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 Borman, RONALD NELSON, PAUL DIORIO, PAUL MUSIC, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, JAY MILKEY and STEPHEN NATHAN,	)
Defendants, sued in their Individual capacity.	)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Defendants GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, and STEPHEN NATHAN (hereinafter the "defendants") [1], by and through their attorneys, submit this Memorandum of Law in Opposition to plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction (Doc. 16).

PRELIMINARY STATEMENT

Rather than join issue in the first filed pending declaratory judgment action (*USAPA v. Velez, et al.*, Case No. 3:14-cv-00577-RJC-DCK, Doc. 1-1) which deals with the exact same

[1]As of this date no affidavits of service are on the court docket as to defendants Steve Smyser, Robert Frear, Courtney Borman, Ronald Nelson, Paul DiOrio, Paul Music, and Jay Milkey and, for that reason, no response is being interposed on behalf of those defendants as plaintiffs have shown no basis for the Court to exercise jurisdiction over them.

issues here, plaintiffs elected to initiate this action under the LMRDA seeking personal liability against defendants, all of whom are working pilots volunteering their services to USAPA. After their repeated threats to these volunteers failed, plaintiffs commenced this action. However, as demonstrated in the Motion to Vacate the Order Dated March 5, 2015, or, in the Alternative, to Dismiss the Verified Complaint and the memorandum of law in support (Docs. 22, 22-1), plaintiffs' action fails as a matter of law and should be dismissed. Not only does the Court lack subject matter jurisdiction over their claim, but plaintiffs fail to state a claim upon which relief can be granted, including but not limited to that their claim is not cognizable under the LMRDA. Thus, plaintiffs cannot make the requisite clear showing they are likely to succeed on the merits, or the other three requirements necessary for the extraordinary relief they seek under Rule 65, and their motion must be denied in its entirety.

STATEMENT OF RELEVANT FACTS

To avoid burdening the Court by repeating general facts, defendants rely upon (and incorporate by reference herein) the statement of facts in their Memorandum of Law in Support of the Motion to Vacate the Order Dated March 5, 2015, or, in the Alternative, to Dismiss the Verified Complaint. Doc. 22-1. Defendants adduce additional facts relevant to specific points herein in the body of this Memorandum of Law.

ARGUMENT

POINT I

LEGAL STANDARD ON A MOTION FOR PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER UNDER RULE 65

Rule 65 motions for a preliminary injunction or a temporary restraining order are reviewed under the same legal standard. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365 (2008). A preliminary injunction/temporary restraining order is an "extraordinary

remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter,* 555 U.S. at 23, 129 S.Ct. 365, 376 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865 (1997)). Because preliminary injunctions and temporary restraining orders involve "the exercise of 'very far-reaching power' [they are] to be granted only 'sparingly' and 'in limited circumstances . . .'" *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1992) (quoting *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983)); *see also MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001).

A plaintiff seeking a preliminary injunction or temporary restraining order must establish: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of the equities tips in plaintiff's favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. 365, 374; *see also Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342 (4th Cir. 2009) (citing the preliminary injunction/temporary restraining order standard as articulated by the Court in *Winter*), *vacated on other grounds by*, 559 U.S. 1089, 130 S.Ct. 2371 (2010), *re-issued in part*, 607 F.3d 355 (4th Cir. 2010). Movant must satisfy all four requirements. *Winter*, 555 U.S. at 20, 129 S.Ct. 365, 374.

A plaintiff must make a "clear showing" that he will likely succeed on the merits at trial, and is likely to be irreparably harmed absent preliminary relief. *Real Truth About Obama*, 575 F.3d at 346-347. "That the plaintiff's harm might simply outweigh the defendant's harm is no longer sufficient." *Foreman v. Charlotte Sch. of Law (NC), Inc.,* 2011 WL 1344210, at *2 (W.D.N.C. April 8, 2011) (citing *Real Truth About Obama*, 575 F.3d at 347). To prevail, all four elements must be satisfied, including the showing of irreparable injury "even if the plaintiff has already demonstrated a strong showing on the probability of success on the merit." *Foreman*,

2011 WL 1344210, at *2 (citing *Real Truth About Obama*, 575 F.3d at 347).

Plaintiffs fail to satisfy all four prongs of the preliminary injunction/temporary restraining order legal standard.

POINT II

PLAINTIFFS CANNOT MAKE A "CLEAR SHOWING" THEY WILL LIKELY SUCCEED ON THE MERITS OF THEIR CLAIM

A. This Court lacks subject matter jurisdiction over plaintiffs' claim.

LMRDA Section 501 was enacted 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 v. Critelli, 853 F.2d 186, 189 (3d Cir. 1988).

Consistent with these concerns, 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. 29 U.S.C. § 501(a); *see also Van Elder v. Amalgamated Transit Union Local #1338*, 2014 WL 1808079, at *2 (N.D.Tex. May 7, 2014).

To protect union officials from vexatious and harassing suits, section 501(b) requires that

certain requirements be met as prerequisites to suit. It 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[2] 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).

Prior to commencing a section 501 suit, a plaintiff must: (1) unsuccessfully demand that the union or its governing board or officers bring the action; (2) 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. Plaintiffs failed to satisfy these jurisdictional prerequisites.

1. 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*

[2] 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)).

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 argue they sent a written demand[3] to "USAPA Officers"[4] on February 13, 2015, requesting: (1) an accounting of USAPA's treasury funds both before and since September 16, 2014; (2) that they cease spending USAPA funds on the Substantive SLI Process; and (3) that they recoup moneys from the Defendants that they improperly expended on the preliminary arbitration and on the SLI process since September 16, 2014." Doc. 16, at 13; Doc. 1-12. Plaintiffs' February 13, 2015 email "demands", however, do not satisfy the section 501 demand element because they did not make such demands of USAPA, its governing board, or its officers to initiate a suit against defendants, and they cannot be so construed. *See* Doc. 1-12. 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.

[3] The communications sent by Roger Velez and plaintiffs' counsel are not proper demands as they were not made by plaintiffs. *See* Doc. 16, at 15.

[4] There is an important distinction between "National Officers" and "officers" under the USAPA Constitution and Bylaws. For certain purposes thereunder, "officers" can mean both National Officers (i.e. President, Vice President, Secretary-Treasurer and Executive Vice President) who are elected by membership as a whole and regional (i.e. domicile) officers, who serve on the USAPA BPR and are elected only by members of the domicile. This distinction is important because the matters at issue herein – deferral of dissolution and distribution – are within the exclusive province of the National Officers. A request that members of the BPR take some action exclusively committed to the National Officers is a legal nullity.

2. 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." While the Fourth Circuit has not specifically established a good cause standard, for the Ninth and Third Circuits, "[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*, 853 F.2d at 190 (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 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).

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.[5]

a) Plaintiffs failed to comply with the following 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,

[5] 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 not have been issued and thus vacated. *See Horner*, 362 F.2d at 229; *Behrmann*, 2006 WL 2771870, at *2.

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, [it] 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.).

Nowhere in the complaint or in plaintiffs' memorandum of law in support of this motion do plaintiffs explain how this suit is for the benefit of USAPA. Indeed, throughout their complaint and motion papers, plaintiffs argue "the Harm to Plaintiffs and the West Pilots from Defendants' Actions." Doc. 16, at 11. Any claim that this action is for the benefit of all USAPA members is belied by plaintiffs' own allegations, and further by the West Pilots' multi-million dollar claim for attorneys' fees made by the same attorneys that represent plaintiffs herein.[6] This action may benefit the West Pilots or the attorneys for the West Pilots[7], but clearly not the majority of USAPA members who have repeatedly endorsed the positions taken by the USAPA leadership by referendums and ratifications and as expressed by the BPR. This reality is

[6] The need to defend against this huge potential claim on the USAPA treasury was among other liabilities the National Officers cited in deciding to defer dissolution and distribution. *See* Ex. "B" to Bradford Decl.

[7] Plaintiffs want to "starve the beast", i.e. USAPA. If USAPA is required to disburse its treasury it will be unable to defend *Addington II*, including the claim therein for a multi-million dollar fee award asserted by the attorneys who represent plaintiffs herein. Not only are the attorneys attempting to turn the tide in their favor, having lost every case thus far, they want to engineer a victory by forcing USAPA to cave-in because it would have no money to defend itself with respect to that claim. They are doing their clients and all USAPA members a disservice because if USAPA is judgment proof because it distributed its treasury in the face of liabilities, including the potential fee award in *Addington II*, it may expose individual USAPA members to liability for attempting to defraud creditors.

furthered by the fact that in their February 13, 2015 e-mail communications to defendants, one of plaintiffs' alleged "demands" was for defendants to "return to USAPA's treasury all money spent on seniority integration and **any matters adverse to West Pilots** since September 16, 2014." Doc. 1-12 (emphasis added). Conveniently, plaintiffs do not reiterate this "demand" in the complaint or the instant motion. Indeed, by objecting to certain expenditures USAPA made, plaintiffs' position is similar to the plaintiffs in *McNamara v. Johnston*, who asserted 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, 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.[8] "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

[8] There is a real and substantial question as to the real party in interest in this case, further calling into question the requirement that the plaintiff be a member of the labor organization. Ostensibly maintained by three individual plaintiffs there is reason to believe that the real party in interest is Leonidas, not individual union members. For example, in an update dated March 30, 2015, Leonidas made repeated statements consistent with its control of the litigation and indicating that it is the party in interest. Bradford Decl., ¶20, Ex. "E". Because an LMRDA action can only be maintained by a member of a labor organization this issue is jurisdictional. In any event, defendants submit a substantial basis exists for discovery on the question of the role of Leonidas in this action, its control over the litigation, and the extent to which the relief sought will benefit Leonidas.

affected union." *Id.* This is precisely the situation with the plaintiffs in this action, all of whom are West Pilots. Doc. 1, ¶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[9]; *US Airways, Inc. v. Addington, et al.*, Case No. 2:10-CV-01570-ROS[10]; *Addington, et al., v. US Airline Pilots Ass'n, et al.*, Case No. 2:13-CV-00471-ROS[11]. These plaintiffs cannot be fairly viewed as agents for the interests of USAPA, which conclusion is supported by the absence of any East Pilots (who outnumbered the West Pilots 5,100 to 1900 at the time of the 2005 merger Doc 1, ¶ 11) among the plaintiffs as well as plaintiffs' admission that their interests are adverse to those of USAPA. Doc. 1, ¶33.

The relief plaintiffs seek in this action is for an 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. By their motion, plaintiffs seek a preliminary injunction enjoining defendants "from authorizing the expenditure of USAPA funds obtained from the collection of dues and assessments of US Airways pilots during the period that USAPA was the certified bargaining agent of US Airways pilots in support of activities of any kind, including but not limited to payment of attorneys, experts, witnesses, office space or flight pay loss to pilots for purposes of preparing for and participating in the

[9] 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.
[10] 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.
[11] 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.

Substantive Seniority Integration Process culminating in an arbitration before Arbitrators Dana Eischen, Ira Jaffe and W. David Vaughn." Doc. 16-5, p.1; Doc. 16-6, p. 1.

Plaintiffs fail to allege how this relief benefits all USAPA members. 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*. The same is true for *Cleary v. USAPA*, in which former USAPA President Michael Cleary seeks unspecified amount of money for compensatory and punitive damages against USAPA, in addition to a claim for an attorneys' fees award. In addition, the relief sought would make it impossible for USAPA to operate and pay its ongoing obligations (such as rent, equipment leases, maintenance of computer systems). *See* Bradford Decl., ¶24.

Enjoining defendants from expending USAPA monies on anything would ruin the association (which may be in the interest of plaintiffs and their supporters who have long sought to punish USAPA for failing to yield to their unreasonable and minority faction demands), but certainly not in the interest of the majority of USAPA members, and would prejudice the majority of USAPA members from being able to advocate on behalf of their position in seniority integration proceedings.

b) Plaintiffs' action is barred by *res judicata*.

Plaintiffs argue "Defendants have refused to provide funding for the West Pilots' Merger Committee, which had plainly stated its intent to support the position that the arbitrated Nicolau Award should be used to order US Airways pilots in the seniority integration." Doc. 16-1, at 11. However, refusing to fund the West Pilots' Merger Committee is not a wrong by 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. Doc. 1, ¶¶14-15, 20. Moreover, the question of the legal right of USAPA to reject the Nicolau Award is settled based upon the decision of every court that has considered the issue.[12] The essence of plaintiffs' case is the 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 is barred by the doctrine of *res judicata.*

c) 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. Doc. 1, ¶¶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

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

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.[13]

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). 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 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 violate USAPA's Constitution and Bylaws as well as section 501(a) itself.

Plaintiffs argue 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. Doc. 16, at 5-6; Doc. 16-1, at 11; Doc. 1, ¶¶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. The PAB ruled

[13] In fact, plaintiffs do not seek a preliminary injunction for an accounting. Doc. 16, at 4 n. 1.

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 3; Doc. 1, ¶24.

Plaintiffs argue USAPA was formed, in part, because a majority of pilots were unhappy with the Nicolau Award. Doc. 16, at 6; Doc. 1, ¶14. They argue 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 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. In fact, the Merger Committee can only exist as a duly constituted committee of the organization. Bradford Decl., ¶11.

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 (Doc. 16, at 20-21), 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 admit, the current facts are wholly different from *Schimmel*. *See* Doc. 1-8, at 3. Plaintiffs' counsel's use of "new USAPA" to imply facts similar to *Schimmel* are belied by plaintiffs' admission 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." Doc. 1, ¶4. Contrary to the facts in *Schimmel*, there has been no transfer of USAPA funds into new accounts since USAPA was decertified. *See* Declaration of John Owens, ¶3. 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.

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

An action under 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 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 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, it must: (1) be engaged in an industry affecting commerce; and (2) exist "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.

USAPA satisfies the "engaged in an industry affecting commerce" prong by "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,[14] hold the term "dealing with" an employer is broader than collective bargaining with an employer. *N.L.R.B. v. Peninsula General Hosp. Medical Center*,

[14] "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).

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 pilots of New American Airlines.

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. Doc. 1-3. Paragraph 5 of the MOU provides 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." *Id.* 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. *Id.* 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 and it does not fall under the LMRDA's definition of labor organization.

C. The complaint fails to state a claim.

1. The complaint must be dismissed against BPR-member defendants.

Under the USAPA Constitution and Bylaws, the sole and exclusive authority to defer dissolution of USAPA lies with the four National Officers. Doc. 1-2, Section 3. The same is true with respect to the determination to make an interim distribution of funds to the membership. *Id.* There is no dispute that defendants Frear, Borman, Nelson, DiOrio, Music, Taylor, Stein, Dugstad, Milkey, and Nathan were Domicile Officers and members of the BPR, not National Officers. Doc. 1, ¶3; Bradford Decl., ¶22. 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.[15] In connection with this action, plaintiffs' "demands" 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 with the USAPA Constitution. Accordingly, the complaint fails to state a claim under section 501 as against these defendants, and the complaint must be dismissed as to them. *See Morrissey v. Curran*, 482 F.Supp. 31 (S.D.N.Y. 1979) (finding that defendant officers were only responsible for actions

[15] 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.

they personally undertook that resulted in a personal benefit to them), *rev'd on other grounds*, 650 F.2d 1267 (2d Cir. 1981).

Moreover, an injunction against defendants Hummel, Streble, DiOrio, Frear, Stein, Dugstad, and Music is a futility because they are no longer office-holders and cannot cast votes one way or another.[16] Bradford Decl., ¶¶21-22.

2. The National Officers' interpretation of USAPA's Constitution and Bylaws is patently reasonable and entitled to deference.

Plaintiffs' suit is precisely the type of harassing suit section 501(b) is intended to prevent. By suing defendants in their individual capacities[17], 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[18], 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

[16] Even assuming the relief plaintiffs seek in this regard is proper. Plaintiffs chose to name these defendants individually, not in their USAPA capacities. And yet, even when in office, these individuals had no power over USAPA divorced from their official capacities.
[17] *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.").
[18] Defendants do not waive their argument the LMRDA does not apply because USAPA is not a labor organization.

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 Int'l 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 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.

Plaintiffs cannot meet this high standard. 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 assets. Plaintiffs' dispute is with the National Officers' interpretation that "collective legal action" includes advancing USAPA's position in the SLI process. Doc. 1, ¶34; *see also* Doc. 16, at 10. 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. In insisting upon the legitimacy of the Nicolau Award, plaintiffs refuse to acknowledge that courts have already ruled that it was not a DFR for USAPA 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); *Addington v. USAPA*, 2014 WL 321349, at *6-7 (D.C.AZ. Jan. 10, 2014); *US Airways, Inc. v. Addington*, 2012 WL 5996936, at *4-5 (D.C.AZ. Oct. 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." Doc. 1, ¶28. Plaintiffs admit 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.[19]

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

[19] It is significant that the proposal to amend the USAPA Constitution to transfer the power to defer from the National Officers to the BPR was defeated by the USAPA membership as a whole, but overwhelmingly (98.58% against the amendment) by the West Pilots. Bradford Decl., ¶3.

opposed to USAPA" (Doc. 1-7, at 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).[20]

Moreover, two arbitration decisions fully support the reasonableness of the decision by the National Officers to the extent they cited the *Addington II* and PBGC cases as collective legal

[20] 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***,** Case No. 3:14-cv-00577-RJC-DCK, so that the propriety of those actions could be determined in a rational manner and not piecemeal in various forums.

actions and a basis for deferring dissolution. *See* Arbitration Award in *USAPA and Seven Dues Challengers* and Arbitration Award in *USAPA and Dues Challengers*, annexed as Ex. "F" and "G" to Bradford Decl., respectively.[21] There decisions affirm the reasonableness of the decision by the National Officers to defer and to rely on these matters in so doing. It was reasonable for the National Officers to adopt an interpretation of the USAPA Constitution and Bylaws that matters that are deemed germane under the RLA are also "collective legal actions" within the meaning of the USAPA Constitution and Bylaw. Moreover, these decisions establish that a union's expenditure of funds does not have to be universally accepted or benefit *every* member equally for it to be deemed germane for "collective" purposes.

An additional consideration in this regard is that the MOU and Protocol Agreement anticipate and presuppose the continued existence of USAPA post-decertification. The MOU, which was ratified by the USAPA membership in February 2013 (97% of the West Pilots entitled to vote voted in favor of the MOU (Bradford Decl, ¶14)), provides, among other things, for the reimbursement of expenses to the USAPA Merger Committee, which is only possible within the structure of the organization as a whole. Bradford Decl. ¶¶11-13. Similarly, in the Protocol Agreement, entered into prior to USAPA's decertification, the parties, including the APA, recognize and provide for the continued existence and autonomy of the USAPA Merger Committee, and expand upon MOU provisions related to reimbursement of expenses. Again, since the Merger Committee has no independent legal existence, in the face of these pre-existing legal obligations and the commitments with respect to the Merger Committee, USAPA was committed to continuing in existence post-decertification. The decision by the National Officers

[21] Under the RLA, members of a bargaining unit represented by a union can opt out of membership, but must still pay a portion of dues deemed "germane" to collective bargaining. In 2008 and 2012, certain West Pilots challenged USAPA's inclusion of attorneys' fees and costs relating to the pursuit of the PBGC matter and defense of *Addington II* as germane to collective bargaining. In both cases, the arbitrators ruled that PBGC and *Addington II* litigation were germane expenses and chargeable to non-members.

was consistent with these prior existing legal obligations, and, in fact, in view of this, the failure to defer dissolution would have been wholly improper.

Because the National Officers' 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.

3. 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.

There was no personal benefit to defendants from their actions. Since November 1, 2014, defendants are full time working pilots volunteering their services to USAPA. Plaintiffs' argument that defendants' actions are "designed to advance the personal seniority interests of the Defendants" (Doc. 16, at 10) fails for several reasons. First, the expenditure of USAPA funds to advance its position before the PAB and its interests in the SLI proceedings 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). Second, defendants' personal seniority interests are identical to the interests provided for in USAPA's Constitution and Bylaws, and thus benefits USAPA. As such, any "interest" defendants have is an indirect one and not in violation of section 501. *Reach*, 843 F.2d at 1347 n 3.

Third, any claim of a personal interest or benefit is too attenuated and speculative to be cognizable under the LMRDA. Any 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, plaintiffs will 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 to defendants or harm to plaintiffs. Valid authorization of defendants' actions serve as a complete defense to this action, and the complaint should be dismissed as a matter of law.

POINT III

PLAINTIFFS FAIL TO MAKE A CLEAR SHOWING OF ACTUAL AND IMMINENT IRREPARABLE HARM

It is well established in the Fourth Circuit that a plaintiff seeking a preliminary injunction must make a clear showing that plaintiff will suffer irreparable harm without the relief. *Direx Israel, Ltd. v. Breakthrough Med. Corp.,* 952 F.2d at 812. "[T]he required irreparable harm must be neither remote nor speculative, but actual and imminent." *Id* (internal quotations omitted). "Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear showing of immediate irreparable injury." *Id*., quoting *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987).

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.*[22] 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, a section 501 claim must allege harm to the labor organization, not to a discrete segment of the membership.

Plaintiffs argue that in the absence of immediate injunctive relief, they "are likely to suffer substantial and irreparable harm" in two ways. Doc. 16, at 19. First, they claim that USAPA's continued expenditure of funds is "draining USAPA's treasury of funds that instead should be returned to its membership." *Id.* Second, plaintiffs suggest they are irreparably harmed in advancing their position in the substantive SLI process. *Id.*, at 21 n.8. Both arguments fail.

As to the first alleged harm, plaintiffs concede that defendants' actions benefit the majority of USAPA members. Doc. 1, ¶33 ("Defendants expended USAPA funds to advance USAPA's position before the PAB . . ."). Moreover, plaintiffs never claim that the majority of USAPA members want the treasury funds returned to them. Indeed, they admit that expending funds in the SLI process benefits the majority of USAPA members. 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,

[22] The *Schimmel* plaintiffs also 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.

and in any event the DFR cases against USAPA and the arbitration decisions stand for the proposition that USAPA does not act improperly merely because all of its actions are not universally approved. Universal approval is not the standard under the DFR, RLA, or collective legal action under the USAPA Constitution and Bylaws and plaintiffs have offered no basis for the Court to impose it here. Plaintiffs repeatedly admit that the National Officers' actions benefitted the majority of USAPA members. That is all that is required. Accordingly, the instant irreparable harm is readily distinguishable from the harm alleged in *Schimmel*, and since the continued expending of USAPA funds does benefit, at minimum, a majority segment of USAPA's membership, plaintiffs fail to allege irreparable harm to USAPA as a whole.

Even as to plaintiffs and the West Pilots, the complaint fails to assert any cognizable harm to them 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." Doc. 1, ¶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, comply with section 501(a). *Cf., Schimmel*, 128 F.3d 689.

Moreover, harm to plaintiffs and the West Pilots is not the "functional equivalent" of harm to USAPA. *Schimmel*, 128 F.3d at 693 (concluding that harm to plaintiffs, and the interests they represented, was not sufficiently distinguishable from harm to the union). The PAB ordered that APA had the discretion to establish a West Pilots Merger Committee to represent the interests of the former American West Pilots in the SLI process. As such, there are three merger

committees participating in the SLI process: APA Merger Committee, USAPA Merger Committee, and the APA designated West Pilots Merger Committee. As such, the membership of USAPA is segmented with respect to seniority integration (as between the East and the West Pilots at least), and for that reason harm to plaintiffs or the West Pilots' segment of USAPA's membership is not harm to USAPA. This is especially true given that the actions plaintiffs seek to enjoin benefit a majority of USAPA's membership and not just the defendants.

As to their suggestion that they are irreparably harmed in the SLI proceeding, any harm, is speculative and theoretical. *See Winter*, 555 U.S. at 22, 129 S.Ct. at 375-76 (holding that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). The SLI process has not yet begun and it is impossible to predict what will result from said process in terms of the ultimate integration of the seniority lists. As a result, it is also impossible to determine whether plaintiffs will suffer any harm at all until the three seniority lists in question are actually integrated and a combined seniority list is created.

There are also significant questions of fact as to the resources available to the West Pilots Merger Committee raising doubts as to any claim of harm from USAPA's refusal to fund that committee. Absent from the complaint and their motion is any assertion that the West Pilots Merger Committee has insufficient funding to adequately participate in the SLI process. And such a claim is contradicted by the multiple avenues to funding available to the West Pilots Merger Committee. For instance, pursuant to the MOU, the merger representatives are entitled to a share of $4 million dollars as funded by US Airways/American Airlines. Doc. 1-3, at ¶7. Also, the West Pilots Merger Committee is a committee established and maintained by APA as

authorized by the PAB. Doc. 1-5, at 36. As such, the APA owes a duty of fair representation to the West Pilots, which translates to a legal duty to fund the West Pilots Merger Committee the same way that the APA has a legal duty to fund the West Committee in the SLI process in order to protect the interests of those pilots. According to APA's 2014 Form LM-2, it has approximately $47 million in assets.

Then there is Leonidas as a source of funding. A January 28, 2015 Leonidas Update identified Leonidas as a source of funding for the West Merger Committee and noted, "[s]ufficient participation in the Push For Justice program will adequately cover the cost of seniority integration." Bradford Decl., Ex. "C"; *see also* March 6, 2015 Leonidas Update ("The Push Campaign will be our main source of funding . . ."), annexed as Ex. "D" to the Bradford Decl. The net result of the foregoing is to create an issue of fact as to the alleged harm resulting from a lack of funding and defendants should be allowed to discover facts concerning this critical element of a preliminary injunction application in the event the Court does not deny the instant motion outright.

The various sources of funding available to plaintiffs negate any claim of irreparable harm. *See Faulkner v. N. Carolina Dep't of Corrections*, 428 F.Supp. 100, 103 (W.D.N.C. 1977) (holding that movant must "show that there is an ongoing injury for which there can be no adequate compensation later."). Moreover, even if the West Pilots Merger Committee is legally entitled to funding from USAPA similar to the funding given by USAPA to the USAPA Merger Committee, any such harm resulting from the lack of funding would not be irreparable as it could be remedied by a subsequent money judgment.

For the foregoing reasons plaintiffs fail to make a clear showing of irreparable harm.

POINT IV

BALANCE OF THE EQUITIES FAVORS DEFENDANTS

In deciding any application for a preliminary injunction/temporary restraining order, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. at 376. In this case, the equities tip decidedly in favor of defendants. Plaintiffs seek to enjoin defendants from:

> authorizing the expenditure of USAPA funds obtained from the collection of dues and assessments of US Airways pilots during the period that USAPA was the exclusive bargaining agent of US Airways pilots in support of activities of any kind, including but not limited to payment of attorneys, experts, witnesses, office space or flight pay loss to pilots for purposes of preparing for and participating in the Substantive Seniority Integration Process …

Proposed Preliminary Injunction and TRO Orders, Docs. 16-5, 16-6.

The pretense that plaintiffs bring this action on behalf of USAPA falls away in this portion of plaintiffs' motion, as they essentially balance the equities of the West Pilots versus the numerical majority of East Pilots. Doc. 16, at 21-22. Plaintiffs' claim enjoining further funding of the USAPA Merger Committee will put the East and West Pilots on equal footing with respect to seniority integration (since each segment of the USAPA membership would get their share of the $4 million promised to the merger representatives in the MOU), and that all pilots will benefit from USAPA ceasing to expend funds by virtue of a larger individual distribution upon dissolution of USAPA. However, plaintiffs omit several essential facts that must be considered in balancing the equities. First, as the West Pilots Merger Committee is a creation of APA (as approved by the PAB), the West Pilots can seek further funding from their certified bargaining representative. This is the solution to any West Pilot Merger Committee funding deficiency

(which, as demonstrated above, is pure fiction). Instead, plaintiffs want the Court to hamstring the USAPA Merger Committee for strategic purposes.

Second, the claim that the East Pilots are harmed by continued USAPA expenditures is wholly without merit. USAPA's funding of the USAPA Merger Committee benefits the East Pilots, who constitute a majority of the membership. While it is true that further expenditures may decrease the individual distribution ultimately received by East Pilots, since those funds are being expended in the interests of the East Pilots, there is no harm to them.

Third, plaintiffs fail to note that USAPA is actively defending two lawsuits that allege significant money damages, including *Addington II*, in which the West Pilots as a certified class and represented by plaintiffs' attorneys in this case, seek a $3 million attorneys' fees award against USAPA. If defendants are enjoined from funding USAPA's defense of these lawsuits, then **all** pilots will be harmed in the same way plaintiffs claim they will be harmed by further expenditure of the funds in USAPA's treasury, namely, further reduction in the ultimate distribution to each eligible member when USAPA dissolves. Therefore, the majority of USAPA's membership will suffer greater harm if plaintiffs' motion is granted.[23]

This serves to demonstrate the convoluted and disingenuous nature of this action and application for injunctive relief. The West Pilots and Leonidas, through the plaintiffs, want to cut off funding to the USAPA Merger Committee to advance their personal interests in the seniority integration dispute. However, with knowledge of the legal standards governing a 501 action, plaintiffs are forced to attempt to dress up their case as being for the benefit of USAPA.

[23] It should also be noted that such a broad injunction as the one plaintiffs seek "would make it impossible for USAPA to operate and pay its ongoing obligations (such as rent, equipment leases, maintenance of computer systems), which would not only potentially expose USAPA to liability (e.g. landlord and other vendors), but would also make it impossible for USAPA to maintain the systems in place and proper order to make a distribution to plaintiffs, which is a major item of relief sought by plaintiffs." Bradford Decl., ¶24.

Their efforts have failed. It is clear from the above that granting the requested provisional relief will be more harmful to USAPA, ironic as it is given plaintiffs' claim to represent USAPA's interests in this matter. The equities compel denial of the instant motion.

POINT V

PUBLIC INTEREST COMPELS DENIAL OF PLAINTIFFS' MOTION

As cited by plaintiffs, "true public interest lies in vindicating principles of union democracy by requiring … defendants to obey their own constitution." *Loretangeli*, 853 F.2d at 196. In this case, defendants are faithfully and fully complying with the USAPA Constitution. Article I, Section 3(C) states in relevant part that deferral of dissolution is appropriate where "the need for collective legal action on behalf of the pilot group, including, but not limited to, representation in seniority integration proceedings" exists or may exist in the future. Without restating defendants' prior arguments regarding the interpretation of this language, it is crucial to note the inclusion of "seniority integration proceedings" as an example of the type of "collective legal action" for which dissolution may be deferred by the National Officers. At the time the USAPA Constitution was drafted and democratically adopted by its members in or around 2008, the divergent interests of the East and West Pilots due to the Nicolau Award were already present and prominent. Accordingly, it is clear, based on this extrinsic piece of evidence, that the relevant Constitutional language was written with knowledge of the fact that in any "seniority integration proceedings" the interests of the East and West Pilots would not be combined, and, therefore, that funding the USAPA Merger Committee in the SLI process is a valid action under the USAPA Constitution.

Further, since plaintiffs want to enjoin all USAPA expenditures and do not simply seek to enjoin USAPA from "expending funds exclusively for the benefit of the East Pilots," their

argument regarding the public interest factor is fatally flawed and should be disregarded. Doc. 16, at 22-23.

POINT VI

THE COURT SHOULD REQUIRE PLAINTIFFS TO POST A SIGNIFICANT BOND

In the event an injunction issues, a significant injunction bond should be required. Under Fed. R. Civ. P. Rule 60(c), the requirement of a bond is presumptive. *Maryland Dep't of Human Resources v. U.S. Dep't of Agriculture*, 976 F.2d 1462, 1483 (4th Cir. 1992)(stating,"[f]ailure to require a bond before granting preliminary injunctive relief is reversible error [footnote omitted]."

The circumstances here demand that any bond be significant amount in order to protect the interests of the individuals plaintiffs have wrongfully chosen to sue. Rather than join issue in the Declaratory Judgment action, rather than sue defendants as representative of USAPA (despite seeking relief they can only provide in their official capacities), plaintiffs have chosen to sue defendants – some of whom are no longer in office, all of whom are volunteers -- in their individual capacities, no doubt, in part to harass and attempt to intimidate them. Adverse consequences from being named as defendants in their individual capacities are possible. A significant injunction bond should be imposed to protect the personal property, rights, and interests of 15 defendants, none of whom should have been sued in this action for the reasons stated.

CONCLUSION

For all of the foregoing reasons, plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction should be denied in its entirety.

This the 20th day of April, 2015.

TIN FULTON WALKER & OWEN

s/ John Gresham

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION with the Clerk of the Court using the CM/ECF system, and that notification pursuant to the CM/ECF system will be sent to:

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