THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO.: 3:15-cv-00111-RJC-DCK

EDDIE BOLLMEIER, BILL TRACY and SIMON PARROTT,	)
Plaintiffs	)
vs.	)
GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, STEVE SMYSER, ROBERT FREAR, COURTNEY BORMAN, And Jane Doe Berman, RONALD NELSON, PAUL DIORIO, PAUL MUSIC, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, JAY MIKEY and STEPHEN NATHAN,	)
Defendants, sued in their individual capacity.	)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE THE COURT'S ORDER DATED MARCH 5, 2015, OR IN THE ALTERNATIVE, TO DISMISS THE VERIFIED COMPLAINT ON BEHALF OF DEFENDANTS GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, and STEPHEN NATHAN

Pursuant to Rules 12(b)(1), 12(b)(6) and Rule 60 of the Federal Rules of Civil Procedure and Local Rule 7.1, defendants GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, and STEPHEN NATHAN (hereinafter the "defendants"), by and through their attorneys, submit this Memorandum of Law in Support of their Motion to Vacate the Order Dated March 5, 2015, or, in the Alternative, Dismiss the Verified Complaint.[1]

[1]As of this date, service has not been made, and no affidavits of service are on the court docket, as to defendants Steve Smyser, Robert Frear, Courtney Borman, Jane Doe Borman, Ronald Nelson, Paul DiOrio, Paul Music, and Jay Milkey.

PRELIMINARY STATEMENT

This action represents the fourth time a court has been asked by a numerical minority of the membership of the US Airline Pilots Association ("USAPA") (hereafter, the "West Pilots"), or those acting in concert with them, to rule on USAPA's right to decline to enforce and support a seniority list integration regime, known as the "Nicolau Award", that the majority of its members have rejected time and again, and that courts have ruled USAPA has no duty to implement. The first action, a breach of the duty of fair representation ("DFR") claim brought in 2008 against USAPA was dismissed on grounds of ripeness by the Ninth Circuit. *Addington v. USAPA*, 606 F.3d 1174 (9th Cir. 2010). The second action, a declaratory judgment action brought by US Airways and a DFR cross-claim by West Pilots, resulted in an order holding that USAPA would not breach the Railway Labor Act ("RLA") and its DFR by entering into an agreement with US Airways that did not incorporate the Nicolau Award and that US Airways was not prohibited from accepting or implementing a non-Nicolau seniority list in a collective bargaining agreement. *US Airways v. USAPA*, 10-cv-01570, Doc. 193, Order, at 7-8.[2] The third attempt, another DFR claim brought by West Pilots in 2013, resulted in an order that confirmed the right of USAPA to enter into an agreement with US Airways (and other parties) that did not require US Airways to adopt the Nicolau Award. *Addington v. USAPA* ("*Addington II*"), 13-cv-00471, Doc. 298, Order, at 9.[3]

Plaintiffs now bring another lawsuit, disingenuously maintained under the Labor Management Reporting and Disclosure Act ("LMRDA") and against individual defendants in

[2] A "[c]ourt may take judicial notice of court records when considering a Rule 12(b)(6) motion without converting the motion to one for summary judgment." *Pol v. Federal Reserve Bank of New York*, 2009 WL 4017164, at *2 (W.D.N.C. Nov. 18, 2009).

[3] On appeal to the Ninth Circuit. Argument was held on April 14, 2015.

their individual capacities. Like the three previous actions, this action must fail. Not only does this action allege claims previously rejected by the courts, it fails as a matter of law on critical elements of an LMRDA claim, including that the challenged acts of the defendants were proper, valid and enforceable, consistent with the explicit language of USAPA's Constitution and Bylaws, clearly made for the benefit of USAPA and a majority of its membership.

STATEMENT OF RELEVANT FACTS[4]

In May 2005, US Airways and America West Airlines merged to become a single airline known as US Airways. Complaint, ¶11. The pilots of both airlines were represented for collective bargaining purposes by the Air Line Pilots Association ("ALPA"). *Id.* At the time of the merger there were approximately 5,100 pilots employed by US Airways (known as "East pilots") and 1,900 pilots employed by America West ("West Pilots"). *Id.* The East and West pilots could not reach agreement on the integration of the two seniority lists and, in accordance with the applicable ALPA merger policy, the issue went to arbitration resulting in an award known as the "Nicolau Award". *Id.*, at ¶12.

There was widespread dissatisfaction among the East Pilots with the Nicolau Award. *Id.*, at ¶¶14-15. In 2007, as a result of dissatisfaction with the Nicolau Award and ALPA, certain East Pilots formed USAPA. *Id.*, at ¶14. A representational election under the auspices of the National Mediation Board ("NMB") was held and USAPA prevailed. In 2008, USAPA was certified as the exclusive bargaining representative of the pilots of US Airways. *Id.*, ¶15. Following its certification by the NMB, USAPA proposed a seniority list to US Airways based upon date of hire principles, which led to the litigation set out above. No merger of the East and West seniority lists was ever effectuated.

[4] The facts as alleged in the complaint are assumed true only for purposes of the Rule 12(b)(6) motion.

The American Airlines/US Airways Merger and the MOU

In early 2013, US Airways, American, USAPA, and the APA entered into an agreement known as the MOU. *Id.*, ¶19; Doc. 1-3, MOU, annexed as Ex. 2 to the Complaint.

The MOU sets forth the pay, benefits, and working conditions for US Airways pilots in the event of a merger, as well as procedures for reaching a final collective bargaining agreement that would apply to the pilots of the merged carrier, including procedures for the integration of the seniority lists of the US Airways and American pilots.[5] Doc. 1-3. Other provisions of the MOU relevant here include: that the carrier will reimburse "the merger representatives involved in the seniority integration process in an aggregate not to exceed $4 million", to be paid when the merger representatives present a consolidated US Airways and American pilot seniority list to the carriers. Doc. 1-3, ¶7. The MOU further addresses reimbursement of merger related expenses in ¶10(f), providing for a "Protocol Agreement" that would set forth the process for accomplishing the seniority list integration, "includ[ing] a methodology for allocating the reimbursement provided for in Paragraph 7" of the MOU. Doc. 1-3, at p. 8.

The Seniority Integration Protocol Agreement

By agreement dated September 4, 2014, US Airways, American Airlines, USAPA, and the APA entered into the Seniority Integration Protocol Agreement ("Protocol Agreement"). Compl., ¶22; Doc. 1-4. The Protocol Agreement provides, *inter alia*, that if and when the NMB certifies the APA as the representative of the combined pilot class, the merger committees established by the APA and USAPA would continue in existence for the seniority list integration ("SLI") process (Doc. 1-3, ¶8(a)), and the West Pilots' request for separate merger committee designation in the SLI process would be referred to a Preliminary Arbitration Board ("PAB")

[5]The MOU provides that the integration process will be consistent with the McCaskill-Bond Amendment to the Federal Aviation Act, 45 U.S.C. § 151, *et seq.* Doc. 1-3, MOU, ¶10(a).

before which they could appear and state their case for merger representative status (Doc. 1-3, ¶8(b)). On January 9, 2015, the PAB issued its award finding that "APA has the discretion to designate a West Pilots Merger Committee to participate in the SLI process, and that it should do so." Compl., ¶23. On January 12, 2015, the APA designated a West Merger Committee as a separate merger representative for purposes of the substantive SLI process. *Id.*, ¶24.

USAPA Defers Dissolution and Distribution

On September 16, 2014, the NMB certified the APA as the bargaining representative of the pilots of New American Airways[6], thereby extinguishing USAPA's certification as the bargaining representative of the pilots of US Airways. *Id.*, ¶17. The USAPA Constitution and Bylaws provide for specific dissolution procedures in the event of its decertification. Doc. 1-2, USAPA Constitution and Bylaws, Article 1, Section 3, annexed as Ex. 1 to the Complaint. The dissolution language takes into account the fact that airline industry mergers often result in drawn out and contentious proceedings to integrate the pre-merger pilot seniority lists and also that there could be other matters in which the need for "collective legal representation" on behalf of the US Airways pilots formerly represented by USAPA could persist following its decertification. *Id.*

As such, while the Constitution and Bylaws provide that decertification by the NMB is a sufficient condition to trigger dissolution, it also provides for deferral of the commencement date of dissolution upon the determination by a majority of the National Officers, that "existing circumstances present, or may present in the future, the need for collective legal action on behalf of the pilot group, including but not limited to, representation in seniority integration proceedings." *Id.* If such a determination is made by the National Officers, the commencement

[6] The new airline from the US Airways/American merger.

date of dissolution is deferred until, "in the judgment of a majority of the National Officers, the need for collective legal representation no longer exists." *Id.*, at Article I, Section 3(C). The USAPA Constitution and Bylaws places sole responsibility for the determination to defer the commencement date of dissolution with the National Officers (*id.*, at Article 1, Section 3), the President, Vice President, Secretary-Treasurer, and Executive Vice President. *Id.*, at Article III, Section 1.

Similarly, these same provisions of the USAPA Constitution and Bylaws give the National Officers sole authority with respect to the timing of the distribution of the assets of the Association upon dissolution. As with the commencement date of dissolution, decertification is a sufficient basis for distribution of assets to members of the association *(id.*, Article I, Section 1(A)), but also, like dissolution, distribution is subject to the deferral provisions of Section 3(C) of Article 1, which provides, "[i]f, in the judgment of a majority of the National Officers, available funds exceed the expected costs of collective legal representation, the excess monies may be distributed in accordance with paragraph A of this section."

On September 16, 2014, a majority of the USAPA National Officers determined to defer the commencement date of the dissolution of USAPA, finding that existing circumstances present, or may present in the future, the need for collective legal action on behalf of the pilot group, including seniority integration proceedings. Compl., ¶31. The National Officers issued a statement to its members setting forth the reasons for their actions in deferring dissolution. National Officers Statement[7], annexed as Ex. "A" to the Declaration of Stephen Bradford in

[7] This statement was annexed as Ex. C to the complaint in *USAPA v. Velez*, 14-cv-00577-RJC-DCK, Doc. 1-1, and is referred to in paragraph 32 of the complaint herein, and therefore is properly before the Court on this motion. *See Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011) (When ruling on a Rule 12(b)(6) motion to dismiss, a court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (internal citations omitted)

Support of the Motion to Vacate the March 5, 2015 Order and/or Dismiss the Verified Complaint ("Bradford Decl."). In addition and at the same time, the National Officers determined that it would be imprudent to make a distribution of USAPA's assets. Compl., ¶31. These actions by the National Officers were preceded by a resolution adopted by the USAPA Board of Pilot Representatives ("BPR") urging the National Officers to defer dissolution and distribution. *Id.*, ¶29; Ex. "C" to Bradford Decl.

There were various matters that informed the determination of the National Officers that "existing circumstances present, or may present in the future, the need for collective legal action on behalf of the pilot group, including but not limited to, representation in seniority integration proceedings," including the SLI process referred to above, litigation involving USAPA, both as plaintiff and defendant (including significantly, *Addington II*, which is awaiting a decision by the Ninth Circuit, and which, if reversed, may require USAPA to defend a DFR claim and which also includes a multi-million dollar attorneys' fee claim, and a lawsuit by former USAPA president Michael Cleary demanding an unspecified amount of consequential, liquidated, and punitive damages, exclusive of attorneys' fees, as and for past due compensation). Ex. "A" to Bradford Decl. Taking into account the factors leading to the decision to defer dissolution, the National Officers determined it was not possible to determine with certainly how much of USAPA's assets would be required in relation to the SLI proceedings and the other matters that impelled deferral of dissolution. *Id.*; Compl., ¶32. Accordingly, the National Officers declined to make any distribution of USAPA assets. *Id.*

USAPA v. Velez

Even as the National Officers exercised their constitutional authority to defer dissolution and distribution, correspondence had been sent for immediate dissolution and distribution of the

funds in USAPA's treasury. Compl., ¶30. Accordingly, in the interest of orderly adjudication of all issues arising out of their decision to defer dissolution and distribution of assets in one forum and one proceeding, and in light of past litigation, immediately upon taking the actions to defer dissolution and distribution, USAPA commenced a Declaratory Judgment action in the Superior Court of North Carolina, Mecklenburg County, seeking declarations as to the validity of the actions taken by the National Officers of USAPA on September 16, 2014, including the decision to defer the commencement date of dissolution and determination not to distribute USAPA's assets, among related decisions. *USAPA v. Velez*, 14-cv-00577-RJC-DCK, Doc. 1-1. On October 16, 2014, defendants Velez and Leonidas removed that action to the United States District Court for the Western District of North Carolina. *Id.*, Doc. 1, Notice of Removal.

Various motions were filed, and on April 2, 2015, Magistrate Judge David C. Keesler issued a Memorandum and Recommendation and Order denying USAPA's motion to remand without prejudice, granting USAPA jurisdictional discovery, granting with modification USAPA leave to amend the complaint[8], and denying without prejudice defendants Velez's and Leonidas' motions to dismiss. *Id.*, Doc. 39.

[8] Subsequent to the September 16, 2014, filing of the complaint, West Pilots' counsel sent additional correspondence making various demands, including that USAPA not use West Pilots' dues to fund or support the East Pilots in SLI proceedings; immediate distribution of USAPA's assets; payment of West Pilots' expenses related to the SLI proceedings; and an accounting of the money that was paid into the USAPA treasury by or on behalf of West Pilots by virtue of a 0.5% dues increase and distribution of such funds to West Pilots. Docs. 1-7, 1-8, 1-9, 1-10, and 1-11, Ex. 6-10 to the Complaint, respectively.

ARGUMENT

POINT I

LEGAL STANDARDS

A. Rule 12(b)(1) Motion to Dismiss.

Plaintiff has the burden under Rule 12(b)(1) of the Federal Rules of Civil Procedure of proving subject matter jurisdiction. *Richmond, Fredericksburg & Potomac R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991). "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.*, at 768. A moving party under Rule 12(b)(1) can seek dismissal by arguing the nonmoving party has failed "to allege facts upon which subject matter jurisdiction can be based …" or by contending "that the jurisdictional allegations of the complaint [are] not true." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Where a defendant attacks the veracity of the jurisdictional allegations in the complaint, the court "may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts." *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009). In such a case, "the presumption of truthfulness normally accorded a complaint's allegations does not apply, and the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction." *Id.*, at 192.

B. Rule 12(b)(6) Motion to Dismiss.

A complaint is dismissible under Rule 12(b)(6) where the allegations therein fail to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (internal quotations omitted); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974

(2007). In order to meet the above facial plausibility standard, the complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949. However, when considering the plausibility of a plaintiff's claim(s), a court is not required to "accept the legal conclusions drawn from the facts," nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

POINT II

THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

Section 501(b) is intended to protect union officials from vexatious and harassing suits, and provides:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or[9] recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte.

29 U.S.C. § 501(b); *see also Phillips v. Osborne*, 403 F.2d 826, 830 (9th Cir. 1968) (Good cause provision in section 501 is a condition designed to protect unions and their officers from harassing, vexatious litigation.).

A plaintiff must satisfy three prerequisites before maintaining a section 501 suit: (1) unsuccessfully demand that the union or its governing board or officers bring the action; (2)

[9] The "or" has been consistently construed to mean "to." *Reed v. United Transp. Union*, 633 F.Supp. 1516, 1527 (W.D.N.C. 1986) (citing *Dinko v. Wall*, 531 F.2d 68, 72 n.4 (2d Cir. 1976)).

secure court permission to bring the action by filing a verified application with the court showing good cause; and (3) seek relief on behalf of the union rather than on his own behalf. *Reed v. United Transp. Union*, 633 F.Supp. 1516, 1527 (W.D.N.C. 1986), *reversed on other grounds*, 828 F.2d 1066 (4th Cir. 1987). "Because § 501(b) extends the jurisdiction of federal courts, its requirements are to be narrowly construed 'so as not to reach beyond the limits intended by Congress.'" *Id.*, quoting *Phillips*, 403 F.2d at 828.

Dismissal of the complaint as a matter of law for lack of subject matter jurisdiction is required as plaintiffs failed to satisfy these jurisdictional prerequisites for a section 501 suit.

A. Plaintiffs failed to make a demand to USAPA that it initiate legal proceedings.

A condition precedent to a section 501 suit is that plaintiff make a demand to the union to institute legal proceedings. *Behrmann v. Farrell*, 2006 WL 2771870, at *6 (S.D.N.Y. Sept. 26, 2000); *Local 108, Laborers' International Union of North America, AFL-CIO v. Mongello*, 2000 WL 744529, at *2 (E.D.N.Y. May 19, 2000); *Yager v. Carey*, 910 F.Supp. 704, 727 (D.D.C. 1995); *O'Connor v. Freyman*, 1985 WL 121, at *2 (D.D.C. May 31, 1985); *Fabian v. Freight Drivers and Helpers Local No. 557*, 448 F.Supp. 835, 839-40 (D.Md. 1978); *Penuelas v. Moreno*, 198 F.Supp. 441, 443-44 (S.D. Cal. 1961). The demand provision of section 501(b) "is mandatory and . . . its requirements cannot be met by anything short of an actual request." *Coleman v. Bhd. of Ry. & S.S. Clerks, Freight Handlers, Exp. & Station Emp.*, 340 F.2d 206, 208 (2d Cir. 1965). Absent such a demand, a plaintiff cannot commence a section 501 action.

Plaintiffs allege they made "demands" to defendants on September 12, 2014, December 4, 2014, December 23, 2014, December 31, 2014, January 9, 2015, and February 13, 2015. Compl., ¶¶30, 35, 36. These "demands" fail to satisfy the section 501(b) demand requirement.

First, section 501(b) requires the "demand" to have been made by plaintiffs. The only demands alleged in the complaint made by plaintiffs were the emails sent to defendants on February 13, 2015. *Id.*, ¶36; Doc. 12. The other "demands" were either made by Roger Velez or Marty Harper, plaintiffs' counsel, and as neither are named plaintiffs, those "demands" do not satisfy the demand requirement, and therefore must be disregarded.[10] Compl., ¶¶30, 32, 35; Docs. 1-6, 1-7, 1-8, 1-9, 1-10, and 1-11.

Second, plaintiffs never made a demand to USAPA, its governing board, or its officers to initiate a suit against defendants. *See* Doc. 1-12. The emails, all identical, make four "demands" to the National Officers and BPR members : "(1) provide an accounting of USAPA's treasury as of September 16, 2014; (2) stop USAPA from spending any additional money on seniority integration; (3) return to USAPA's treasury all money spent on seniority integration and any matters adverse to West Pilots since September 16, 2014; (4) disburse dues funds in USAPA's treasury back to all members in accordance with Section 3.C of USAPA's constitution." Doc. 1-12. No demand was made for USAPA to initiate suit against defendants, and they cannot be so construed. While section 501 "is designed to protect union members, who may be of limited education and are rarely represented by counsel when sending letters to their union", this is hardly the case here where plaintiffs have long had the benefit of counsel. *Dinko v. Wall*, 531 F.2d 68, 73 (2d Cir. 1976). Plaintiffs and their counsel are chargeable with knowledge of the section 501 prerequisites. Their failure to demand legal action by USAPA is fatal to their claim.

[10] Exhibits 6 through 10 are letters and emails from Marty Harper to Brian O'Dwyer, general counsel to USAPA. See Doc. 1, Ex. 6-10. These correspondence are not "demands" because section 501(b) requires a demand be made to "the labor organization or its governing board or officers". 29 U.S.C. § 501(b). They are also not demands because 501(b) requires that the demand be made by a "member of the labor organization", and Marty Harper is not a member of USAPA.

B. Plaintiffs failed to satisfy the good cause requirement.

Section 501(b) provides that "[n]o such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown." 29 U.S.C. § 501(b). The statute does not prescribe any procedure for determining good cause. While the statute allows for an *ex parte* determination, it does not require it. "There is support for the view that before finding good cause and allowing the action to proceed, the better course is to give union officials a chance to demonstrate that good cause is lacking." *Dinko*, 531 F.2d at 73 (citing *Penuelas*, 198 F.Supp. at 449). Union officials may challenge the good cause finding after an *ex parte* determination, and move to vacate the order. *Id.,* at 74 (Approving this practice "as a practical means of protecting union officials against vexatious and harassing suits, the obvious policy behind this portion of section 501(b).").

While the policy considerations behind the 501(b) requirements are clear, there is no agreement amongst the courts as to what constitutes "good cause." For the Ninth Circuit and Third Circuit, "[t]he absence of good cause might be demonstrated through undisputed affidavits showing that the plaintiffs had failed to comply with some condition precedent to suit or that the action was barred by the statute of limitations, or by the application of the principles of res judicata or collateral estoppel." *Loretangeli v. Critelli*, 853 F.2d 186, 190 (3d Cir. 1988) (citing *Horner v. Ferron*, 362 F.2d 224, 229 (9th Cir. 1966)). The Eleventh Circuit and District of Columbia Circuit have adopted the *Horner* standard. *Erkins v. Bryan*, 663 F.2d 1048, 1051 (11th Cir. 1981); *George v. Local Union 639*, 98 F.3d 1419, 1422 (D.C.Cir. 1996).

The Second Circuit, in order to satisfy section 501's competing policy concerns, requires plaintiff to show "a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence." *Dinko*, 531 F.2d at 75.

District courts in the Seventh Circuit have adopted the Second Circuit likelihood of success requirement. *Slavich v. Local Union No. 551, United Automobile Aerospace and Agricultural Implement Workers of America, UAW*, 1986 WL 6957, at *4 n5 (N.D.Ill. June 13, 1986).

For the Fifth Circuit:

> In order to establish good cause . . . a plaintiff must: First, allege misconduct that directly implicates the fiduciary duties enumerated in § 501(a); second, show that the remedies sought would realistically benefit the union and/or the membership of the union; third, plausibly allege facts supporting a conclusion that the breaches of § 501 were presented to the union; fourth, make a showing that the union's refusal to act was objectively reasonable . . .; and, finally, convince the court that some evidence exists, disputed or not, that will support the claims of a breach of fiduciary duties under § 501(a).

Hoffman v. Kramer, 362 F.3d 308, 323 (5th Cir. 2004).

The Fourth Circuit has not specifically established a good cause standard. Whichever standard is applied, courts agree that they can look beyond the complaint in determining whether good cause exists and in deciding whether an order granting leave to sue should be vacated. *See Horner*, 362 F.2d at 229; *Behrmann*, 2006 WL 2771870, at *2.

Plaintiffs fail to establish good cause under any of the standards, and the order granting them leave to file this action should be vacated, and the complaint dismissed.

1. Plaintiffs failed to comply with the statutory prerequisites.

i. Demand Requirement:

As discussed above, plaintiffs failed to satisfy the section 501(b) requirement that a demand be made to initiate a legal proceeding.

ii. Relief on Behalf of the Union Requirement:

A 501 suit must be "for the benefit of the labor organization." 29 U.S.C. § 501(b); *see also Kinslow v. Briscoe*, 1993 WL 72336, at *2 (N.D.Ill. Mar. 12, 1993) ("Actions under §

501(b) must be brought on behalf of the union."); *Phillips*, 403 F.2d at 831 ("Section 501(b) makes it clear that relief granted under Section 501 is for the benefit of the real party in interest, the union whose officers are charged with dereliction."); *Hoffman*, 362 F.3d at 319 (In determining whether the "good cause" requirement of 501(b) is met, "the court must satisfy itself that the applicant seeks remedies that would realistically benefit the union . . ."); *Van Elder v. Amalgamated Transit Union Local # 1338*, 2014 WL 1808079, at *4 (N.D.TX May 7, 2014) (Dismissing the 501 suit with prejudice because, *inter alia*, "the Second Amended Petition does not seek remedies that would realistically benefit the union . . . and/or the membership of the union. Rather, the Second Amended Petition seeks merely economic damages that would only benefit Plaintiff and not the union or its membership as a whole."); *Fabian*, 448 F.Supp. 835 (Granting defendants summary judgment on 501 action because, *inter alia*, suit not initiated on behalf of the union but for the benefit of particular members.).

While the complaint herein states in conclusory fashion that this action seeks, *inter alia*, "restitution to USAPA" and "disbursement of USAPA funds to its members" (Compl., ¶1), there can be no doubt that this suit is only brought on behalf of the West Pilots. In fact, nowhere in the complaint do plaintiffs explain how this suit is for the benefit of USAPA, nor indeed how distributing its assets in the face of a multi-million dollar attorneys' fee claim by the same attorneys that represent plaintiffs herein, can possibly be in the interests of USAPA or its members.[11] Indeed, by objecting to certain expenditures USAPA made, plaintiffs' position is similar to the plaintiffs in *McNamara v. Johnston*, whose position was that "union officers have a fiduciary duty under § 501 to hold and spend union funds for the union members' benefit and that where members object to a particular expenditure and that expenditure is made, the officers,

[11] Among other liabilities the National Officers cited in deciding to defer dissolution and distribution. .Ex. "A" to Bradford Decl.

at least as to the objecting members, breach that duty." 522 F.2d, 1157 1163 (7th Cir. 1975). The Seventh Circuit rejected this construction of section 501. Likewise, plaintiffs in this action object to USAPA's expenditure of funds to advance USAPA's interest in the SLI process. However, like the plaintiffs in *McNamara*, simply because plaintiffs object to the expenditure does not mean defendants have breached any 501 duty. Precisely because plaintiffs seek relief only for themselves or the West Pilots, they cannot properly represent the union's interests in this litigation. *See Phillips*, 403 F.2d 826.

Section 501(b) expressly requires a 501 suit to be commenced by a member of the labor organization. "The condition of membership . . . seeks to insure that a representative of the union, the real party in interest, will properly represent the union's interests in the litigation." *Id.*, at 832. The "membership" necessary to authorize a section 501 suit may "be negated by a showing that the plaintiff in such a suit cannot be fairly viewed as an agent for the interests of the affected union." *Id.* This is precisely the situation with the plaintiffs in this action, all of whom are West Pilots. Compl., ¶2. As West Pilots, they were all members of the class that sued USAPA in three previous DFR lawsuits, including *Addington II* which is currently on appeal before the Ninth Circuit. *Addington, et al., v. US Airline Pilots Ass'n, et al.*, Case No. 2:08-CV-01633-NVW[12]; *US Airways, Inc. v. Addington, et al.*, Case No. 2:10-CV-01570-ROS[13]; *Addington, et al., v. US Airline Pilots Ass'n, et al.*, Case No. 2:13-CV-00471-ROS[14]. These plaintiffs cannot be fairly viewed as agents for the interests of USAPA, which conclusion is

[12] Certified class defined as"[a]ll pilots employed by the airline US Airways in September 2008 who were on the America West seniority list on September 20, 2005." 2:08-CV-01633-NVW, Doc. 248.

[13] Certified class defined as "[a]ll pilots employed by US Airways in September 2008 who were on the America West seniority list on September 20, 2005." 2:10-CV-01570-ROS, Doc. 206.

[14] Certified class defined as "[a]ll pilots who are on the America West seniority list currently incorporated into the West Pilot's collective bargaining agreement." 2:13-CV-00471-ROS, Doc. 305.

supported by the absence of any East Pilots as plaintiffs and plaintiffs' admission that their interests are adverse to the interests of USAPA's interests. Compl., ¶33.

The relief plaintiffs seek in this action is for order requiring defendants to pay restitution for funds "wrongfully expended", enjoining defendants from further expending any USAPA monies in furtherance of the SLI process, and ordering defendants to immediately disburse to USAPA members all funds remaining in its treasury. Plaintiffs fail to allege how this relief benefits all USAPA members. Indeed, immediate disbursement of the treasury would potentially expose all USAPA members to liability in the event the same attorneys who represent plaintiffs herein obtain a multi-million dollar attorneys fee award in *Addington II*. Enjoining defendants from expending USAPA monies in the SLI process would prejudice the majority of USAPA members from being able to advocate on behalf of their position in seniority integration.

2. This action is barred by res judicata.

Moreover, given the allegations in the complaint, this action is barred by *res judicata.* To the extent that plaintiffs allege it is improper for USAPA to fund the USAPA Merger Committee because it advances a seniority regime that is not universally endorsed, they are not vindicating a wrong to USAPA. USAPA, as an organization, with the support of a majority of its membership, has repeatedly and steadfastly supported a seniority list proposal consistent with its Constitution and Bylaws, one based upon principles of date of hire. The ratification of this position reaches back to the representational vote as between USAPA and ALPA and has been manifested numerous times since in various referenda and elections. Compl., ¶¶ 14-15, 20. Moreover, the question of the legal right of USAPA to reject a Nicolau Award is settled based upon the decision of every court that has considered the issue.[15] The essence of this case is the

[15] *Addington v. USAPA*, 606 F.3d 1174, 1178 (9th Cir. 2010); *Addington v. USAPA*, 2014 WL 321349, **6-7 (D.Arizona January 10, 2014); *US Airways, Inc. v. Addington*, 2012 WL 5996936, **4-5 (October 11, 2012).

same as the others: forcing USAPA to support the Nicolau Award by funding the West Merger Committee, and/or preventing USAPA from supporting the kind of seniority proposal reflected in its Constitution and Bylaws by funding the USAPA Merger Committee. This action is an attempt to re-litigate issues that have already been decided and as such it is barred by the doctrine of *res judicata*

3. Defendants' alleged misconduct does not directly implicate the fiduciary duties enumerated in § 501(a).

Plaintiffs allege defendants violated their 501(a) fiduciary duties by: (1) failing to provide an accounting; (2) expending USAPA funds to advance USAPA's position before the Preliminary Arbitration Board; and (3) expending USAPA funds to advance the seniority interests of only the East Pilots. Compl., ¶¶30, 33-34.

Section 501(a) does not prohibit any of the above acts. *See Van Elder*, 2014 WL 1808079, at *2 (In deciding whether the "good cause" requirement is met, the court must first "determine that the alleged misconduct directly relates to the duties enumerated in Section 501(a)."). Section 501(a) does not require union officials to provide an accounting. *Moran v. Flaherty*, 1993 WL 60898, at *6 (S.D.N.Y. Feb. 26, 1993) ("Section 501(a) does not require union officials to grant access to the union's financial documents."); *Gabauer v. Woodcock*, 594 F.2d 662, 668 (6th Cir. 1979) (Section 501 is not to be used "as an independent discovery tool to investigate official use of union funds."). Nor does USAPA's Constitution and Bylaws require such access. Defendants did not violate any fiduciary duty to provide an accounting.

As to plaintiffs' claims of improper expenditures for SLI purposes, section 501(a) likewise imposes no duty prohibiting expenditures for seniority integration. It does however, impose a duty to expend the union's money "in accordance with its constitution and bylaws." 29 U.S.C. § 501(a). As discussed above, the dissolution provisions of USAPA's Constitution and

Bylaws specifically allow for deferral if the National Officers make a determination that there exists "the need for collective legal action on behalf of the pilot group, including, but not limited to, representation in seniority integration proceedings." Doc. 1-2, at p. 7. The National Officers made such a determination, and thus the expenditure of funds to advance USAPA's position before the PAB was proper. That a numerical minority group of members disagree with the expenditure is not a 501 violation. The satisfaction of all members is not a prerequisite or fundamental element of an officer's or union's duty. To act against the interests of a majority of its members would be a violation of not only USAPA's Constitution and Bylaws, but section 501(a) itself.

Plaintiffs allege that this long standing intra-union animosity stems from the majority of pilots' rejection of the Nicolau Award, and the West Pilots' insistence that the Nicolau Award be used to determine the seniority list of the East and West pilots. Compl., ¶¶ 12-15. West Pilots have maintained this position despite the merger with American Airlines. West Pilots argued to the PAB that a West Merger Committee should be designated and allowed to fully participate in the SLI process because USAPA will pursue a seniority list based on "date-of-hire" which is precisely the opposite of what the West Pilots believe should be used as the basis for seniority integration, i.e. the Nicolau Award, and thus USAPA cannot promote the seniority interests of the West Pilots. *See* Doc. 1-5, PAB Decision, at p. 20.[16] The PAB ruled and there will now be three separate committees participating in the SLI process: American Airlines PSIC Merger Committee, USAPA Merger Committee, and West Pilots Merger Committee. Doc. 1-5, at p. 3; Compl., ¶24.

[16] "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co.*, 945 F.2d at 768.

Plaintiffs allege USAPA was formed, in part, because a majority of pilots were unhappy with the Nicolau Award. Compl., ¶14. They allege that at the time of the 2005 America West/US Airways merger, the premerger US Airways pilots ("East Pilots") outnumbered the America West or West Pilots. *Id.* One of USAPA's founding objectives is "[t]o maintain uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." Doc. 1-2, at p. 9. To that end, USAPA's Constitution and Bylaws allows USAPA to "levy dues and assessments upon the membership with which to provide the funds necessary to conduct the business and objectives of the Association." *Id.* USAPA business includes the USAPA Merger Committee's participation in the SLI process.

Refusing to expend funds to advance USAPA's position before the PAB and in SLI proceedings would also violate section 501(a)'s mandate to refrain from dealing "in behalf of an adverse party", and refrain from holding or acquiring any interest "which conflicts with the interests of [the] organization". 29 U.S.C. § 501(a).

The decision in *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Schimmel*, 128 F.3d 689 (8th Cir. 1997), cited by plaintiffs' counsel in his December 23, 2014 letter (Doc. 1-8, at p.3), does not provide otherwise. In *Schimmel*, the Eighth Circuit held that "IFFA has a fiduciary duty to preserve union funds that reflect the dues paid by the TWA flight attendants and to use them only to advance the interests of the flight attendants." 128 F.3d at 692. USAPA has no obligation to advance the West Pilots' position which is antithetical to USAPA's and a majority of USAPA's members' interest, and to do so would violate section 501(a)'s prohibition against dealing "in behalf of an adverse party", and from holding or acquiring any interest "which conflicts with the interests of [the] organization." 29 U.S.C. §

501(a). And as plaintiffs' counsel admits, the current facts are wholly different from *Schimmel*. Plaintiffs' counsel's use of "new USAPA" to imply facts similar to *Schimmel* are belied by the allegation in the complaint that "beginning April 18, 2008, USAPA operated as a national unincorporated labor organization . . . [and] Since its 2014 decertification . . . USAPA has continued to exist and operate as a private unincorporated nonprofit association under the laws of North Carolina . . . governed in accordance with its Constitution and Bylaws." Compl., ¶4. Contrary to the facts in *Schimmel*, and admitted by plaintiffs' counsel, there was no transfer to USAPA funds into new accounts. Moreover, in response to the request of the West Pilots, the APA asked the PAB to decide whether it could and should designate another merger committee to represent the interests of the West Pilots in the SLI process. As a result of the PAB decision, the APA designated a West Pilots Merger Committee to fully participate in the SLI process. Thus, any obligation USAPA had to the West Pilots with respect to seniority integration ended by virtue of APA's designation of a West Pilots Merger Committee. Accordingly, their claim that USAPA's expenditure of funds for the SLI process only benefits the majority of former US Airways pilots is the West Pilots' own doing (and their remedy is with the union that created them – the APA). No section 501(a) fiduciary duties were violated, and the complaint should be dismissed as a matter of law.

4. There is no likelihood that plaintiffs will succeed on the merits of their 501 claim.

Plaintiffs will not succeed on the merits of their claim for the reasons discussed above, and in Point III of this memorandum.

C. The LMRDA does not apply because USAPA is not a "labor organization."

An action under Section 501 can only be brought against an "officer, agent, shop steward, or representative of any labor organization." 29 U.S.C. § 501(a). Similarly, only a member of

said labor organization has standing to sue on behalf of the labor organization under Section 501(b). 29 U.S.C. § 501(b). Accordingly, if the organization in question is not a labor organization, a member of that organization does not have standing to file suit under Section 501(b), and there is no jurisdiction to file suit against the officials of that organization under Section 501. USAPA is not a labor organization as defined by the LMRDA. Plaintiffs lack standing to bring this action and the court does not have jurisdiction over defendants under Section 501.

To qualify as a labor organization under the LMRDA, an organization must: (1) be engaged in an industry affecting commerce; and (2) exists "for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." 29 U.S.C. § 402(i) and (j). Both requirements must be met to be considered a labor organization.

USAPA satisfies the "engaged in an industry affecting commerce" prong by virtue of its "acting as the representative" of the former US Airways pilots in SLI proceedings and pending litigation by/against USAPA. 29 U.S.C. § 402(j)(2). However, representing the seniority interests of the former US Airways pilots in SLI proceedings or pending litigation does not involve the necessary requirement "of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment . . ." 29 U.S.C. § 402(i).

Cases under the National Labor Relations Act ("NLRA"), which has a similar definition of labor organization to the LMRDA,[17] have held that the term "dealing with" an employer is

[17] "Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5).

broader than collective bargaining with an employer. *N.L.R.B. v. Peninsula General Hosp. Medical Center*, 36 F.3d 1262 (4th Cir. 1994) ("'[D]ealing with'" should be viewed as a "'bilateral mechanism involving proposals from the employee committee concerning the subjects listed in 2(5) [grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work], coupled with real or apparent consideration of those proposals by management'", quoting *Electromation, Inc.*, 309 N.L.R.B. 990, 995 n. 21 (1992), *enf'd by*, 35 F.3d 1148 (7th Cir. 1994)). "An employee organization which does not exist for the purpose of dealing with, or does not actually deal with, an employer over matters affecting employment cannot be deemed to be a labor organization …" *Id.,* citing *Kanawha Valley Labor Council, AFL-CIO v. American Fed. Of Labor and Congress of Indus. Orgs.*, 667 F.2d 436, 439 (4th Cir. 1981).

Once USAPA was decertified as the certified bargaining representative of the US Airways pilots, it ceased being a labor organization under the LMRDA. While USAPA continues to exist as an unincorporated nonprofit association and act as the representative of the former US Airways pilots in SLI proceedings through the USAPA Merger Committee, it does so not for purposes of dealing with an employer concerning "grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment" within the meaning of the LMRDA. That responsibility now lies with APA, the certified bargaining representative for the New American Airlines pilots.

In fact, the MOU recognizes the fact that any dealings between USAPA and US Airways/American Airlines concerning employees' terms and conditions of employment ceased upon USAPA's decertification. Compl., Ex. 2, Doc. 1-3. For example, paragraph 5 of the MOU states that "US Airways, and its successors, if any, shall continue to recognize and treat with

USAPA as the representative of the pilots employed by US Airways until another representative for the pilot craft of class is certified by the NMB." Additionally, paragraph 10(d) of the MOU requires US Airways, American and New American Airlines to "remain neutral regarding the order in which pilots are placed on the integrated seniority list" during the seniority integration process. Thus, USAPA's representation of the former US Airways pilots does not include any activity that could be construed as "dealing with" US Airways/American Airlines or any employer. USAPA does not fall under the LMRDA's definition of labor organization.

POINT III

THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM

A. The Complaint must be dismissed against defendant BPR members.

Under the USAPA Constitution and Bylaws, the sole and exclusive authority to defer dissolution of USAPA belongs to the four National Officers. Compl., ¶¶ 28, 31, Ex. 1. The authority to determine whether or not to make an interim distribution of funds to the membership is also vested in the four National Officers. *Id.* As set forth in paragraph 3 of the Verified Complaint, among the moving defendants, Taylor, Stein, Dugstad, and Nathan were Domicile Officers and members of the BPR, not National Officers. As such, these defendants had absolutely no role in the decision to defer dissolution of USAPA and to defer distribution pursuant to the Constitution and Bylaws and none is alleged.[18] In connection with this action, plaintiffs' "demand letters" to defendants only took issue with the deferral of dissolution (Doc. 1-12), which as stated above was an act solely undertaken by the National Officers consistent

[18] The September 4, 2014, BPR resolution "urg[ing] the National Officers to defer dissolution . . . " and "[[urg[ing] the National Officers to decline to make an immediate dissolution. . .". This wording and the Resolution as a whole (see also the third "Whereas") underscores that the exclusive authority to make this decision rested with the National Officers, and the BPR's role was merely advisory in nature. Ex. "C" to Bradford Decl.

with the USAPA Constitution. Accordingly, the complaint fails to state a claim under Section 501 as against the moving defendants Taylor, Stein, Dugstad, and Nathan. *See Morrissey v. Curran*, 482 F.Supp. 31 (S.D.N.Y. 1979) (finding that defendant officers were only responsible for actions they personally undertook that resulted in a personal benefit to them), *rev'd on other grounds*, 650 F.2d 1267 (2d Cir. 1981).

B. Defendants' interpretation of USAPA's Constitution and Bylaws is patently reasonable, and entitled to deference.

LMRDA Section 501(a) imposes three fiduciary duties: (1) to hold the union's money and property solely for the benefit of the union and its members and to manage, invest, and expend the same in accordance with the union's constitution and bylaws; (2) to refrain from dealing with the union as an adverse party or in behalf of an adverse party in any matter connected with his duties, and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of the union; and (3) to account to the union for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the union. *See also Van Elder*, 2014 WL 1808079, at *2.

Section 501 was designed to further two policy concerns:

> In subdivision (a), Congress intended to protect rank and file union members by imposing a duty of union officials to act as fiduciaries with respect to union funds and property. 29 U.S.C. § 501(a). Yet, concerned with the potential for harassing and vexatious suits brought without merit or good faith against union officials, and also with the specter of unwarranted judicial intrusion into the processes of union democracy, Congress designed section 502(b)'s good cause requirement as a prerequisite to suit.

Loretangeli, 853 F.2d at 189.

Plaintiffs' suit is precisely the type of harassing suit section 501(b) is intended to prevent.

By suing defendants in their individual capacities[19], plaintiffs seek the *in terrorem* effect of personal liability knowing full well that plaintiffs' dispute is with USAPA and not the defendants in their individual capacities. The plain and simple fact is the challenged acts of the National Officers were proper, valid and enforceable, and consistent with the explicit language of USAPA's Constitution and Bylaws, clearly made for the benefit of USAPA, and in keeping with USAPA's long standing objectives.

By filing this suit, plaintiffs ask this Court to violate the "well-established, soundly based policy of avoiding unnecessary judicial intrusion into the affairs of labor unions." *Local No. 48, United Bhd. of Carpenters and Joiners of America v. United Bhd. of Carpenters and Joiners of America*, 920 F.2d 1047, 1051 (1st Cir. 1990). The LMRDA, while "intended to protect union members against overreaching by their leaders . . . does not comprise 'a license for judicial interference in the internal affairs of a union.'" *Id.*, quoting *Howard v. United Ass'n of Journeymen & Apprentices, Etc., Local No. 131*, 560 F.2d 17, 21 (1st Cir. 1977)). Consistent with the policy of noninterference ""judges should refrain from second-guessing labor organizations in respect to plausible interpretations of union constitutions." *Local No. 48, United Bhd. of Carpenters and Joiners of America*, 920 F.2d at 1052. "It is well established that a union's interpretation of its own constitution is entitled to judicial deference unless its interpretation is patently unreasonable." *Tile Workers Finishers Local 77 v. Tile Marble, Terrazzo, Finishers, Shopworkers & Granite Cutters International Union*, 848 F.2d 186 (4th Cir. 1988).

Although courts have not explicitly defined what constitutes "patently unreasonable", "the standard is undeniably a high one." *Executive Bd. of Transport Workers Union of*

[19] *Hoffman*, 362 F.3d at 320 ("We think it is clear that Section 501 is not generally intended as a statute to impose personal liability on union officials for funds expended in the course of activity that violates other titles of the act.").

Philadelphia, Local 234 v. Transport Workers Union of America, AFL-CIO, 338 F.3d 166, 170 (3d Cir. 2003). The reasonableness of the interpretation is evaluated "at the time of the decision, not on a *post hoc* evaluation of the reasonableness of the underlying action." *Local No. 48, United Bhd. of Carpenters and Joiners of America*, 920 F.2d at 1052. The viewpoint is "the officer's . . . at the time . . ." *Stelling v. International Bhd. of Elec. Workers, Local 1547*, 587 F.2d 1379, 1389 n. 10 (9th Cir. 1978), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2890 (1979).

Plaintiffs cannot meet this high standard. Plaintiffs challenge USAPA's decisions to defer distribution of its assets and its expenditure of USAPA assets in furtherance of the SLI process. There is no dispute that the express language of USAPA's Constitution and Bylaws allows the National Officers to defer both dissolution and distribution of dues. Plaintiffs do not allege facts opposing the deferral language in the Constitution and Bylaws. Nor do they allege facts challenging the constitutional provision allowing dissolution to be deferred because "existing circumstances present, or may present in the future, the need for collective legal action".[20] Compl., ¶6. Plaintiffs' dispute is with the National Officers' interpretation that "collective legal action" includes advancing USAPA's position in the SLI process. *Id.*, ¶34. Thus, while "the unfortunate political animosity pervading this intra-union battle is deep", the legal issue before this Court is narrow, "namely whether the Union's interpretation of [its] Constitution is patently unreasonable . . ." *Executive Bd. of Transport Workers Union of Philadelphia*, 338 F.3d at 175. Facts regarding the 2005 merger of America West and US Airways and the formation of USAPA are irrelevant to the issue before this court, and is simply a

[20] Plaintiffs seek an order directing defendants "to disburse immediately to USAPA members in accordance with Article I, section III of the Constitution all funds remaining in its treasury as of its decertification as an exclusive bargaining representative on September 16, 2014, except such funds reasonably necessary for the collective action on behalf of the pilot group and ordinary expenses of winding down." Compl., p. 15. Plaintiffs never define what they define to be "collective action" and apparently want this Court to decide.

reminder of how long this intra-union dispute has been going on. Compl., ¶¶11-15. In insisting upon the legitimacy of the Nicolau Award, plaintiffs refuse to acknowledge that a court has already ruled that it was not a DFR to reject it. The Nicolau Award was never implemented, and plaintiffs have lost every single litigation in which they have argued that USAPA had a duty of fair representation to implement it. *Addington v. USAPA*, 606 F.3d 1174, 1178 (9th Cir. 2010);[21] *Addington v. USAPA*, 2014 WL 321349, **6-7 (D.Arizona January 10, 2014); *US Airways, Inc. v. Addington*, 2012 WL 5996936, **4-5 (October 11, 2012).

As to the very narrow issue before this Court, the complaint is devoid of allegations that defendants' actions were patently unreasonable. Plaintiffs admit that the USAPA Constitution provides that the National Officers can defer dissolution and distribution of assets if they make a determination that "existing circumstances present, or may present in the future, the need for *collective legal action* on behalf of the pilot group, including, but not limited to, representation of [sic] the seniority integration process." *Id.*, ¶28. The complaint admits that on September 4, 2014, a majority of the USAPA BPR passed a resolution urging the National Officers to defer dissolution and decline to make an immediate distribution of assets because existing circumstances present the need for collective legal action, including seniority integration proceedings. *Id.*, ¶29. That neither the BPR nor the National Officers enumerate the specific costs of "collective legal action" does not make the decision patently unreasonable. Moreover, neither section 501(a) nor USAPA's Constitution and Bylaws require USAPA or defendants to provide the costs of the "collective legal action." USAPA's interpretation is not patently unreasonable and the contested acts of the National Officers are entitled to deference mandating dismissal of this action.

[21] The District Court's decision vacating its prior judgment as a result of the Ninth Circuit's reversal is reported at 2010 WL 4038822 (D.Ariz. October 14, 2010).

Plaintiffs challenge defendants' interpretation that "collective legal action" includes the SLI process. However, it is not limited to the SLI process. The National Officers determined "collective legal action" to include pending litigation that USAPA is a party to, including the appeal in the Ninth Circuit of *Addington v. USAPA*, in which the West Pilots are "directly opposed to USAPA" (Doc. 1-7, at p. 3) and have made a claim for attorneys' fees, and *Cleary v. USAPA* wherein former USAPA President Mike Cleary is demanding an unspecified amount of consequential, liquidated and punitive damages. *See* Ex. "A" to Bradford Decl. Because "collective legal action" also includes the *Cleary* litigation, which plaintiffs do not challenge, dissolution of USAPA and distribution of its assets would still be deferred even if USAPA assets were not expended on SLI.

Given the express language of the dissolution provisions in the Constitution and Bylaws, the National Officers' decision to defer distribution of USAPA's assets and to expend monies on the SLI process was, as a matter of law, patently reasonable. The National Officers' actions are in stark contrast to the defendants in *Schimmel*, in which the defendant "IFFA made no provision for the disposal of union funds in the event its only members elected a new bargaining representative." 128 F.3d at 692.

The National Officers' actions were "in conformity with the union constitution and bylaws" and thus in compliance with their fiduciary obligations under section 501(a). *Brink v. DaLesio*, 667 F.2d 420, 424 (4th Cir. 1982) (Section 501(a) "constitutes union officials trustees and requires them to act in conformity with the union constitution and bylaws."); *see also Executive Bd. of Transport Workers Union of Philadelphia, Local 234*, 338 F.3d at 170 ("[A]n interpretation that conflicts with the 'stark and unambiguous' language of the Constitution or

reads out of the Constitution important provisions is a 'patently unreasonable interpretation' of a union Constitution", quoting *Loretangeli*, 853 F.2d at 194-95). [22]

Because defendants' interpretation of USAPA's Constitution and Bylaws is not patently unreasonable, it is entitled to deference, and USAPA's decision to defer dissolution and distribution of assets, and expend its assets on SLI proceedings should not be disturbed. Plaintiffs fail to state a claim for which relief can be granted, and the complaint should be dismissed.

C. Defendants did not personally benefit from the National Officers' determinations.

Judicial intervention is further not warranted because defendants have not profited "personally through the use or receipt of union funds." *Brink*, 667 F.2d at 424; *see also Council 49, Am. Fed'n of State, Cnty. & Mun. Employees Union by Adkins v. Reach*, 843 F.2d 1343, 1347 (11th Cir. 1988) (Rule of judicial deference only does not apply if the expenditure "is authorized but bestows a direct, personal benefit on a union official."). Where there is personal profit, "the official bears the burden of proving that the transaction was validly authorized in accordance with the union's constitution and bylaws after adequate disclosure, and that it does not exceed a fair range of reasonableness." *Brink*, 667 F.2d at 424. However, an incidental or indirect personal benefit to a union official is not sufficient to remove the rule of judicial deference, especially where the union itself also benefits. *Reach*, 843 F.2d at 1347 (citing *Ray v. Young*, 753 F.2d 386, 390 (5th Cir. 1985)). In such a situation, "valid authorization will normally be a complete defense" to a Section 501 action. *Id.*, at n.3. Plaintiffs make no allegation that defendants personally profited from their decision. On the contrary, plaintiffs allege that

[22] Indeed, as further evidence of the good faith of the National Officers and in view of the controversy surrounding the decision to defer dissolution, USAPA commenced *USAPA v. Velez* so that the propriety of those actions could be determined in a rational manner and not piecemeal in various contexts and forums.

defendants have "expended USAPA funds to advance USAPA's position before the PAB . . ." Doc. 1, at ¶33. Expenditures to benefit USAPA is consistent with the National Officers' section 501 duty to "hold its money and property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a).[23]

The only personal benefit posited by plaintiffs is along the lines that defendants or East Pilots will benefit from a date of hire seniority list rather than the Nicolau Award. However, this benefit is too attenuated and speculative to be cognizable under the LMRDA. At the outset it should be noted that any such benefit is completely aligned with USAPA's interests as set forth in its Constitution and Bylaws, the interests of a majority of its members and the pursuit of which (date of hire seniority list over Nicolau) has been endorsed by three separate courts. Moreover, a claim of personal benefit is premature given that the substantive SLI process has not yet occurred and it is impossible to determine what will result from the process. As a result of the APA's appointment of the West Pilots Merger Committee, they have equal opportunity to advocate for a Nicolau based integration. Accordingly, it is not possible to determine whether defendants' actions have resulted in any personal benefit. Valid authorization of defendants' actions serve as a complete defense to this action, and the complaint should be dismissed as a matter of law.

---

[23] The Eleventh Circuit in *Reach* encapsulated this principle as follows:

> Heightened judicial scrutiny is not justified every time a union officer receives an indirect benefit from a union expenditure. For example, when a union officer enjoys a legitimate business dinner at union expense, he has received an indirect benefit. "Obviously, however, courts cannot and should not probe into the reasonableness of every union dinner. The line should be drawn in these cases between expenditures that benefit the union and those that do not." *Ray v. Young,* 753 F.2d 386, 391 (5th Cir.1985). Accordingly, if a union officer receives an indirect benefit from a transaction that also benefits the union, valid authorization will normally be a complete defense. *Id.*

Id, 843 F.2d at 1347, fn. 3.

D. The challenged acts do not violate section 501(a) fiduciary duties.

As more fully discussed above in Point II.B.3 of this Memorandum of Law, defendants did not violate any section 501(a) fiduciary duties. The statute does not require an accounting, or prohibit expenditures for seniority integration. It does, however, impose a duty to expend the union's money "in accordance with its constitution and bylaws", to refrain from dealing "in behalf of an adverse party", and refrain from holding or acquiring any interest "which conflicts with the interests of [the] organization". 29 U.S.C. § 501(a). Not only did defendants act consistent with this duty, a failure to advance USAPA's interests in the SLI process would be a violation of USAPA's Constitution and Bylaws, and the express provision in section 501(a).

E. Plaintiffs' suit seeks a remedy only for the benefit of plaintiffs and West Pilots, and not for the union as a whole.

As more fully discussed above in Point II.B.1.ii of this Memorandum of Law, the order granting plaintiffs leave to file this suit should be vacated because this action is not for the benefit of USAPA, but only for West Pilots. *See Fabian*, 448 F.Supp. at 840 ("[E]ven assuming an official's fiduciary duties under s 501 include non-monetary matters . . . it is clear that this suit has not been initiated on behalf of the union, but for the benefit of particular members. Thus, the plaintiffs cannot rely on section 501 for this additional reason."); *Van Elder*, 2014 WL 1808079 (Granting defendants' motion for judgment on the pleadings of the section 501 suit because, *inter alia*, the Second Amended Petition "seeks merely economic damages, which would only benefit Plaintiff and not the union or its membership as a whole.").

The complaint outlines the long dispute between the West Pilots and USAPA concerning integration of the seniority lists of the former America West and US Airways pilots. This action is merely an extension of that long dispute. What West Pilots could not achieve against USAPA

through multiple DFR lawsuits, they now try to achieve through a section 501 action. There is no dispute that West Pilots do not act for the benefit of USAPA or the majority of its members.

F. Any harm to plaintiffs is speculative.

Plaintiffs must demonstrate harm to the union as a whole in order to properly allege a Section 501 claim. *Schimmel*, 128 F.3d at 692-93. In *Schimmel* the court found harm because IFFA members "constituted a single group of like employees," and, therefore, IFFA's interests were the "functional equivalent" of plaintiffs' interests. *Id.*[24] In so finding, the court conceded, however, that "[t]he interests of a union as a whole . . . can vary significantly from the interests of a particular segment of the union's membership." *Id.*, at 693. As a result, where a Section 501 plaintiff only alleges harm to a distinct segment or faction of the labor organization for which the suit is maintained, said plaintiff has failed to state a LMRDA breach of fiduciary claim.

In this case, the PAB found that the East and West pilots have separate and distinct interests with respect to seniority integration. Compl., ¶23; Doc. 1-5. As a result, the PAB ordered APA to establish a West Pilots Merger Committee to represent the interests of the former America West Pilots in the SLI proceeding. *Id.* The East and West Pilots have worked under their own respective East and West seniority lists since the US Airways/America West merger in 2005. The upcoming substantive SLI process will finally integrate those seniority lists, along with the seniority list for the legacy American Airlines pilots. Plaintiffs are fully represented in the process by the APA-established West Pilots Merger Committee. Moreover, the complaint is devoid of any allegation that USAPA's deferral of dissolution has disadvantaged the West Pilots Merger Committee in advancing their interests in the SLI process.

[24] It should also be noted that the *Schimmel* plaintiffs properly alleged harm because the Court found that the actions of the defendants (seeking to organize a different airline's flight attendants) did not advance the interests of any of the former IFFA members. To the contrary, plaintiffs in this case allege in the complaint that defendants' actions benefitted a majority of the members of USAPA.

Furthermore, the complaint fails to assert any cognizable harm to the plaintiffs as a result of defendants' actions. The only harm they allege is that "[d]efendants violated their section 501(a) duties to hold USAPA's money solely for the benefit of its members and to expend such monies only in accordance with USAPA's constitution and bylaws" by "expending USAPA funds after the decertification of USAPA … in a manner that does not advance collective legal action on behalf of the pilot group." Compl., ¶40. As already discussed, the National Officers' determinations and expenditure of USAPA funds were precisely for the benefit of its members and in accordance with the express language of its Constitution and Bylaws, and thus, as a matter of law, in compliance with Section 501(a). *Cf., Schimmel*, 128 F.3d 689. Unlike in *Schimmel*, plaintiffs here do not claim that USAPA's post-certification expenditures were not in the interests of *any* USAPA members. Plaintiffs simply allege that USAPA's expenditures were not in the interests of *all* USAPA members. But Section 501 does not require (nor does the USAPA Constitution) that union officials only take actions that benefit *all* members of their organization. Plaintiffs repeatedly admit that the National Officers' actions benefitted the majority of USAPA members. That is all that is required. The Complaint should be dismissed.

CONCLUSION

For all of the foregoing reasons, the Motion to Vacate the Order Dated March 5, 2015, or, in the Alternative, Dismiss the Verified Complaint should be granted.

This the 15th day of April, 2015.

TIN FULTON WALKER & OWEN
s/ John Gresham
John Gresham
N.C. State Bar No. 6647
301 East Park Avenue
Charlotte, NC 28203
(704) 338-1220

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE THE COURT'S ORDER DATED MARCH 5, 2015, OR IN THE ALTERNATIVE, TO DISMISS THE VERIFIED COMPLAINT ON BEHALF OF DEFENDANTS GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, and STEPHEN NATHAN with the Clerk of the Court using the CM/ECF system, and that notification pursuant to the CM/ECF system will be sent to:

C. Grainger Pierce, Jr.
NEXSEN PRUET, PLLC
227 West Trade Street, Suite 1550
Charlotte, NC 28202
gpierce@nexsenpruet.com

Marty Harper
Kelly J. Flood
ASU ALUMNI LAW GROUP
Two North Central, Suite 600
Phoenix, AZ 85004
Marty.harper@asualumnilawgroup.org
Kelly.flood@asualumnilawgroup.org

Jeffrey Freund
Zachary Ista
BREDHOFF & KAISER, P.L.L.C.
805 15 Street, N.W.
jfreund@bredhoff.com
zista@bredhoff.com

This the 15th day of April, 2015.

s/ John W. Gresham
John W. Gresham, N.C. Bar No. 6647
301 East Park Avenue
Charlotte, NC 28203
(704) 338-1220