

**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. )

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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. )

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Civil Action No.:  
3:15-cv-00111-RJC-DCK

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' [PROPOSED] TEMPORARY  
RESTRAINING ORDER**

## **I. BACKGROUND**

This Court held a hearing on June 30, 2015, to address the Bollmeier Plaintiffs' Motion for a TRO. At the conclusion of the hearing, and based upon the avowals of counsel for all parties that certain agreements may be reached, the Court instructed the parties to work together to determine what they could agree on, and to submit that to the Court by July 14<sup>th</sup>, in the form of a stipulated TRO. The Court indicated further that, to the extent the parties could not come to an agreement, they could separately submit their proposals and position.

On July 2, 2015, after the hearing, USAPA Prescient and LMRDA Defendant Steve Bradford confirmed that the USAPA Merger Committee had withdrawn from the Seniority Arbitration proceedings. (See July 2, 2015 letter from Steve Bradford to Arbitrator Dana Eischen, et al, attached hereto as Exhibit A.) The letter ratified the USAPA Merger Committee's previous avowal via counsel they were withdrawing from the SLI proceedings and would not re-enter the proceedings at any time in the future. See Doc. 56, at Exhibit 12. As a result of USAPA's withdrawal from the SLI proceedings, the Arbitration Panel, after requesting briefing, determined that it would implement a process whereby it would appoint a new East Merger Committee. (See July 5, 2015, excerpts from SLI Arbitration Panel Procedural Question and Award, attached as Exhibit B.)

On Wednesday, July 8, in accordance with and in furtherance of the Court's instruction, the Bollmeier LMRDA Plaintiffs drafted a proposed Joint Stipulation, and submitted it to counsel for the LMRDA Defendants and USAPA. (See July 8, 2015 email from Marty Harper to Gary Silverman and John Gresham, attached as Exhibit C, and the Proposed Joint Stipulation attached, attached hereto as Exhibit D.) The email suggested that counsel have a call to discuss to stipulation and what the parties might be able to agree on. On July 9, when Counsel for the LMRDA

Defendants and USAPA had not responded, counsel for the LMRDA Plaintiffs sent a reminder email that they were available to discuss, to which counsel for the LMRDA Defendants And USAPA responded later in the day, indicating that they could talk on July 10, 1015. (See email exchange dated July 9, attached as Exhibit E.)

On Friday, July 10, counsel for the LMRDA Defendants and USAPA sent a redline of the Plaintiffs' draft Proposed Joint Stipulation. (See email from Gary Silverman to Marty Harper, attached as Exhibit F, and REDLINE of Proposed Joint Stipulation, attached as Exhibit G.) The LMRDA Defendants' and USAPA's redline of the proposed joint stipulation indicated that the LMRDA Defendants and USAPA did not agree with any of the material terms that the LMRDA Plaintiffs had proposed, including (1) which parties would be bound by the TRO - the LMRDA Defendants refused to be included, (2) how much money the LMRDA Defendants could authorize USAPA to spend on merger-related expenses - the LMRDA Defendants and USAPA increased their demand from \$15,000 [in Doc. 58 at paragraph 5] to \$500,000, (3) whether the LMRDA Defendants could authorize USAPA to transfer any other assets of value to the new East Merger Committee - no agreement, and (4) whether the LMRDA Plaintiffs were entitled to an accounting - the LMRDA Defendants and USAPA refused, but stated that a recent LM2 audit should suffice. (See Exhibit D at paragraphs 1 - 3.) The only material item on which USAPA, but not the LMRDA Defendants, agreed was that USAPA would not dissolve without notice and approval of the Court. (See Exhibit F at paragraph 4.)

On July 10, 2015, counsel for all parties had an extended conference call to discuss the parties' disagreements and whether additional agreements could be reached. The parties could not reach any agreements except that USAPA will not dissolve without notice and approval by the Court. One critical piece of information that counsel for the LMRDA Defendants and USAPA

revealed during the conference call is that, notwithstanding that \$1.3 million has been available to them from APA since January of 2015 to pay for merger-related expenses incurred, the LMRDA Defendants and USAPA have done nothing to obtain payment from APA and preserve this asset of USAPA and have, instead, continued to deplete the USAPA treasury for all merger related expenses. This is also why they seek permission from this Court to spend another \$500,000 at this time. In other words, rather than submit merger-related invoices directly to APA since January of 2015, the LMRDA Defendants and USAPA have paid and seek to continue to pay such expenses from the USAPA treasury, thereby depleting it and leaving a \$1.3 million asset outside of the treasury. When counsel for the LMRDA Plaintiffs learned this, they demanded during the phone call and via writing that the LMRDA Defendants and USAPA immediately seek reimbursement from APA, in order to ensure that the USAPA treasury is funded to the greatest extent for the benefit of all members. (See July 13, 2015 email from Marty Harper to John Gresham, Brian O'Dwyer and Gary Silverman, attached as Exhibit H.)

Because the parties could not reach any agreements on the material aspects of the relief that the LMRDA Plaintiffs seek, Plaintiffs submit herewith their separate Proposed TRO to the Court. The Plaintiffs' TRO is appropriate under the circumstances, designed to preserve and conserve the assets of USAPA in accordance with the LMRDA, and should be granted. Plaintiffs' Proposed TRO is submitted herewith as Exhibit I, and separately submitted as a proposed order via Cyberclerk.

## **II. ANALYSIS**

Plaintiffs' proposed TRO is an urgent and necessary remedy to preserve, conserve and maximize the assets of USAPA for the benefit of all of its members. This LMRDA action is in the nature of a derivative action, and it is brought against the officers and directors of USAPA to

address and remedy their inappropriate and self-interested spending that has depleted and will continue to deplete USAPA's treasury.

***A. The LMRDA Defendants Must Be Bound By The TRO.***

As addressed in the LMRDA Plaintiffs' briefs and as discussed at the June 30 hearing, as of September 16, 2014, USAPA was decertified as the bargaining agent for all US Airways pilots, and the officers and directors were at that point no longer constrained by the duty of fair representation imposed by the Railway Labor Act ("RLA"). And, as this Court recognized at the June 30 hearing, the landscape changed that date because USAPA is a North Carolina unincorporated non-profit membership association.

Under North Carolina law, such an association consists of "*members joined by mutual consent for a common, nonprofit purpose.*" See N.C.G.S. §§ 59B-2 et seq. As of September 16, 2014, however, there was no unified group of members joined by mutual consent for a common purpose. Instead, there was a majority group of East Pilots including specifically the LMRDA Defendants in control, ganging up on a minority group of West Pilots who had previously been forced to pay dues to USAPA when it was the certified bargaining agent. The LMRDA Defendants, who are East Pilots, used USAPA treasury funds to facilitate and further their and the other East Pilots' position against the West Pilots, in order to increase the LMRDA Defendants' and other East Pilots' pay and seniority at the expense of the West Pilots.

The LMRDA Defendants did not cease spending USAPA treasury monies to feather their own nests after September 14, nor even after January 9, 2015, with the PAB confirmed that USAPA did not represent the West Pilots in the SLI proceedings. Instead, the LMRDA Defendants continued with their unfettered spending of USAPA treasury funds to the tune of \$3.5 million, and they seek to spend another \$500,000 right now for expenses that have only ever benefitted them

and their fellow East Pilots. Their spending must stop, and every effort must be made to seek reimbursement from APA from the \$1.3 million made available to them for all merger-related expenses.

Because the LMRDA Defendants have breached their fiduciary duties to USAPA and its members by spending money that shouldn't have been spent, by incurring expenses that should not have been incurred, and by failing and refusing to pursue the \$1.3 million assets available to USAPA, the LMRDA Defendants must be enjoined by this Court.

The LMRDA Defendants and USAPA insist that if USAPA is bound, that is all that is necessary. Not so. First, an entity acts only by and through its officers and directors, here the LMRDA Defendants. Second, this is an LMRDA action, and its remedy is by statute against the officers and directors for the benefit of the entity:

“This is an action brought by union members of USAPA 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 this Court grants the TRO proposed by the LMRDA Plaintiffs.

***B. The LMRDA Defendants Must Not Be Allowed To Spend An Additional \$500,000  
And Must Be Ordered To Seek Reimbursement From APA.***

The LMRDA Defendants have increased their demand for additional spending on merger-related activities from the avowal they made [in Doc. 58 at paragraph 5] for \$15,000 to \$500,000. Moreover, they concede that they have failed and refused to submit any merger-related expenses to the APA for reimbursement, notwithstanding the fact that \$1.3 million has been available since

January 2015. By failing and refusing to apply for reimbursement to APA, and instead depleting the USAPA treasury, the LMRDA Defendants have breached their duties to the membership of USAPA. Presumably, the LMRDA Defendants have done this in order to be able to continue to tax the West Pilot minority of the membership for efforts that benefit only the LMRDA Defendants and their fellow East Pilots.<sup>1</sup> Regardless, failing to take in a \$1.3 million asset and instead continuing to deplete the USAPA treasury works a detriment on all members of USAPA, because less money will be available to distribute to the members upon dissolution.

***C. The LMRDA Defendants Must Not Be Permitted To Authorize USAPA To Pay For Further Efforts At The Ninth Circuit And Beyond.***

On July 10, 2015, USAPA filed a Petition for Re-Hearing En Banc at the Ninth Circuit. Because USAPA has withdrawn from the SLI proceedings completely, and has avowed not to re-enter regardless the outcome at the Ninth Circuit, expenses from briefing at the Ninth Circuit and beyond is not “collective legal action on behalf of the pilot group” because USAPA has no further role in SLI proceedings and is now entity fractured into two groups. Nevertheless, counsel for the LMRDA Plaintiffs offered and continue to offer a compromise to allow the LMRDA Defendants to authorize USAPA to expend a reasonable amount of treasury funds to file the Petition for Re-hearing En Banc, but nothing further. This is only an offer to compromise given the short deadline that USAPA had to file at the Ninth Circuit. If the Ninth Circuit denies the Petition, the LMRDA

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<sup>1</sup> It also appears that this tactic would benefit the LMRDA Defendants further because any new East Merger Committee most likely will have access to the entire \$1.3 million left on the table for them to argue for seniority and pay increases that will benefit the LMRDA Defendants and the East Pilots. Thus, the LMRDA Defendants will have been able to tax the West Pilots by using USAPA treasury funds for the USAPA Merger Committee expenses, and leave behind and unavailable to all USAPA members the \$1.3 million they could have gotten from APA.

Defendants should not be allowed to authorize to spend any further treasury funds on effort on remand in the District Court or to seek a writ of certiorari from the US Supreme Court.

This is not a hardship on the LMRDA Defendants because USAPA has already confirmed it will not re-enter the SLI process, so there is no need to spend any further USAPA funds on such efforts.

***D. The LMRDA Plaintiffs Are Entitled To A Full Accounting.***

The LMRDA Plaintiffs have requested a full and neutral accounting for purposes of determining what the LMRDA Defendants have collected, what they have authorized USAPA to spend and from where, and what monies may ultimately be available to membership upon dissolution. The LMRDA Defendants and USAPA have refused to provide an accounting and have, instead, suggested that an audit for purposes of USAPA's LM2 reporting requirements should suffice. Not so.

First, an LM2 audit does not reveal details about spending, including the back-up for expenditures. Second, the LM2 audit is conducted on a fiscal year basis, which means that it is not current. Finally, based upon the LMRDA Defendants' and USAPA's recent discovery responses, it is apparent that the LMRDA Defendants are not properly accounting for merger-related expenses. This is apparent because although USAPA collected an additional amount of dues from members over and above regular dues for a "special merger assessment fund" commencing April of 2013, and that fund totaled over \$4.5 million as of September 16, 2014, USAPA has not actually used any of the funds held in the merger assessment fund on merger-related expenses. Instead, the LMRDA Defendants have directed USAPA to expend regular treasury monies to pay merger-related expenses, and have no explanation for why the merger assessment fund has not been used to merger-related expenditures.

In sum, because (1) the LMRDA Defendants have failed and refused to produce detailed information regarding what they have authorized USAPA to spend on merger-related expenses, (2) what information the LMRDA Defendants and USAPA have disclosed shows that they used the general treasury and not the merger assessment fund to pay merger-related expenses, and (3) the LM2 audit is neither detailed nor current, the LMRDA Plaintiffs are entitled to an actual, thorough accounting.

### **III. CONCLUSION**

The LMRDA Plaintiffs have established the need for a TRO against the LMRDA Defendants to stop their misuse of USAPA treasury funds and to preserve as much of USAPA funds as possible for the benefit of USAPA and its membership. It is clear, especially from the LMRDA Defendants' unwillingness to be bound by an order of this Court and their stated intent to spend an additional \$500,000, that they will not cease breaching their duties to the membership of USAPA unless and until ordered to do so by this Court. This Court should therefore enter a TRO in substantially the same form as submitted herewith as Exhibit H, and submitted via Cyberclerk.

Respectfully submitted this 14<sup>th</sup> day of July, 2015.

*/s/ Kelly J. Flood*

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Marty Harper, admitted *pro hac vice*

Kelly J. Flood, admitted *pro hac vice*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Memorandum in Support of Proposed TRO with the Clerk of the court using the CM/ECF system. In the event that notification pursuant to the CM/ECF system cannot be sent to counsel for the LMRDA Defendants, I hereby certify that the foregoing document was duly served upon counsel for the Plaintiff 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:

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This the 14<sup>th</sup> day of July, 2015.

*/s/ Kelly J. Flood*

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