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

US AIRLINE PILOTS ASSOCIATION, Plaintiff, v. ROGER VELEZ, on behalf of himself And all similarly situated former America West Pilots, and LEONIDAS, LLC, Defendants.	)	Civil Action No.: 3:14-CV-577-RJC-DCK
EDDIE BOLLMEIER, BILL TRACEY and, SIMON PARROTT, Plaintiffs, v. 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.	)	Civil Action No.: 3:15-cv-00111-RJC-DCK
Roger Velez, Counterclaimant and Third Party Plaintiff, v.	)	Civil Action No.: 3:14-CV-577-RJC-DCK

US AIRLINE PILOTS ASSOCIATION)
GARY HUMMEL,)
STEPHEN BRADFORD,)
ROB STREBLE, STEVE SMYSER,)
And JOHN OWENS, in their official)
capacity as officers of USAPA)
)
Counter Defendants)
And Third Party Defendants.)
_____)

AMENDED* MEMORANDUM IN SUPPORT OF MOTION TO HOLD DEFENDANTS IN CONTEMPT AND/OR FOR ORDER TO SHOW CAUSE

Defendants continued to spend USAPA monies on seniority/merger issues after Plaintiffs filed their Motion for Temporary Restraining Order on March 27, 2015. By the time of the scheduled oral argument on June 30, 2015, Defendants claimed that they had approximately $500,000 in unpaid bills for seniority/merger-related expenses that they were seeking Court permission to pay. The issue squarely presented at oral argument on June 30, 2015 was whether Defendants could pay any or all of these unpaid invoices with USAPA treasury funds. Plaintiffs objected to the use of any USAPA money to pay any bills for seniority/merger expenses. At the conclusion of oral argument, the Court directed the parties to "put your heads together on the things that you agree upon and submit a stipulation." (Rough Transcript of Hearing held June 30, 2015, at p. 48, ll. 12-13, excerpts attached at Exhibit A). The parties complied and on July 14, 2015, submitted largely separate proposed orders after their efforts to negotiate a full stipulation were unsuccessful [Doc. 62-Plaintiffs' and Doc. 61-Defendants'.]

*Counsel omitted three words at the end of the top paragraph on page 11, corrected here.

Unbeknownst to either the Court or Plaintiffs, Defendants did not wait for the Court's decision on whether they could use USAPA funds to pay the pending bills. Instead, they pressed on with business as usual and used USAPA money to pay seniority/merger-related invoices totaling approximately $380,000 before the Court could rule. The only pending seniority-related invoices they did not pay for some reason were those totaling approximately $125,000 to American Airlines for flight pay loss expenses.

Almost $400,000 of the money at issue at oral argument on June 30, 2015 is now gone. The question now is, what can be done about it? The obvious solution is to enter an order for civil contempt against all of the Defendants, along with a remedial directive ordering the Defendants, either jointly or severally, to repay $380,000 with interest to the USAPA treasury immediately.

CHRONOLOGY

Plaintiffs filed their Motion for Temporary Restraining Order or Preliminary Injunction on March 27, 2015. [Doc. 48.] The Motion sought, *inter alia*, to restrain Defendants "from authorizing the expenditure of USAPA funds obtained from the collection of dues and assessments of US Airways pilots during the period that USAPA was the exclusive bargaining agent of US Airways pilots in support of activities of any kind, including but not limited to payment of attorneys, experts, witnesses, office space or flight pay loss to pilots for purposes of preparing for and participating in the Substantive Seniority Integration Process." [Doc. 48-5 ¶ 1.] After the Plaintiffs filed their Motion, Defendants continued to spend USAPA money to support USAPA's Merger Committee in

all of its efforts to obtain a date-of-hire type of seniority list. [See Doc. 98, at Exhibit B, Report of Grant Thornton, at Exs. 8-9 thereto.]

The Plaintiffs' Motion was scheduled for oral argument for June 30, 2015. On June 29, 2015, Defendants filed a Motion requesting that the June 30 hearing be continued and additional briefing be allowed. [Doc. 58.] In that Motion, Defendants clearly stated that they wanted the Court's permission to spend approximately $15,000 from the USAPA treasury to pay seniority/merger-related expenses. The June 30, 2015 hearing was not postponed, and on that date Defendants suddenly announced they were now seeking the Court's permission to spend approximately $500,000 on seniority/merger-related expenses. Plaintiffs objected to this request.

The Court will recall that the Ninth Circuit Court of Appeals issued its decision on June 26, 2015 in *Addington III*. That opinion caused USAPA on June 29, 2015 to precipitously withdraw its Seniority Merger Committee from the then pending SLI process in Washington, DC. The sudden withdrawal of the USAPA Merger Committee from the SLI process apparently accelerated the presentation of bills associated with the SLI process, thus resulting in the pronouncement on June 30, 2015 that the Defendants now wanted the Court's permission to pay approximately $500,000 in seniority-related expenses.[1]

[1] Relevant also is that USAPA and the LMRDA Defendants had intentionally failed and refused to seek USAPA's designated $1.3 million advance from APA to cover merger-related expenses, choosing instead to deplete USAPA treasury funds, thereby (1) taxing the West Pilots' for efforts that only benefitted the East, (2) leaving the $1.3 million on the table for the New East Merger Committee to use, and (3) transferring to the New East Merger Committee all the expert and attorney work product, and the like, notwithstanding that West Pilots' dues money has been used to pay for that work. [Doc. 64, Velez's Counterclaim and Third Party Complaint, at ¶33.]

Oral argument was held as scheduled on June 30. At the conclusion of the hearing, the Court clearly took all issues under advisement; but directed the parties to "put your heads together on the things that you agree upon and submit a stipulation. I'll decide whether it stays in a stipulation form or I convert it to some type of TRO." (Ex. A, at p. 48, ll. 12-15.)

Plaintiffs submitted a proposed joint stipulation to counsel for Defendants on July 8, 2015. [Doc. 62, Ex. D.] Counsel for Defendants returned a redline of the proposed joint stipulation on July 10, 2015. [Doc. 62, Ex. G.] The differences between these two proposals showed substantial disagreement between the parties. Accordingly, as directed by the Court, the parties filed separate proposals on July 14, 2015. [Doc. 62 (Plaintiffs'); Doc. 61 (Defendants')] Plaintiffs' proposal regarding expenditures of USAPA funds was fundamentally the same as their originally proposed TRO [Doc. 48-5], with additional proposed restrictions for expenditures made to oppose implementation of the ruling by the Ninth Circuit in *Addington v. USAPA*. [Doc. 62 ¶ 1.]

It should have been clear to everyone at the end of oral argument on June 30 that the Court intended to act upon Defendants' request to spend approximately $500,000 in USAPA money for seniority-related expenses, and that USAPA's treasury funds were the "subject matter" of the imminent injunction.

Plaintiffs thought that it was perfectly clear at the end of the hearing on June 30 that the Defendants knew that they needed the Court's permission to use USAPA money to pay any of the outstanding bills discussed at oral argument, and Plaintiffs suspect that the Court did also. This awareness is reflected in the pleading the Defendants filed on July 14, 2015

[Doc. 61.] There Defendants proposed language for the Court's approval "permitting the payment of incurred, but as of yet, unpaid expenses," and agreed that they would not "spend any USAPA treasury monies for expense incurred in relation to merger/seniority related matters after June 30, 2015, whether directly or indirectly, except that USAPA shall be permitted to pay such expenses incurred through June 30, 2015 in an amount estimated to be $500,000, as and for flight pay loss to the Company (in the approximate sum of $175,000); subject matter experts, reimbursement to members of the Merger Committee for travel, accommodation, and similar expenses, and attorneys' fees." [Doc. 61 at 6.]

The Court ruled on August 27, 2015 that USAPA's request to spend $500,000 was "unreasonable," and ordered that it "will not permit USAPA to make these expenditures out of its treasury." [Doc. 75.] We now know that by the time the Court ruled, the proverbial "horse had already left the barn." Defendants, without waiting for Court approval, went forward and spent at least $380,000 of USAPA's money to pay a majority of the expenses that were pending on June 30, 2015.

ARGUMENT

This Court should impose civil contempt sanctions on Defendants for their willful disregard of the Court's jurisdiction and its authority to restrain Defendants from spending USAPA funds on merger/seniority related matters.

It is firmly established that district courts have inherent power to punish parties for contumacious conduct. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). The Court's contempt powers may be used to prevent or punish a party that interferes with or diverts property in order "to defeat any decree which the court might ultimately make in a cause .

. . in fraud of the rights of the plaintiffs to prosecute the suit to its conclusion." *Lamb v. Cramer*, 285 U.S. 217, 219 (1932); *see also Merrimack River Savings Bank v. Clay Center*, 219 U.S. 527 (1911) ("[T]he willful removal beyond the reach of the court of the subject-matter of the litigation, or its destruction pending an appeal from . . . an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of this court."). A primary aspect of the Court's contempt power is its "ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45.

In *Griffin v. County School Board of Prince Edward Co., Va.*, 363 F.2d 206 (4th Cir. 1966), the Court held that a party could be guilty of civil contempt even when no injunction is in effect. In *Griffin*, members of the Prince Edward County School Board had disbursed board funds while an appeal from the district court's denial of an injunction was pending. 363 F.2d at 207. The Court held that, even though no injunction had been issued, the disbursement of funds by the School Board during the "process" of the appeal constituted civil contempt. *Id.* at 210. In finding that it had the power to hold the School Board members in contempt even though the district court denied the injunction, the court noted:

> That these acts of the Board of Supervisors constituted a contempt of this court is beyond cavil. The Board undertook to put the money then available for tuition grants—and then wholly subject to its orders—beyond its control as well as that of the court. In doing so the Board took upon itself to decide its right to exercise . . . the Board's general power to appropriate school funds. This use of power was, as the Board was acutely aware, an arrogation of this court's responsibility. Obviously, the aim was to thwart the impact of any adverse decree which might ultimately be forthcoming on the appeal. In

> effect it was a "resistance to its (this court's) lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3).

Id. at 210.

The same holds true here. It was clear to everyone on June 30 that the Court intended to decide whether the Defendants could spend another $500,000 of USAPA's money to pay seniority-related expenses that were not for "collective legal action on behalf of the pilot group." Nevertheless, shortly after June 30, Defendants determined not to wait for the Court's decision and went ahead and paid most of the outstanding bills,[2] before the Court could rule. For the Defendants, it apparently was business as usual after oral argument with the attitude: We control the money so we will spend it like we want before the Court says no.

Like *Griffin*, the central issue in this case is the legal ability of USAPA's officers and directors, post-decertification, to spend USAPA funds for merger- and seniority-related purposes that were not "collective legal action on behalf of the Pilot group. Plaintiffs put the Defendants on notice in their March 27, 2015 Motion that the Plaintiffs were contesting the expenditure by the Defendants of any USAPA funds that were not for "collective legal action on behalf of the pilot group" after September 16, 2014.

Post decertification, the Defendants were not shy at all about spending from the USAPA treasury whatever it took to obtain their long-coveted date-of-hire-like list. The Grant Thornton report (at Exhibit B to Doc. 98) shows that they spent approximately $1.8

[2] Defendants paid bills from East Pilots, their SLI consultants, experts and attorneys, all of whom were involved in the SLI process for the benefit of the East Pilots and most of whom continued on in the SLI process as the "New East Pilot Merger Committee."

million on their personal cause post decertification. The Ninth Circuit's decision on June 26, 2015 was a total shock to the Defendants' plan to keep spending whatever it took to get their desired seniority list. Unable to live with the Ninth Circuit's directive to support the Nicolau list in the SLI process, USAPA quit the process, but was left with unpaid bills of approximately $500,000, with about $380,000 due to East Pilots, East consultants, East attorneys and East experts, most of whom were needed to support the new East Pilot surrogate Merger Committee. Not wanting to run the risk that the Court would tell them not to use USAPA money to pay these bills, Defendants boldly went forward and paid them before it was too late.

The Court ruled on August 27, 2015 that it would not allow the Defendants to pay the pending invoices from USAPA's treasury. [Doc. 75 at p. 12.] By the time the Court ruled, however, much of the USAPA funds Plaintiffs sought to preserve through their Motion for TRO, had secretly been spent. This contumacious conduct by the Defendants before the Court ruled on August 27, 2015 must be sanctioned.

Plaintiffs anticipate that the Defendants will argue that no injunction had been ordered when they paid the bills, and by the way, the Court did not tell them in "clear and unambiguous" terms at oral argument on June 30 that they could not pay the pending invoices until the Court ruled. Defendants are wrong because "[i]t has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Porter v. Lee*, 328 US 246, 251 (1946). Indeed, when this happened in *Griffin*, *supra*, the court held the offending parties in civil contempt. 363 F.2d at 210. It is what should happen

here because Defendants expended union funds while the Court was considering issuing an injunction prohibiting such expenditures.

That the Court took the issue of the Defendants' ability to pay the open bills under advisement should have been sufficient warning to a reasonable defendant that it needed to wait for a Court ruling before spending $380,000 of USAPA's money on their seniority issues. But these are not reasonable or rational Defendants, as they have repeatedly demonstrated for nearly eight years. Over the years they have spent nearly $11 million of USAPA's money to obtain a date-of-hire-like list rather than accept the Nicolau seniority list that resulted from a lengthy and binding arbitration. [Doc. 98.] Nearing the end of their run as a result of the Ninth Circuit's decision, they were not going to let anyone, not even this Court, stop them from spending another $400,000 or so on their seniority cause.

If the "you didn't tell us in no uncertain terms," not to spend the money feign of ignorance does not carry the day, then perhaps Defendants will suggest that they told the Court at oral argument what they were going to do. They may point to Mr. Silverman's short comment that "there will be no more expenditures in relation to the USAPA Merger Committee except for money that's already been incurred. . ." (Ex. A, p. 31, ll. 22-25.) On the other hand, local counsel followed-up with the Court and stated, "To make it clear, we understood the injunction would be that USAPA would not spends money on a merger committee. We weren't trying to parse the words that somehow we were going to do something that got around that." (Ex. A, p. 47, l. 24 – p. 48, l. 2.)

If Defendants suggest that they gave the Court and Plaintiffs' fair warning that they would keep spending until the Court ruled, this approach should also fail. If the Defendants

intended to pay the pending bills because someone needed to pay them, their counsel should have so stated in clear terms on June 30 about what they intended to do. Instead, they tergiversated, perhaps with the hope that this Court would not notice.

The undisputed facts demonstrate that the Defendants acted deliberately to deny this Court its right to decide the issues pending on June 30, 2015. Rather than delaying payments of these merger-related expenses until the Court could rule, Defendants unilaterally decided to use more USAPA money to advance their personal objective of achieving a date-of-hire-like seniority list no matter what the circumstances. So they paid the bills and thus denied the Court the ability to rule on a matter it had taken under advisement. This contumacious conduct needs to be punished, and the status quo must be restored.

CONCLUSION

Plaintiffs have shown that Defendants willfully obstructed the proceedings in this case by depleting the USAPA treasury by at least $380,000 while the Plaintiffs' Motion for TRO was under consideration by the Court. Accordingly, Defendants should be held in civil contempt and fines and penalties should be imposed on Defendants, either jointly and severally, including an Order consistent with Rule 65(d)(2)(A-C) (1) requiring the Defendants, either jointly or severally, and their officers, agents, servants, employees, and attorneys and anyone acting in concert with them to immediately restore to the USAPA treasury an amount equal to the merger- and seniority-related expenditures spent after June 30, 2015, with interest, and; (2) payment of Plaintiffs' attorneys' fees and costs incurred in

bringing this contempt proceeding; and (3) any other relief the Court deems proper. Plaintiffs hereby request that this Court enter such an Order, or, in the alternative, order that the LMRDA Defendants appear and show cause why an order should not issue.

Respectfully submitted this 20th day of January, 2016.

/s/ *Kelly J. Flood*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Memorandum in Support of Motion to Hold Defendants in Contempt and for Order to Show Cause with the Clerk of the court using the CM/ECF system and that notification will be sent via that system to:

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This the 20th day of January, 2016.

/s/*Kelly J. Flood*