. Tr. 1018.

After the investigation was completed, Captain Graham, who was the decision-maker in the case, consulted with Flight Operations management, and their recommendation was to terminate Grievant's employment. Tr. 456-57, 487-89. Captain Graham also reached out to the DPAC Program Administrators to ensure that Grievant's tests had been performed pursuant to the protocols set forth in the Substance Abuse Policy and was assured the standard protocols had been followed. Tr. 455-46.

On July 12, 2018, pursuant to ***Section 18.C.*** of the PWA, the Company issued Grievant a Notice of Intent to Terminate.[21] Tr. 448; CX 5. In the Notice of Intent to Terminate, Captain Graham wrote that Grievant's use of alcohol, as indicated by the positive EtG and PEth tests, violated Grievant's Contract A and invalidated his medical certificate. CX 5. In accordance with the Substance Abuse Policy, Grievant was given the opportunity to go to retreatment, but refused retreatment. CX 5. Captain Graham concluded that Grievant's failure to maintain abstinence and refusal to undergo retreatment created a safety risk, and Delta intended to

[21] Under the PWA, before the Company can take any disciplinary action against a pilot, it is required to provide a written notification of the discipline to be imposed and the reasons. ***Section 18 C. 1. c***. This step is accomplished by issuance of a "Notice of Intent" letter.

terminate Grievant's employment. CX 5. Captain Miller presented the Notice of Intent to Terminate to Grievant, and, as he had previously, Captain Miller again attempted to persuade Grievant to go to retreatment; Grievant continued to refuse. Tr. 702.

E. The Initial Hearing

On July 20, 2018, the Association filed a grievance on Grievant's behalf. CX 6. Per ***Section 18 C. 2. 1. f.***, on July 30, 2018 the parties held an initial hearing on the grievance. Tr. 448, 727; CX 7. Captains Graham and Burns were present on behalf of the Company; Grievant was present and represented by ALPA Representative Captain Scott Martin. Tr. 448, 727; CX 6.

Captain Graham testified the purpose of the initial hearing is to ensure the Company has all information it needs to make an appropriate decision and importantly, to provide the Grievant with the opportunity to present any information he believed was relevant to the Company's decision. Tr. 449, 728. Grievant presented the results of three tests he claimed to have taken after the May 9 positive PEth test.[22] Tr. 449, 728; CX 20. Grievant represented that those tests were the only tests he had taken since the positive PEth test. Tr. 450. Grievant did not raise any other concerns or issues during the initial hearing. Tr. 451, 760-62.

F. The Company terminates Grievant.

After the initial hearing, Captain Graham considered whether Grievant had presented any information that would require reconsideration of the Notice of Intent to Terminate. Tr. 451. He decided that the self-directed tests produced by Grievant were not relevant because they were not taken pursuant to the DPAC Program and its protocols and controls. Tr. 450. After reviewing

[22] On May 15, 2018, Grievant gave a blood sample for a PEth test and a chest hair sample for an EtG test. CX 20. On May 16, 2018, Grievant gave a dried blood sample for a PEth test. CX 20. The results of those three tests were negative. CX 20. Grievant gave copies of these test results to Captain Graham during the initial hearing. Tr. 449. On June 20, 2018, Grievant gave a hair sample for an EtG test, and that test was positive at 4.8 picograms per milligram. UX 75. Tellingly, Grievant did not give a copy of the June 20 test result to Captain Graham during the initial hearing. Tr. 733.

the information presented by Grievant, Captain Graham concluded termination was still the appropriate penalty for Grievant's refusal to undergo retreatment after a relapse. Tr. 451. Captain Graham determined that Grievant had ample opportunity to go to retreatment after his relapse, and, if he had successfully completed retreatment, he could have been returned to his First Officer position. Tr. 451. Grievant's insistence that he had not been drinking was refuted by the positive EtG and PEth tests. Tr. 451. Because the positive EtG and PEth tests established that Grievant had not maintained abstinence, and because Grievant refused to go to retreatment, Captain Graham was not willing to take on an unnecessary safety risk and concluded there was no option but to terminate his employment. Tr. 451.

On August 6, 2018, Captain Graham denied the grievance and issued Grievant a Letter of Termination. Tr. 452; CX 2; CX 7. The termination letter issued to Grievant states:

> Your use of alcohol violated the provisions of your Contract A and invalidated your medical certificate. In accordance with the Delta Substance Abuse Policy … your positive alcohol test was treated as a relapse and you were given the opportunity to receive retreatment at an in-patient facility that is more extensive than the initial treatment you underwent before signing your Contract A. Completion of re-treatment would allow you to meet the FAA requirements for medical re-certification and provide a pathway to return to flying at Delta.
>
> You have refused to enter re-treatment. Your failure to maintain abstinence as you were required to do and refusal to accept retreatment creates an untenable safety risk to Delta passengers, crew and aircraft. The Company has lost all trust in your ability to serve as a pilot. Delta demands its pilots exercise the highest standards of conduct, judgment, character, trust and integrity. You have failed to uphold those standards and there is nothing in the record to provide mitigation. Accordingly, Delta … is terminating your employment.

CX 7.

IV. ARGUMENT

A. The Company has a statutory duty under federal law to ensure that its employees are performing their duties with the highest possible degree of safety.

It is well settled under federal law that air carriers have ultimate responsibility for air safety. Air East, Inc. v. National Transp. Safety Bd., 512 F.2d 1227, 1229 (3d Cir. 1975), cert. denied, 423 U.S. 863 (1976); Spurlock v. United Air Lines, 475 F.2d 216, 219 (10th Cir. 1972). An air carrier has a statutory duty to perform its services "with the highest possible degree of safety in the public interest," 49 U.S.C. § 44702(b)(1)(A), and, when that duty has been breached, carriers may be liable for administrative and civil penalties. In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 747-48 (C.D. Cal. 1975).

Due to the statutory duty that air carriers owe to the traveling public, arbitrators have concluded that air carriers have the right to institute substance abuse policies and discipline employees for violating those policies. For example, in USAir Inc., Arbitrator Fishgold held:

> The prevention of drug possession and use by USAir's safety sensitive airline employees is a matter of strong public policy, rooted in concern for public safety. The Company's responsibilities to the flying public and the protection of its own business interests makes it entirely reasonable to prohibit its flight attendants from using or possessing drugs on or off duty, and to hold such employees to a high standard of compliance.

USAir Inc., Gr. No. 30-40-01-33-89, at 16 (Fishgold, Arb.) (undated). See also Southwest Airlines, Gr. No. JAN-O-0886/11, at 12 (Lemons, Arb.) (2011) (carrier's drug and alcohol policy was "essential to the safe operation" of the carrier) and Northwest Airlines, Sanders Termination, at 7 (Wittenberg, Arb.) (1999) (carrier's substance abuse policy was "related to the Company's business interests, namely the safety of the traveling public and its employees").

Further, because air carriers bear the crucial responsibility of ensuring the safety of the traveling public, courts and arbitrators have long recognized a carrier's determination that a pilot

is unable to operate its aircraft in the safest possible manner is not to be lightly disturbed. See Murnane v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982). Indeed, arbitrators have held, if a carrier's decision to discharge a pilot in the interest of safety, the decision can be set aside only if it is shown to be arbitrary, capricious or discriminatory. For example, in National Airlines, Arbitrator I.L. Broadwin stated:

> How strict each carrier should be in compelling and securing from its pilots "the highest degree of care" is a matter of policy to be established by each carrier. If the carrier in the discharge of its said absolute responsibility and in the performance of its said absolute duty, decides honestly and in good faith that one of its pilots is inadequate, its judgment may not be disturbed.
>
> ***
>
> Subject only to the condition that the Company shall act in good faith and not arbitrarily, discriminatorily, maliciously or capriciously, it is the Company's right to err on the side of safety in discharging a pilot who in its honest judgment has demonstrated his inadequacy for the position of pilot.

National Airlines, Grievance 49-13 P (Broadwin, Arb.) (1949).

Arbitrators routinely apply the arbitrary, capricious, or discriminatory standard in grievance arbitrations involving violations of a carrier's substance abuse policy. For example, in upholding the termination of an employee charged with violating the carrier's substance abuse policy, Arbitrator Wittenberg held, "In the absence of showing that the Company's [substance abuse] policy is arbitrary, capricious, or discriminatory, the Board has no authority to alter or amend it." Northwest Airlines, Sanders Termination, at 7. See also Comair, Gr. No. 0070049 (Gold, Arb.) (2008) (upholding termination of flight attendant for violation of carrier's substance abuse policy and applying arbitrary, capricious, or discriminatory standard); Northwest Airlines, Gr. No. 155062 (Douglas, Arb.) (2003) (upholding termination of ground security coordinator who violated substance abuse policy and determining that carrier's decision was not arbitrary, capricious, or discriminatory); Alaska Airlines, Gr. No. 36-30-01-61-04, at 6, 8 (Perkovich, Arb.)

(2005) (finding carrier's substance abuse rules "axiomatically effect the safe, orderly and efficient operation" of the airline and upholding termination of flight attendant for violating drug and alcohol policy when there was no evidence the carrier's decision was arbitrary, discriminatory, or capricious).[23]

1. The Company and Association jointly administer the DPAC Program for the purpose of ensuring safety.

Because of the inherent risk that comes with allowing individuals with substance abuse issues to perform in safety sensitive positions, programs like DPAC must ensure that safety is paramount. Tr. 268. This goal is plainly set forth in the Substance Abuse Policy's Mission Statement:

> Delta's preeminent goal is to ensure a safe operation. Delta's Substance Abuse Policy recognizes the disease aspect of addiction and provides incentives for recognition and recovery of employees with this disease. Delta's Flight Operations Leadership Team is committed to supporting an environment conducive to identification, rehabilitation, and recovery.

CX 4.

One significant risk to safety, of course, is that pilots who have been identified as having substance abuse issues will relapse without telling anyone and operate an aircraft while impaired.[24] Tr. 267-68. The architects of the DPAC Program understood the risks, both to the individual pilot's health and to public safety that relapse presented, and took steps to ensure that these risks were addressed. Tr. 240, 442; CX 4. Delta and ALPA both recognized that it was critically important to identify pilot participants who had relapsed and remove them from the

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[23] Grievant will likely argue that the "clear and convincing" or some other more burdensome evidentiary standard should apply. While the Company believes that under the circumstances of this case the "arbitrary, capricious or discriminatory" standard is the correct one, if clear and convincing, or any other standard for that matter, were applied that would not change the fact that the Company has presented more than enough evidence to establish that just cause for termination exists.

[24] It is a well-known fact that relapse is part of the disease of alcoholism. Indeed, Theodore Shults, who testified on behalf of Grievant, acknowledged that alcoholics relapse "more often than not." Tr. 906. Dr. Skipper testified that individuals who relapse once have a higher risk of further relapses. Tr. 593-94.

cockpit unless and until they could demonstrate renewed sobriety. Tr. 243-44, 443. According to Captain Storbeck:

> Relapse represents a threat to the health of the pilot. If a person is diagnosed with the illness, then it's acknowledged that reuse of mood altering chemicals, whether it be the drug of choice or some other drug, can result in reactivation of the disease state and under that state, the pilot's health is put in jeopardy, along with the rest of the airline is substantially. And … particularly [if] a relapse is undiscovered that results in a public incident could undermine public support for the program.
>
> ***
>
> … [A]n overriding concern is always the safety of the traveling public.

Tr. 267-68.

In the event of a relapse, the parties agreed a pilot would be allowed to go to retreatment rather than being terminated outright. Tr. 241, 243, 257, 942. A pilot, however, must undergo retreatment and reestablish sobriety to be returned to the cockpit. Tr. 443. Both Captains Storbeck and Graham testified that there is no way to ensure that a pilot has reestablished sobriety unless the pilot successfully completes retreatment. Tr. 243-44, 443. Obviously, for safety purposes, the Company cannot allow a pilot with a substance abuse diagnosis who has relapsed to operate its aircraft and transport its passengers and crewmembers unless the pilot has shown that he/she has reestablished and is maintaining sobriety.

2. Random EtG and PEth testing is a critical component in identifying relapsed pilots and maintaining the integrity of the program.

Random testing is used to ensure that pilots in the DPAC Program maintain abstinence and to identify pilots who have succumbed to relapse. Tr. 245, 260. The parties agreed to use different testing methods and pilots who enter the program are put on notice in their Contract A that they are subject to both EtG and PEth testing. Tr. 249; CX 4. Importantly, it is undisputed that EtG and PEth tests are appropriate tests in abstinence monitoring programs like the DPAC

Program. Dr. Skipper testified he used "everything available," including EtG and PEth tests, to test individuals in his abstinence monitoring program. Tr. 555-56. Skipper further testified that PEth tests are useful in professional monitoring because they "really help us determine things" and are "a valuable tool." Tr. 528, 559. In fact, during a September 2019 HIMS Seminar,[25] Skipper specifically recommended the use of the highly sensitive EtG test with a follow-up test performed by the highly specific PEth test. Tr. 572; CX 19. See also CX 18.

Delta and ALPA agreed to use lower testing cutoffs on the EtG test (100 ng/ml) because, in the interest of safety, they did not want to miss pilots who had relapsed. Tr. 266-67. Dr. Taylor testified that the parties' use of lower cutoffs is appropriate in an abstinence monitoring program and if the parties had agreed on higher cutoffs, there is a high likelihood that pilots who had relapsed would not be detected. Tr. 1018-19, 1066-67; UX 52 at p. 2 ("Cutoffs of [greater than] 500 ng/ml are likely to only detect heavy drinking during the previous day."). Dr. Skipper agreed with Dr. Taylor, testifying that he used lower cutoffs in his abstinence monitoring program. Tr. 518. Dr. Skipper also admitted, if the DPAC Program used higher cutoffs, there would be pilots who had relapsed who would not be detected and would remain in the cockpit even though they were not maintaining sobriety. Tr. 548. The 100 ng/ml cutoff on EtG tests also allows the Company to detect alcohol consumption for a longer period of time, which aids in the detection of a relapse. Tr. 1066-67; UX 52 at p. 2 ("An EtG-I cutoff of 100 ng/ml is most likely to detect heavy drinking for up to five days and any drinking during the previous two days.").

With respect to PEth tests, the DPAC program uses the 20 ng/ml cutoff, which is the standard cutoff in the United States. Tr. 56, 1018-19, 1072-73; CX 28 at p. 1636. According to Dr. Taylor and other experts, the cut off is high enough to ensure that non-drinkers do not

[25] Participants at this HIMS Seminar included FAA, carrier, medical and union representatives. Tr. 571.

receive a positive test. Tr. 1018-19, 1072-73; CX 28 at p. 1636 ("To protect against false positives … PEth is currently considered to be an indicator of purposeful alcohol ingestion at values > 20 ng/ml.").

B. <u>The Company had just cause to terminate Grievant.</u>

1. <u>Grievant's multiple positive alcohol tests establish that he relapsed.</u>

When Grievant signed his Contract A, he specifically agreed to maintain sobriety and that he was subject to random EtG and PEth tests. CX 3 at ¶¶2, 13. Grievant acknowledged that failure to comply with the provisions of his Contract A could result in disciplinary action, up to and including termination. CX 3 at ¶18.

On May 1, 2018, Grievant tested positive for EtG at a concentration of 117 ng/ml and negative for EtS. Tr. 323; CX 9 at p. 107. The experts and scientific fact witnesses who testified, including Grievant's expert Dr. Skipper, agree that Grievant's EtG result was positive. Tr. 324, 520, 1017, 1078. According to Dr. Sample:

> [T]here is no doubt that the specimen identified as being provided by Mr. Danford was reported positive EtG concertation of 117 nanograms per mL. And both the laboratory, as well as my subsequent review of the documentation package indicates that it was all done in compliance with the applicable policies and procedures.

Tr. 324. Because Grievant's test was positive for EtG but negative for EtS, in accordance with the Substance Abuse Policy, Grievant was required to take a PEth test to confirm whether he was maintaining abstinence. Tr. 445-46, 465-66.

On May 9, 2018, Grievant tested positive for PEth at a concentration of 98 ng/ml, well over the 20 ng/ml cutoff. Tr. 76, 94-95; CX 10 at pp. 2-3, 42-43. The results of Grievant's PEth test confirmed that Grievant was not maintaining sobriety as required by his Contract A. According to Dr. Jones:

So based on the chain of custody being intact, based on the outcome of the initial

> test and based on the outcome of the confirmation test, it's my conclusion that the specimen that we received identified, Michael Danford, contained PEth. And… that is consistent with someone who has not been abstinent during the approximately two to four weeks prior to the collection of this sample.

Tr. 101. Dr. Taylor reached a similar conclusion: "It's my opinion that [Grievant] was drinking prior to the May the 9th PEth test. A two-week interval prior to that is the most likely … time."[26] Tr. 1077.

Importantly, Dr. Jones' and Dr. Taylor's conclusion that Grievant was not maintaining abstinence is supported by a scientific study authored by Grievant's own expert witness. In a 2013 study, Dr. Skipper sought to ascertain whether PEth testing could be used to confirm low positive EtG tests. Based on the results of his study, Skipper concluded:

> PEth results in combination with previous low positive EtG/EtS results allow differentiating between innocent/extraneous exposures and drinking. Negative PEth testing following low positive EtG/EtS results helps to further elucidate the findings and support the claim of the patient of recent alcohol abstinence. **Positive PEth testing following positive EtG/EtS results confirms recent drinking.**

CX 18 (emphasis added). See also Tr. 1017-18 (Dr. Taylor concluded Grievant had not maintained abstinence due to the consistent positive EtG and PEth test results) and CX 18 at p. 1583 ("… blood PEth is only positive following significant alcohol use."). Accordingly, the Company has established that Grievant, in violation of his Contract A, failed to maintain abstinence in May 2018.

2. Grievant's June 20, 2018 positive hair test supports the conclusion that he relapsed in May 2018.

If there were any question as to whether Grievant relapsed in May 2018, it is resolved

[26] This conclusion is also supported by the actions of Grievant's HIMS AME, Dr. Harper, Jr., and the FAA. After learning of Grievant's positive PEth test and Grievant's refusal to go to retreatment, Dr. Harper, Jr. withdrew his sponsorship as Grievant's HIMS AME. Tr. 447, 702, 710. On May 18, 2018, the FAA withdrew Grievant's special issuance medical certificate. Tr. 447. Notably, Grievant agreed in his Contract A that, if he used alcohol or drugs, his medical certificate would be "immediately invalidated." CX 3 at ¶2.

conclusively by his June 20, 2018 positive EtG hair test. This test result establishes Grievant consumed alcohol at some point prior to June 4, 2018. Tr. 1038.

Hair can be tested for EtG with the caveat that a hair test will not show ethanol exposure for approximately two weeks after consumption. Tr. 1035. This is because, when EtG is incorporated into the hair, the hair that is exposed to the EtG is growing beneath the skin, and it takes approximately 2 weeks for that hair to penetrate the skin so that it can be cut and tested. Tr. 1035. EtG in hair can be detected for weeks or even months after alcohol ingestion. UX 50 at p. 3. According to Dr. Skipper, to have a positive hair EtG test, an individual must consume a "fairly significant" amount of alcohol. Tr. 553.

On June 20, 2018, Grievant submitted a hair sample for an EtG test. UX 75. ExperTox, the laboratory that analyzed the hair sample, used a cutoff of 2 picograms/milligram ("pg/mg"). Tr. 1038; UX 75. On June 27, 2018, ExperTox reported that the test was positive at a concentration of 4.8 pg/mg. Tr. 1038; UX 75. Although the test result is above the cut off used, states that EtG was "DETECTED" and under Test Result it says "Positive," Grievant insists that the June 20, 2018 result is not really a positive result because it did not exceed 7 pg/mg. This argument has no basis in science or fact.

Dr. Taylor explained that the 2 pg/mg cutoff used by ExperTox was appropriate and scientifically supported as establishing non-abstinence. Tr. 1043, 1046. According to a study by Kronstrand, et al., individuals who drank one drink per day for a 90-day period had EtG results of less than 7 pg/mg on hair EtG tests. Tr. 1040-41; CX 32. The study concluded, "[O]ur results show that an EtG concentration of below 7 pg/mg does not exclude daily alcohol use and thus the sensitivity [of the 7 pg/mg cutoff] is questioned for the purpose of monitoring total abstinence." CX 32 at p. 4. A subsequent study by Pirro, et al., found that individuals who

maintained total abstinence (the study used children as test subjects) had hair EtG values lower than 1 pg/mg. CX 33. Given the extremely low concentrations of EtG in abstinent individuals, the study concluded, for abstinence monitoring purposes, a cutoff of 1.0-2.0 pg/mg was appropriate. Tr. 1043; CX 33. Thus, the June 20, 2018 positive EtG test establishes Grievant was not maintaining sobriety because his result of 4.8 pg/mg far exceeds the abstinence norm of less than 1 pg/mg and recommended cutoff of 1.0-2.0 pg/mg.

Taken together, the May 1, 2018 positive EtG test, the May 9, 2018 positive PEth test, and the June 20, 2018 positive hair EtG test establish conclusively that Grievant was not maintaining abstinence as required by his Contract A. Tr. 1077-78. Indeed, Dr. Skipper admitted three positive test results "more likely than not" establish a relapse. Tr. 558. According to Dr. Taylor:

> It's my opinion that [Grievant] was drinking prior to the May the 9th PEth test. A two-week interval prior to that is the most likely … time. If you notice in this case, it's quite unusual, in that we have three positive tests. We have a positive EtG test from May the 1st, we have a positive PEth test from May the 9th, and we have a positive hair test from June the 20th. All three of those point to use [of alcohol] in that two-week period preceding the positive PEth test. At least, they're all consistent. Those are all consistent with drinking during that two-week period.

Tr. 1077-78.

3. Grievant's refusal to complete retreatment after testing positive for alcohol is grounds for termination.

As discussed above, after relapsing, the DPAC Program requires an individual to complete retreatment to reestablish sobriety. Tr. 443, 945. When the Company was notified of Grievant's positive PEth test, which confirmed the positive EtG test was in fact from consumption of alcohol, Captain Miller offered Grievant the opportunity to go to retreatment. Tr. 692, 951. After Grievant refused to go to retreatment, numerous individuals encouraged him to reevaluate his decision. Those individuals include his HIMS AME Dr. Harper, Jr. and ALPA

DPAC Committee Chair Captain Mowry. Tr. 702, 753-55. Additionally, Captain Miller continued to speak with Grievant and encourage him to rethink his position and accept retreatment. Tr. 952, 969.

Grievant is likely to argue that nothing in the Substance Abuse Policy requires an individual to go to retreatment if the individual denies relapse and that argument must be rejected. While it is true the Substance Abuse Policy does not explicitly state that an individual must go through retreatment after testing positive, Captains Storbeck, Graham, and Miller testified that the Company's long-standing practice has been to provide the relapsed pilot the opportunity to go to retreatment in lieu of termination. Tr. 241, 243, 257, 443, 945. Captain Storbeck testified this was the practice under the DPAC Program from 1990 through 2012, the entirety of the time he was involved in the Program, and Captains Graham and Miller confirmed that nothing changed after Captain Storbeck moved into his role as National HIMS Chair and the practice remains firmly in place. Tr. 257, 443, 945. Accordingly, the Board should conclude that the parties' have a long-established, mutual, and binding practice of requiring participating pilots to undergo retreatment after a confirmed positive alcohol test.[27] See Celanese Corp. of Am., 24 Lab. Arb. Rep. (BNA) 168, 172 (Justin, Arb.) (1954) (A past practice is binding on the parties if the practice is "1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties.") and American Eagle Airlines, Gr. Nos MEC-1210 & MEC-0211, at 18 (Fishgold, Arb.) (2012) (quoting Celanese and holding a past practice is a "mutually agreed upon response

[27] Although the Substance Abuse Policy is not incorporated in the PWA, it is appropriate for the Board to apply the past practice doctrine to the Policy because it is a mutually-negotiated, written workplace policy. See Chevron Products Co., 116 Lab. Arb. Rep. (BNA) 271 (Goodstein, Arb.) (2001) (appropriate for arbitrator to apply past practice concepts to written workplace policy) and Indiana Michigan Power Co., 107 Lab. Arb. Rep. (BNA) 1037 (Render, Arb.) (1997) (past practice doctrine can be invoked to interpret non-contractual handbook provisions).

to a particular situation"). Neither Grievant nor the Association made any attempt whatsoever to dispute the evidence introduced at the hearing that the Association not only knew of, but also, through its DPAC Committee helped create the practice and has actively worked for over 30 uninterrupted years to enforce it. As such, the Board must find, that after testing positive on the May 1 EtG test and the May 9 PEth test, to maintain participation in the DPAC Program and employment with the Company, Grievant was required to go to retreatment, which he refused to do.

4. The Company completed a thorough investigation of Grievant's positive alcohol tests.

After learning of Grievant's positive EtG and PEth test results, and after Grievant refused to go to retreatment, the Company completed a thorough investigation. During its investigation, the Company consulted with Dr. Taylor, a toxicologist, to determine whether Grievant's EtG and PEth tests were properly administered. Tr. 1015, 1089. Dr. Taylor reviewed the litigation packages for the May 1, 2018 EtG test and the May 9, 2018 PEth test; he concluded both tests were scientifically valid and established Grievant had not maintained abstinence in the two weeks prior to the PEth test. Tr. 1017-18. The Company also listened to Grievant's explanations and decided they were without merit. And, the Company was aware that Grievant's HIMS AME had withdrawn his sponsorship.

A recommendation for termination was made to Captain Graham, the decision-maker in the case. Tr. 456-57, 487-89. Captain Graham reached out to the DPAC Program Administrators to ensure that Grievant's tests were administered properly under the DPAC Program, and he was informed that the standard protocols had been followed. Tr. 455-56.

Prior to termination, Captain Graham and Captain Burns met with Grievant to hear his side of the story. Tr. 448, 727; CX 7. During the initial hearing, Grievant was given the

opportunity to present any information he believed was relevant to the Company's decision. Tr. 449, 728; CX 7. The only information Grievant presented were the results of three self-directed tests dated May 15, 2018 and May 16, 2018. Tr. 449; CX 20. Captain Graham concluded that the tests produced by Grievant were not relevant because they were not taken pursuant to the DPAC Program and its protocols and controls.[28] Tr. 450. Grievant deliberately withheld the June 20, 2018 positive hair test result. Tr. 733; UX 75.

5. The Company terminates Grievant's employment.

At the conclusion of the Company's investigation, due to Grievant's refusal to go to retreatment, Captain Graham determined termination was the Company's only recourse. According to Captain Graham:

> [T]ermination is not something that we ever take lightly at Delta Air Lines and certainly not someone who has been in our DPAC Program. In this particular instance, Mr. Danford did have a positive test that showed that he was not in compliance with his contract. He could not be returned to the flight deck unless he went through a retreatment. It's … the responsibility of the chief pilot of the airline to ensure that … to the best of your ability you are only allowing pilots to fly aircraft that are 100 percent safe and are able to adequately decide and use good judgment in the conduct of … those flights. Unfortunately, in this situation, there was no opportunity for me to be able to validate that … sound judgment and those decisions would be made in the highest level of safety. So I had no other option but to … [discharge] Mr. Danford.

Tr. 453. Captain Graham's conclusion that he could not trust Grievant, a pilot with a diagnosed substance abuse problem who had relapsed, to operate Delta's aircraft with the highest degree of safety is manifestly not arbitrary, capricious, or discriminatory. As such, the Board should conclude the Company had just cause to terminate Grievant and deny his grievance in its entirety.

[28] As discussed below, arbitrators routinely dismiss self-directed tests either as irrelevant or as being unpersuasive to the question of whether the employee violated a substance abuse policy.

C. Grievant's dishonesty and attempts to manipulate others demonstrate he cannot be trusted and that termination is appropriate.

Grievant has repeatedly made misstatements and manipulated others in an effort to regain his flying privileges and his job at Delta. These omissions, misstatements, and manipulations demonstrate both that Grievant cannot be trusted to tell the truth and that Grievant is not in a good place in his recovery.[29]

1. Grievant was dishonest during the initial hearing.

During his initial hearing, Grievant deliberately withheld a test result he knew validated the two positive tests the Company had administered. He then tried to pull the wool over the Company's eyes by selectively producing self-directed tests he misleadingly claimed would show he was abstinent. He chose to present Captain Graham the results of one EtG test and two PEth tests he had taken after he learned of his May 9, 2018 positive test result. CX 20. Grievant told Captain Graham that these three tests were the only tests he had taken since the May 9, 2018 positive PEth test. Tr. 450. This was a blatant misrepresentation. On June 27, 2018, three weeks prior to the initial hearing, Grievant had received a positive EtG results from his June 20, 2018 hair test. UX 75. Grievant deliberately withheld this test result from Captain Graham, and the Company did not learn about the June 20, 2018 test until it was preparing for the arbitration before this System Board. Tr. 733. Had the June 20 test result not found its way into one (but not all) of his expert reports, the Company would have never seen it.

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[29] This System Board has repeatedly held that the Company is not required to employ a pilot who has demonstrated dishonesty and untrustworthiness. Delta Air Lines, Gr. No. 17-15, at 17 (Weinstock, Arb.) (2018) (summarizing prior arbitration awards holding the Company had just cause to terminate pilots who it can no longer trust due to their dishonesty and concluding, "Thus, the message loudly conveyed by arbitrators in prior cases on this property is that the Company will terminate employees for lack of honesty and integrity, and those terminations will be upheld."); Delta Air Lines, Gr. Nos. 18-03 &14-05, at 44 (Gold, Arb.) (2019) (upholding termination of pilot for providing falsified medical records and concluding reinstatement was inappropriate based on the grievant's dishonesty because, were he reinstated, the Company would not be able to trust him to conduct himself with integrity and trustworthiness); Delta Air Lines, Gr. No. ATL 02-14, at 5 (2002) (Fishgold, Arb.) (2002) (upholding termination of pilot who engaged in a "pattern of deliberate and calculated deception" and holding "[n]o employer need return in its employ an employee whose honesty has come into serious question").

During the arbitration hearing, Grievant made the preposterous allegation that he had not disclosed the June 20, 2018 positive test result to Captain Graham on the advice of his HIMS AME, Dr. Faulkner. Tr. 735. Grievant claimed he and Dr. Faulkner discussed the test result, and Dr. Faulkner agreed with Grievant that Captain Graham might misinterpret the result. Tr. 733-36. Again, this is a blatant misrepresentation. Dr. Faulkner testified that he never advised Grievant to hide the result of the June 20, 2018 positive test from the Company. Tr. 923-24. In fact, as discussed below, Dr. Faulkner testified Grievant never showed the June 20, 2018 test result to him. Tr. 922.

2. Grievant was dishonest in his representations to the FAA.

In an effort to regain his special issuance medical certificate, Grievant made numerous misleading and dishonest statements to the FAA and its representatives. For example, in his written statement to the FAA, Grievant asked to have his first-class medical certificate reinstated so that he could continue flying privately, flight instruct, and volunteer with the Experimental Aircraft Association ("EAA"). Tr. 741-42; CX 21. Grievant also wrote that he had accepted his termination from Delta, and he "[did] not wish to start over in part 121 flying, flying for another airline." CX 21. Grievant repeated these claims to Dr. Steve Lynn during his FAA Psychiatric Re-Evaluation on October 11, 2018. Tr. 747; CX 23. In his report, Dr. Lynn wrote that Grievant "reports that he would like to get a Class I Medical Certificate so that he can fly general or corporate aviation." CX 23. Based on Grievant's representations, Dr. Alan Sager, Psychiatric Consultant for the FAA, concluded Grievant wished to receive a first-class medical certificate so that he could "pursue a general aviation and corporation aviation career" and volunteer for the EAA. UX 35. Never once did Grievant admit to the FAA that he wanted to regain his first-class medical certificate so he could be reinstated to his Part 121 pilot position at Delta. Of course, as one might expect, since he regained his medical certificate on February 26, 2018, Grievant has

never volunteered with the EAA. Tr. 742-43.

Grievant was also dishonest with Dr. Faulkner during his attempt to regain his medical certificate. Grievant provided Dr. Faulkner with the results of the May 15, 2018 EtG test, the May 15, 2018 PEth test, and the May 16, 2018 PEth test, and Dr. Faulkner provided those test results to the FAA. Tr. 923, 926, 928. Grievant never gave Dr. Faulkner a copy of the results from his June 20, 2018 positive hair EtG test. Tr. 922, 924. Had Grievant given Dr. Faulkner a copy of the June 20, 2018 EtG test result, Dr. Faulkner was required to forward those results to the FAA. Tr. 922-23. Indeed, Dr. Faulkner testified it is his obligation as a HIMS AME to submit to the FAA all tests that have been performed. Tr. 922-23. As a result of Grievant's withholding of relevant information, the FAA did not have the opportunity to consider whether the June 20, 2018 test result demonstrated evidence of a relapse, and the FAA's decision to issue Grievant a medical certificate was based on incomplete information. UX 35 at p. 1-2.

Further, Grievant at best allowed and at worst encouraged his girlfriend, Artis Todd, to make a misrepresentation to the FAA and this Board. In a letter to the FAA dated October 24, 2018, Todd wrote:

> [Grievant] and I are together constantly… I was as surprised as he with a positive PEth test and am also at a loss to explain how that could occur. …
>
> The very few days we were apart since we met, my airline trips being the only days until his three trips after he received his medical, he was with his son helping with his successful granite countertop manufacturing and hotel remodeling business.

UX 36. During her testimony, Todd confirmed these statements. Tr. 615. In fact, Todd's flight records paint a much different picture. CX 37-38. She was working and very rarely off-duty in the time period when Grievant relapsed – she was on a trip 19 out of 30 days in April.[30] CX 37;

[30] Grievant was also flying as a First Officer during this period and would have been away from home on flight assignments.

CX 38.

3. Grievant attempted to manipulate the Board and was dishonest during his testimony.

Grievant was far from candid with the Board during his testimony. For example, Grievant claimed that he had not been arrested when he was charged with OWI in 2017. Tr. 721. In contrast to Grievant's self-serving testimony, the police report from January 7, 2017 plainly states, "I then informed [Grievant] that he was going to be placed under arrest for OAWI and had him place his hands behind his back and applied my handcuffs to [Grievant's] wrists." CX 11 at p. 4.

Grievant also lied to the Board about his communications with different medical professionals. As noted above, he unconvincingly tried to shift the blame for withholding his positive June 20 test to Dr. Faulkner. Tr. 733-35. Dr. Faulkner is not the only health care provider whom Grievant attempted to throw under the proverbial bus. During the hearing, Grievant was shown the part of his records from TRC where Dr. Bedi, who oversaw Grievant's initial treatment at TRC, noted that he had made Grievant aware of how his "histrionic compulsive and narcissistic traits interact with his disease of addiction." Tr. 751; CX 24. Despite the fact it was in his contemporaneous medical records, Grievant denied that Dr. Bedi discussed those concerns with him. Tr. 752. Similarly, Dr. Lynn, a HIMS psychiatrist, noted that Grievant had a "tendency towards narcissistic defenses" and Grievant also denied that Dr. Lynn discussed that concern with him. Tr. 747-48; CX 23. In sum, Grievant would have this Board believe: (1) that one Medical Doctor encouraged him to lie then ignored his own HIMS AME ethical obligations by deliberately withholding information from the FAA; and (2) two other Medical Doctors went to the trouble of documenting that they raised medical concerns to Grievant but never actually did. The Board should conclude that these fabrications are part of a

pattern of deception and manipulation that is consistent with what one would expect of an alcoholic in denial.[31]

4. Grievant's dishonesty shows that he is not in good recovery.

Just as relapse is a part of substance dependence so is denial and deception. Tr. 953; CX 4. Grievant's omissions, misstatements, manipulations, and outright lies establish that he is in poor recovery. The Alcoholics Anonymous program requires participants to engage in "rigorous honesty." See Alcoholics Anonymous, Big Book 58 (4th ed. 2001).[32] At the end of each day, participants are instructed to account for "selfishness, dishonesty, resentment, and fear." Id. at 84. Grievant's documented dishonesty shows that he is not being rigorously honest with himself or others. Other facts provide further evidence that Grievant is not working the Alcoholics Anonymous ("AA") program and managing his recovery. For example, although it has been more than three years since Grievant reported to TRC, he still does not know his sobriety date and is unfamiliar with Steps 6 and 7 in the AA program. Tr. 748; CX 23. Not surprisingly, Step 6 focuses on character defects and Step 7 on shortcomings. Tr. 748; see also AA Big Book.

D. Failure by the Board to enforce Delta's decision to terminate Grievant would undermine other pilots' compliance with Delta's DPAC Program.

In order for agreements such as Grievant's Contract A to have their intended effect – to encourage sobriety – they must be enforced. Accountability is a critical component of the DPAC program and if agreements are not enforced, an addicted pilot will perceive the agreement as

[31] Grievant attempted to manipulate the Board by postponing the arbitration hearing dates until such time as he had regained his medical certificate. This case was originally scheduled to be heard by this Board in January 2019. On August 11, 2018, Grievant emailed Dr. Faulkner to ask whether he believed the FAA would make a determination on his medical certificate request before January 2019. CX 25. That is not a coincidence. In late-December 2018, when the FAA had not yet communicated a decision, Grievant asked for the dates to be rescheduled, claiming that his newly-hired outside counsel had a conflict for the scheduled January 2019 dates.

[32] The Big Book is available online at https://www.aa.org/pages/en_US/read-the-big-book-and-twelve-steps-and-twelve-traditions.

lacking coercive effect and that there will always be another chance on the horizon if the one the pilot is on is violated. Tr. 225, 441-42, That not only undermines each pilot's sobriety, it undermines the entire program.

Delta has a program of which it is justifiably proud. Tr. 437. DPAC has served as a model for other carriers, and the Board should not lose sight of the fact that it is quite literally a life saver to the pilots at Delta whose lives have been torn apart by addiction and substance abuse. Tr. 237, 258, 438-39. Empathetic leaders like Captain Storbeck and Captain Graham have given addicted pilots the tools needed to embrace the healthy lifestyle that comes with long-term recovery. Those pilots can get treatment instead of hiding in the shadows. Tr. 236, 438. The success stories in the DPAC program drastically outweigh the failures. Tr. 441. There is a reason DPAC has been a model for other carriers. Tr. 237.

A decision allowing Grievant to escape the consequences of his own choices and deceptive behavior would be detrimental because the pilots in the DPAC program would see a pilot, whose relapse was evidenced by three positive tests and who has shown dishonesty throughout the entire process, simply return to work as if nothing happened. The message that would send to the pilots in the DPAC program put their recoveries in jeopardy and create a destabilizing effect throughout the program. The Board should not allow that to happen.

E. <u>Grievant's plethora of arguments are entirely without merit.</u>

Over the course of the hearing, Grievant concocted a dizzying array of arguments lashing out at everything from scientific validity of PEth tests to the DPAC Program itself. This scattershot approach is designed to confuse and distract the Board from the unrebutted facts of the case that prove Grievant relapsed.

1. The Department of Transportation Regulations do not apply to alcohol tests performed pursuant to a workplace policy.

Grievant argues that the EtG and PEth tests administered to him were not performed pursuant to the Department of Transportation ("DOT") drug and alcohol testing regulations set forth in 49 C.F.R. Part 40. Grievant claims, because his alcohol tests were not performed pursuant to the DOT regulations, the appropriate safeguards, like review by a medical review officer ("MRO") were not followed.

The requirements set forth by the DOT drug and alcohol testing regulations are entirely irrelevant for the present case. The federal drug and alcohol testing program was created to deter employees in covered industries from working while under the influence of illegal drugs or alcohol. Tr. 776. Unlike the DPAC Program, the federal drug and alcohol testing program is not an abstinence monitoring program, and airline employees subject to DOT testing are not required to abstain from drinking alcohol when off-duty. In fact, under the DOT regulations, the question when an employee is given an alcohol test is not whether the employee has alcohol in his/her system, but instead whether the employee is impaired. Tr. 779. Thus, if an employee's blood alcohol level is below 0.04, the employee is not considered to be in violation of the DOT regulations. Tr. 780. In contrast, under the DPAC Program and the Substance Abuse Policy, employees agree to maintain complete abstinence from all mood-altering drugs, including alcohol. CX 4.

Random testing performed pursuant to the Substance Abuse Policy and an individual's Contract A is performed in addition to any required DOT testing. Tr. 263. Furthermore, Delta and the Association were not required to incorporate the DOT regulations into the jointly-negotiated Substance Abuse Policy. Tr. 567. In fact, Dr. Skipper admitted that the DOT regulations do not address either EtG or PEth testing. Tr. 567. As such, the Board should reject

any argument by Grievant that the Company was required to comply with the DOT regulations in this case.

Grievant's claim that a MRO never reviewed his positive test results is similarly unpersuasive. The DOT regulations do not require MRO review of tests performed pursuant to an employer's abstinence monitoring program. Tr. 567. While Dr. Skipper and Mr. Shults testified at length about MRO review of drug testing results, they both admitted, under the DOT regulations, MROs do not even review positive alcohol tests. Tr. 537, 778, 888. Moreover, while Delta was not required to have a MRO review Grievant's positive EtG and PEth tests, during the investigation, Delta engaged Dr. Taylor to review the positive results and to determine whether the results were scientifically valid.[33] Tr. 1015. In a similar manner to a MRO, Dr. Taylor reviewed both litigation packets for scientific validity and accuracy, chain of custody, quality control, and the appropriate analytical techniques.[34] Tr. 1015-16. See also Tr. 500 (a MRO performs quality assurance control of the drug testing process); UX 56 (a MRO acts as "an independent and impartial 'gatekeeper' and advocate for the accuracy and integrity of the drug testing process"). After reviewing the litigation packages and speaking with Dr. Jones regarding one question, Dr. Taylor concluded both tests were positive and both tests were scientifically valid. Tr. 1017-18. Accordingly, the Board should deny any argument that Grievant was prejudiced by the Company not consulting with a MRO prior to terminating him.

[33] MROs are not required to be toxicologists, and Shults admits it is useful for MROs to consult with toxicologists when reviewing litigation packages. Tr. 888.

[34] Additionally, Dr. Harper, Jr., Grievant's HIMS AME and a medical doctor, reviewed the results. Dr. Harper's actions after reviewing the positive test results – advising Grievant to go to retreatment and, when Grievant refused, withdrawing as Grievant's HIMS AME – establish Dr. Harper believed the positive test results to be valid. Tr. 447, 702, 753.

2. Grievant has not established his May 1, 2018 positive EtG test result was invalid.

a. *Grievant has presented no evidence of laboratory error.*

For Grievant to establish his May 1, 2018 positive EtG test was invalid, Grievant would need to prove that there was a laboratory error in the processing of his sample. Grievant cannot make this showing. Grievant's positive EtG result has been reviewed and validated multiple times. As part of its certification procedure, Quest has a certifying scientist review each positive result and the underlying data; that process was followed in Grievant's case, and his EtG test was certified as positive. CX 9 at p. 111. Dr. Sample testified he reviewed the litigation package, determined the test was performed in compliance with Quest's policies and procedures, and confirmed the result was positive. Tr. 324. During the investigation, Dr. Taylor reviewed the litigation package, and he also concluded the EtG test was scientifically valid and represented a positive result. Tr. 1017. Dr. Taylor testified, after he reviewed the litigation package for the EtG test, he saw no basis for a claim of laboratory error. Tr. 1051.

Even Mr. Shults admits Quest is a quality laboratory that follows sound practices. According to Mr. Shults, "I mean, again, you know, again, Quest does an awful lot of this stuff. They know what they're doing." Tr. 850 (emphasis added). When asked specifically whether Quest had committed a laboratory error, Mr. Shults testified, "No." Tr. 895. Thus, the Board should conclude Quest followed its standard operating procedures when testing Grievant's sample, and there is no evidence Quest committed any laboratory error when processing Grievant's sample.

b. *Grievant's negative EtS result is not an indication that the EtG test was faulty.*

Grievant is likely to argue he tested negative for EtS on the May 1, 2018 test, and thus he cannot have truly been positive for EtG. Any such argument represents a misunderstanding of

how EtG and EtS testing works. Dr. Sample testified, when an individual tests positive for EtG at a low concentration, it is common for the individual's EtS test to be negative.[35] Tr. 325. According to Dr. Sample:

> That's [testing positive for EtG but negative for EtS] … quite common. That's not unusual at all which is why for concentrations of EtG less than 500 nanograms per mL, we do not require the presence of EtS. So … at or above 500 nanograms per mL of EtG, we would expect EtS to always be present, but at concentrations below 500, we don't have that expectation.

Tr. 325. See also UX 78. In fact, testing positive for EtG but negative for EtS occurs often enough that Grievant admitted he knew it to be "not completely uncommon." Tr. 675.

Additionally, it is critical for the Board to remember, after the positive EtG/negative EtS result, the DPAC Program did not consider Grievant to have relapsed. Instead, pursuant to the parties' joint practice, and in accordance with the method advocated by Grievant's own expert witness, Grievant was required to undergo a PEth test to confirm his abstinence. Tr. 266, 445-46, 465-67; CX 18.

c. *The cutoff used on the EtG test was jointly-negotiated by the Company and the Association.*

Both Dr. Skipper and Mr. Shults attempted to discredit Quest's use of a 100 ng/ml cutoff for Grievant's EtG test, claiming that such a low cutoff could lead to a positive result caused by incidental exposure to ethanol-containing products. Dr. Skipper testified a cutoff over 1,000 ng/ml would eliminate the risk of a positive result due to incidental exposure, and most

[35] In his testimony, Mr. Shults claimed that EtG and EtS go together "hand in hand like brother and sister." Tr. 849. Mr. Shults further testified he would not be suspicious of the EtG result if the EtG had been present at a higher concentration and the EtS had been negative. Tr. 852. This testimony shows Mr. Shults has a fundamental misunderstanding of the interplay between EtG and EtS. Given Mr. Shults' acknowledgment of Quest's expertise in the area of EtG/EtS testing, to the extent Mr. Shults' testimony differs from Dr. Sample's testimony, the Board should credit Dr. Sample over Mr. Shults.

laboratories now use a cutoff of 500 ng/ml.[36] Tr. 516-17. Mr. Shults testified that "somebody" told him the most common cutoff is "around 250 or 200 or something like that." Tr. 844.

The DPAC Program purposefully uses a lower cutoff of 100 ng/ml. Captain Storbeck testified the parties agreed to use a relatively low cutoff for EtG testing to ensure all pilots who may have relapsed were identified. Tr. 266-67. As discussed above, the identification of pilots who have relapsed is critical to the safety of the Company's operation and to the viability of the DPAC Program, and both of these considerations were acknowledged by the Association when the parties were drafting the Substance Abuse Policy. Tr. 261-62. Dr. Skipper admits the use of a higher cutoff will result in pilots who have relapsed going undetected, which is a result that is untenable for an air carrier. Tr. 548. Because the 100 ng/ml cutoff was negotiated and agreed to by the parties for the purpose of ensuring the safety of Delta's operation, this Board should not second guess the parties' determination.

Moreover, the Board should reject any argument that Grievant's May 1, 2018 positive EtG test could have resulted from incidental exposure to ethanol-containing products.[37] Because Grievant's EtG was a low positive, and because of the split EtG/EtS result, Grievant was required to take a PEth test to verify his abstinence. If Grievant's positive EtG test had been caused by incidental exposure rather than by consumption of alcohol, his PEth test would have been negative because incidental exposure to ethanol-containing products cannot cause a positive PEth result. Tr. 119, 1104; CX 19. Grievant's May 9, 2018 positive PEth test result confirmed

[36] Dr. Skipper's testimony is refuted by his own admission that, in his abstinence monitoring program, he used a lower cutoff so he could use "discretion" in analyzing a case. Tr. 518.

[37] In fact, Grievant has claimed he was careful to avoid using ethanol-containing products. CX 21. According to Grievant's October 28, 2018 letter to the FAA, "… [I] don't claim any incidental contact. If there was, I have no idea what that could have been. I also do not believe in tempting fate by exposing myself to ANY known to me incidental exposure products, being very conservative in that assessment." CX 21.

the positive EtG test, and the result of both tests were again confirmed by the June 20, 2018 positive hair EtG test.

d. *Grievant's EtG result should not have been normalized.*

Dr. Skipper and Mr. Shults testified Grievant was dehydrated on May 1, 2018, and, as a result, his creatinine levels were high. Tr. 519, 845. Based on this conclusion, Dr. Skipper and Mr. Shults both claimed Quest should have normalized Grievant's EtG result to determine what his result would have been if he had not been dehydrated.

As an initial matter, the evidence refutes Dr. Skipper's and Mr. Shults' conclusion that Grievant's creatinine levels were high on May 1, 2018. Dr. Sample testified, prior to running the 10-panel drug test on Grievant's urine sample, Quest performed a test for specimen validity, which checked the sample's creatinine level. Tr. 319-20. Grievant's creatinine level of 256 mg/dL was acceptable. Tr. 320; CX 9 at p. 111. Similarly, Dr. Taylor testified Grievant's creatinine was well within the normal range of 20 to 320 mg/dL. Tr. 1052.

Additionally, normalization of Grievant's EtG result would have been entirely inappropriate. Dr. Taylor explained that laboratories only normalize drug testing results for drugs that stay in the body for long periods of time, like THC. Tr. 1047, 1108. EtG stays in the body for only a few days. Tr. 1108. The purpose of normalization is to compare two test results, from two different points in time, to determine whether a recent positive drug test result indicates new use of the drug or old use (with the drug remaining in the body from the prior use). Tr. 1047, 1108. According to Dr. Taylor, "Forensic drug testing laboratories, if they do normalize results … they're used for the purpose of comparing two results. <u>It's not possible to normalize a single result and provide any interpretation.</u>" Tr. 1047-48 (emphasis added). It is for these

reasons that no United States laboratory, including Quest, normalizes EtG results, a fact admitted by Mr. Shults.[38] Tr. 325-26, 900, 1107.

In his expert report, Dr. Skipper wrote, had Grievant's EtG result been normalized, the result would have been 46 ng/ml, below the 100 ng/ml cutoff. UX 57, p 3. Taylor testified Dr. Skipper's suggested approach is arbitrary:

> Well, there's no way to interpret that [the normalized result calculated by Dr. Skipper]. I mean … there's no laboratory that says a certain normalized EtG result results in a positive. Laboratories just don't do that. So Dr. Skipper took … an arbitrary creatinine value, a random creatinine value, and used that for his denominator … as the result. So the calculation is purely arbitrary. The laboratory does not do that. It's not customary to do that. The laboratory's procedure and policy say that anything over a 100 nanogram per milliliter is considered positive. So it's still positive. There's … no additional interpretation that would make this negative. It's positive to begin with. And you can normalize it all you want, but it's still positive.

Tr. 1048-49. Moreover, Dr. Skipper agreed with Dr. Taylor's conclusion, testifying, even if Quest had normalized Grievant's EtG result, the test would still have been positive for the presence of alcohol. Tr. 520, 549-50. Because it is inappropriate to normalize creatinine for EtG tests, because Grievant's creatinine levels on May 1, 2018 were within the normal range, and because even Dr. Skipper admits Grievant's EtG result was positive for the presence of alcohol, the Board should not be persuaded by any argument that Quest erred by not normalizing Grievant's creatinine before reporting his EtG results to the Company.

3. Grievant has not established that the May 9, 2018 PEth test results were invalid.

Grievant spent the majority of his case attacking his May 9, 2018 positive PEth test result. Grievant has thrown an incredible number of arguments against the metaphorical wall in

[38] Like much of his testimony, Mr. Shults testimony with respect to normalization of EtG test results is contradictory. During cross-examination, Mr. Shults initially testified he believed Quest's procedure is to perform a creatinine normalization, which would have resulted in a negative EtG result for Grievant. Tr. 895-96. Yet, later in cross-examination, Mr. Shults admitted that no United States laboratories normalize creatinine during EtG tests. Tr. 900. Dr. Sample confirmed that Quest, like all United States laboratories, does not normalize creatinine for EtG tests. Tr. 325-26.

the hope that one of them will stick and excuse his positive PEth test result. Grievant argues, in general, PEth tests are not reliable. Grievant also argues USDTL must have committed a laboratory error when processing his sample and/or the collector committed errors when collecting his DBS sample, causing the positive PEth test result. For the reasons discussed below, the Board should reject all of Grievant's attacks on PEth testing and his May 9, 2018 PEth test.

a. *PEth tests are reliable to detect alcohol consumption.*

At the outset of the case, Grievant attempted to attack the validity of PEth testing and the ability of PEth testing to detect alcohol consumption. Grievant has not succeeded. It is well established that PEth is one of the most sensitive biomarkers for evidencing alcohol use. Tr. 290-91, 897; CX 26 ("The diagnostic sensitivity for PEth was 99%."); CX 28 at p. 1638 ("The literature is very consistent in concluding that PEth is a highly sensitive and specific biomarker for alcohol consumption."); UX 82 ("In this study, blood PEth was the most sensitive biomarker for evidencing alcohol use.").[39] It is undisputed that PEth is formed in an individual's body only if the individual consumes alcohol. Tr. 573; CX 18 at p. 1583 ("… blood PEth is only positive following significant alcohol use); CX 28 at p. 1635 ("PEth requires ethanol for its production in the red blood cell membrane."); UX 50 at p. 3 (PEth is "formed only in the presence of ethanol."). Unlike EtG, which can be formed by incidental exposure to ethanol-containing products, there is no evidence that incidental exposure to ethanol can produce PEth in blood. Tr. 119, 573, 1104; CX 19.

Scientific studies have found positive PEth tests over 20 ng/ml to be reliable indicators of

[39] Company Exhibit 26 contains slides from an American Association of Medical Review Officers MRO Training and Certification presentation given by Shults in August 2020. During this presentation, Shults informed attendees that PEth is formed only in the presence of ethanol. CX 26. Shults further represented, "The diagnostic sensitivity for PEth was 99%." CX 26.

alcohol consumption.[40] According to a Critical Review authored by William Ulwelling and Kim Smith:

> A "positive" PEth finding (>20 ng/ml) in the lower range (e.g., 20-80 ng/ml) indicates that the person has very likely consumed at least 2.5 or more standard drinks for several days prior to the test or had binged rather heavily. While a low PEth value does not reveal the pattern of consumption, **the unassailable conclusion is that the employee has consumed alcohol within the past month or so**.

CX 28 at p. 1638 (emphasis added). See also CX 18 at p. 1583 ("PEth is only possible following significant alcohol use."); UX 27 ("The present analysis demonstrates a good clinical efficiency of PEth for detecting chronic heavy drinking."). No scientific study has found PEth results at or above 20 ng/ml to be false positives.[41] Tr. 903, 1122.

Because of its reliability and sensitivity, PEth testing is used throughout the airline industry in HIMS programs. For example, in Captain Storbeck's role as national HIMS chairman, he recommended that American Airlines implement PEth testing in its substance abuse program. Tr. 251. American Airlines subsequently reported that the use of PEth testing had allowed it to identify a substantial number of pilots who had relapsed and who had not been previously detected. Tr. 252. The FAA also uses PEth testing for abstinence monitoring and when making determinations on special issuance medical certificates. Tr. 561. In fact, in

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[40] Dr. Skipper opined that the amount of the phospholipase D ("PLD") enzyme in an individual's blood may cause some people to make more PEth than others, which could affect PEth test results. Tr. 581-82. Dr. Jones confirmed that scientists are currently looking at the question of whether some individuals produce more PLD than others. Tr. 284. This consideration, however, is not relevant in an abstinence monitoring program because, regardless of the concentration of the PLD enzyme in an individual's blood, someone who is maintaining abstinence will not have any PEth in his/her blood. Tr. 284.

[41] Since 2007, USDTL has performed between 120,000 and 150,000 PEth tests. Tr. 71. None of the positive PEth test results confirmed by USDTL have ever been scientifically determined to be a false positive. Tr. 71. USDTL has sent approximately 50-60 positive DBS PEth tests to the research laboratory at the University of Texas for retesting, and all of those tests have been reconfirmed as positive. Tr. 71. Dr. Jones testified he was not aware of any other laboratories that have had confirmed positive PEth results be scientifically determined to be false positives. Tr. 73. Dr. Taylor testified that his laboratory, Addiction Labs of America, has performed 400-500 PEth tests, and all of the positive samples that his laboratory has submitted for retesting have been confirmed as positive. Tr. 1122.

August 2020, the FAA mandated that HIMS AMEs subject pilots who are diagnosed with substance dependence to random PEth testing. Tr. 254, 256-57; CX 17. Prior to August 2020, the FAA left the types of tests to the discretion of the HIMS AME. Tr. 256.

b. *Grievant presented no evidence that USDTL committed laboratory errors when analyzing his dried blood spot sample.*

As with the EtG result, to succeed on his claim that his May 9, 2018 positive PEth test result was a false positive, Grievant would need to show that USDTL committed a laboratory error when processing his DBS sample. Grievant cannot make this showing. In March 2020, in preparation for his expert testimony before this Board, Dr. Taylor visited the USDTL laboratory to observe the PEth analysis process and to ensure the laboratory was operating pursuant to its SOP.[42] Tr. 1019. Dr. Taylor reviewed USDTL's SOP to ensure that it was scientifically valid and that the laboratory technicians were following the SOP. Tr. 1019-20. Dr. Taylor also reviewed USDTL's validation data on DBS testing and USDTL's quality control procedures. Tr. 1020, 1023-24. Dr. Taylor testified he wanted to understand how the validation was done on DBS testing and whether that validation was appropriate for the testing method. Tr. 1020. After reviewing these documents, Dr. Taylor "was assured and convinced that the testing process was accurate and certainly defensible [as a] very sound forensic process." Tr. 1020. Dr. Taylor further concluded that the validation of DBS testing was performed properly according to the Standard Forensic Toxicology Guidelines. Tr. 1022.

Dr. Taylor also reviewed the original data from Grievant's May 9, 2018 PEth test. Tr. 1020. Dr. Taylor testified the litigation package is a summary of the data, and he wanted to see the actual, underlying data. Tr. 1020. On the confirmation test, Dr. Taylor specifically looked

[42] Dr. Taylor is certified to perform drug testing laboratory inspections on behalf of the National Laboratory Certification Program ("NLCP") and the Substance Abuse and Mental Health Services Administration ("SAMHSA"). Tr. 1019; CX 15. Dr. Taylor testified he applied the same standards in looking at the USDTL facility as he would when performing a SAMHSA inspection. Tr. 1019.

for the possibility that Grievant's sample could have been contaminated by carryover contamination. Tr. 1020. Dr. Taylor discovered that no carryover contamination was possible because USDTL inserts a blank solvent in between each confirmation sample.[43] Tr. 1020-21.

Dr. Taylor also followed a technician through the entire process from receipt of a sample through the confirmation test. Tr. 1021. Dr. Taylor observed that the technicians were following the SOP and maintaining chain of custody during analysis. Tr. 1022. Dr. Taylor inspected the equipment used by USDTL and found it to be appropriate for PEth testing. Tr. 1021. At the end of his inspection, Dr. Taylor concluded, "The … process is sound. The laboratory has a very thorough and accurate forensic process, both in chain of custody, quality control, and the analytical methodology … which they're using." Tr. 1024.

Mr. Shults opined in his report that laboratory error must have occurred during the analysis of Grievant's sample. UX 50, p. 2. Mr. Shults formed this opinion even though he admits he had not reviewed laboratory documentation, laboratory analytical results, quality assurance data, or the SOP. UX 50, p. 2. Mr. Shults also wrote that he could "only speculate" as to the source of the laboratory errors. UX 50, p. 5. With respect to Mr. Shults' conclusions in his expert report, Dr. Taylor testified:

> I found no evidence of error. I don't know what [Mr. Shults is] talking about. When he wrote this report, he had not or has not been to the laboratory. He had not even reviewed the litigation package at the time he wrote this report. So I … don't understand what he's talking about and I … disagree with that comment.

Tr. 1050.

Moreover, while Grievant will undoubtedly use Mr. Shults' report to argue USDTL's

[43] Mr. Shults testified in "an ideal world," a laboratory would run a blank between each presumptively positive sample, but most laboratories do not take this step because it "increases costs tremendously." Tr. 824. As noted by Dr. Taylor, USDTL does use a blank between each presumptively positive sample, just as advocated by Mr. Shults. Tr. 1020-21. Had Mr. Shults bothered to make any inquiries, he would have known.

testing methodology is not scientifically valid, Mr. Shults admitted during his testimony that he was not questioning the scientific validity of the USDTL PEth testing procedure. Tr. 895. Indeed, Mr. Shults changed course by attacking the DBS collection procedure rather than the USDTL procedure and testing analysis. Tr. 895. With respect to the USDTL analysis, Mr. Shults admitted the chromatograms from Grievant's PEth tests "look good" and the quality control on the litigation package "looks good." Tr. 896. Mr. Shults could not go further in his testimony because, as he readily admitted, he had still never reviewed USDTL's SOP or its validation data on PEth testing. Tr. 894, 896. Accordingly, based on Dr. Taylor's testimony of his inspection of the USDTL laboratory, and given Mr. Shults' admissions, the Board should conclude USDTL's PEth testing procedures are scientifically valid and no laboratory errors occurred when USDTL analyzed Grievant's DBS sample.[44]

c. *The results of the initial test and confirmation test of Grievant's dried blood spot sample are within the required uncertainty range.*

Grievant is likely to argue that the difference between the results of his initial PEth test, 69 ng/ml, and his confirmation PEth test, 98 ng/ml, is evidence that the PEth testing at USDTL is not scientifically valid. Mr. Shults testified that results from the initial and confirmation tests should be within 10 percent of each other. Tr. 835. Mr. Shults testimony is further evidence of his ignorance regarding USDTL's PEth testing procedure.

Dr. Jones testified the uncertainty of USDTL's PEth testing is plus or minus 30 percent.

[44] Grievant may also argue that the Board should not trust USDTL's PEth testing method because it has not been approved by the Food and Drug Administration ("FDA"). Any such argument is nonsense. USDTL's PEth test is a laboratory-developed test that is used for forensic testing purposes. Tr. 49-51. As such, there is no requirement that USDTL's PEth test receive FDA approval. Tr. 50, 55-56, 560, 901, 1058-59. USDTL is a certified laboratory under the Clinical Laboratory Improvement Amendments of 1988 ("CLIA") and accredited by the Illinois College of American Pathologists, the State of New York State Department of Health, and the International Organization for Standardization ("ISO") 17025. Tr. 25-27. To maintain certification and accreditation, USDTL is subject to routine inspections to ensure that the laboratory is operating within the scope of the requirements set forth by each of these organizations. Tr. 28. USDTL's whole blood and DBS PEth tests have been approved by CLIA, the College of American Pathologists Drug Testing program, the New York State Department of Health, and ISO 17025. Tr. 55.

Tr. 97. The uncertainty represents the cumulative effect of the unknowns that go into a testing procedure. Tr. 97, 1025. A laboratory is required to calculate the uncertainty during its validation studies, and USDTL ensures that all confirmed positive PEth tests are within the range of uncertainty. Tr. 97-98, 1027-28. If an initial test and a confirmation test are more than 30 percent apart, USDTL will not confirm those results. Tr. 98-99.

Dr. Taylor explained, the uncertainty really just represents that the true value of the test result is a range of the detected value plus or minus 30 percent. Tr. 1025. When determining whether a test result is accurate, it is critical for the initial test result and the conformation test result to overlap in the uncertainty range of plus or minus 30 percent. Tr. 1026. Grievant's initial result was 69 ng/ml, and the uncertainty range would be from 48-90 ng/ml. Tr. 1026. Grievant's confirmation result was 98 ng/ml, and the uncertainty range would be from 69 to 127 ng/ml. Tr. 1026. Thus, there is significant overlap between the range of Grievant's initial test and the range of his confirmation test, validating that Grievant's PEth test was positive. Tr. 1026. When asked whether he had any concern about the accuracy of the May 9, 2018 PEth test, Dr. Taylor testified:

> No. In fact, if … we take a look at that uncertainty and apply it to the … cutoff [of 20 ng/ml], if … you noticed the range that I just discussed, 69 and the range is 48-90 and the 98 range is 69-127. Those ranges are nowhere near the cutoff. So this … result, even with … the uncertainty from the laboratory, is not anywhere near [the] 20 nanogram per mL cutoff. So I'm … convinced that this PEth is present, it's positive, and it's well above the cutoff.

Tr. 1028.

d. *To the extent Grievant's hematocrit had any effect on his PEth result, it was minimal and would not have changed the positive test result.*

Based on his conclusion that Grievant's creatinine was high on May 1, 2018 (which as discussed above, is not supported by the objective evidence), Mr. Shults testified that Grievant

likely was dehydrated on May 9, 2018 and again had a high creatinine level. From this unsupported assumption, Mr. Shults extrapolated that Grievant likely had a high hematocrit on May 9, 2018, and the high hematocrit could have affected his PEth test result. Tr. 856-57, 907.

Dr. Taylor testified that scientists have not resolved the question of whether hematocrit has any effect on a PEth test. Tr. 1053-54. Some studies have found that the hematocrit has no effect (CX 34; UX 24) while others have found that hematocrit can alter a PEth result by approximately ten percent. Tr. 1053-54. Assuming, *arguendo*, that Grievant's hematocrit altered his positive PEth test results by ten percent, that ten percent alteration would be included in the uncertainty of plus or minus 30 percent. Tr. 1054. Even if the potential ten percent alteration was added to the uncertainty, for a total of 40 percent, Grievant's PEth results still would have been well over the 20 ng/ml cutoff for a positive test. Tr. 1054. Dr. Taylor concluded, "So the hematocrit, it may have some effect. Certainly it will. But how much an effect, it's fairly minimal. It's going to be well below anything that would alter this result significantly enough to cause it to be below the cutoff, for sure." Tr. 1054.

e. *Grievant has not shown that the DBS collection process affected his positive PEth result.*

As noted above, during the arbitration hearing, Grievant's strategy seemed to shift from attacking the USDTL PEth testing procedures to attacking the DBS collection process. For the reasons discussed below, the Board should conclude that USDTL's DBS PEth testing method is scientifically validated, and Grievant cannot establish that any errors allegedly committed during the DBS collection process affected his positive PEth test result.

(1) <u>Whole blood testing is not preferable to dried blood spot testing.</u>

Much of Mr. Shults' testimony focused on his opinion that whole blood PEth testing is better than DBS PEth testing. Mr. Shults' testimony ignores that there are several reasons many

laboratories prefer DBS testing over whole blood testing. First, it is more convenient for a donor to provide a DBS sample. Dr. Jones testified if an individual already is having blood drawn, taking a whole blood sample for PEth testing is not difficult. Tr. 69. If an individual, however, is not otherwise giving a blood sample, it is more time consuming and expensive for the donor to find a clinic where he/she can give a whole blood sample. Tr. 69. Second, if an individual is under the influence of alcohol at the time of a whole blood collection, PEth can continue to form in the sample. Tr. 69. In contrast, when a donor gives a DBS sample, the blood is fixed by the guanidinium salts in the Whatman 903 paper used by USDTL for collection of DBS samples, and there is no creation of additional PEth.[45] Tr. 70. PEth can also be produced in whole blood if the blood sample is contaminated by bacteria or yeast, causing fermentation and the production of ethanol in the blood sample. Tr. 1063; UX 26. Fermentation has no effect on DBS samples because the guanidinium salts in the Whatman 903 paper deactivate all enzymes and prevent the production of additional PEth. Tr. 1064. Additionally, PEth in whole blood degrades more quickly over time. Tr. 70, 131. Decomposition in dried blood spots is much slower than in whole blood. Tr. 70, 131. Based on these factors, Dr. Jones testified, "[I]t's my opinion that the dried blood spot is… a more convenient, better service than the whole blood." Tr. 70-71.

(2) <u>USDTL has performed extensive validation studies on using DBS samples for PEth testing.</u>

Grievant places much emphasis on Union Exhibit 1, a study authored by Sara Capiau, et al. on therapeutic monitoring using DBS samples. Mr. Shults testified that Union Exhibit 1 was "one of the most significant exhibits" the Union presented. Tr. 836. The major conclusion of the Capiau study is that a laboratory must have a sound validation process to implement DBS

[45] Whatman 903 collection paper has been approved by the FDA for the collection of blood spots. Tr. 46-47, 143-44.

testing. Tr. 1060. The Company has established that USDTL complies with the relevant portions of Union Exhibit 1.[46]

USDTL has conducted validation studies to ensure the accuracy of testing DBS samples for PEth. Tr. 304. These validation studies complied with the Guidelines for Forensic Toxicology Laboratories and the Scientific Working Group for Forensic Toxicology. Tr. 304-05. Dr. Taylor testified he reviewed USDTL's validation data for its DBS testing and found the validation data to be scientifically supported.[47] Tr. 1060-62. According to Dr. Taylor, "[T]he laboratory [USDTL] did what they were supposed to do with the forensic toxicology guidelines, and I would argue that their validation is as good as any … laboratory's validation data." Tr. 1062.

(3) Grievant never notified the Company of any issues with the DBS collection process.

Grievant's claim that there were numerous deficiencies in the May 9 DBS collection process – heard for the first time at the System Board hearing – is not believable. Grievant testified he began researching PEth immediately after learning of his positive PEth test result, and he printed materials on the recommended DBS collection process from the USDTL website as early as the third week of May 2018. Tr. 685. Yet, Grievant admits he never raised any of the issues he now claims occurred in the collection process with Captain Miller or with Captain Graham during the initial hearing. Tr. 451, 760-62. It is inconceivable, if Grievant truly believed the DBS collection process was flawed, that he would not have mentioned these alleged

[46] It is important to note that the Capiau study was performed for the purpose of analyzing therapeutic drug monitoring, not abstinence monitoring. Tr. 297-99, 303, 1060, 1062, 1113. As such, there are considerations in the Capiau study that are not relevant to the testing of DBS samples for PEth. Tr. 1114-15.

[47] Mr. Shults testified that he could place no confidence in USDTL's DBS testing method because he had not seen the validation studies. Tr. 828-29. Mr. Shults is opining on matters about which he is entirely uninformed. Given Dr. Taylor's detailed testimony regarding his review of USDTL's validation studies on DBS testing, the Board should reject Mr. Shults' uninformed opinion on the validity of DBS PEth testing.

flaws to the Company so it could investigate. This is especially unbelievable since Grievant undertook the time and expense of having at least three self-directed alcohol tests administered prior to the initial hearing. It is a little too convenient that over three years later, Grievant suddenly recalls collection issues that allow him to try to shift blame to others for his relapse. Grievant obviously was grasping at anything that appeared to support his claims of sobriety. If there truly were collection flaws on May 9, 2018, Grievant would have raised those with Captain Miller or Captain Graham, and he would have provided Delta with the materials he found on the USDTL website.[48]

The Board should not consider the alleged collection issues when determining whether the Company had just cause to terminate Grievant. Arbitrators hold, when an employee fails to provide allegedly exculpatory evidence to his employer during an investigation, such evidence is inadmissible at arbitration because an employer's decision to terminate must either succeed or fail based on what the employer knew at the time of the decision. See e.g. Southwest Airlines, 122 Lab. Arb. Rep. (BNA) 856 (Jennings, Arb.) (2006) (when the grievant was discharged for falsification of sick leave, but the grievant declined to tell the carrier what her illness was during the investigative process, the arbitrator declined to consider evidence of the grievant's illness that was first presented at the arbitration hearing); Air Wisconsin Airlines, Grievance No. 220 (Conway, Arb.) (2008) (when grievant failed to give medical records to the carrier during investigation, the grievant was estopped from presented potentially exculpatory evidence to the system board during the arbitration hearing); BNSF Railway, 121 Lab. Arb. Rep. (BNA) 987 (Irvin, Arb.) (2005) (when the grievant failed to participate in his investigatory meeting but later sent the company a letter in response to his discharge, exculpatory information contained in the

[48] It is also telling that Grievant did not inform the FAA of the alleged collection flaws. CX 21; CX 22.

letter was inadmissible because information was known to grievant at the time of the investigation and he chose not to divulge it to the company until after the disciplinary decision had been made). Because Grievant never presented any information about the alleged DBS collection flaws to either Captain Miller or to Captain Graham during the Company's investigation, the Board should not now consider the issue when determining whether the Company had just cause for termination.[49]

(4) The collection issues alleged by Grievant would not have caused his positive PEth test.

Even if the Board were to consider the alleged issues with the DBS collection process, the Company has established that none of the alleged problems would have caused Grievant's positive PEth test result. First, Grievant claims the collector used his finger to "finger paint" blood onto the DBS card. Tr. 683. Dr. Skipper testified the layering of successive blood drops on top of each other, the so called "volcano effect," can affect the results. Tr. 532. Skipper admitted, however, that there is no clear evidence that shows that the volcano effect can change the quantitative test result. Tr. 532. Mr. Shults testified layering successive drops of blood doubles the amount of red blood cells and "theoretically" could double the amount of PEth in the sample. Tr. 862.

Dr. Taylor rejected the argument that the volcano effect could have an effect on DBS PEth results. USDTL randomly takes three punches from a DBS sample. Tr. 1062. By taking three punches from different points on the DBS sample, USDTL minimizes any effect that that could be caused by a concentration of PEth in an area of the DBS. Tr. 1062-63. According to

[49] Similarly, the Board also should not credit Grievant's argument that he did not want to go to retreatment due to the allegedly bad experience he had at the TRC. Grievant never raised any issues about his treatment at the TRC either while he was in treatment or during the investigation into his relapse. Tr. 451, 724, 935. Moreover, pilots do not go to the TRC for retreatment; the Company sends pilots to MARR for retreatment. CX 4. Thus, any concern Grievant had about the TRC and the way he was allegedly treated there would not be relevant.

Dr. Taylor, "So the volcano effect is really minimized by taking three punches." Tr. 1063. Dr. Taylor's conclusion is supported by a study performed by Natalie Kummer, et. al on the quantification of PEth in DBS, which found that the quantification of PEth is not affected by punch localization or spot volume. CX 34.

Second, Grievant claims his sample was not allowed to dry for three hours prior to it being sealed in an envelope. USDTL does not require that collectors allow a sample to dry for three hours. Tr. 156, 182. Dr. Jones explained, when DBS collection began, it was used to collect blood samples from newborn infants, and it was not onerous for nurses working with infants to allow DBS samples to dry for three hours before sending them for testing. Tr. 156. Individuals in abstinence monitoring programs, however, do not want to sit at a collections site for three hours while their DBS sample dries. For this reason, USDTL developed a drying box, which allows the DBS sample to be secured in the donor's presence immediately after collection. Tr. 58-59. The drying box is not airtight, allowing the blood sample to continue to dry after it has been sealed. Tr. 58-59.

Dr. Skipper opined that not allowing the DBS sample to dry for three hours could cause fermentation in the sample.[50] Tr. 533, 581. The Board should not be persuaded by this testimony because Dr. Skipper admitted that he was unaware of the manner in which the guanidinium salts in the Whatman 903 paper prevent fermentation. Tr. 593. Jones and Taylor testified, when a blood drop hits the Whatman 903 paper, the guanidinium salts deactivate all enzymes in the blood. Tr. 58, 130, 1063-64. Thus, even if a DBS sample was exposed to

[50] To support this theory, the Union submitted a study performed by Joyce Chang, et al. on the potential for bacteria or yeast to produce ethanol in a whole blood sample. UX 26. It is easily distinguishable. Dr. Taylor pointed out the Chang study is not relevant because Grievant's sample was a DBS sample rather than a whole blood sample. Tr. 1063. Additionally, the Chang study found no ethanol formation until five days after a whole blood sample had been taken because yeast has to have time to grow to produce ethanol. Tr. 1064-65; UX 26 at p. 108. Grievant's DBS sample was analyzed on May 10, just one day after it was collected. Tr. 1064.

bacteria or yeast, the DBS sample would not be able to ferment and produce ethanol. Tr. 1064. Furthermore, by placing the DBS sample in a drying box, the sample is allowed to dry for hours while it is being transported. Tr. 177, 1115.

Finally, Grievant alleges his DBS sample was placed in an airtight shipping bag in violation of USDTL's collection procedure. Dr. Jones testified there is no evidence that placing a DBS sample in an airtight bag causes production of PEth or interferes with the integrity of a DBS sample. Tr. 173. Furthermore, there is no evidence that placing a DBS sample in an airtight bag before the sample is dried can cause microbiological growth, and desiccant pouches are not required if an airtight bag is used.[51] Tr. 176-77.

Perhaps the best evidence that Grievant's May 9, 2018 positive PEth test was valid and appropriately administered is the June 20, 2018 hair EtG test, which showed there was EtG present in Grievant's hair at a concentration inconsistent with abstinence. Tr. 1043; CX 33; UX 75. Taken together, the May 1, 2018 positive EtG test, the May 9, 2018 positive PEth test, and the June 20, 2018 positive hair EtG test establish conclusively that Grievant was not maintaining abstinence. Tr. 558, 1077-78. As such, the Board should conclude Grievant's May 9, 2018 PEth test was properly administered and analyzed, and the confirmed positive result of 98 ng/ml is valid and establishes Grievant was not maintaining abstinence as required by his Contract A.

4. Grievant's self-directed tests do not cast doubt on the May 1, 2018 positive EtG and May 9, 2018 positive PEth tests.

Grievant's conduct in this case – selectively producing self-directed tests he believes support his case but deliberately withholding at least one he knows does not – is just one of

[51] During his testimony, Mr. Shults referenced a study by Nico Gruner advocating the use of desiccant packs when transporting DBS samples. Tr. 868; UX 53. Dr. Taylor testified that the Gruner study is irrelevant in the present case because that study is focused on the use of DBS samples for immunoassays for virus identification (particularly hepatitis and HIV). Tr. 1067. Grievant's PEth test was not an immunoassay, and Grievant's DBS sample was not tested for viruses. Tr. 1067. Similarly, Union Exhibit 54, which analyzes the effects of humidity on DBS samples taken for the purpose of diagnosing diabetes, is irrelevant because it has not bearing whatsoever on PEth. Tr. 1067-68.

several reasons why companies like Delta do not consider tests obtained by employees outside of the designated testing protocol. The vast majority of arbitrators also do not consider self-directed tests and neither should the Board. Even if the Board were to consider the tests, however, the unrebutted evidence in the case shows the tests do not establish that Grievant was maintaining abstinence in late-April/early-May 2018.

a. *Arbitrators reject self-directed tests and the Board should as well.*

In cases involving termination for violation of a substance abuse policy, employees often attempt to challenge a positive test result with negative results from self-directed tests, and arbitrators routinely find self-directed tests to be irrelevant or not persuasive. For example, in Sheriff of Broward County, 92 Lab. Arb. Rep. (BNA) 937 (Seidman, Arb.) (1989), the grievant was terminated after he tested positive for marijuana. Twenty-four hours after the employer-directed test, the grievant underwent an independent urine test at a laboratory recommended by her personal physician; the initial screen on the independent test was negative for the presence of marijuana. Id. Arbitrator Seidman rejected the union's argument that the employer's drug test must have been flawed because the grievant tested negative for marijuana just 24 hours after the employer's test. Id. at 938. Seidman concluded the employer's test had been performed under proper protocol, and the chain of custody had been documented. Id. The employer test consisted of both an initial screen and a confirmation test. Id. Seidman found the independent test was "inadequate to set aside or, indeed, even to throw suspicion upon the [employer's] test." Id. See also American Airlines, Gr. No. M-889-97, at 4-5 (Sherman, Arb.) (1998) (disregarding self-directed test and concluding "an employee who knew he was guilty might seek a second test because he was confident that he would receive a 'negative' result"); Comair, Inc., K. Lumpkin Termination (Wittenberg, Arb.) (2004) (declining to credit result of self-directed alcohol test; the carrier established the employer-directed alcohol test was performed properly, and the grievant

tested positive on an initial and confirmatory test); America West Airlines, T. Trotti Termination (Roberts, Arb.) (2001) (finding that negative drug test taken by the grievant one week after she tested positive for marijuana on a DOT random drug test was unpersuasive due to the passage of time); United States Steel Tubular Products, 2014 BNA LA Supp. 167737 (Das, Arb.) (2014) (declining to consider results of self-directed test because there was no reason to question either the validity or accuracy of the employer-directed test); Appalachian Power Co., 2001 BNA LA Supp. 108620 (Heekin, Arb.) (2001) (declining to consider results of self-directed drug test and holding, because the employer presented evidence that the employer-sponsored drug test was properly performed and analyzed, the carrier had just cause to terminate the grievant for violating substance abuse policy); Gaylord Container Corp., 1999 BNA LA Supp. 104491 (O'Grady, Arb.) (1999) (rejecting union's argument that the grievant's negative result on an independent blood alcohol test taken 69 minutes after the employer's test established the positive result on the employer's test was a false positive and concluding, based on the employer's evidence regarding the employer-sponsored test, that the grievant had to have alcohol in his system at the time of the employer's test).

In the present case, Captain Graham placed no weight on the self-directed tests Grievant took on May 15, 2018 and May 16, 2018 because those tests were not performed pursuant to the DPAC Program. Tr. 450. The Company had no way to know whether those tests were performed with proper protocols and safeguards. Additionally, the Company could not know whether those were the only tests taken by Grievant. As established by Grievant's own admission, Grievant purposefully hid the results of the June 20, 2018 positive EtG hair test from the Company and misrepresented to Captain Graham that the results Grievant presented were from the only tests he had taken. It is very possible and, if his conduct is any indication, highly

likely that Grievant took other self-directed tests that he has chosen not to disclose to the Company and this Board. For these reasons, the Board should decline to consider the results of the self-directed tests taken by Grievant on May 15, 2018 and May 16, 2018.

b. *Grievant's May 15, 2018 and May 16, 2018 self-directed tests do not refute the May 1, 2018 positive EtG and May 9, 2018 positive PEth tests.*

Even if the Board were to consider the self-directed tests taken by Grievant on May 15, 2018 and May 16, 2018, the results of those tests do not refute the May 1, 2018 positive EtG and May 9, 2018 positive PEth test results.

(1) The May 15, 2018 PEth Test

On May 15, 2018, Grievant gave a whole blood sample to be PEth tested. Tr. 698-99. Grievant alleges he asked for the sample to be tested at a cutoff of 8 ng/ml. Tr. 698-99. On May 30, 2018, LabCorp reported Grievant's blood sample was negative for PEth at a cutoff of 20 ng/ml. CX 20. Mr. Shults testified this May 15, 2018 negative PEth test was "inconsistent" with the May 9, 2018 PEth test. Tr. 873-74; UX 50 at p. 5. Mr. Shults reasoned, with an average half-life of 5-10 days, if the May 9 PEth test result was accurate, Grievant should have tested positive for PEth on the May 15, 2018 test. Tr. 873-74. Mr. Shults admitted, however, that he did not know what Grievant's half-life was. Tr. 899.

In contrast to Mr. Shults' testimony, Dr. Taylor testified it was entirely possible for Grievant to have tested positive for PEth on May 9, 2018 and negative six days later, on May 15, 2018. Tr. 1030-32. Studies show that the half-life of PEth ranges from 1 to 13 days. Tr. 1030-31, 1033; CX 27 at pp. 1, 7; CX 28 at p. 1636. Alcoholics or individuals who are heavy drinkers tend to have a shorter half-life than moderate or social drinkers. Tr. 306, 1032, 1076; CX 28 at p. 1636. Dr. Taylor testified it is "very possible" for an individual to have a one day half-life. Tr. 1031. Based on the test results from May 9, 2018 and the results from May 15, 2018, Dr.

Taylor calculated Grievant's half-life to be between one and two days. Tr. 1031, 1033. With a one to two day half-life, and assuming Grievant did not consume alcohol after his May 9, 2018 PEth test, by May 15, Grievant's PEth concentration would be below the 20 ng/ml cutoff used on the May 15, 2018 test. Tr. 1030-32; CX 31.

It is very telling that Grievant has never produced a litigation package for the May 15, 2018 PEth test. See generally Grievant's exhibits. Adding anonymous laboratory personnel to the list of individuals to whom Grievant unconvincingly attempts to shift blame, it is very convenient that Grievant alleges to have asked for his May 15, 2018 blood sample to be tested for PEth at a cutoff of 8 ng/ml, only to have the laboratory fail to test the sample at the 8 ng/ml cutoff. Tr. 698-700. As shown on Company Exhibit 31, it is very possible, on May 15, 2018, Grievant would have tested positive for PEth at a concentration lower than 20 ng/ml. Further, it is possible that the May 15 sample would have been positive for PEth with an 8 ng/ml cutoff. As demonstrated by Grievant's actions with respect to the June 20, 2018 positive EtG hair test, if the May 15, 2018 PEth test with an 8 ng/ml cutoff had been positive, Grievant would have hidden that result from the Company. This, of course, highlights the exact reason why arbitrators do not consider employee-directed tests: there are simply too many unknowns, and it is too easy for a grievant to manipulate the information presented.

(2) The May 15, 2018 Hair EtG Test

On May 15, 2018, after giving his whole blood sample, Grievant gave a chest hair sample to be tested for EtG. Tr. 700. On May 23, 2018, ExperTox reported Grievant's chest hair sample was negative for EtG at a cutoff of 2 pg/mg. CX 20. Mr. Shults testified that the May 15, 2018 negative hair EtG test also is inconsistent with the May 9, 2018 positive PEth test result. Tr. 873; UX 50, p. 5. In fact, Mr. Shults testified that it is "not possible" to have a positive PEth test on May 9 and a negative hair test on May 15. Tr. 873.

Dr. Taylor testified that it was not inconsistent for Grievant to have a positive PEth on May 9, 2018 and a negative EtG hair test six days later. Tr. 1034. An EtG hair test will not show ethanol exposure for approximately two weeks after alcohol consumption. Tr. 1035. This is because, when EtG is incorporated into the hair, the hair is growing beneath the skin; it takes approximately 2 weeks for the hair on an individual's head to penetrate the skin so that it can be cut and tested. Tr. 1035. Chest hair, which was the matrix Grievant provided on May 15, 2018, grows more slowly than hair on the head, meaning the lookback period would be even greater than two weeks for a chest hair sample. Tr. 700, 1035. According to Dr. Taylor:

> So this test … doesn't negate or rebut the [May 9, 2018] PEth test at all. There's not enough time for the hair to grow in order to be reflective of any drinking that might have occurred in that period that we discussed previously with the PEth test [the two weeks prior to the May 9th test].

Tr. 1035-36.

(3) The May 16, 2018 PEth Tests

On May 16, 2018, Grievant gave a DBS sample for another PEth test, and Grievant again asked for this sample to be run at a cutoff of 8 ng/ml. Tr. 703-04. The result of the PEth test was negative at a cutoff of 20 ng/ml and negative at a cutoff of 8 ng/ml. CX 20. Mr. Shults claimed that this negative result is inconsistent with the May 9 positive PEth test. Tr. 875; UX 50, p. 5.

Dr. Taylor testified that he would expect these results to be negative since the May 15, 2018 PEth test result was negative. Tr. 1036-37. Indeed, based on Grievant's one-to-two day half-life, the May 16, 2018 PEth tests should have been negative (assuming Grievant had not consumed alcohol since the May 9 PEth test). Tr. 1036-37; CX 31.

(4) The Board should conclude the results of Grievant's self-directed tests do not support the conclusion that Grievant was abstinent.

Dr. Taylor's testimony clearly establishes, even if the Board were to give weight to the

May 15, 2018 and May 16, 2018 self-directed tests taken by Grievant, these negative test results are not inconsistent with the May 1, 2018 positive EtG or May 9, 2018 positive PEth test results. As such, the Board should reject any argument that the May 15 and May 16 tests support the conclusion that Grievant was maintaining abstinence and did not relapse in late-April/early-May 2018.

Furthermore, and as discussed above, the May 1 and May 9 positive test results are confirmed by the June 20, 2018 positive hair EtG test. UX 75. By June 20, 2018, the hair that was exposed to ethanol when Grievant consumed alcohol in late-April/early-May 2018 would have had time to penetrate his skin. Tr. 1038. The 4.8 pg/mg result on the June 20, 2018 EtG test establishes that Grievant had not maintained abstinence. Tr. 1043. Taken together, the May 1, 2018 positive EtG test, the May 9, 2018 positive PEth test, and the June 20, 2018 positive hair EtG test establish conclusively that Grievant was not maintaining abstinence as required by his Contract A. Tr. 1077-78. For these reasons, the Board should conclude the Company has established Grievant failed to maintain abstinence as required by his Contract A and the Substance Abuse Policy.

5. <u>The reports authored by Dr. Skipper and Mr. Shults are replete with incorrect assertions and assumptions.</u>

Grievant will undoubtedly rely heavily on the reports authored by Dr. Skipper and Mr. Shults as evidence that his PEth test was a false positive and he did not relapse. The Board, however, should not be persuaded by these reports because they contain numerous incorrect assertions and show that Dr. Skipper and Mr. Shults relied upon subjective information rather than objective facts.

To prepare his report, Dr. Skipper interviewed Grievant over the telephone on two occasions for a total of approximately two hours. Tr. 510-11, 545. Dr. Skipper also spoke with

Todd for approximately 30 minutes. Tr. 546. During Dr. Skipper's conversation with Todd, Todd stated that she had been with Grievant around the time of the EtG test, and he was not consuming alcohol. UX 57, p. 8. As shown by Todd's flight records, Todd was away from home on trips for a significant portion of the end of April 2018. CX 37; CX 38. Moreover, Dr. Skipper admits that family members do not always recognize that a loved one has relapsed. Tr. 548. Dr. Skipper did not speak with anyone else who knew Grievant, including Grievant's son, or any of the doctors who had treated Grievant. Tr. 546-57.

In making his recommendation that Grievant could return to flight duty, Dr. Skipper testified he discounted the positive result of the May 9, 2018 PEth test because Grievant "had a lot of negative results up to that point." Tr. 534. This is an astounding admission. At the time of Grievant's May 9, 2018 PEth test, he had been sober and managing recovery for less than one year. CX 1. It is not at all surprising that an alcoholic, with less than one year of sobriety, could relapse. In fact, Mr. Shults testified that alcoholics relapse "more often than not." Tr. 906. Dr. Skipper's reliance on Grievant's self-serving claims of sobriety and Todd's misleading comments rather than on the objective, scientifically-valid PEth test result shows that his report is entirely unreliable.

Dr. Skipper also failed to give Grievant's June 20, 2018 positive EtG test proper weight. Dr. Skipper's comments regarding the June 20, 2018 hair test establish that he does not understand the appropriate cutoff levels for determining abstinence. In his report, Skipper wrote that Grievant's positive result of 4.8 pg/mg was "consistent with teetotalers." CX 57 at p. 2. Dr. Skipper admitted that he was unaware of any scientific studies supporting this statement. In fact, as discussed above, studies show that individuals who are abstinent from alcohol have EtG levels at or below 1 pg/mg. CX 33. Dr. Skipper further testified that the cutoff for the hair EtG test

should have been 20 pg/mg, a cutoff that is well above the 2 pg/mg cutoff recommended for abstinence monitoring. Tr. 592; CX 32; CX 33.

Dr. Skipper also wrote in the report that he believes false positives on PEth tests may be possible. UX 57 at p. 9. Dr. Skipper expounded on this in his testimony, alleging he has had concerns over PEth testing over the past 10 years. Tr. 521, 578. At best, this testimony is disingenuous. In 2013, Dr. Skipper was the lead author on a study that concluded a positive PEth test was only possible "following significant alcohol use." CX 18 at p. 1583. That study further found:

> The major finding of this pilot study is that the combination of urinary EtG/EtS testing and PEth testing seems effective in providing additional information on potential recent drinking. (i) PEth results in combination with previous low positive EtG/EtS results allow differentiating between innocent/extraneous exposure versus drinking. (ii) Negative PEth testing following low positive EtG/EtS results helps to further elucidate the findings and support the claim of the patient of recent alcohol abstinence. (iii) **Positive PEth testing following positive EtG/EtS results confirms recent drinking**.

CX 18 at p. 1585 (emphasis added). Similarly, in a presentation Dr. Skipper gave at a HIMS conference held in September 2019 for participants from the FAA, air carriers and unions, one month after Dr. Skipper wrote his report on behalf of Grievant, Dr. Skipper recommended using a combination of the highly sensitive EtG test and the highly specific PEth test to determine abstinence. Tr. 572; CX 19 at p. 3. With respect to PEth, Dr. Skipper informed the audience that PEth (1) is a direct biomarker of alcohol; (2) is not affected by age, gender, incidental exposure; (3) is not sensitive to a single drink; and (4) requires several drinks for several days for a positive result. Tr. 572-73; CX 19. Given Dr. Skipper's documented support for the validity of PEth tests and the usefulness of PEth tests to abstinence monitoring programs, this Board should not credit Dr. Skipper's unsupported claims that false positives may occur on PEth tests.

Mr. Shults' report suffers from similar flaws. Mr. Shults' report primarily attacks the

USDTL testing procedure and USDLT's use of DBS samples. Mr. Shults' conclusion is that a laboratory error must have occurred to cause Grievant's alleged false positive PEth result. CX 50 at p. 2, 8. Mr. Shults reached this conclusion despite the fact that he never reviewed USDTL's analytical data, quality assurance data, or SOP.[52] Tr. 834-35; CX 50 at p. 2, 8. By the time he testified at the arbitration hearing, however, Mr. Shults had backtracked from claiming laboratory error, admitting that he was not questioning the scientific validity of the USDTL testing procedure. Tr. 895. With respect to USDTL's analysis of Grievant's DBS sample, Mr. Shults admitted the chromatograms from Grievant's PEth tests "look good" and the quality control on the litigation package "looks good." Tr. 896. Mr. Shults could not go further in his testimony because he had still never reviewed USDTL's SOP or its validation data on DBS PEth testing. Tr. 894, 896. Accordingly, the Board should not credit any of the claims Mr. Shults makes in his report with regard to USDTL's DBS PEth testing procedure.

Mr. Shults also claims to have included all of the tests Grievant took before and after the May 9 PEth test on Table 1 of his report. UX 50 at p. 3-4. Yet, conspicuously missing from this table is Grievant's June 20, 2018 positive EtG hair test. Mr. Shults claimed the omission was his mistake, but the failure to include that test result on Table 1 inevitably leads to one of two conclusions: (1) Mr. Shults never saw the June 20, 2018 positive test result or (2) Mr. Shults purposefully left the June 20, 2018 result out of his analysis. Either conclusion casts grave doubt on the entirety of Mr. Shults' analysis and resulting opinion.

Furthermore, statements Mr. Shults made during the hearing and in his report call into question whether Mr. Shults is qualified to discuss EtG or PEth testing at all. For example, Mr. Shults alleged that USDTL is the only laboratory that performs PEth analysis on DBS, leading to

[52] As discussed above, Dr. Taylor reviewed all of this documentation when he inspected USDTL's laboratory, and Taylor found USDTL's DBS PEth testing validation data to be sound and the underlying data behind Grievant's May 9, 2018 test to establish a positive result.

the conclusion that Mr. Shults is not familiar with Dr. Javors' laboratory at the University of Texas. Tr. 901. On pages 5-6 of his report, Mr. Shults opines that dehydration can cause interference in immunoassay tests. UX 50. Mr. Shults also testified he had reviewed the litigation package for the PEth test "based upon the immunoassay." Tr. 894. But neither EtG nor PEth tests are immunoassay tests, a basic fact that an expert witness should know. Tr. 1051. Mr. Shults also compared DBS testing to the fraudulent Theranos test, a comparison Dr. Taylor testified was "beyond inappropriate." Tr. 1056. According to Dr. Taylor:

> In fact, this is beyond inappropriate for an expert to say something like that, particularly since he's never visited the [USDTL] laboratory and at this point hadn't even looked at the litigation package. That … is completely inappropriate and frankly, I'm shocked that [Mr. Shults] would even go down this road. It's … nonsense.

Tr. 1056.

Because Mr. Shults admits he sees no issues with USDTL's testing procedure or its analysis of Grievant's May 9, 2018 DBS sample, and because his report is filled with mistakes, the Board should not credit Mr. Shults' conclusion that Grievant's May 9 PEth test was a false positive.[53]

6. Grievant's receipt of a special issuance medical certificate post-termination is not relevant because an air carrier may impose more stringent safety standards than the minimum standards set forth by the FAA.

Grievant may argue, since his termination, he has received a special issuance medical certificate from the FAA, and the FAA did not require him to go through retreatment before issuing the medical certificate. This should have no bearing on the Board's determination regarding whether the Company had just cause for termination.

In 49 U.S.C. §44701(a)(5), Congress directed the FAA to create "regulations and

[53] Taylor also disagreed with Shults' conclusion, testifying that there is "no evidence" of a false positive. Tr. 1057.

minimum standards" that the FAA considers to be "necessary for safety in air commerce and national security." Based on 49 U.S.C. §44701(a)(5), federal courts have held an air carrier may impose more stringent safety standards than the minimum standards set forth by the FAA in the Federal Aviation Regulations ("FARs"). See, Tremblay v. United States, 261 F. Supp. 2d 730,732-733 (S.D. Tex. 2003) (the FARs set forth a uniform set of minimum standards but carriers maintain the right to impose higher standards than those set forth in the FARs); Delta Air Lines v. United States, 490 F. Supp. 907, 913 (N.D. Ga. 1980) (holding the FARs provide the minimum standards with which carriers must comply, but airlines may go beyond these minimum standards, and concluding "air lines should [not] be hampered in their attempts to perform their services 'with the highest possible degree of safety'"); Northwest Airlines v. FAA, 795 F.2d 195, 203 (D.C. Cir. 1986) (in response to carrier's suit claiming that the FAA had violated its statutory mandate to promote safety by reinstating a pilot's medical certificate, concluding that the carrier did not have standing to bring the suit, but noting that Northwest was "free to institute more demanding requirements than the FAA").

Arbitrators have also recognized that air carriers may implement stricter standards than the minimum standards imposed by the FAA, and this is particularly true in the realm of terminations for drug or alcohol offenses. As stated by Arbitrator Wittenberg:

> The Company, like all airlines, has the right to establish policies to attain the highest degree of safety in the public interest. In fulfilling this obligation, the Company is entitled to establish a policy that provides for strict alcohol standards, **including stricter standards than those promulgated by the FAA**.

Comair, Inc., K. Lumpkin Grievance, at 18 (Wittenberg, Arb.) (2004) (emphasis added). See also US Airways, Gr. No. 30-40-01-07-01, at 11 (Conway, Arb.) (2002) (rejecting the union's argument that the carrier could not terminate the grievant for one positive drug test and holding the carrier could subject its employees to more stringent requirements as long as such

requirements were not arbitrary or discriminatory).

In the present case, the Company has demonstrated the binding past practice between the parties under the Substance Abuse Policy requires all pilots who have relapsed to go to retreatment. See Section IV.A.1., supra. After his positive EtG and PEth tests, Grievant was given the opportunity to go to retreatment; he refused, leaving the Company with no other option but to terminate him because allowing him to operate Delta aircraft after relapsing constituted an untenable safety risk. The FAA's decision to reinstate Grievant's special issuance medical certificate does not change or undermine the Company's determination that it cannot trust Grievant to perform his pilot duties with the highest level of safety.[54] For these reasons, the Board should reject any argument that termination is too severe based on the FAA's post-termination actions.

7. Grievant's attempt to cast doubt on the May 9, 2018 positive PEth test result through witness testimony failed.

a. *Dr. Tordella's testimony shows that he does not understand how PEth and EtG testing works.*

Grievant presented the testimony of three witnesses to describe alleged false positive PEth tests. The first of these witness was Dr. Joseph Tordella, who testified he was the HIMS AME for a pilot named Matt Dacier. Tr. 370. On May 18, 2020, after approximately five years of monitoring, Dacier tested positive on a PEth test at a concentration of 24 ng/ml. Tr. 372; UX 37. Dr. Tordella testified he was "shocked" by this result because he did not feel it was possible

[54] Furthermore, as discussed above in Section IV.C.2., Grievant made numerous misstatements and omissions to the FAA, bringing into question whether the FAA would have issued his special issuance medical certificate if Grievant had been completely truthful. For example, Grievant lied to the FAA regarding why he wanted his medical certificate reinstated. Grievant claimed he wanted his medical certificate so he could fly privately, flight instruct, and volunteer with the EAA. CX 21; CX 23. Grievant expressly stated that he had no interest in flying for a Part 121 carrier, and he had accepted that his career with Delta was over. CX 21. Grievant also failed to provide a copy of the June 20, 2018 positive hair EtG test (UX 75) to Dr. Faulkner so that Dr. Faulkner could submit it to the FAA. Tr. 922-23. Grievant never provided a copy of the June 20, 2018 test to Dr. Lynn. Tr. 749. The FAA clearly had no idea the June 20, 2018 test existed because it is not discussed in the FAA's December 31, 2018 memorandum. UX 35.

for Dacier to relapse at that point in his treatment. Tr. 373. To resolve his questions, Dr. Tordella decided to send Dacier to have an EtG hair test "as quickly as possible" to see if that test would confirm the positive PEth result.[55] Tr. 374. On May 28, 2020, 10 days after Dacier gave his PEth test sample, Dacier provided a hair sample for an EtG test. UX 38. The EtG test result was negative at a cutoff of 20 pg/mg. UX 38.

Dr. Taylor testified there are numerous problems with the manner in which Dr. Tordella handled the situation. First, Dr. Tordella ordered the hair test to be performed in too close a proximity to the PEth test. Tr. 1070. As discussed above, it takes approximately two weeks for hair that is exposed to ethanol in the hair follicle to penetrate an individual's skin such that EtG can be detected in a hair sample. Tr. 1035. Dacier's hair EtG test was performed just 10 days after he gave his PEth test sample, and that period would not be sufficient for a detection of EtG in his hair sample. Tr. 1070. Second, the 20 pg/mg cutoff used for the hair test is very high. Tr. 1070. When monitoring abstinence, the appropriate cutoff to use is 2 pg/mg. Tr. 1043, 1046; CX 33. Crucially, Dr. Tordella admitted he was not familiar with the appropriate cutoff for an EtG test on hair for the purposes of verifying abstinence. Tr. 382.

Dr. Tordella also directed Dacier to take another PEth test, and Dacier gave a sample for the second PEth test on May 28, 2020. UX 84. This result was negative at a cutoff of 20 ng/ml; according to Dr. Tordella, Jones confirmed to Dr. Tordella that the sample was negative at a concentration of 0 ng/ml. Dr. Tordella testified he did not understand how Dacier's PEth test on May 18, 2020 could be positive at a concentration of 24 ng/ml but the subsequent PEth test on May 28, 2020 be negative at 0 ng/ml. Tr. 375. Dr. Tordella's testimony demonstrates he does not understand the half-life of PEth. Dr. Tordella testified he expected, after just over a week

[55] Dr. Tordella also spoke with Dr. Javors at the University of Texas, and Dr. Javors informed Dr. Tordella that PEth is "infallible." Tr. 378, 383-84.

between the tests, for the result to have decreased by approximately half. Tr. 375. As discussed above, however, the half-life of PEth varies widely from individual to individual. Tr. 35, 1033; CX 28 at p. 1636. Studies show that the half-life of PEth ranges from 1 to 13 days, and alcoholics tend to have a shorter half-life than moderate or social drinkers. Tr. 306, 1032-33, 1076; CX 27 at pp. 1, 7; CX 28 at p. 1636. Thus, it is entirely possible for an individual with substance abuse dependency to test positive at 28 ng/ml on May 18 and, 10 days later, test negative.

Ultimately, Dr. Tordella's conclusion that Dacier's May 18 PEth test did not necessarily demonstrate a relapse is supported only by his lack of understanding of PEth and EtG testing. It is clear from Dr. Tordella's testimony that he believed Dacier to be at a point in his recovery at which he would not relapse. Dr. Tordella allowed his personal feelings on Dacier's recovery to cloud his assessment of the objective evidence established by the positive PEth test. Notably, Dr. Tordella admitted there was another situation in which a different pilot under his care had tested positive; Dr. Tordella believed the test to be a false positive; and the pilot later admitted to relapsing. Tr. 384. Accordingly, the Board should not rely on Dr. Tordella's misinformed and subjective testimony when determining whether the Company had just cause to terminate Grievant.

b. *Stepanian's testimony was inaccurate and misleading.*

Grievant also presented the testimony of Matthew Stepanian, who testified he was required to take PEth tests as part of a child custody dispute. Stepanian claimed, during a hearing on September 7, 2018, the judge in his child custody dispute declared, "I have lost faith in this PEth test." Tr. 362. Counsel for Grievant then repeated the judge's alleged declaration. Tr. 363.

In actuality, the court's order from the September 7, 2018 hearing provides that Stepanian

was required to continue PEth testing, and the court ordered that Stepanian would have his visitation with his children suspended if he tested positive on a PEth test. CX 40; CX 41. Clearly, if the judge had actually "lost faith" in PEth testing, the judge would not have ordered Stepanian to continue to be subject to PEth testing. Additionally, in the final negotiated consent order between Stepanian and his ex-wife, Stepanian agreed to continue to be subject to PEth testing at his ex-wife's discretion. CX 40; CX 41. Since the September 7, 2018 hearing, Stepanian has taken five DBS PEth tests, all of which were analyzed by USDTL.[56] CX 42.

8. Grievant was not treated differently than any other pilot who has relapsed.

In an effort to discredit the past practice of requiring retreatment after relapse, Grievant entered evidence regarding First Officer Michael Perez. Grievant bears the burden of establishing that Perez is a comparator to Grievant, but he has failed to do so because Perez's situation is in no way similar to Grievant's. Jax Transit Management Corp., 129 Lab. Arb. Rep. (BNA) 110, 119 (Smith, Arb.) (2011) ("Disparate treatment is an affirmative defense on which the Union bears the burden of proof. … It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.") (internal citations omitted).

Perez entered treatment at the TRC in 2018 after he was arrested for DUI. Tr. 390-91. He graduated from the TRC on December 18, 2015, and he signed his Contract A on the same

[56] Grievant also presented the testimony of Amy McDougal, who claimed she had received false positives on PEth tests administered during a child custody dispute. The Board should not place any weight on McDougal's testimony. Like Stepanian, McDougal presented no court records that supported her claims, and, when the Company attempted to obtain information about her court proceeding, counsel for Grievant objected. Furthermore, also like Stepanian, McDougal presented no custody forms, litigation packages or analytical data for either of the tests she claimed were false positives or for the tests she claimed were true negatives. As such, the Board has no way to verify if the test results McDougal presented are accurate. Perhaps most telling, McDougal admitted that the psychologist who was evaluating her as part of the child custody dispute believed that McDougal was not maintaining abstinence. Tr. 638-39.

day. Tr. 414; CX 35. Perez then received his special issuance medical certificate on June 22, 2016. Tr. 419-20; CX 36.

On February 16, 2016, after Perez had entered the DPAC Program but before he had regained his medical certificate or returned to the line, he was directed to take an EtG test. UX 35. Similar to Grievant, the results of Perez's EtG test were positive at a concentration of 138 ng/ml, but the EtS test was negative. UX 35. Perez spoke with Captain Miller after learning of the test result, and Captain Miller discussed with Perez that he would need to take a PEth test. Tr. 397-98, 948. On February 23, 2016, Perez gave a DBS sample for a PEth test. UX 33 at p. 1113. On February 25, 2016, USDTL reported that Perez's DBS sample was negative for PEth at a cutoff of 20 ng/ml. UX 33 at p. 1113. Captain Miller subsequently contacted Perez and informed him that the PEth test was negative. Tr. 399.

During the arbitration hearing, counsel for Grievant attempted to muddy the facts and timeline by asking Perez about a PEth test that occurred on March 16, 2016. Tr. 400-03. The March 16, 2016 PEth test was not the follow-up test to the February 16, 2016 spilt EtG/EtG test. Tr. 400. As noted above, the follow-up test occurred on February 25, 2016 and was negative. UX 33 at p. 1113. The March 16, 2016 PEth test given to Perez was a follow-up to a March 3, 2016 Quest Diagnostics EtG test that resulted in a split sample and was not reported until March 15, 2016. Tr. 947-48; CX 29. To resolve the split sample test, Perez's HIMS AME, Dr. Charles Harper, Sr., ordered the PEth test at a cutoff below the standard 20 ng/ml.[57] Tr. 405-06; UX 33 at p. 1110.

Importantly, Perez's March 16, 2016 PEth test does not constitute a positive test under

[57] As Dr. Harper, Sr. has passed away we cannot say for certain why he had the confirmatory PEth test run below the normal cut off of 20 ng/ml, but it may have been because Perez had produced two split samples in the three months since graduating from TRC.

the DPAC Program. The March 16, 2016 test result was never disclosed to Captain Miller, and he testified he had no idea why the test would have been run with a cutoff of 8 ng/ml. Tr. 949-50, 963-64. Moreover, because Perez's PEth concentration on the March 16, 2016 test was below 20 ng/ml, the test would have been considered to be a negative under the DPAC Program. Tr. 950.

Further, because the March 16, 2016 test occurred before Perez had received his special issuance medical certificate, it would not count as a relapse under the Substance Abuse Policy. The Substance Abuse Policy defines a relapse as, "Any prohibited use of alcohol or drugs subsequent to receiving a Special Issuance Medical Certificate related to a diagnosis of alcohol or drug dependence." CX 4 at §IV.T. (emphasis added). Perez received his special issuance medical certificate on June 22, 2016, three months after the March 16, 2016 test.[58] Tr. 419-20; CX 36. All of the tests Perez has taken since June 22, 2016 have been negative. Tr. 420. Thus, the Board should disregard any argument that Perez was treated in a more lenient or inconsistent manner from Grievant.

9. Grievant was not denied relevant information prior to the arbitration.

Grievant may argue that USDTL refused to provide him with copies of USDTL's SOP and validation studies. The Board should reject any such argument. In response to the subpoena issued by this Board, Todd Duffield, counsel for USDTL, informed Grievant's counsel that he or his designee could inspect USDTL's SOP and validation studies at USDTL's facility in Des Plaines, Illinois. Tr. 152, 305; UX 13; UX 14. Dr. Jones testified it is standard practice for

[58] Similarly, any tests Perez took while he was in treatment at the TRC and before he signed his Contract A would not be relevant to the DPAC Program because those tests were administered under the auspices of the TRC program. Tr. 962-63. For example, according to Union Exhibit 33, it appears that Perez also produced split samples while at TRC. It is not apparent how TRC chose to handle those tests. What is apparent, however, is that under the DPAC program split samples are automatically followed by a PEth test. Tr. 246, 249, 265-66. Grievant could not produce even one example of a pilot who got a split sample while being tested in the DPAC program who did not also get a follow up PEth test.

laboratories not to reproduce their proprietary documents, like the SOP and validation studies. Tr. 307. In 25 years of business, USDTL has never been required by a court or arbitrator to provide copies of its proprietary documents. UX 14. Neither Grievant's counsel nor any of Grievant's experts ever bothered to come to USDTL's facility to inspect USDTL's SOP or validation studies. Tr. 305. Thus, the Board should conclude that Grievant was given access to USDTL's SOP and validation studies, but counsel for Grievant declined to take the necessary steps to review that information.

V. CONCLUSION

For the foregoing reasons, the Company asks this Board to conclude the Company had just cause to terminate Grievant when he failed to maintain abstinence as required by his Contract A and then refused to undergo retreatment. The Company asks the Board to deny the grievance in its entirety.

Respectfully submitted this 12th day of February, 2021.

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