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

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

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

MEMORANDUM OF LAW IN REPLY AND IN FURTHER SUPPORT OF MOTION TO VACATE THE COURT'S ORDER DATED MARCH 5, 2015, OR IN THE ALTERNATIVE, TO DISMISS THE VERIFIED COMPLAINT ON BEHALF OF DEFENDANTS GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, STEVE SMYSER, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, JAY MILKEY, and STEPHEN NATHAN[1]

Defendants GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, STEVE SMYSER, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, JAY MILKEY, and STEPHEN NATHAN (hereinafter the "defendants"), by and through their attorneys, submit this

[1] To the extent plaintiffs' Combined Memorandum of Law (Doc. 36) is also in opposition to the motions of defendants Smyser and Milkey to Vacate and/or Dismiss (Doc. 29), filed on April 28, 2015, this reply memorandum of law is also submitted on their behalf.

Memorandum of Law in Reply and in Further Support of their Motion to Vacate the Order Dated March 5, 2015, or, in the Alternative, Dismiss the Verified Complaint.[2]

PRELIMINARY STATEMENT

Plaintiffs' memorandum of law in opposition is an exercise in contradictions and tautology. They accuse defendants of having "redrafted" their claims "as ones (1) brought against USAPA; (2) seeking to require it to advance a different seniority integration principle; 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." Doc. 36 at 2. But their claim of "redrafting" is contradicted by their own papers and arguments. That this lawsuit is really against USAPA and decisions made by USAPA interpreting its constitution and bylaws is evidenced by the complaint and their memorandum of law wherein they repeatedly allege that USAPA's interests and positions are adverse and at the expense of the *West Pilots*, not the plaintiffs.[3] That this case, like the three DFR cases before it, is really about USAPA's refusal to implement the Nicolau Award is best demonstrated by plaintiffs' statement in their memorandum of law that "[a]s Plaintiffs have pleaded – and as the facts make clear – USAPA's seniority

[2] Plaintiffs attempt to make an issue out of the fact that only nine of the defendants have been served, claiming that though the pleadings were mailed to the remaining defendants, "for whatever reasons, these Defendants have not signed for their certified mail." Doc. 36, at 1, n. 1. Service other than by certified mail is available to plaintiffs under North Carolina and federal rules of civil procedure. Fed.R.Civ.P. 4; N.C. Gen.Stat. § 1A-1, Rule 4. Instead of transferring the responsibility of service on the defendants not served to date, plaintiffs should simply serve them by the means allowed by law, as is their obligation as plaintiffs.

[3] For example: "Specifically, between September 16, 2014, and January 9, 2015, Defendants expended USAPA funds to advance USAPA's position before the PAB that *the West Pilots should be denied* separate representation in the seniority integration process occasioned by the merger with American Airlines. USAPA's position before the PAB advance only the interests of the East Pilots (which includes Defendants here) at the expense of the interests of the West Pilots." Doc. 1, ¶33 (emphasis added). "Since September 16, 2014, and continuing to the present, Defendants have authorized the use of, used, and continue to use USAPA funds for the purpose of advancing the seniority interests of only the East Pilots (including Defendants) at the *expense of the interests of the West Pilots* (including Plaintiffs) in the Substantive SLI Process. More specifically, on information and belief, Defendants have authorized the use of, used, and continue to use USAPA funds to, *inter alia*, pay the fees of lawyers and experts and to pay flight pay loss and expenses of East Pilots who are members of the East Pilots Merger Committee, all of whom who will advance the East Pilots' interest in the Substantive SLI process." *Id.*, ¶34 (emphasis added).

integration objective is fundamentally at odds with the entire West Pilot groups' interest 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.'" Doc. 36, at 21. The fact of the matter is, that having failed at three previous lawsuits alleging USAPA breached their duty of fair representation to West Pilots by failing to implement the Nicolau Award, plaintiffs now, in a last ditch effort, resort to suing the National Officers and BPR members in their individual capacities in an attempt to avoid the preclusive effect of the prior rulings.

Plaintiffs are wrong. These defendants are not "rogue" officers acting outside of the scope of their official duties. Their actions were all consistent with and in furtherance of, USAPA's objectives and interests. Plaintiffs' dispute lies with the organization, USAPA and the relief they seek can only be provided by USAPA (as opposed to the individual defendants some of whom are no longer USAPA officers and are powerless to effect any decision within USAPA even if ordered to do so by the Court). It can only be concluded that plaintiffs decided not to assert these claims in the context of the declaratory judgment for strategic reasons. *See US Airline Pilots Ass'n v. Velez*, 3:14-cv-577-RJC-DCK, Doc. 1-1. But that must fail, as not only have they failed to state a claim for violations of the LMRDA, but also, that statute provides no remedy for the claims that plaintiffs now assert.

Plaintiffs make no real attempt to defend their assertion that defendants "redraft" their complaint by "claiming the lawsuit is not one seeking a benefit for the Union as a whole" Doc. 36, at 2. For instance, plaintiffs simply quote Section 501 to deny defendants' contention that this action is only for the benefit of West Pilots. Doc. 36, at 9 ("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.'"). However, as the courts in *Van Elder v.*

Amalgamated Transit Union Local #1338, 2014 WL 1808079, at *4 (N.D.Tx. May 7, 2014)[4], and *Fabian v. Freight Drivers and Helpers Local No. 557*, 448 F.Supp. 835 (D.Md. 1978)[5] held, simply bringing a Title V case does not mean the action is, in fact, for the benefit of the union.

Plaintiffs failed to satisfy the prerequisites necessary to maintain this Section 501 suit, and fail to state a claim for which relief, for the union, can be granted, and the court's order of March 5, 2015 should be vacated, and the complaint dismissed.

ARGUMENT

POINT I

PLAINTIFFS CANNOT MEET THEIR BURDEN OF PROVING SUBJECT MATTER JURISDICTION

A. A demand to the union to initiate legal proceedings is mandatory.

Ignoring the cases cited by defendants that say otherwise[6], plaintiffs, relying on *Saunders v. Hankerson*, 312 F.Supp.2d 46 (D.D.C. 2004), claim the language of Section 501(b) does not require that a demand to institute legal proceedings is the exclusive means by which to satisfy the demand requirement. Doc. 36, at 3-4. Plaintiffs are wrong.

Several courts have looked to the intent of Congress in holding that Section 501 requires that a demand to sue be made. The court in *Persico v. Daley*, 239 F.Supp. 629, 630-631 (S.D.N.Y. 1965), concluded that the "or" in "fail to sue or recover damages" must be a misprint given the fact that "the Congressional Committee reports, both of the Senate and the House, and

[4] Dismissing the 501 suit with prejudice because, *inter alia*, "the Second Amended Petition does not seek remedies that would realistically benefit the union . . . and/or the membership of the union. Rather, the Second Amended Petition seeks merely economic damages that would only benefit Plaintiff and not the union or its membership as a whole."

[5] Granting defendants summary judgment in a 501 action because, *inter alia*, the suit was not initiated on behalf of the union but for the benefit of particular members.

[6] *Behrmann v. Farrell*, 2006 WL 2771870, at *6 (S.D.N.Y. Sept. 26, 2000); *O'Connor v. Freyman*, 1985 WL 121, at *2 (D.D.C. May 31, 1985); *Penuelas v. Moreno*, 198 F.Supp. 441, 443-44 (S.D. Cal. 1961).

the bills to which those reports relate, use the word "to" instead of "or".[7] The court held that "[i]f the word 'or' in the statute were 'to,' as it was in the bills and in the Committee reports, there could be no doubt that a demand to sue is necessary. *Id.*, at 631. The court in *Penuelas v. Moreno*, 198 F.Supp. 441, 443 (S.D.Cal. 1961), referring to the same section stated "although the wording is not artful, the section clearly refers to a failure or refusal to bring a court action after a request has been made that the action be brought." The court went further to say the words "to sue" and "recover damages" "obviously refer to court action only" as does "other appropriate relief" which "is a standard, well-known legal term referring to court action." *Id.* While "'secure an accounting' may be ambiguous", read with "to sue" and "recover damages", "it refers to court relief granting an accounting. *Id.*

It is noteworthy that despite the Congressional intent in drafting the legislation, the *Saunders* court does not construe the "or" in "fail to sue or recover damages" to mean "fail to sue to recover damages". 29 U.S.C. § 501(b). *But see Reed v. United Transp. Union*, 633 F.Supp. 1516, 1527 (W.D.N.C. 1986), *rev'd on other grounds*, 828 F.2d 1066 (4th Cir. 1987) (The "or" has been consistently construed to mean "to.") (citing *Dinko v. Wall*, 531 F.2d 68, 72 n.4 (2d Cir. 1976)); *Cassidy v. Horan*, 405 F.2d 230, 232 (2d Cir. 1968) (stating, "A demand for a sum of money is not sufficient. The statutory language requiring a request that the labor organization 'sue or recover' has been construed to mean 'sue to recover'"). The foregoing cases show that *Saunders* is an outlier on this issue and should be disregarded.

[7] The July 30, 1959 report of the House Committee on Education and Labor (H.R.Rep.No. 741), states that Section 501(b):

> Provides that when the fiduciary duties declared in subsection (a) are alleged to have been violated and the union or its officers upon request of any member refuse or fail within a reasonable time to sue to recover damages or for an accounting or other appropriate relief, the requesting member may sue on behalf of the union for appropriate relief in any Federal district court or State court of competent jurisdiction.

That said, *Saunders'* exception to the rule can be attributed to the fact that plaintiffs were proceeding *pro se* at the time the demand was made upon their union. Thus, in analyzing the "competing policy considerations underlying resolution of the question of whether plaintiff's actions are sufficient to meet the demand requirement enshrined in Section 501(b)", the court in *Saunders* made special note of the fact that the plaintiff made his demands "*pro se* and in the good faith belief that they represented sufficient demands. . ." *Id.*, at 63. The Second Circuit in *Dinko v. Wall*, cited in *Saunders*, was likewise sympathetic to union members who were unrepresented when making demands to their union. 531 F.2d 68 (2d Cir. 1976) ("[T]he fiduciary responsibility created by the [LMRDA] is designed to protect union members, who may be of limited education and are rarely represented by counsel when sending letters to their union.").

Plaintiffs here however, are in a far different situation, having been continuously represented by the same counsel since 2008 and should be held to the rule, not the exception. Indeed, the majority of the so-called "demands" relied upon by plaintiffs were sent by plaintiffs' counsel himself directly to USAPA's general counsel. Docs. 1-7 to 1-11. Plaintiffs had the full benefit of counsel in drafting their identical February 13, 2015 emails to defendants. Given the consistency in language in the emails with the previous letters, it is likely that these February 13, 2015 emails were in fact drafted by their counsel. Neither the letters nor emails even echo the words of Section 501(b), an omission for which there are no policy reasons to overlook, unlike in *Saunders* and *Dinko*.

The *Dinko* and *Saunders* courts' sensitivity to the limited education and *pro se* status of union members does not apply here. Holding plaintiffs, long represented by counsel, chargeable

with knowledge of the Section 501(b) prerequisites is consistent with the statute's objective of protecting union officials from vexatious and harassing suits such as the instant action.

This Court should also reject plaintiffs' claim that a demand to USAPA to "sue" its officers, including Steve Bradford, the founder of USAPA, would have been "futile". Doc. 36, at 4 n.3. As the *Saunders* court stated, "the provision of the statute requiring [a] demand to sue is mandatory and . . . its requirements cannot be met by anything short of an actual request. An allegation of the futility of such a request will not suffice." 312 F.Supp.2d at 61 (quoting *O'Connor v. Freyman*, 1985 WL 121, at *2 (D.D.C. May 31, 1985)); *see also Coleman v. Bhd. of Ry. & S.S. Clerks, Freight Handlers, Exp. & Station Emp.*, 340 F.2d 206, 208 (2d Cir. 1965) ("[T]he provision of the statute [requiring demand to sue] is mandatory and that its requirements cannot be met by anything short of an actual request. An allegation of the futility of such a request will not suffice."); *Flaherty v. Warehousemen, Garage & Service Station Employees' Local Union No. 334,* 574 F.2d 484 (1978) (An allegation of futility will not suffice.); *Yager v. Carey*, 910 F.Supp. 704, 727 (D.D.C. 1995), *aff'd*, 159 F.3d 638 (D.C.Cir. 1998) ("The court now holds that some form of request that the union or a governing member of the union bring the action is a requirement that cannot be waived as futile."). Equally unavailing would be any claim by plaintiffs that the demand to sue requirement should be waived as futile because the National Officers are all East Pilots, or that the defendant BPR members make up a majority of the BPR. *See Persico v. Daley*, 239 F.Supp. 629, 631 (S.D.N.Y. 1965) (Rejecting plaintiffs' "claim that although no demand to sue was made, failure to make the demand should be excused, for it would be futile to make it, in view of the fact that defendants constitute a majority of the Local's Executive Board."). Plaintiffs' reliance on derivative suits is unavailing. Doc. 36, at 7 n.

5. Section 501's requirements are narrowly construed and its demand requirement is mandatory. *See Coleman*, 340 F.2d at 208.

B. The correspondence prior to the February 13, 2015 emails are not demands under Section 501(b).

Plaintiffs claim "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." Doc. 36, at 6 n.4. On the contrary, it is unnecessary to look any further than Section 501(b) for such authority, which expressly requires the "demand" to have been made by plaintiffs when its states "[w]hen any officer . . . is alleged to have violated the duties declared in subsection (a) of this section and the labor organization . . . refuse or fail to sue . . . within a reasonable time after being requested to do so *by any member of the labor organization*, *such member* may sue such officer . . ." 29 U.S.C. § 501(b) (emphasis added); *see also O'Connor*, 1985 WL 121, at *2 (D.D.C. May 31, 1985) (Rejecting plaintiff Moller's argument that joining in the demand would have been superfluous or futile, and dismissing plaintiff Moller from the 501 suit for failing to comply with the demand requirement.). The statute requires a member of the union to make the demand. The letters and emails from Marty Harper to Brian O'Dwyer, general counsel to USAPA (Docs.1-7 to 1-11) are not Section 501(b) "demands" because they were neither made by a member of USAPA nor made to "the labor organization or its governing board or officers." 29 U.S.C. § 501(b).

Though Roger Velez is a member of the union, the words "such member" in the statute requires that it is the same member who made the demand that "may sue". *Id.; see Persico*, 239 F.Supp. at 632 ([Referring to Section 501(b) "after being requested to do so by any member of the labor organization, such member may sue"] "Literally this means that only the member who made the demand may sue."); *International Bhd. of Teamsters, Chauffeurs, Warehousemen and*

Helpers of Am. v. Hoffa, 242 F.Supp. 246, 249-250 (D.D.C. 1965) (As other courts have done, construing Section 501 "to mean that when no member makes the stipulated request the statutory action cannot be brought at all, and when such a request is made only the members making it can later sue."). As Roger Velez is not a plaintiff in this action, his letter must also be disregarded. *See* Doc. 1-6.

C. Plaintiffs do not satisfy the "good cause" requirement.

Despite the fact that there is no agreement amongst the circuits as to what constitutes "good cause" and while conceding that the Fourth Circuit[8] has not defined a good cause standard, plaintiffs nevertheless ask this Court to adopt the standard used by the court in *Loretangeli v. Critelli*, 853 F.2d 186 (3d Cir. 1988). Doc. 36, at 7-8. As more fully discussed in defendants' memorandum of law in support (Doc. 22-1), plaintiffs fail to establish good cause under *any* recognized standard – whether that is the standard adopted by the court in *Loretangeli*, the "reasonable likelihood of success" standard set forth by the Second Circuit and adopted by the Seventh Circuit, or the five requirement standard adopted by the Fifth Circuit. *See Dinko*, 531 F.2d at 75; *Slavich v. Local Union No. 551, United Automobile Aerospace and Agricultural Implement Workers of Am., UAW*, 1986 WL 6957, at *4 n 5 (N.D.Ill. June 13, 1986); *Hoffman v. Kramer*, 362 F.3d 308, 323 (5th Cir. 2004).

For the Third Circuit, "[t]he absence of good cause might be demonstrated through undisputed affidavits showing that the plaintiffs had failed to comply with some condition precedent to suit or that the action was barred by the statute of limitations, or by the application

[8] Although the Fourth Circuit has not definitively defined a good cause standard, the district court in *Brink v. DaLesio*, cited favorably to *Dinko*, and ruled that the good cause requirement was satisfied because in granting the TRO, it found that there was a "reasonable likelihood of success" on the Section 501 claim. 453 F.Supp. 272, 277 (D.Md. 1978).

of the principle of res judicata or collateral estoppel." *Loretangeli*, 853 F.2d at 190. Even under this standard, there is no good cause and the March 5, 2015 order should be vacated.

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

Plaintiffs do not respond at all to defendants' assertion that their alleged misconduct does not directly implicate the fiduciary duties enumerated in Section 501(a). *See* Doc. 22-1, at 18-21. As discussed in their main brief, none of defendants' allegedly wrongful acts are prohibited under Section 501(a). *See* Doc. 1, ¶¶30, 33-34 (Alleging 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.).

Neither USAPA's Constitution and Bylaws nor Section 501(a) require union officials to provide an accounting. *See 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), *cert. denied*, 444 U.S. 841 (1979) (Section 501 is not to be used "as an independent discovery tool to investigate official use of union funds."). Section 501(a) likewise imposes no duty prohibiting expenditures for seniority integration. It does impose a duty to expend the union's money "in accordance with its constitution and bylaws" (29 U.S.C. § 501(a)), and the dissolution provisions of USAPA's Constitution and Bylaws specifically allow for deferral if the National Officers make a determination that there exists "the need for collective legal action on behalf of the pilot group, including, but not limited to, representation in seniority integration proceedings." Doc. 1-2, at p. 7. That a numerical minority group of members disagrees with the expenditure is not a Section 501 violation. The satisfaction of all members is not a prerequisite or fundamental element of an

officer's or union's duty. To the contrary, to act against the interests of the majority of its members would be a violation of not only USAPA's Constitution and Bylaws, but Section 501(a) itself and its 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). For USAPA to act to further the interests of its members, and arguably against the wishes of a minority is fully consistent with "collective" action. As plaintiffs concede, one of USAPA's founding objectives is "[t]o maintain uniform principles of seniority based on date-of-hire . . . with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." Doc. 1-2, Section 8. Any act taken in contravention of this objective would be a violation of USAPA's Constitution and Bylaws and Section 501.

2. Plaintiffs failed to comply with the statutory prerequisites.

As discussed above, no demand was ever made to USAPA to initiate action against the defendants. Whether a demand was made is not a "complex question of law." *See* Doc. 36, at 8. Either they made a demand or not, and in this case, there is no dispute that they did not.

Equally not complex is the issue of whether plaintiffs seek relief on behalf of the union. Simply reciting Section 501's requirement that plaintiffs must seek "appropriate relief for the benefit of the labor organization" (Doc. 36, at 9) does not mean that this statutory prerequisite has been met, and indeed such a conclusory statement is not entitled to any presumption of truth, and is insufficient to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct. 1937, 1949-50 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . are not entitled to the assumption of truth" and are insufficient to state a claim.).

Plaintiffs' claim that this action is for the benefit of the union is not entitled to any presumption of truth when the only "facts" in support of that legal conclusion is the statute and USAPA's Constitution and Bylaws. Doc. 36, at 10; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 1966 (2007) (Bare naked assertions without factual enhancement are insufficient to show that the pleader is entitled to relief.). Plaintiffs are notably silent in response to defendants' assertion that "nowhere in the complaint do plaintiffs explain how this suit is for the benefit of USAPA, nor indeed how distributing its assets in the face of a multi-million dollar attorneys' fee claim by the same attorneys that represent plaintiffs herein, can possibly be in the interests of USAPA or its members." Doc. 22-1, at 15. Dissolving the association in the face of the ongoing need to protect the interests of its members in the SLI process and the pending adverse litigation is clearly not in the best interest of USAPA. The long history of litigation by West Pilots against USAPA and the absence of an East Pilot as a plaintiff is proof positive that this action is not for the benefit of USAPA, but for the West Pilots only. Plaintiffs' conclusory claim that "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" is unsupported by the facts. Doc. 36, at 10.

3. The parties to this action are in privity to the parties to the three prior DFR cases, and this action is barred by *res judicata*.

Plaintiffs assert that *res judicata* does not apply here because there is no identity of parties or issues. Doc. 36, at 15-18. Plaintiffs are wrong because the parties in this action are in privity with the parties in the three previous DFR cases against USAPA. The Fourth Circuit has stated:

> There are three generally recognized categories of non-parties who will be considered in privity with a party to the prior action and who will therefore by bound by a prior adjudication: (1) a non-party who controls

> the original action; (2) a successor-in-interest to a prior party; and (3) a non-party whose interests were adequately represented by a party to the original action.

Martin v. American Bancorporation Retirement Plan, 407 F.3d 643, 651 (4th Cir. 2005).

Plaintiffs 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 ("*Addington* I"); *US Airways, Inc. v. Addington, et al.*, Case No. 2:10-CV-01570-ROS ("2012 DJ Action"); *Addington, et al., v. US Airline Pilots Ass'n, et al.*, Case No. 2:13-CV-00471-ROS ("*Addington* II")[9]. *See* Doc. 1, ¶ 2.

Defendants are in privity with USAPA, which was a party in the three previous cases. If as plaintiffs assert, it is the National Officers and BPR that control USAPA, then they in turn, controlled USAPA in the three previous cases.

As to the identity of causes of action, it is well established that "[a] much broader definition of cause of action in connection with the doctrine of res judicata, has developed under modern authorities." *Nash County Bd. of Ed. V. Biltmore Co.*, 640 F.2d 484, 487 (4th Cir. 1981) (internal quotations omitted). Thus, "the identity of two actions … will not be destroyed in the res judicata context simply because the two suits are based on different statutes." *Id*., at 488.

The shared identity of the instant cause of action and the DFR causes of action asserted by the certified West Pilot class in the three previous cases is clear. Plaintiffs argue that USAPA expending any funds that is adverse to West Pilots' interests is, by definition, not collective legal action. Doc. 36, at 19. However, the district court in *Addington II* already ruled that conduct that is not endorsed by all members of USAPA does not mean it is not "collective." In *Addington II*, West Pilots alleged USAPA breached its DFR to West Pilots when it entered into the MOU that

[9] Plaintiffs refer to this action in their memorandum of law as *Addington* III.

did not include the Nicolau Award. 2:13-cv-00471-ROS, Doc. 298, at 9. The court in granting summary judgment to USAPA held:

> collectively bargained agreements often require 'the interests of a few individuals . . . give way to the interests of the group.' *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213, 216 (9th Cir. 1989). Thus, '[b]argaining has winners and losers,' and the 'losers' cannot prove a DFR claim merely by showing they were disadvantaged by the ultimate result. *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1530 (7th Cir. 1992). Instead, the 'losers' must show the ultimate result did not serve 'the interests of labor as a whole.'

Id., at 9-10.

"Collective" does not mean it must benefit every single member of the union. Indeed, if that was the case, then anytime a member disagreed with his or her union, a DFR action claim against the union would lie. Thus, collective legal action does not require that it benefit every single member of the union, and it may require "the interests of a few give way to the interests of the group." *Id.* This action is barred by the doctrine of *res judicata*.

D. USAPA is not a labor organization as defined by the LMRDA.

Plaintiffs miss the point in making the argument that they are still "members" of USAPA under the LMRDA pursuant to the Eleventh Circuit's holding in *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981). Plaintiffs cannot be "members" unless USAPA is a "labor organization" under the LMRDA. The court in *Erkins* did not address the issue of whether the union in question was in fact a labor organization under the LMRDA, so plaintiffs' analysis of the facts and holding of that case is totally irrelevant to the argument raised by defendants in support of its motion.

Moreover, plaintiffs fail to offer any authority in support of their position that (1) USAPA's participation in the ongoing SLI process is "dealing with an employer" as defined by the LMRDA, and (2) a decertified unincorporated association that is not actively seeking to

represent any other group of employees for collective bargaining purposes is subject to the LMRDA. Doc. 36, at 13-14.

First, the upcoming SLI process is not a dispute or a negotiation as between USAPA and New American Airlines. It is, instead, a dispute among the various representatives of the groups of pilots being combined by virtue of the merger between American and US Airways (i.e. the USAPA Merger Committee, the West Pilots Merger Committee, and the American Pilots Merger Committee). New American Airlines has agreed to be neutral with respect to the order in which pilots are placed on an integrated seniority list.

Second, plaintiffs cite to *Int'l Ass'n of Machinists & Aerospace Workers v. Schimmel*, 129 F.3d 689 (8th Cir. 1997), in support of their position that a decertified union is still a "labor organization" under the LMRDA after decertification. Doc. 36, at 14-15. Plaintiffs concede that this particular issue was not actually decided in *Schimmel* noting that that court treated the officers of the IFFA as bound by the LMRDA "as a matter of course." Doc. 36, at 15. However, there is another vital distinction between the IFFA and USAPA that plaintiffs ignore, namely, that the IFFA in *Schimmel* was actively seeking to represent the flight attendants of another airline at the time the case was filed. In fact, it was for exactly this reason (i.e. organizing the flight attendants of *another* airline) that the IFFA's officials retained the funds in its treasury after decertification. In contrast, USAPA does not, and has never sought to represent the employees of any other employer or otherwise seek to deal with any employer for collective bargaining purposes on behalf of any employees. Plaintiffs' citation to *Schimmel* is inapposite.

POINT II

THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND THE COMPLAINT SHOULD BE DISMISSED

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

Plaintiffs' "demand letters" to defendants 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 the BPR defendants. *See Morrissey v. Curran*, 482 F.Supp. 31 (S.D.N.Y. 1979) (finding that defendant officers were only responsible for actions they personally undertook that resulted in a personal benefit to them), *rev'd on other grounds*, 650 F.2d 1267 (2d Cir. 1981).

B. "Collective legal action" does not require it to benefit every single member of USAPA, and as such, defendants' interpretation of USAPA's Constitution and Bylaws is patently reasonable, and entitled to deference.

Plaintiffs argue their complaint should not be dismissed because it adequately pleads 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." Doc. 36, at 18. The only facts to support these broad allegations are recitations of Section 501 and the Constitution and Bylaws. No facts are alleged in which this Court could plausibly conclude that Section 501 was breached by the National Officers' decision to defer dissolution and distribution of USAPA's assets, and defendants' decisions regarding the expenditure of USAPA funds, including but not limited to, for merger related activities, seniority integration proceedings, and litigation such as defending the district

court's grant of summary judgment in favor of USAPA in *Addington II*, are "collective legal action" in furtherance of USAPA's goals, objectives, and interests. As to plaintiffs' reliance on the merits of the Nicolau Award and USAPA's long held refusal to adopt it, they had their opportunity in *Addington II* to present to the district court the benefits to the West Pilots (at the expense of the East Pilots) of the Nicolau Award. They are, however, bound by the holding in that case which found no DFR was breached. The "merits" of the Nicolau Award are simply irrelevant in this case.

As discussed, none of the challenged acts are prohibited under Section 501. Moreover, USAPA's Constitution and Bylaws explicitly allow for deferral of dissolution and distribution of assets. Defendants' determination of what expenditures constitute "collective legal action" is entitled to judicial deference. *See Tile Workers Finishers Local 77 v. Tile Marble, Terrazzo, Finishers, Shopworkers & Granite Cutters International Union*, 848 F.2d 186 (4th Cir. 1988) ("It is well established that a union's interpretation of its own constitution is entitled to judicial deference unless its interpretation is patently unreasonable.").

Plaintiffs are correct that "[w]hat is at issue . . . is the meaning of the phrase "collective legal action on behalf of the pilot group". Doc. 36, at 20. As to that very narrow issue, all plaintiffs argue is that any act that does not benefit the West Pilots is, per se, not "collective legal action." However, as noted above, the definition of "collective" within the labor context is not as narrow as plaintiffs suggest. Indeed, the Supreme Court as early as 1953 recognized that "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686 (1953).

Underlying plaintiffs' animosity towards USAPA is USAPA's rejection of the Nicolau Award., which has spawned two DFR suits by West Pilots against USAPA, in addition to a

reprise of the *Addington I* claims in the 2012 declaratory judgment action. Since its inception, USAPA has had to expend millions of dollars and countless resources defending its right to reject the Nicolau Award as contrary to the interests of a majority of the pilot group which was then represented by USAPA. No court has held that USAPA breached its DFR to West Pilots. No court has found that USAPA's rejection of the Nicolau Award is arbitrary, discriminatory or in bad faith, even though rejecting the Nicolau Award may deprive some West Pilots of the significant advancement that the award gave them over East Pilots. Indeed, "[t]he duty of fair representation does not require that a union achieve absolute equality among its members. Rather, because a union by necessity must differentiate among its members in a variety of contexts . . . a showing that union action has disadvantaged a group of members, without more, does not establish a breach of the duty of fair representation." *Haerum v. Air Line Pilots Ass'n*, 892 F.2d 216, 221 (2d Cir. 1989) (internal citations omitted); *see also Huffman*, 345 U.S. at 338, 73 S.Ct. at 686 ("mere existence of . . . differences does not make them invalid."); *Dement v. Richmond, Fredericksburg & Potomac R. Co.*, 845 F.2d 451, 458 (4th Cir. 1988) ("[T]he law is well settled that 'a union may compromise to achieve long-term advantages, even though individual employees may be affected differently by the resulting agreement,") (quoting *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 412 (4th Cir. 1983)); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988) ("[T]he fact that a seniority system in a collective bargaining agreement favors one group more than another does not in itself constitute a breach of the union's duty.").

It is "a requirement of the Labor-Management Reporting and Disclosure Act . . . that unions act democratically to reach a *collective* decision – the majority is entitled to prevail." *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1531 (7th Cir. 1992) (citing *Humphrey v.*

Moore, 375 U.S. 335, 349-50, 84 S.Ct. 363, 372 (1964) and *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203, 65 S.Ct. 226, 232 (1944)), *rehearing denied*, 989 F.2d 944 (7th Cir. 1993), *cert. denied, Hammond v. Air Line Pilots Ass'n, Intern.*, 510 U.S. 861 (1993), *cert. denied, Rakestraw v. Air Line Pilots Ass'n, Intern.*, 510 U.S. 906 (1993) (emphasis added). Democracy by definition is rule by the majority. *See Hardcastle v. Western Greyhound Lines*, 303 F.2d 182, 187 (9th Cir. 1962), *cert. denied*, 371 U.S. 920, 83 S.Ct. 288 (1962) ("The appellants herein have done nothing more than present facts showing dissatisfaction with a result adopted by a majority of the union of which the appellants are members. That portions of an electorate will be dissatisfied with the result of an election is a fact inherent in the democratic process and the principle of majority rule."). Thus, just as a *collective* bargaining representative does not breach its DFR when it adjusts seniority in a way known to favor some employees over others, the officers of a unincorporated non-profit association does not breach a fiduciary duty when it determines that expenditures that plaintiffs allege are against their and West Pilots' interests are "*collective* legal action" under its Constitution and Bylaw. The mere fact that plaintiffs are a minority group within USAPA who allege they were adversely affected by the actions or inactions of USAPA and defendants does not establish that defendants breached any fiduciary duty. *See Ratkosky*, 843 F.2d at 878-79 (Affirming district court's grant of summary judgment in favor of the defendant union because "[t]he mere fact that plaintiffs are a minority group within their union organization and that they were adversely affected by the actions or inactions of the union does not establish that the union has acted with hostile or discriminatory intent.").

The complaint is devoid of any hard facts supporting a Section 501 action. There are no allegations that defendants' actions were patently unreasonable, and plaintiffs do not even discuss the undeniably high "patently unreasonable" standard in their memorandum of law.

Executive Bd. of Transport Workers Union of Philadelphia, Local 234 v. Transport Workers Union of Am., AFL-CIO, 338 F.3d 166, 170 (3d Cir. 2003) (The "patently unreasonable" standard is "undeniably a high one."). Plaintiffs cannot meet this high standard, and make no attempt to meet it. That the contested acts do not benefit every member of USAPA does not render defendants' actions patently unreasonable, and plaintiffs' complaint must be dismissed as a matter of law.

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

Plaintiffs claim that defendants are East Pilots who stand "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." Doc. 35, at 22. Plaintiffs are incorrect.

SLI proceedings will be governed by the McCaskill Bond Amendment, which provides, *inter alia*, "for the integration of seniority lists in a fair and equitable manner." 49 U.S.C. § 42112. To the extent that defendants have a place on the East seniority list (East and West pilots have their own seniority lists), plaintiffs' argument that having a place on the seniority list is a "holding or acquiring any pecuniary interest" as described in Section 501 is simply false. If it is plaintiffs' contention to define defendants' seniority interests as a "pecuniary interest" then they must show how that interest is distinct from the interests of USAPA. *See Council 49, Am. Fed'n of State, County & Mun. Employees Union by Adkins v. Reach*, 843 F.2d 1343, 1347, n. 3 (Finding that "if a union officer receives an indirect benefit from a transaction that also benefits the union, valid authorization will normally be a complete defense."). Defendants' seniority interests are inseparable from that of the majority of USAPA pilots. That this interest is not the same as that of a minority of pilots (to which group plaintiffs belong) does not make this a

personal pecuniary interest. The seniority interests of the defendants are fully aligned and in common with USAPA and the majority of its members.

Citing to *Ray v. Young*, 753 F.2d 386 (5th Cir. 1985), plaintiffs claim that it is "ludicrous" to claim that a pilot's relative seniority position is incidental or indirect. Doc. 35, at 23. In *Ray*, the Fifth Circuit found that a free dinner for a union official was an indirect benefit. Plaintiffs' response demonstrates a fundamental misunderstanding of what makes a benefit to a union officer incidental or indirect. It is not necessarily the value or importance of the benefit received by the union officer, but rather whether it was conveyed on the officer indirectly or incidentally as a result of activity that benefits the union itself. That is exactly the case here. Defendants' actions were consistent with USAPA's Constitution and Bylaws, and for the benefit of USAPA and its members.[10] Plaintiffs' claim that the challenged expenditures harm all USAPA members because the treasury is being depleted and any future distribution of funds will be lessened ignores this fact.

Moreover, any seniority interest defendants' have (which all USAPA members have, including plaintiffs) is simply not a "personal benefit" or "personal profit" prohibited by case law. Defendant DaLesio in *Brink v. DaLesio* was accused of causing a trust fund to be established that provided payments to him when he ceased his employment as Secretary-Treasurer of the union. He was also furnished a car, a monthly automobile allowance, a tennis club membership, season tickets to professional football games, and a daily dining allowance all

[10] It is expected that a significant portion of the USAPA Merger Committee's advocacy in the SLI process will be in the interests of all former US Airways pilots as compared to the interests of the legacy American Airlines pilots. By contrast, it is expected that the West Merger Committee will make a seniority proposal that benefits only the West Pilots to the detriment of the majority of former US Airways pilots because the list they will put forward has no rational basis in longevity. Furthermore, it is also conceivable that the West Pilots Merger Committee's Nicolau-based proposal will actually be detrimental to all former US Airways pilots, as it may dilute and/or contradict arguments comparing former US Airways pilots to legacy American pilots and will inure to the benefit of the legacy American pilots.

at the expense of the union. 667 F.2d 420, 423 (4th Cir. 1981). Plaintiffs in *Loretangeli* were members of Local 194 and accused defendants of rebating a substantial portion of Local 194 per capita dues to two other local unions. 853 F.2d at 187-88. Plaintiffs in *Saunders* accused four defendants of participating in a scheme to defraud the union in the amount of $5 million dollars and utilizing union funds to purchase luxury items for personal use. *Saunders v. Hankerson*, 312 F.Supp.2d 46, 51 (D.D.C. 2004). In fact, one defendant pled guilty to money laundering and another defendant to the criminal charge of embezzlement. *Id.*, at n. 1. Defendants are not accused of acting for "personal benefit" or "personal profit" as the defendants in the above cases. To the extent defendants have an interest, it is an interest in seniority that all members of USAPA hold, including plaintiffs. That the ultimate decision in the SLI process may impact individuals differently does not make defendants' actions prohibitive under Section 501.

Finally, that there is no personal benefit or profit to defendants is all the more evident by the fact that defendants have served in their various capacities as volunteers. They are not on full time flight pay loss status and have not received any pecuniary benefit for their service to USAPA.

Plaintiffs have not alleged the type of direct, personal benefit to defendants that is required for this Court to deviate from the well established principle that "a union's interpretation of its own constitution is entitled to judicial deference." *Tile Workers Finishers Local 77*, 848 F.2d at 186.

D. Any harm to plaintiffs is speculative.

Plaintiffs' arguments to this Court regarding the relative benefits of the West Pilots' seniority proposal vis-a-vis the USAPA Merger Committee's proposal (which has not even been released or published in any way) are (1) irrelevant to this case; (2) premature; and (3)

speculative. The issue before this Court is not which seniority proposal is preferable Indeed, plaintiffs themselves claim that the very narrow issue before this Court is whether the contested expenditures are "collective legal action" as provided for in USAPA's Constitution and Bylaws. Thus, the Declaration of Brian Stockdell, and the exhibits attached thereto, are irrelevant.

Seniority integration will be conducted consistent with McCaskill-Bond before a panel of three neutral arbitrators. Because the PAB ordered the APA to establish a West Pilots Merger Committee to represent the interests of the former America West Pilots in the SLI proceeding (Doc. 1, at ¶23), plaintiffs will be fully represented in the SLI process. When the time comes, each participant in the SLI process will argue their respective positions before the arbitration panel. Plaintiffs' arguments and exhibits as to the merits of their seniority proposal are premature and given to the wrong party as it is the arbitration panel that will decide the SLI issue.

Given that the arbitration has not taken place, any claim of harm resulting from a party's position as to seniority is speculative. Indeed, the parties' positions have not even been disclosed, and the SLI process has not yet played out. The West Pilots have been granted party status to the arbitration proceeding and, like the other parties, they will have the opportunity to make any arguments they wish. The arbitration panel will make the decision. It is impossible to predict the outcome of this process and for that reason, any assignment of harm is wholly speculation. Importantly, this was nearly the exact conclusion reached by the Ninth Circuit when it held that the West Pilots' DFR claim against USAPA was not ripe in *Addington I*. *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1180-81 (9th Cir. 2010) ("USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award.").

Schimmel does not support plaintiffs' contention that a challenged expenditure may be enjoined if it does not benefit the union's members as a whole group. Doc. 36, at 26. *Schimmel* merely stands for the proposition that under the LMRDA, a challenged expenditure that does not benefit *any* union members may be enjoined.[11] Plaintiffs would have the Court ignore this vital distinction, but the inescapable conclusion is that plaintiffs seek to enjoin an expenditure that benefits, at minimum, a majority of USAPA's membership.[12]

CONCLUSION

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

This the 14th day of May, 2015.

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[11] With respect to distinguishing *Schimmel* from the instant matter, it is also important to note the following: (1) the IFFA in *Schimmel* was attempting to use the treasury to organize the flight attendants of another airline, while USAPA is using the treasury to benefit the members of USAPA, and (2) the IFFA's Constitution was devoid of any provisions concerning how the treasury would be distributed upon IFFA's decertification as certified bargaining representative. Here, USAPA's Constitution contains clear provisions addressing dissolution, distribution, and the deferral of distribution.

[12] The phrase "at minimum" is used because defendants do not concede that the USAPA Merger Committee is only representing the interests of the East Pilots. It is expected that a significant portion of the USAPA Merger Committee's advocacy in the SLI process will be in the interest of all former US Airways pilots as against the legacy American Airlines pilots.

CERTIFICATE OF SERVICE

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

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This the 14th day of May, 2015.

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