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

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

EDDIE BOLLMEIER, BILL TRACY and SIMON PARROTT,

Plaintiffs

vs.

GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, STEVE SMYSER, ROBERT FREAR, COURTNEY BORMAN, and Jane Doe Borman, RONALD NELSON, PAUL DIORIO, PAUL MUSIC, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, JAY MILKEY and STEPHEN NATHAN,

Defendants, sued in their Individual capacity.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY AND IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S JUNE 17, 2015 TEXT-ONLY ORDER

Defendants GARY HUMMEL, STEPHEN BRADFORD, ROB STREBLE, STEVE SMYSER, JOHN TAYLOR, JOE STEIN, PETE DUGSTAD, JAY MILKEY and STEPHEN NATHAN (collectively, the "defendants"), by and through their attorneys, submit this Memorandum of Law in Opposition to plaintiffs' Motion for Expedited Discovery (Doc. 49) and in support of (a) Defendants' Motion for Reconsideration of the text-only Order of June 17, 2015 granting plaintiffs' motion for expedited discovery, and (b) Defendants' Motion for Expedited Discovery.

PRELIMINARY STATEMENT

It is respectfully submitted that plaintiffs have failed to demonstrate their entitlement to expedited discovery in advance of the hearing on their motion for a temporary restraining order and there are overwhelming reasons as a matter of law and fact for the denial of such relief. Defendants seek reconsideration of the Court's Order of June 17, 2015 in that it was decided without defendants being afforded an opportunity to submit the herein opposing papers, and, upon reconsideration, the application for expedited discovery should be denied for the reasons set forth herein. Should the Court decline to reconsider and vacate its order granting plaintiffs expedited discovery, defendants seek an order directing plaintiffs to provide discovery on an expedited basis.[1]

ARGUMENT

POINT I

PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LEGAL BASIS FOR EXPEDITED DISCOVERY

The Federal Rules of Civil Procedure grant courts the authority to direct expedited discovery and adjust the timing requirements set forth in the rules in limited circumstances. *Dimension Data N. Am., Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528, 530 (E.D.N.C. 2005). Courts apply "a standard based upon reasonableness or good cause, taking into account the totality of the circumstances, [which] is more in keeping with discretion bestowed upon the court in the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(b); Fed. R. Civ. P. 30(a)(2)." *Id*., at 531. In *Dimension*, the plaintiff sought injunctive relief in the complaint and sought expedited discovery

[1] Following the issuance of the text-only order on June 17, 2015, plaintiffs' counsel contacted defendants regarding the timing of discovery responses. Defendants stated they were not in a position to discuss timing as they were planning to oppose the motion as per the June 1, 2015 docket text concerning plaintiffs' motion for expedited discovery. Plaintiffs have proposed that responses be interposed by June 24, 2015, but defendants have not consented to same in that their opposition (and now, motion for reconsideration) has not been considered.

in aid of an anticipated motion for preliminary injunction. The court determined that expedited discovery was "not reasonable at this stage of the proceedings" for several factors. *Id.* Although one of the factors was that plaintiff had not yet filed a motion for temporary order or preliminary injunction, the other grounds that militated against the discovery are applicable here. First, the court found that the discovery requested was not narrowly tailored to obtain information relevant to a preliminary injunction analysis and determination. *Id*., at 532. Second, the plaintiff did not make an adequate showing that it would be irreparably harmed by delaying the "broad-based" discovery requested, nor had it alleged that the discovery sought would be unavailable in the future. *Id.*

In the case at bar, the discovery sought by plaintiffs relates principally to the amount of money that was generated by virtue of a dues increase enacted by USAPA in March 2013 in support of merger related activities (the propriety of which has not been challenged in this action), how much money has been spent in connection with merger activities, and the amount of money on hand in USAPA bank accounts at two different points in time. [2] (Doc. 49-3) Plaintiffs made scant attempt to justify setting aside the usual disclosure time-frames other than the bald assertion that the information sought "is material to the relief sought by Plaintiffs" (Doc. 49, at 3), and the vague projection as to what the Court would find interesting. *Id.* Plaintiffs have not demonstrated how the specific information sought relates to the burdens they must meet to obtain a TRO, nor how the amount of money generated by the dues increase, the amount spent in connection with the merger, or the amount of money on hand, for example, will affect the analysis of the TRO elements or the Court's determination of whether plaintiffs have met their

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While the specific requests and interrogatories appear limited and appropriate for expediting, in fact, the requests for production for "all documents reviewed, referred to and/or relevant" are likely to require production of a large volume of documents and may be unduly burdensome to produce.

burden to obtain the extraordinary relief of a TRO, which, as defendants discussed in their opposition to plaintiffs' motion for a TRO or preliminary injunction, will adversely affect USAPA's ability to protect the interests of a majority of its members. (*See e.g.* Doc. 24, at 12; Doc. 24-2, at 6) Plaintiffs' statement that this material, allegedly in the hands of *defendants*, is "directly pertinent to the Plaintiffs' requested relief" (Doc. 49, at 3) is disingenuous because the critical question is not whether the information is relevant to the ultimate relief sought by plaintiffs in this case, but whether the information sought is relevant to plaintiffs' request for a TRO and/or their burdens thereon.[3] As to that nexus, plaintiffs have failed to address, let alone prove, the reasonableness or good cause.

POINT II

AS A MATTER OF FACT, THE DEMANDS ARE MISDIRECTED TO DEFENDANTS HEREIN, SUED IN THEIR INDIVIDUAL CAPACITIES

As a matter of fact, the discovery demands are misdirected because the information necessary to respond to these requests is not possessed by defendants herein but is exclusively in the possession, custody and control of a third-party, USAPA.

It is critical to bear in mind that plaintiffs and their counsel chose to bring this claim against individual defendants (and not USAPA) under section 501(a) of the LMRDA. Plaintiffs leave no doubt about this distinction in the complaint herein, beginning with the caption that provides, "Defendants, sued in their individual capacity [sic]". (Doc. 1 at 1) Similarly paragraph 1 of the complaint alleges that defendants' "own personal interests are adverse to Plaintiffs' interests and the interests of approximately 1500 similarly situated pilots." *Id*. Paragraph 3 of the

[3] Moreover, as addressed below, plaintiffs' statement that defendants have this information is incorrect. The individual defendants do not have the information necessary to respond to these demands. Rather, it is in the possession, custody, and control of USAPA, which is not a party to this action, a deliberate result of plaintiffs' litigation strategy.

complaint contains the allegation that "[each] defendant is sued herein in his personal capacity." (Doc. 1, at 2) The relief requested includes an order directing defendants to pay restitution. (Doc. 1, at 15)

Plaintiffs representing West Pilots, and their counsel, have sued USAPA directly twice in the past.[4] In another litigation in which the West Pilots and USAPA were both defendants, the West Pilots asserted cross claims against USAPA.[5] The West Pilots and their counsel know how to maintain an action against USAPA when they want to and the decision to maintain this action only against current and former officers and BPR members of USAPA, in their individual capacities, is a result of a deliberate litigation strategy. Moreover, as defendants have observed, plaintiffs could have raised the same issues in the context of the previously filed declaratory judgment action commenced by USAPA and that is pending before this Court. *USAPA v. Velez,* 14-Civ-577- RJC-DCK.

A consequence of plaintiffs' strategy herein is that the discovery they seek herein, just like the relief they ultimately seek, is beyond the capacity of the individual defendants to provide, but is wholly within the possession, custody and control of USAPA. All of the information sought by plaintiffs is maintained by and in the possession, custody, and control of USAPA in accordance with its policies and practices in USAPA's offices, databases, and banking institutions. The individual defendants simply do not have the information required to respond to the discovery requests, and it would be improper for any individual defendant, sued in his individual capacity, to speak for USAPA in this regard. In this regard and for the same reasons, no defendant, sued in his individual capacity, can attest to responses to discovery

[4] *Addington v. US Airline Pilots Ass'n, et al.*, 08-cv-1633 and *Addington v. US Airline Pilots Ass'n, et al.*, 13-cv-01471.
[5] *US Airways, Inc. v. Addington, et al.*, 10-cv-01579

demands regarding information that is in the sole possession, custody, and control of USAPA, or derived from such information and records, as required by Fed. R. Civ. P. Rule 33.

Moreover, the individual defendants are under constraint with respect to the release of information even if such information was in their possession. Under the USAPA Code of Ethics, which is part of the USAPA Constitution and Bylaws, each member pledges that he or she "will hold USAPA's business secrets in confidence, and will take care they are not improperly revealed." USAPA Constitution and Bylaws, Art. VI, Section 1, Doc. 1-2, at 34. The release of any information in the absence of authorization from USAPA would be improper. The same is certainly true to the extent a *former* officer or BPR member possessed information he or she obtained in the course of service on behalf of USAPA. A violation of the Code of Ethics is a basis for a charge against a member as acting contrary to the best interests of the organization and its membership. USAPA Constitution and Bylaws, Art. VI, Section 1, Doc. 1-2, at 24.

Plaintiffs as West Pilots cannot have it both ways. On the one hand they have departed from their usual course in venting their complaints regarding USAPA and are trying to obtain USAPA information by suing officers and BPR members individually. On the other hand they want information which they know, or are chargeable with knowing, that is exclusively in the possession of USAPA. To be sure, this disingenuousness is not manifested only in this discovery, it inheres in the relief sought, which, as a recent Leonidas/West Pilot update makes clear, stems from plaintiffs' belief that this is a "dues disgorgement case",[6] which relief can only be provided by USAPA, not the individual defendants (seven of whom are no longer officers or BPR members. (Doc 24-2, at 5-6, ¶¶21-23)).

[6] Available at: http://leonidas.cactuspilots.us/51-library/300-america-west-merger-committee-update-june-12-2015

Finally, it is noted that should the Court order or adhere to its Order directing this discovery, it would inevitably implicate personal confidentiality issues as pilot payroll data is required to respond to these demands. At the same time, since the information is in the hands of a third party (USAPA), the individual defendants have no capacity to assure such confidentiality, even as they may be in jeopardy if a pilot or pilots are aggrieved by the release of the information. This just serves to underscore the legal conundrum that would result from requiring defendants to provide information as to which they have no possession, custody or control.

Plaintiffs' motion for expedited discovery should be denied.

POINT III

IN THE ALTERNATIVE, THE COURT SHOULD GRANT DEFENDANTS' MOTION FOR RECONSIDERATION, AND, UPON RECONSIDERATION, THE MOTION FOR EXPEDITED DISCOVERY SHOULD BE DENIED

Defendants respectfully request that the Court to reconsider its text-only Order of June 17, 2015 granting plaintiffs' Motion for Expedited Discovery as it was granted without defendants having an opportunity to present its objections and opposition to the motion and defendants reasonably believed the deadline to file opposition to the motion was June 18, 2015.

Plaintiffs filed a Motion for Expedited Discovery on June 1, 2015. Doc. 49. The docket text in the Notice of Electronic Filing provides: "Responses due by 6/18/15" and referred the motion to Magistrate Judge David Keesler. *Id.*

As per the Notice of Electronic Filing, it was defendants' understanding that they had until June 18, 2015 to respond to the motion, and intended to oppose said motion by that date for the reasons set forth above. It would be manifestly unjust for the Court to rule on plaintiffs' motion without first considering defendants' opposition to the motion on the various grounds set forth above.

For these reasons Defendants' Motion for Reconsideration should be granted and, upon Reconsideration, the motion for expedited discovery should be denied.

POINT IV

SHOULD THE COURT DECLINE TO RECONSIDER ITS ORDER AND DENY PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY, DEFENDANTS ARE ENTITLED TO EXPEDITED DISCOVERY

To the extent that the Court orders expedited discovery interposed by plaintiffs and/or adheres to its ruling directing same, defendants are entitled to discovery of a similar nature as that information is relevant to elements of a TRO, including but not limited to irreparable harm. As defendants argued in their papers opposing the TRO, plaintiffs have failed to demonstrate that they will be irreparably harmed without the TRO because they have various funding sources for their merger related activities. *See e.g.*, Doc. 24, at 29-30. By separate motion, defendants seek expedited discovery. The limited discovery demands attached hereto as Ex. A to defendants' motion for expedited discovery relate to this critical element of a request for TRO.

CONCLUSION

For all of the foregoing reasons, plaintiffs' motion for expedited discovery should be denied and, if necessary, defendants' motion for reconsideration should be granted and plaintiffs' motion for expedited discovery denied. Should the Court decline to reconsider its Order of June 17, 2005, defendants' motion for expedited discovery should be granted.

This the 18th day of June, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY AND IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S JUNE 17, 2015 TEXT-ONLY ORDER and MOTION FOR EXPEDITED DISCOVERY** 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 18th day of June, 2015.

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