**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

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| EDDIE BOLLMEIER, et al | ) | |
| | ) | Case No. 3:15-cv-00111-RJC-DCK |
| v. | ) | |
| | ) | |
| GARY HUMMEL, et al | ) | |
| | ) | |

**COMBINED MEMORANDUM OF LAW (1) IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE THE COURT'S ORDER DATED MARCH 5, 2015, OR IN THE ALTERNATIVE, TO DISMISS THE VERIFIED COMPLAINT, AND (2) IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION**

Plaintiffs, through their attorneys, submit this Memorandum of Law in Opposition to Defendants' Motion to Vacate the Court's March 5, 2015 Order, or in the alternative, Motion to Dismiss the Verified Complaint (Doc 22-1). Because the issues of law raised in Defendants' Motion are nearly identical to those raised in Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction (Doc. 24), this combined brief also serves as Plaintiffs' Reply to that Opposition.

## INTRODUCTION

Through the present action, Plaintiffs seek relief under Title V of the Labor-Management Reporting and Disclosure Act ("LMRDA") against Defendants'[1] past and ongoing breaches of the fiduciary duties they owe to all members of the US Airline Pilots Association ("USAPA"). Their Verified Complaint alleges that (1) the individual Defendants; (2) have authorized the expenditure of, and have spent, USAPA funds; (3) to advance their personal interests in a manner not authorized by USAPA's governing documents; and (4) should be required to reimburse USAPA

[1] To date, nine Defendants have been officially served with the Verified Complaint. All the remaining Defendants have been sent multiple copies of the Complaint, Summons and all subsequent filings via certified mail, but, for whatever reason, these Defendants have not signed for their certified mail. *See* Ex. A, attached hereto.

for those expenditures and enjoined from making further expenditures of that nature; and (5) should also be required to hold those reimbursed funds and other USAPA funds for distribution individually to USAPA's members as provided for by USAPA's Constitution. Rather than address the Complaint (and Motion for preliminary relief) as written, Defendants have "redrafted" them as ones (1) brought against USAPA; (2) seeking to require it to advance a different seniority integration principle (a requirement, they say, that has been rejected by other courts in other cases); or (3) fund the West pilots' merger committee; and (4) to dissolve USAPA now; (5) thereby claiming the lawsuit is not one seeking a benefit for the Union as a whole.

Defendants' "straw-man" approach to this case cannot withstand scrutiny. Plaintiffs are masters of their own Complaint and, contrary to Defendants' misleading assertions, mischaracterizations and implications, their Complaint seeks nothing of the sort. Rather, Plaintiffs seek only to enforce those rights afforded union members under Title V of the LMRDA, namely the right to hold union officers personally liable for breaching their fiduciary duty to the Union's members by expending Union funds—derived exclusively from dues payments by union members—in contravention of the plain terms of a Union's constitution and bylaws and under circumstances where their expenditure of those funds advances their personal interests, rather than holding those funds for the benefit of the Union for ultimate dispersal to all of the Union's members as expressly provided for by USAPA's Constitution. More precisely, as set forth in Plaintiffs' Complaint, they seek only the unique relief available under Title V: an accounting of USAPA's treasury; restitution by Defendants of the funds they have expended in contravention of their authority under the USAPA Constitution and their fiduciary duties; a preliminary and permanent injunction against Defendants' further expenditure of USAPA funds on matters not

authorized by the USAPA Constitution; and a disbursement of funds to USAPA's members in a manner provided for by the USAPA Constitution.

As outlined below, Plaintiffs' Complaint plainly states a claim upon which this Court can—and should—grant relief. Likewise, contrary to Defendants' assertions, this Court has subject matter jurisdiction over this claim. And, for the reasons discussed herein, the Court should also preliminarily and permanently enjoin Defendants from their continued breaches of their fiduciary duties.

## ARGUMENT[2]

### A. This Court Has Subject Matter Jurisdiction over Plaintiffs' Claims Because Plaintiffs have Met Each of Title V's Three Statutory Preconditions to Filing a Complaint

Defendants incorrectly assert that Plaintiffs' Title V suit must be dismissed on jurisdictional grounds because, according to Defendants, Plaintiffs failed to satisfy each of the three jurisdictional prerequisites contained within the statute. As shown below, however, this Court has subject matter over Plaintiffs' claim because Plaintiffs (1) made an unsuccessful demand to USAPA that it stop Defendants from expending Union funds in violation of their fiduciary duties; (2) demonstrated good cause to bring the present action, as this Court has already held; and (3) are seeking relief on behalf of the Union rather than on their own behalf.

1. As is required by 29 U.S.C. § 501(b), Plaintiffs made a demand upon USAPA that it secure an accounting of its treasury and other appropriate relief.

By its terms, Title V of the LMRDA requires a prospective plaintiff to first make a demand to the Union that it take action against its officers who are violating their fiduciary duties to the Union's members. Contrary to Defendants' assertion, Title V does not provide that a demand to

[2] Rather than burden the Court with another recitation of the pertinent facts in this matter, Plaintiffs incorporate by reference the facts stated in their Motion for Temporary Restraining Order or Preliminary Injunction (Doc. 16).

institute legal proceedings is the exclusive means by which to satisfy Section 501(b)'s demand requirement. Rather, prospective Title V Plaintiffs satisfy the LMRDA demand requirements in four separate ways: (1) demand that the Union "sue" its officers[3]; (2) demand that the Union "recover damages" from its officer(s); (3) demand that the Union "secure an accounting" of the questioned funds; or (4) demand that the Union secure "other appropriate relief" against the officers. 29 U.S.C. 501(b). Section 501(b) lists these four types of demands in the disjunctive, meaning that a plaintiff satisfies the demand requirement by demanding any one of them. *Id*. Thus, the plain language of Section 501(b) contradicts Defendants' assertion that Plaintiffs could only meet the demand prerequisite by unsuccessfully requesting that USAPA file suit against its National Officers.

The District Court of the District of Columbia recognized this plain meaning when it observed that "the demand required by Section 501(b) is not necessarily one to pursue legal action; rather [] this jurisdiction prerequisite may be satisfied by a demand for an accounting or 'other appropriate relief.'" *Saunders v*. *Hankerson*, 312 F. Supp. 2d 46, 60 (D.D.C. 2004). In *Saunders*, the court held that, whether viewed individually or in the aggregate, the Title V plaintiff's actions were sufficient to satisfy the Section 501(b) demand requirements where plaintiff (1) requested from the union a refund of certain union dues he alleged were withheld improperly; (2) participated in drafting a letter to the union officials reiterating his demand for a refund and inquiring as to why the funds were deducted in the first instance; (3) organized and participated in a protest outside the union's offices and concurrently participated in drafting, issuing, and distributing a press release

[3] Such a demand here would have been futile in any event. USAPA never would have sued Steve Bradford, the founder of USAPA, for conduct related to the performance of his duties as Vice-President (and now for the second time President) of USAPA. Moreover, as discussed infra at fn.6, futility is a well-recognized exception to the demand-to-sue point.

regarding the allegedly improper deductions; and (4) proposed a motion demanding an immediate refund at a union meeting. *Id*. at 61. Observing that the "express purpose of section 501 is to enforce the fiduciary obligations of union officers to union members," the *Saunders* court held that the plaintiff's actions were "sufficient to constitute a demand for 'appropriate relief' [] consistent with the purposes of the [LMRDA]," even though the plaintiff stopped short of demanding that the union initiate legal proceedings. *Id*. at 63; *see also Dinko v*. *Wall*, 531 F.2d 68, 70-73 (2d. Cir. 1976) (holding that a detailed letter alleging constitutional violations and requesting a "complete accounting" of union expenditures was sufficient to meet the section 501(b) demand requirements); *Sabolsky v*. *Budzanoski*, 457 F.2d 1245, 1252 (3d Cir. 1972) (holding that a letter to an international union president seeking internal relief but not requesting that the union file suit against any officers was sufficient to meet the section 501(b) demand requirements). Therefore, where a plaintiff "complained of the wrongs which [he] now assert[s] in this litigation to the Union and the Union took no action to redress those wrongs," that plaintiff has met the 501(b) demand prerequisite. *Saunders*, 312 F. Supp. 2d at 63 (quoting *Cefalo v*. *Moffett*, 333 F. Supp. 1283, 1285 (D.D.C. 1971)).

Here there can be no doubt, and Defendants do not contend otherwise, that both USAPA and Defendants were keenly aware of the wrongs complained of by Plaintiffs in this action well before Plaintiffs sought relief from this Court. Nor can there be any doubt that USAPA and Defendants repeatedly ignored—and continue to ignore—Plaintiffs' demands that Defendants stop spending Union funds in violation of the USAPA Constitution. As early as September 12, 2014, a USAPA member, writing on behalf of all former America West Pilots (including each Plaintiff), demanded that USAPA's National Officers (Defendants here) "make an accounting of its treasury," and "take immediate steps to calculate the amount of money to be returned to" USAPA's members. *See* Ex.

5 to Compl. Plaintiffs' attorney reiterated similar demands in correspondence to USAPA's general counsel beginning in December 2014. *See* Ex. 6 to Compl. (demanding that USAPA distribute its assets to its members in accordance with its Constitution, cease using treasury funds to oppose the West Pilots' position in the seniority list integration process, and advising that USAPA's National Officers may expose themselves to personal liability for breaching their fiduciary duties to the members of USAPA); Ex. 7 to Compl. (demanding that the National Officers "take steps to ensure that the West Pilots' dues money collected by [USAPA] are not used against them"); Ex. 8 to Compl. ("[T]he excess dues paid to USAPA . . . cannot be used to pay for [] East Pilot litigation. Please make sure that the four National Officers understand this."); Ex. 10 to Compl. ("USAPA's spending habits need to be shut down now. If they are not, the National Officers are breaching their fiduciary duties . . . [and] are responsible for stopping the expenditure of USAPA funds on all items that do not legitimately qualify as 'collective legal action'"). USAPA failed to take action against its National Officers despite these repeated demands by West Pilots and Plaintiffs' attorney. [4]

Prior to initiating this litigation, each of the Plaintiffs sent a final correspondence on February 13, 2015, to each of the Defendants reiterating and adopting the demands outlined in the prior correspondence from their colleague and attorney. *See* Ex. 11 to Compl. Specifically—and consistent with section 501(b)'s demand requirements—Plaintiffs demanded an accounting of USAPA's treasury as of September 16, 2014, in addition to other appropriate relief such as

[4] Defendants offer no authority for their assertion that the demands made by Plaintiffs' attorney, Marty Harper, as well as their colleague and class representative, Roger Velez, are legal nullities for Section 501(b) purposes. Moreover, each of the individual Plaintiffs made prior to filing this Complaint, and as set out in text below, were expressly incorporated and adopted in each of the Plaintiffs' demands in their February 13, 2015 correspondence to Defendants. *See* Ex. 11 to Compl. ("I adopt and agree with all of the prior letters, requests and demands made by Mr. Velez and Mr. Harper.").

stopping Defendants from spending additional funds on seniority list integration and disbursing to USAPA members the dues funds remaining in USAPA's treasury pursuant to the terms of its Constitution. Therefore, Plaintiffs' February 2015 demands—either standing alone or in conjunction with the prior demands made to USAPA discussed above—plainly meet the Section 501(b) prerequisite that Plaintiffs demand that a Union "secure an accounting and other appropriate relief." *See* 29 U.S.C. 501(b). Accordingly, Defendants' assertion that Plaintiffs somehow failed to meet Section 501(b)'s demand requirement is unavailing. [5]

2. Plaintiffs established good cause for bringing their Title V action against Defendants.

Section 501(b) requires—and Plaintiffs sought and obtained—leave of court upon good cause shown before filing a Title V complaint against Union officers. Defendants now challenge the Court's holding that Plaintiffs demonstrated good cause sufficient to bring this action. As shown below, this argument is unpersuasive.

The Title V good cause standard is defined nowhere in statute, and Defendants correctly observe that the Fourth Circuit also has not defined it. However, in *Loretangeli v. Critelli*, 853 F.2d 186 (3d Cir. 1988), the Third Circuit thoroughly analyzed Title V's good cause requirement and rejected the heightened standard Defendants argue for here. The *Loretangeli* court aptly noted that, in enacting Section 501, Congress simultaneously "intended to protect rank and file union members by imposing a duty on union officials to act as fiduciaries with respect to union funds and property" but also instituted a good cause requirement to protect Union officials from

[5] In the analogous context of shareholder derivative suits, the Fourth Circuit has held, applying federal law, that no demand for suit is required when such a demand would be futile. *See, e.g., Meltzer v. Atl. Research Corp.*, 330 F.2d 946, 948 (4th Cir. 1964) ("It was too much to expect that the Board would direct the corporation to sue themselves.") North Carolina courts applying state law are in accord. *See, e.g., Bridges v. Oates*, 605 S.E.2d 685 (N.C. Ct. App. 2004)(no demand for suit is required where obviously futile).

"harassing and vexatious suits brought without merit or good faith." *Id*. at 189. Although noting the difficulty in giving effect to both competing policies, the Court rejected good cause standards that require a plaintiff to demonstrate a certain likelihood of success, because such standards "gloss[] over Congress' expressed intent to protect union members from fiduciary breaches by union officials" and "overemphasize[] the purpose of guarding against vexatious suits." *Id*. at 191. The *Loretangeli* court rightly found significant the fact that Section 501 allows Plaintiffs to file an *ex parte* application for leave to sue as suggestive of Congress' intent for "a low level of judicial scrutiny" at this early point in the litigation. *Id*. Likewise, the Court found nothing in the statutory text to suggest that a district court should "make a searching inquiry into the merits of the suit" when determining whether good cause exists to grant leave to file; indeed a finding of good cause at the infancy stage of a Title V action does not eliminate the protection against meritless suits that summary judgment affords to Defendants. *Id*. at 191-92.

Therefore, it is inappropriate for a court to consider, when determining whether good cause exists, any asserted defenses "which require the resolution of complex questions of law going to the substance of the case or which necessitate the determination of a genuine issue of material fact." *Id*. at 192. For instance, a district court should not consider at the good cause stage of a Title V action the Union's interpretation of its own Constitution when a putative plaintiff alleges that Union officers violated certain constitutional provisions. *See id*. at 192-93 (holding that it is error for a district court to dismiss a proceeding at the good cause stage based on the defendant's invocation of legal principles that raise complex questions of law going to the merits).

Each of the reasons purportedly evincing a lack of good cause relied on by Defendants require the Court to resolve either a complex question of law, make a determination of a genuine issue of material fact, or both. For instance, Defendants argue that good cause is lacking because

Plaintiffs did not make a demand to initiate legal proceedings. However, as discussed above, this reason implicates both a complex legal question (which demands are sufficient to meet the statutory prerequisites of Section 501) and a disputed factual issue (the precise nature of Plaintiffs' demands). Likewise, Defendants' contention that Plaintiffs fail to seek relief on behalf of the Union, as discussed below, requires the Court to resolve a material question of disputed fact. In effect, Defendants ask the Court to convert the good cause standard and determination into a summary judgment proceeding. As in *Loretangeli*, the Court should reject this inappropriate invitation.

Before leaving this section, Plaintiffs want to make one thing crystal clear: by addressing Defendants' "good cause" arguments in this manner in the context of Defendants' 12(b)(1) motion, they are not "running away from" the showing required for preliminary injunctive relief, an admittedly higher standard. For reasons set out throughout this Brief (*see infra* Part B), Plaintiffs have met their burden on this standard as well. But for purposes of dealing with Defendants' arguments regarding the "good cause" standard in the motion to dismiss context, it is enough to say that Plaintiffs' Verified Complaint easily meets Title V's requirements, and the Court should reject Defendants' Motion to Vacate its Order finding good cause to file this action.

3. Plaintiffs seek only relief on behalf of USAPA and its members.

Defendants claim that Plaintiffs seek relief only for the West pilots. They are flat wrong. Title V lawsuits are derivative in nature, meaning that Plaintiffs bring them on behalf of the Union and to obtain "appropriate relief for the benefit of the labor organization." 29 U.S.C. 501(b). Plaintiffs' Complaint here seeks precisely such relief, and Defendants' assertions to the contrary grossly misreads and mischaracterizes Plaintiffs' allegations and prayer for relief.

Plaintiffs here seek four distinct remedies: (1) an accounting of USAPA's treasury; (2) restitution from Defendants of the USAPA funds they expended in violation of USAPA's Constitution; (3) an injunction against Defendants from expending further USAPA funds in violation of the Constitution; and (4) disbursement to USAPA's members, in accordance with the terms of the USAPA Constitution, all funds remaining in USAPA's treasury that are not needed for its reasonable expenses of winding down. Properly understood, the first three remedies work together to ensure that maximum USAPA funds are available to effectuate the fourth remedy for USAPA's benefit, *i.e*. disbursement of its funds to all of USAPA's membership.

USAPA's Constitution expressly provides that, upon dissolution, "[a]ll [USAPA] assets shall be liquidated and, less any indebtedness, shall then be prorated to the active members of good standing of USAPA as of the time of such dissolution." Ex. 1 to Compl. at Art. I, § 3(A). Seeing to it that monies that should not be spent are available for return to its members upon dissolution is decidedly a remedy serving the union's express constitutional purposes. By its plain terms, the USAPA Constitution mandates that, upon dissolution, the organization must disburse its remaining treasury funds to *all members*, meaning both East and West Pilots. And it is this provision of USAPA's Constitution that Plaintiffs here seek to enforce. The very first paragraph of Plaintiffs' Complaint makes this clear: "This is an action brought by union members under Title V of the [LMRDA] seeking . . . restitution to USAPA, *for the benefit of its members*, of any monies spent in violation of Defendants' fiduciary duties . . . and [] disbursement of USAPA funds *to its members* in accordance with its Constitution. Compl. ¶ 1 (emphasis added). Thus, every member of USAPA—regardless of his or her status as an East or West Pilot—stands to benefit if the Plaintiffs succeed in this action.

Defendants further attempt to show that Plaintiffs have not sought relief on behalf of the union by incorrectly framing Plaintiffs' lawsuit as seeking disbursement of all USAPA funds without regard to any consequences that may befall the organization in doing so. This position deliberately misreads both the Complaint and the clear terms of the USAPA Constitution. In their prayer for relief, Plaintiffs expressly concede that some USAPA funds may be "reasonably necessary for [] collective action on behalf of the pilot group and [for] ordinary expenses of winding down" the organization. In so stating, Plaintiffs echo USAPA's Constitution, which allows the organization to maintain funds in its treasury for certain purposes even after USAPA ceases to serve as a certified bargaining representative for any class of employees. *See* Ex. 1 to Compl, at Art. I, § 3. Therefore, Plaintiffs do not seek to prevent Defendants from expending USAPA funds for necessary and constitutionally-authorized purposes, but rather only to compel disbursement to USAPA members of those surplus funds not reasonably required to further those legitimate objectives.

4. Under Title V, USAPA is a "labor organization," and Plaintiffs are USAPA members.

In a final attempt to defeat subject matter jurisdiction, Defendants implausibly argue both that, as defined by the LMRDA, Plaintiffs are not "members" of a labor organization and that USAPA is not a "labor organization." Both claims ring hollow.

Doubtless, membership in the pertinent labor organization is a condition precedent to bringing a Title V claim. *See* 29 U.S.C. 501(b). To that end, the LMRDA defines union members as "any person who has fulfilled the requirements for membership in [a labor organization], and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership." 29 U.S.C. § 402(o). In *Erkins v. Bryan*, the Eleventh Circuit made clear that when, as here, the relevant labor organization has been decertified as an exclusive bargaining

representative, its members in good standing at the time of decertification (here September 16, 2014) still meet the LMRDA's "membership" definition and have standing to bring a Title V action. *See* 663 F.2d 1048, 1050-51 (11th Cir. 1981). There, the plaintiffs' former local union represented only the employees of a single company and lost the right to do so when it was decertified as those employees' bargaining representative after a National Labor Relations Board election. *Id*. at 1050. Thus, the local union ceased being a collective bargaining representative for any class of employees. *Id*. Despite the appointment of an administrator by the international union, the local union remained essentially dormant after its decertification, which the international union argued stripped prospective Title V plaintiffs of "membership" status. *Id*. The court rejected this argument, holding instead that, under "the precise language" of the LMRDA, membership ceases to exist only when a person has voluntarily withdrawn from the organization, or been expelled or suspended from membership. *Id*. at 1051;[6] *see also Alvey v*. *Gen*. *Elec*. *Co*., 622 F.2d 1279, 1284 (7th Cir. 1980) ("Congress did not limit the protections of the [LMRDA] to those whom the union recognizes as members. Rather one who has fulfilled the membership requirements, that is, one who is a member in substance, is protected.").

Here, however, Defendants assert that they ought to have the right to define who is and who is not a "member" of USAPA since decertification. Under their proposed definition, Plaintiffs—and indeed *all* West Pilots—are no longer USAPA members because the West Pilots have taken legal action against USAPA and are unwilling to concede that USAPA represents their seniority

[6] In so holding, the *Erkins* court expressly rejected the rationale of *Phillips v*. *Osborne*, 403 F.2d 826 (9th Cir. 1968), upon which Defendants principally rely in support of their contention that Plaintiffs are not USAPA "members." *See* 663 F.2d at 1051. Although the *Phillips* court held that, contrary to the plain language of the LMRDA, union membership may be negated in some instances by factors other than voluntary withdrawal or expulsion, no other federal court—and certainly none within the Fourth Circuit—appears to have followed this conclusion.

interests in the "current" seniority integration process. The LMRDA, however, does not provide that union membership is lost merely by asserting legal action against a labor organization. Rather, union membership ceases only in three specific ways: voluntary withdrawal, suspension, or expulsion. *See* 29 U.S.C. § 402(o). Defendants do not assert—nor could they—that any Plaintiff withdrew from USAPA membership or was suspended or expelled from membership[7]. Absent such facts, Plaintiffs are plainly "members" for Title V purposes.

Defendants' second contention—that USAPA is not a "labor organization" under the LMRDA—is equally without merit. Defendants concede, as they must, that USAPA is "engaged in an industry affecting commerce" as defined in 29 U.S.C. § 402(i)–(j), because it "act[s] as the representative," *id*. § 402(j)(2), of former US Airways pilots in the ongoing seniority list integration process with American Airlines. Although Defendants admit that USAPA represents the interests of former US Airways pilots in the SLI process, they assert that USAPA ceased being a "labor organization" when it was decertified as the exclusive bargaining representative of US Airways pilots and, thus, no longer exists "for the purpose, in whole or in part, of dealing with employers concerning . . . wages, rates of pay, hours, or other terms or conditions of employment." *Id*. § 402(i). Defendants' position is wrong as a matter of fact and law.

It requires an inconceivably narrow view of the SLI process to conclude that USAPA's continued participation in it is anything other than dealing with an employer, namely American Airlines, concerning matters of rates of pay and other terms or conditions of employment. Since its decertification in September 2014, USAPA has continued to vigorously advance the preferred position of a subset of its members—the East Pilots—in the substantive SLI process between

[7] In fact, each of the Plaintiffs affirmatively alleges in their Verified Complaint that they are members in good standing at USAPA.

American Airlines, the American Pilots Merger Committee, the USAPA Merger Committee, and (more recently), the West Pilots Merger Committee. *See* Compl. ¶ 22. The primary purpose (and source of contention) of seniority list integration is to determine the relative position of pilots from separate airlines on the seniority list of a newly merged airline. Pilots' positions on the seniority list are determinative of, *inter alia*, their rates of pay and other terms and conditions of employment. *See* Stockdell Decl. and Ex. A–E to Stockdell Decl. (Docs. 16.3–16.4). Thus, throughout its ongoing participation in the substantive SLI process, USAPA deals with an employer—American Airlines—concerning US Airways pilots' rates of pay and other terms and conditions of employment. Because of this undisputed fact, USAPA cannot escape the conclusion that, as a matter of fact, it is a "labor organization" as defined by the LMRDA.

Nor does the fact of USAPA's decertification as an exclusive bargaining representative mean that, as a matter of law, it is not an LMRDA "labor organization." As a matter of first principles, it is inconceivable that Congress—in enacting Title V as a mechanism to protect union members from their officers' misuse of monies collected as mandatory dues—would have created a regime that would permit those same officers to abscond with the same dues money the day after the union was decertified without fear of recourse.[8] It is for that reason, not surprisingly, that Defendants have pointed to no case in which such conduct was countenanced. It is likewise not surprising that in those few cases with similar fact patterns, *i.e.*, a Title V challenge to the misuse of money after

[8] Defendants' position is especially absurd because, as here and in the other cases addressing Title V claims after decertification, there are funds remaining in the union treasury. With respect to USAPA, over the eight years that it was the exclusive bargaining representative of the former US Airways pilots, it collected nearly $70 million in mandatory dues and assessments (this figure is derived from a review USAPA's LM-2 forms from June 2008 through March 2014, which can be publically accessed at http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm). At decertification, on September 16, 2014, it had approximately $12 million left. The Plaintiffs do not know the precise figures because USAPA has failed to respond to any demands for an accounting.

a union's decertification, the argument Defendants would have this Court accept has never even been raised, and the courts treated the officers of the decertified unions as bound by Title V as a matter of course. *See, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers v. Schimmel*, 128 F.3d 689 (8th Cir. 1997) (officers of decertified union, operating as an unincorporated association, liable under Title V for misuse of funds collected during union's status as an exclusive bargaining agent)[9]; *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981). Any other result would be, frankly, nonsensical.

5. *Res judicata* does not apply.

Defendants claim that this action is barred by the doctrine of *res judicata* based on final judgments in *Addington, et al. v. USAPA*, et al., 2:08-cv-01633-NVW (D. Ariz.) (Wake, J.) ("*Addington I*"); reversed on ripeness grounds in *Addington v. USAPA*, 606 F.3d 1174, 1184 (9th Cir. 2010), *US Airways, Inc. v. Addington, et al.*, 2:10-cv-01570-ROS (D. Ariz.) (Silver, J.) ("*Addington II*") and *Addington, et al v. USAPA*, et al., 2:13-cv-00471-ROS (D. Ariz.) (Silver, J.) ("*Addington III*") (currently pending appeal; oral argument held on April 14, 2015). Their flawed argument on this point flows from their repeated, and incorrect, characterization of Plaintiffs' claims in this case.

Under the doctrine of *res judicata*, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Andrews v. Daw*, 201 F.3d 521, 524 (4th Cir. 2000) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). "To establish a *res judicata* defense, a party must establish: (1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or

[9] For a complete discussion of *Schimmel*, see Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction (Doc. 16), at pp. 20–21.

their privies in the two suits." *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) (internal quotation marks omitted). Defendants' claim fails on both the second and third prong of the test (and all three prongs, to the extent they rely on *Addington I and II*).

*Addington I and III* were brought by a class of US Airways West pilots against USAPA as an institution based on claims that USAPA breached the duty of fair representation it owed to the West Pilots and, in *Addington III*, that the West pilots had a right to participate in the seniority integration process under the McCaskill-Bond Amendment. *Addington II* was brought initially by US Airways seeking a declaratory judgment that US Airways would not be liable in damages if it acceded to USAPA's demand to adopt a pilot seniority list that did not incorporate the Nicolau Award. Like *Addington I and III*, the claim in *Addington II* had its roots in the duty of fair representation doctrine. In all three cases, the Defendant was USAPA, the institution. In contrast, the instant case is brought by three individual West Pilots, against officers and directors of USAPA in their individual capacities. And the instant case is not based on a claim that USAPA breached its Duty of Fair Representation; rather, it is grounded solely on the claim that USAPA's individual officers and directors have breached their fiduciary duties under Title V of the LMRDA by spending money they were not authorized to spend. The chart below shows in a simple-to-view format the differences in the cases:

| **Case** | **Plaintiffs** | **Defendants** | **Claim** | **Disposition** |
|---|---|---|---|---|
| *Addington I* | Class of West Pilots | USAPA, US Airways | DFR | Dismissed on Ripeness Grounds |
| *Addington II* | US Airways; | USAPA, Class of West Pilots | DFR; Declaratory Judgment Act | Dismissed on Ripeness Grounds |

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| *Addington III* | Class of West Pilots | USAPA, US Airways | DFR; McCaskill-Bond Amendment | Judgment for Defendant USAPA; currently on appeal to 9th Circuit |
| *Bollmeier, et al. v. Hummel, et al.* | 3 individual West Pilots | 14 individual USAPA officers and directors in their individual capacities | LMRDA Title V | |

*Addington I* and *II* were both dismissed on ripeness grounds. Thus, even if the plaintiffs and defendants were identical to those in the instant case, and even if they were based on the same cause of action here, *res judicata* would not apply because there was no final judgment on the merits. *Addington III* did produce a final judgment on the merits (albeit currently on appeal), but the claim in that case (DFR) is plainly not the claim in this case (LMRDA Title V) and the defendant in that case (USAPA) is not the defendant in this one (individual USAPA officers and directors). *See Andrews*, *supra*. 201 F.3d at 525 (quoting Restatement (Second) of Judgments § 36(2) (1982)) ("As an initial matter, we note that the rule of differing capacities in the context of *res judicata* provides that '[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of *res judicata* in a subsequent action in which he appears in another capacity.'"); *see also* 18 James Wm. Moore *et al*., Moore's Federal Practice ¶ 131.40[2][A] (3d ed. 2015); *Akin v*. *PAFEC Ltd*., 991 F.2d 1550, 1559 (11th Cir. 1993); *Clark v*. *Amoco Prod*. *Co*., 794 F.2d 967, 673 (5th Cir. 1986). In other words, in *Addington III*, plaintiffs sought relief against USAPA in the form of an order that USAPA take a particular action (adopt the Nicolau Award as a basis for the seniority integration with American Airlines pilots) while in the instant case Plaintiffs seek money damages against USAPA's individual officers to be returned to USAPA and that these same officers be prohibited from spending USAPA money for an improper purpose. Because the claims and defendants in

*Addington III* and this case are not identical, *Addington III* does not support Defendants' *res judicata* defense.

**B. Plaintiffs Have Stated a Claim upon which Relief Can Be Granted.**

In moving to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants ignore the well-pleaded allegations in Plaintiffs' Complaint which show that (1) Defendants owe a fiduciary duty to USAPA's members, including Plaintiffs, to expend union funds only in accordance with specific provisions of the USAPA Constitution; (2) that Defendants have authorized and expended (and continue to authorize and expend) USAPA funds on activities not authorized by the USAPA Constitution, namely legal actions that are not "collective legal action on behalf of the pilot group"; and (3) that Defendants personally benefit from such unauthorized expenditures. In so alleging, Plaintiffs' Complaint, if accepted as true (as it must be for purposes of a 12(b)(6) motion to dismiss), "contain[s] sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 627 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Accordingly, Defendants' motion to dismiss on this basis should be denied.[10]

1. Plaintiffs have stated a § 501 claim against Defendant BPR members.

Defendants' argument that the Complaint does not state a claim against Defendant BPR members relies on a mischaracterization of Plaintiffs' claim and the relief sought. Defendants correctly posit that USAPA's Constitution vests sole and exclusive authority to defer USAPA dissolution and to determine whether to make interim distributions of funds to USAPA members

[10] Plaintiffs make the same observation in connection with Defendants' 12(b)(6) motion as they did with respect to the 12(b)(1) motion: not only does the Complaint pass the *Iqbal* test, but the facts—which we contend are not in dispute—support Plaintiffs' separate motion for preliminary relief.

with USAPA's four National Officers (Defendants Hummel, Bradford, Streble, and Smyser). If Plaintiffs' lawsuit sought only to force immediate dissolution or to compel interim distribution to USAPA's members of all of USAPA's funds, Defendants would be correct that no such claim lies against BPR members. However, all of the demand letters, including the Plaintiffs' demand letters, and the Complaint seek to stop all Defendants from spending USAPA funds (or authorizing the expenditure of USAPA funds) for impermissible purposes, including on legal actions directly adverse to the West Pilots which are, by definition, *not* "collective legal action on behalf of the pilot group," and to recover from them funds already improperly spent[11]. Therefore, Plaintiffs' action challenging the propriety of those expenditures necessarily lies against both the National Officers who make such expenditures, as well as the BPR members who authorize them to do so. Accordingly, Plaintiffs have stated a claim for relief against the BPR Defendants, and Defendants' motion to dismiss as to those Defendants should be denied.

2. Plaintiffs have alleged facts showing that Defendants breached their fiduciary duties owed to USAPA's members as defined by Title V of the LMRDA.

The starting point for Plaintiffs' claim that Defendants have authorized and made expenditures in violation of the duties imposed on them by Title V and USAPA's Constitution. It mandates specific requirements that its officers and directors must follow regarding USAPA funds, which were derived almost exclusively from membership dues, upon USAPA's loss of certification and consequent dissolution: "All assets shall be liquidated and, less any indebtedness,

[11] Any doubt on this point was clarified by the January 12, 2015 letter by USAPA's General Counsel. *See* Ex. B, attached hereto. In that letter, the West Pilots were advised that, under USAPA's Constitution, once the decision to defer was made by the National Officers, "the organization continues under the governance of the BPR," and that "the power [to decide how the funds of the Association are spent] rests exclusively with the BPR." Thus, the East BPR members were included as Defendants in this action because USAPA's attorney, Mr. O'Dwyer, instructed the Plaintiffs to do so.

shall then be prorated to the active members in good standing of USAPA as of the time of such dissolution . . . ." Ex. 1 to Compl, at Art. I, § 3(A). However, when USAPA's National Officers decide to defer dissolution after decertification, the Constitution provides that the Officers may delay disbursement of only those funds needed for "collective legal action on behalf of the pilot group, including, but not limited to, representation in seniority integration proceedings." *Id*. Therefore, when USAPA's decertification on September 16, 2014, as the bargaining representative of US Airways pilots triggered its dissolution, its Constitution permitted its officers and directors to utilize USAPA funds in three ways: (1) to extinguish any indebtedness of the organization; (2) to disburse any remaining funds to USAPA members in accordance with the formulas outlined in the Constitution; or (3) to spend funds on "collective legal action on behalf of the pilot group." Pursuant to section 501(a), Defendants violate their fiduciary duties if they expend (or authorize the expenditure of) USAPA funds for any other purpose. *See* 29 U.S.C. 501(a); *see also Schimmel*, 128 F.3d at 692 (holding that union officials have "a fiduciary duty to preserve union funds that reflect the dues paid by" its members and to use such funds only to advance the interests of those members).

What is at issue, then, is the meaning of the phrase "collective legal action on behalf of the pilot group" in the context of the particular facts here presented. Plaintiffs assert, and have so pleaded, that this clause authorizes expenditures only for purposes that advance the interests of the singular pilot group, namely all pilots of the former US Airways. As such, expenditures that are directly adverse to a substantial subset of that group—the West Pilots—are necessarily not on "behalf of *the* pilot group," but rather on behalf of only the East Pilots. There is simply no plausible way to characterize actions that benefit one subset of USAPA and which directly harm a different subset as collective in nature or "on behalf of *the* pilot group." Thus, Plaintiffs have plainly alleged

a violation of Defendants' fiduciary duty to abide by the terms of the USAPA Constitution when expending union funds.

That these expenditures are not for collective actions on behalf of the pilot group is not simply an assertion of some rump minority group inside a union who, because of their minority status, cannot control union decision-making to achieve a result they desire. As Plaintiffs have pleaded—and as the facts make clear—USAPA's seniority integration objective is fundamentally at odds with the entire West Pilot groups' interests manifested by the Nicolau Award. The two pilot groups have been at odds over this matter for years. But we are now at the point where "the rubber meets the road." Defendants are spending USAPA's money in a proceeding in which they will advance the unique and specific interests of the East Pilots and themselves and in which the West Pilots—on behalf of Plaintiffs and all other West Pilots—will be separately represented *precisely because, as the Preliminary Arbitration Board that granted the West Pilots party status said, USAPA cannot fairly represent the West Pilots' interests*. *See* Ex. 4 to Compl, at 33; *see also* Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction (Doc. 16), at 11, for additional discussion regarding the Preliminary Arbitration Board's decision.

Defendants attempt to distract from this conclusion by arguing that Plaintiffs' suit really seeks to compel USAPA to advance the West Pilots' minority position in SLI negotiations. This assertion is factually incorrect, not pleaded in the Complaint and contrary to the results ordered by the Preliminary Arbitration Board. There the Board ordered the Allied Pilots Association to appoint a West Pilot Merger Committee so that it could represent the West Pilots without any USAPA involvement. Consequently, Plaintiffs do not seek to require USAPA to advance the West Pilots' preferred integration principles, *i.e.*, the Nicolau Award, nor to fund the West Pilots Merger Committee to permit them to do so. Such an expenditure would be directly adverse to the interests

of the East Pilots and therefore violate the USAPA Constitution in the same way that Defendants' expenditures for purposes adverse to the West Pilots already have.

Instead, what Plaintiffs seek—and what Title V compels—is that Defendants cease making expenditures that are not for "collective legal action on behalf of the pilot group" because they are directly adverse to the interests of the West Pilots. Such restraint is mandated by USAPA's Constitution, because this category of expenditures is neither collective in nature nor for the benefit of the whole pilot group. And Defendants' prior and ongoing violations of the Union's Constitution is a breach of their fiduciary duties as defined by the LMRDA. Therefore, Defendants' motion to dismiss on this basis should be denied.

3. Defendants personally benefit from the expenditures they have authorized and made in violation of USAPA's Constitution, and their unreasonable interpretation of the USAPA Constitution is entitled to no judicial deference.

Under Title V, "[i]n cases where a union official profits personally through the use or receipt of union funds . . . 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 v. DaLesio*, 667 F.2d 420, 424 (4th Cir. 1981). Such is the case here, where each Defendant is also an East Pilot who stands to profit personally through the use of USAPA funds to advocate solely on behalf of the East Pilots' seniority interests and directly against the West Pilots' interests in SLI proceedings.

As alleged in the Complaint and as shown in the Declaration of Brian Stockdell and the exhibits attached to that declaration, *see* Docs 16-3, 16-4, each Defendant will obtain a higher position on an integrated American Airlines seniority list if the Defendants' preferred date-of-hire integration principle is used for the placement of East and West Pilots *vis a vis* one another as opposed to the integration principles contained in the Nicolau Award and preferred by the West

Pilots. Unsurprisingly, Defendants' personal gain comes at the direct expense of West Pilots, including Plaintiffs, who would fall hundreds of positions on an integrated seniority list premised on Defendants' preferred principles. *See id*.

Defendants would have the court shrug off this benefit as an "incidental indirect benefit" that does not raise a Title V red flag. *See, e.g.*, *Ray v. Young*, 753 F.2d 386, 390 (5th Cir. 1985) (noting that receiving a complementary business dinner paid for with union funds is, in some sense, a benefit but not sufficient to give rise to Title V liability). But a pilot's relative seniority position is anything but "incidental" or "indirect." Rather, a pilot's position on the seniority list is vitally important to his or her career, as it determines, *inter alia*, compensation, work schedule, and the type of aircrafts he or she will fly relative to all other pilots forever. These material terms and conditions of employment are hardly incidental or indirect, and that is why the Defendants are spending hundreds of thousands of dollars from USAPA's treasury to support the East Merger Committee.

Because Defendants' actions result in personal benefit to them, the mere fact that they were "authorized" by the body with the authority to authorize expenditures is not the end of the inquiry. Under Title V, authorization is not a complete defense, and "cannot be used to shield the very acts that prompted the [LMRDA], misappropriation and abuse of union funds by officers for their personal benefit." *Morrisey v. Curran*, 650 F.2d 1267, 1273-74 (2d Cir. 1981). Instead, Defendants bear the burden of showing that such expenditures were authorized pursuant to a reasonable interpretation of USAPA's Constitution. *See Brink v. DaLesio*, 667 F.2d. 420, 424 (4th Cir. 1981) (citing *Morrisey*, 650 F.2d at 1274-75). And where the interpreting officers have a self-interest in the advanced interpretation, their interpretation is not entitled to the usual deference accorded to a union's interpretation of its governing documents. *Loretangeli v. Critelli*, 853 F.2d

186, 195 (3d Cir. 1988) (union officials may not adopt a "contorted reading" of their constitution to justify use of union funds in breach of their fiduciary duties); *see also Morrisey*, 650 F.2d at 1273-74.[12]

### C. Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction Should Be Granted.

Plaintiffs have demonstrated that they meet each of the four factors this Court considers when deciding on a motion for preliminary injunction or temporary restraining order. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As shown above, Plaintiffs are likely to succeed on the merits of their Title V suit; thus, this factor weighs strongly in Plaintiffs' favor. Moreover, as discussed below, Plaintiffs also have demonstrated that they—along with USAPA's members in general—are likely to suffer substantial and irreparable harm without preliminary relief; that balancing this harm against the lack of harm that Defendants would suffer if enjoined weights in favor of Plaintiffs; and that issuing an injunction or TRO against Defendants is in the public interest.

1. Plaintiffs will suffer substantial, irreparable harm without preliminary injunctive relief.

[12] Although Defendants have not made the argument that the fact that the "collective legal action" phrase in the USAPA Constitution concludes with the words "including, but not limited to, representation in seniority integration proceedings," means on its face that the challenged expenditures are expressly contemplated by the Constitution, we address it and debunk it here. When the USAPA Constitution was adopted in 2008, there certainly could have been circumstances where participation in a seniority integration proceeding was such "collective legal action." For example, the internal US Airways seniority situation might have been solved by the time the next merger occurred (in 2013) through the ratification of a collective bargaining agreement embodying a seniority list of some kind. In that circumstance, participation in a subsequent seniority integration proceeding would have been "collective legal action," because the relationship between the East and West Pilots would have been settled. But, as we have explained, that is not the case now, and the two distinct groups are at swords' points over the issue, leading the Preliminary Arbitration Board to require the appointment of a separate West Pilots merger committee. The Board's decision in and of itself makes the Defendants' current interpretation of the Constitution completely unreasonable.

Defendants' ongoing expenditure of USAPA funds in violation of the USAPA Constitution has harmed, and will continue to harm, Plaintiffs and USAPA's membership. The USAPA funds being spent by Defendants were derived almost exclusively from USAPA membership dues paid by Plaintiffs and all other USAPA members. Since its decertification in 2014, USAPA, of course, no longer collects membership dues. Thus, the funds remaining in its treasury at the time of decertification are a finite resource that cannot be replenished once spent.

The USAPA Constitution contemplates this scenario and mandates that those funds remaining in USAPA's treasury, less any outstanding indebtedness or use of funds for permissible post-decertification purposes, must be disbursed back to USAPA's members. Thus, Plaintiffs and all other USAPA members have a constitutional right to reimbursement of their dues payments upon USAPA's decertification and ultimate dissolution.

Defendants admit that they have made no such disbursement despite USAPA having been decertified over six months ago. *See* Doc. 24, at 12. And they further admit that they continue to spend USAPA funds on a variety of impermissible activities, including to advance seniority integration principles that are not in the "collective interests" of "the pilot group." *See id*. at 22-23. Each USAPA dollar spent for such impermissible purposes is a dollar that will not be disbursed to USAPA's members in accordance with the Constitution. Since USAPA no longer has the ability to replenish its coffers—and because it is highly unlikely that Defendants, either jointly or severally, have sufficient assets to replenish the millions of dollars potentially spent on impermissible purposes—Plaintiffs and their fellow USAPA members face a substantial risk of irreparable harm to their financial interests.

Although Defendants attempt to distinguish the case, *Schimmel*, *supra*, 128 F.3d 689 (8th Cir. 1997) is on point. There, like here, plaintiffs brought a Title V suit against the officers of their

former union (the IFFA), which (like USAPA) had been decertified as the plaintiffs' bargaining representative and no longer represented any group of employees. *Id*. at 690. Similarly to Plaintiffs here, the *Schimmel* plaintiffs sent a letter to IFFA's officers demanding an accounting of the union's assets and that the officers refrain from further expenditures in light of the union's then-pending decertification. *Id*. Nonetheless, IFFA's president continued to expend union funds, prompting plaintiffs to seek an injunction against further expenditures. *Id*. at 691.

On these facts, the Eighth Circuit held that plaintiffs successfully demonstrated a threat of irreparable harm. Significant to the court's holding was the fact that IFFA represented a single class of employees performing the same job for the same employer. *Id*. at 693. "[W]here a union only represents a single class of employees, harm to the union is [not] sufficiently distinguishable from harm to" individual members of the union. *Id*. at 693. Accordingly, the court held that the plaintiffs "will be irreparably harmed without an injunction because union funds reflecting their union dues would finance continued [union] activities that do not advance the . . . interests" of the union's members as a whole group. *Id*.

The same outcome should follow here. Like the IFFA in *Schimmel*, USAPA no longer has any representative authority over any employees. However, when it did, it represented a single class of employees performing the same job for the same employer, namely all US Airways Pilots. Thus, harm to individual USAPA members, such as Plaintiffs, is indistinguishable from harm to USAPA as a whole. *See id*. at 693. Such harm plainly exists here, where, as in *Schimmel*, Defendants are using USAPA union dues to finance continued activities that do not advance the collective interest of the whole pilot group.

Furthermore, on the facts presented here, it is irrelevant—and Defendants provide no authority to the contrary—that Defendants' impermissible expenditures may benefit some

members of USAPA or even may benefit the majority of USAPA members. That is not the standard in USAPA's Constitution, which authorizes only expenditures furthering "collective legal action on behalf of the pilot group." Indeed, the fact that some USAPA members would benefit by the expenditures makes Plaintiffs' point precisely. Some members—namely Defendants and the East Pilots—will benefit from the expenditures because their ability to advance their seniority integration position over the position Plaintiffs and the West Pilots prefer will be advantaged. That is the whole point of this action.

Finally, Defendants point to the West Pilots' private fundraising and argue that the success of that fundraising means that Plaintiffs will not be irreparably harmed if Defendants are allowed to unlawfully spend money they are not entitled to spend. That is, simply put, a *non sequitur*. Nowhere do Defendants explain how the West Pilots' private fundraising will result in USAPA's members getting back from USAPA funds to which they are entitled but which have been unlawfully spent.[13]

2. Balancing the equities weighs heavily in Plaintiffs' favor because Defendants will suffer no harm at all if the Court were to issue a preliminary injunction or TRO.

As shown above, Plaintiffs and their fellow USAPA members risk substantial and irreparable harm if Defendants are not enjoined from making further expenditures in violation of USAPA's Constitution. Defendants, however, risk no harm at all in the event of an injunction. Therefore, a

[13] To the extent Defendants' argument is that the West Pilots' private fundraising puts them on equal footing with Defendants and the East Pilots in their ability to finance the seniority integration process, that argument is equally frivolous. There is simply no comparison between the use of literally millions of coerced dollars collected from pilots as a condition of employment and the voluntary donations by some well-intentioned West Pilots who have also been subject to the obligation to pay dues to USAPA to keep their jobs. Put another way, Defendants are forcing the West Pilots to pay twice: once through the West Pilots' mandatory dues paid to USAPA, which Defendants are keeping and using against the West Pilots, and second with West Pilots' voluntary fund-raising to get them the fair representation that USAPA and Defendants have denied them for eight years.

balancing of the equities swings heavily in Plaintiffs' direction.

Defendants have no personal or individual right to the USAPA funds at issue. Thus, *a fortiori*, enjoining them from using these funds does not harm them in anyway. To the extent that Defendants, as East Pilots, wish to advance their interests in the ongoing SLI process, an injunction in no way limits that ability. Rather, as Defendants themselves note, each merger committee participating in the SLI process has access to a proportional share of $4 million that American Airlines has committed to support the respective committees during the integration process. *See* Ex. 2 to Verified Compl., at pp. 2–3, ¶ 7. Consequently, an injunction would merely put Defendants (in their capacity as East Pilots) on equal footing with all other merger committees participating in the SLI process.

Defendants further argue that they will be harmed if unable to expend funds to defend USAPA in a series of lawsuits. While Defendants do not explain how this would personally harm them, even if they had, this argument misstates Plaintiffs' position and mischaracterizes the nature of the injunction sought. Plaintiffs seek only to enjoin the authorization and expenditure of funds for purposes not authorized by USAPA's Constitution, and Plaintiffs do not argue that there are no permissible reasons or purposes for which Defendants could authorize or spend USAPA funds at this time, although Plaintiffs do not concede that Defendants are correctly doing so now. Thus, the fact that USAPA has incurred and will incur legal expenses in other litigation in no way supports Defendants' position that an injunction prohibiting expenditures in support of the East Pilots' SLI position would irreparably harm them.

3. <u>An injunction against Defendants is in the public interest.</u>

Both parties agree that "true public interest lies in vindicating principles of union democracy by requiring [] defendants to obey their own constitution" and that "Section 501 embodies this

public interest by imposing fiduciary responsibilities on union officials." *Loretangeli*, 853 F.2d at 196; Doc. 24, at 33. Contrary to Defendants' assertion, however, they *have* failed to obey the USAPA Constitution by authorizing and expending USAPA funds for impermissible purposes. Defendants do not make, nor does there exist, a plausible argument that violating a union constitution in any way furthers the public interest. Instead, Defendants rely only on their self-interested interpretation of what constitutes "collective legal action on behalf of the pilot group." Since, as has been shown above, this interpretation is incorrect and unreasonable and is predicated on self-interest, the public interest is not furthered by giving effect to it or denying Plaintiffs' motion on such grounds.

4. Plaintiffs should not be required to post an injunction bond

The purpose of an injunction bond "is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n. 3 (4th Cir. 1999). Where the risk of harm is remote, the court may waive Rule 65(c)'s security requirement, *Pashby v. Delia*, 709 F.3d 307, 331-32 (4th Cir. 2013), or require only a nominal bond. *Hoechst Diafoil Co.*, 174 F.3d at 421 n.3. *See also Ark. Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 521 (W.D.N.C. 1999) (nominal $100 bond sufficient where the plaintiff demonstrated that the risk to defendant in issuing an injunction was remote).

There is no risk of harm to the Defendants at all if they are enjoined from spending USAPA funds for seniority integration purposes. As demonstrated in this submission, Defendants use of USAPA funds for seniority integration purposes is an improper use of those funds, and Defendants have no personal interest that would be adversely affected from an injunction precluding them from using USAPA funds in that improper manner. But assuming, *arguendo* for purposes of the

bond analysis only, that following issuance of an injunction the court ultimately concluded that the challenged expenditures were lawful, Defendants would still not have been harmed personally, as they have no personal interest in the funds under any circumstances. Accordingly, it is not surprising that Defendants have identified no harm that they will suffer as a consequence of an injunction, but only speculate that "adverse consequences" are "possible." *See* Doc. 24, at 34.[14] That being the case, Defendants have not met (and cannot meet) their burden of proving that an injunction bond—let alone a significant one—is necessary to protect them in this instance. *Laboratory Corp. of America Holdings v. Kearns*, --- F. Supp. 3d ---, No. 14cv1029, 2015 WL 413788, at *16 (M.D.N.C. Jan. 30, 2015) ("The burden of establishing the bond amount rests with the party to be restrained . . . ."). Accordingly, the Court should deny Defendants' invitation to require an injunction bond, or alternatively, set only a nominal bond. *Accord Hoechst Diafoil Co.*, 174 F.3d at 421 n.3.

## CONCLUSION

For all the foregoing reasons, Defendants Motion to Vacate the Court's March 5, 2015, Order or, alternatively, to Dismiss the Verified Complaint should be denied, and Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction should be granted.

[14] Defendants argue that their ability to prosecute the seniority integration will be compromised if they are precluded from using USAPA funds for that purpose. But that argument gets them nowhere. First, as we have shown in Part B.2, above, USAPA has access to the same share of $4 million that the West Pilots have access to for seniority integration purposes. Second, Defendants can do what the West Pilots have done for years (and continue to do today) and solicit voluntary contributions from their pilot group to fund these activities. Finally, in any event, executing on a bond in the event it is later determined that funds could be spent on seniority integration matters would be entirely unnecessary because, if the injunction is ultimately lifted, Defendants will again have access to the funds themselves and will not require resort to a bond for this purpose at all.

Respectfully submitted this 4th day of May, 2015.

*/s/ Kelly J. Flood*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the COMBINED MEMORANDUM OF LAW (1) IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE THE COURT'S ORDER DATED MARCH 5, 2015, OR IN THE ALTERNATIVE, TO DISMISS THE VERIFIED COMPLAINT, AND (2) IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION with the Clerk of the court using the CM/ECF system. John Gresham, of Tin, Fulton Walker & Owen, has notified Plaintiffs' counsel that he is counsel for Defendants Bradford, Streble, Hummel, Stein, Nathan, Taylor, Dugstad, Milkey and Smyser. In the event that notification pursuant to the CM/ECF system cannot be sent to John Gresham, I hereby certify that the foregoing document was duly served upon counsel for the Defendants in accordance with the provisions of Rule 5 of the Federal Rules of Civil Procedure by depositing it in the United States Mail, first-class postage prepaid, addressed as follows:

John Gresham
Tin Fulton Walker & Owen
301 East Park Avenue
Charlotte, NC 28203

I hereby certify that I additionally emailed this Motion to Mr. Gresham this same date at jgresham@tinfulton.com.

I hereby certify that, with respect to the Defendants who have to our knowledge not been served or are evading service, I have placed a copy of this motion in the United States Mail, certified first-class postage prepaid, return receipt requested, addressed as follows:

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Dated this 4th day of May, 2015.

*/s/ Kelly J. Flood*

Kelly J. Flood