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

US AIRLINE PILOTS ASSOCIATION, **Plaintiff,** **v.** **ROGER VELEZ, on behalf of himself and all similarly situated former America West Pilots, and LEONIDAS, LLC,** **Defendants.**	**File No. 3:14-CV-577-RJC-DCK**
EDDIE BOLLMEIER, BILL TRACY, and SIMON PARROTT, **Plaintiffs,** **v.** **GARY HUMMEL et al.,** **Defendants.**	**File No. 3:15-CV-00111-RJC-DCK**
EDDIE BOLLMEIER, BILL TRACY, and SIMON PARROTT, **Plaintiffs,** **v.** **ROBERT FREAR, COURTNEY BROWN, RONALD NELSON, PAUL DIORIO, and PAUL MUSIC,** **Defendants.**	**File No. 3:15-cv-480-RJC-DSC**

DEFENDANTS DIORIO, FREAR, AND NELSON'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS AND MOTION FOR RECONSIDERATION

Defendants Paul DiOrio, Robert Frear, and Ronald Nelson (collectively, the ñMoving Defendantsò), respectfully submit this memorandum of law in support of their motion to dismiss the plaintiffsô claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6) and their motion for the Court to reconsider its orders granting a preliminary injunction and denying the other defendantsô motion to dismiss.

Plaintiffs claim that the Moving Defendants, all former members of the US Airline Pilots Association (ñUSAPAò) board of representatives, violated their fiduciary duties to USAPA. However, all of the Moving Defendantsô alleged acts were plainly in pursuit of USAPAôs constitutionally-enshrined objective to seek date-of-hire-based seniority. Under controlling Fourth Circuit authority ï not cited previously in this case ï those acts cannot have breached defendantsô fiduciary duty to USAPA, regardless of whether they had a negative impact on a portion of USAPAôs membership. Therefore, plaintiffsô claims against the Moving Defendants must be dismissed for failure to state a valid claim. Because plaintiffsô claims against all defendants are identical, the same Fourth Circuit authority controls, and the Court should thus reconsider its prior orders.

PROCEDURAL HISTORY

On February 23, 2015, plaintiffs Eddie Bollmeier, Bill Tracey, and Simon Parrott (the ñBollmeier Plaintiffsò) filed their complaint in *Bollmeier v. Hummel*, No. 3:15-cv-00111-RJC-DCK (W.D.N.C.) (ñ*Bollmeier I*ò). (15-cv-111, Doc. No. 1.)[1] Although plaintiffs named the

[1] Unless otherwise indicated, reference to a docket document refers to the consolidated docket in No. 3:14-cv-00577-RJC-DCK.

Moving Defendants in that suit, the Moving Defendants were never served and never appeared in the case. The Bollmeier Plaintiffs filed a motion for a temporary restraining order (ñTROò) or preliminary injunction on March 27, 2015. (Doc. No. 48.) The defendants who were served (the ñBollmeier I Defendantsò) filed a motion to dismiss on April 15, 2015. (Doc. No. 49.)

On June 25, 2015, the Court consolidated *Bollmeier I* with *USAPA v. Velez*, No. 3:14-cv-00577-RJC-DCK (W.D.N.C.) (ñ*Velez*ò), a declaratory judgment action that had been brought by USAPA regarding the same conduct at issue in *Bollmeier I*. (Doc. No. 47.) On June 30, 2015, the Court held a hearing on the Bollmeier Plaintiffsô motion for a TRO or preliminary injunction. On August 27, 2015, the Court granted the motion and issued a preliminary injunction that barred USAPA from spending any funds on seniority-related matters or from dissolving the organization. (Doc. No. 75.) On September 30, 2015, the Court dismissed as moot the Bollmeier I Defendantsô motion to dismiss because of the determinations made in granting the preliminary injunction motion. (Doc. No. 76.)

In the briefing on the motions to dismiss and for a preliminary injunction, no party cited or discussed *Nellis v. Air Line Pilots Association*, 815 F. Supp. 1522 (E.D. Va. 1993) *aff'd by*, 15 F.3d 50 (4th Cir. 1994), the controlling case discussed in this memorandum. (Doc. Nos. 48, 49-1, 62, 66-67); (15-cv-111, Doc. Nos. 24, 35-36, 39.) The Court did not cite or discuss *Nellis v. Air Line Pilots Association* in its orders granting the preliminary injunction or dismissing the motion to dismiss. (Doc. Nos. 75, 76.)

On October 12, 2015, the Bollmeier Plaintiffs filed their complaint in *Bollmeier v. Frear*, No. 3:15-cv-00480-RJC-DSC (W.D.N.C.) (ñ*Bollmeier II*ò). (ñBollmeier II Complaint,ò 15-cv-480, Doc. No. 1.) The defendants in *Bollmeier II* ï including the Moving Defendants ï are those defendants in *Bollmeier I* who were never served. The substantive allegations in the Bollmeier II

Complaint are exactly the same as those in the Bollmeier I Complaint. On November 10, 2015, the Court consolidated *Bollmeier II* with *Velez* and *Bollmeier I*. (Doc. No. 78.)

STATEMENT OF FACTS

In May 2005, US Airways and America West Airlines merged to become a single airline known as US Airways. (Bollmeier II Complaint, ¶ 11.) The pilots of both airlines were represented for collective bargaining purposes by the Air Line Pilots Association (ñALPAò). (Id.) At the time of the merger there were approximately 5,100 pilots employed by US Airways (the ñEast Pilotsò) and 1,900 pilots employed by America West (the ñWest Pilotsò). (Id.)

The East and West Pilots could not reach agreement on the integration of the two pilot seniority lists. (Id., ¶ 12.) In accordance with the applicable ALPA merger policy, the issue went to arbitration, which resulted in an award known as the ñNicolau Award.ò (Id.) The Nicolau Award provided an integrated seniority list that placed many East Pilots at the bottom the list despite their having an earlier date of hire than higher-placed West Pilots. *Addington v. USAPA*, No. 2:13-cv-471-ROS, Doc. 213-6 (D. Ariz Oct. 11, 2013); *see also Addington v. USAPA*, 791 F.3d 967, 972 (9th Cir. 2015) (ñ*Addington II*ò).[2]

There was widespread dissatisfaction among the East Pilots with the Nicolau Award. (Bollmeier II Complaint, ¶ 14.) In 2007, as a result of dissatisfaction with the Nicolau Award and ALPA, certain East Pilots formed USAPA to oppose the Nicolau Award. (Id.)

In its Constitution, USAPA expressly stated that one of its objectives was to ñmaintain uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilotôs un-merged career expectations.ò

[2] When ruling on a Rule 12(b)(6) motion, the Court may consider ñdocuments incorporated into the complaint by reference, and matters of which a court may take judicial notice.ò *Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011).

(ñUSAPA Constitution,ò Bollmeier II Complaint, Ex. 1, p. 8.) By being committed to date-of hire seniority principles, the USAPA Constitution was fundamentally opposed to the seniority order in the Nicolau Award. (Id., ¶¶ 14-15); *see also Addington II*, 791 F.3d at 986 (ñThis principle flatly contradicted the Nicolau Award[.]ò).

A representational election under the auspices of the National Mediation Board (ñNMBò) was held and USAPA prevailed. (Bollmeier II Complaint, ¶ 15.) In April 2008, USAPA was certified as the exclusive bargaining representative of the pilots of US Airways. (Id.) Following its certification, USAPA proposed a seniority list to US Airways based upon date-of-hire principles. (Id.); *see also Addington II*, 791 F.3d at 973. No merger of the East and West seniority lists was ever effectuated. (Bollmeier II Complaint, ¶ 15); *see also Addington II*, 791 F.3d at 986.

USAPAôs commitment to date-of-hire seniority rather than the Nicolau Award has generated a series of lawsuits. (Bollmeier II Complaint, ¶ 15.) In *Addington v. USAPA*, 606 F.3d 1174 (9th Cir. 2010) (ñ*Addington I*ò), the West Pilots sued USAPA, alleging that USAPA had breached its duty of fair representation by proposing a date-of-hire seniority list instead of the Nicolau Award. *Id.* at 1177-78. The Ninth Circuit eventually concluded that the lawsuit was not ripe because no collective bargaining agreement had yet been reached with US Airways. *Id.* at 1179-81.

In 2013, US Airways agreed to merge with American Airlines. (Bollmeier II Complaint, ¶ 16). Subsequently, American Airlines, US Airways, USAPA, and the Allied Pilots Association (ñAPAò) ï the union for American Airlines pilots ï negotiated a multi-party agreement called the ñMemorandum of Understanding Regarding Contingent Collective Bargaining Agreementò (ñMOUò). (Id., ¶ 19; Id. Ex. 2) The MOU reached agreement on, *inter alia*, the pay, benefits,

and working conditions for US Airways pilots in the merged airline, as well as procedures for integrating the seniority lists of the US Airways and American pilots. (Id. Ex. 2.)

In *Addington II*, the West Pilots sued USAPA, alleging that USAPA breached its duty of fair representation in agreeing to the MOU because the MOU did not treat the Nicolau Award as final and binding. *Addington II*, 791 F.3d at 976. In January 2014, the district court issued a final decision in favor of USAPA. *Id.* at 977-78. On June 26, 2015, the Ninth Circuit reversed and concluded that USAPA did breach its duty of fair representation in negotiating the MOU. *Id.* at 990. In doing so, the Ninth Circuit found that ñ[f]rom the outset, USAPA was irreconcilably opposed to the negotiating position of the West Pilots[,]ò and was instead ñconstitutionally committed to a date-of-hire list that favored the East Pilots[.]ò *Id.* at 986.

On September 16, 2014, the NMB certified the APA as the bargaining representative of all pilots in the merger airline, which extinguished USAPAôs certification as the bargaining representative of US Airways pilots. (Bollmeier II Complaint, ¶ 17.) Under the USAPA Constitution, upon decertification by the NMB, dissolution of USAPA can be deferred if circumstances present ñthe need for collective legal action on behalf of the pilot group, including but not limited to, representation in seniority integration proceedings.ò (USAPA Constitution, Art. I, Sec. 3(C).) Similarly, USAPA funds need not be immediately distributed to the membership if they are needed to pay for continuing legal action. (Id.) The USAPA Constitution and Bylaws place sole responsibility for the determination to defer dissolution and funds distribution with the National Officers, i.e. the President, Vice President, Secretary-Treasurer, and Executive Vice President. (Id.; Id. Art. III, Sec. 1.)

On September 16, 2014, a majority of the USAPA National Officers determined to defer dissolution of USAPA and distribution of USAPAôs funds. (Bollmeier II Complaint, ¶ 31.) The

Moving Defendants were members of the USAPA Board of Pilot Representatives and were not National Officers. (Id., ¶ 3.) The Moving Defendants did not make the September 16, 2014, determination.

After September 16, 2014, USAPA funded a merger committee to advance its position in the seniority integration process for the American Airlines merger. (Id., ¶ 34.) The Bollmeier Plaintiffs have alleged that USAPA spent funds in the integration process to advance seniority positions favored by the East Pilots and disfavored by the West Pilots. (Id., ¶¶ 33-34, 40.)[3] There are no specific allegations that the Moving Defendants in particular made any of the spending decisions contested by plaintiffs.[4]

Plaintiffsô sole cause of action against the Moving Defendants is under 29 U.S.C. § 501(a), which establishes that union officers have a fiduciary duty to the union. (Id., ¶ 40.) Plaintiffs allege that defendantsô expenditure of USAPA funds in the seniority integration process breached defendantsô fiduciary duty to the union. (Id.)

STANDARD OF REVIEW

Under Rule 12(b)(6), a plaintiffôs complaint must be dismissed if it does not provide ñenough facts to state a claim to relief that is plausible on its face.ò *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiffôs complaint must allege sufficient factual information to show that she has stated a claim that, if proven, would entitle her to relief and the court ñneed not

[3] In their preliminary injunction motion, plaintiffs specified that USAPA allegedly pursued seniority based on date-of-hire instead of the Nicolau Award in the merger integration process. (Doc. 48, pp. 11-13.) Plaintiffs stated that this advocacy has been USAPAôs ñ*modus operandi*ò since April 2008. (Id. at 3.)

[4] In fact, the Moving Defendants were not even active members of the USAPA Board of Pilot Representatives after September 30, 2014.

accept as true unwarranted inferences, unreasonable conclusions, or arguments.ò *Giarrantano v. Jonson*, 521 F.3d 298, 302 (4th Cir. 2008).

ARGUMENT

This case is controlled by *Nellis v. Air Line Pilots Association*, 815 F. Supp. 1522 (E.D. Va. 1993) *aff'd by*, 15 F.3d 50 (4th Cir. 1994). In that case, plaintiffs alleged that the officers of a pilots union took actions that disadvantaged certain members of the union, and sued the officers for breach of fiduciary duty under Section 501. The court rejected plaintiffsô claims, holding that ñ[a]s long as a union leadership remains in compliance with the unionôs internal policies, then the union itself suffers no harm, even if subgroups within the union are disadvantaged.ò *Id.* at 1542.

Here, plaintiffs challenge USAPAôs spending of money in the seniority integration process for the US Airwaysï American Airlines merger. They allege USAPAôs pursuit of date-of-hire principles in seniority favored only the East Pilots. However, the USAPA Constitution itself commits USAPA to pursuing date-of-hire principles in seniority. Therefore, the actions at issue here were plainly required by, and committed in furtherance of, the primary objective of the USAPA Constitution. Because the Moving Defendantsô alleged actions followed the USAPA Constitution, they could not have breached their fiduciary duty to USAPA and cannot be held liable under Section 501, regardless of any harm to the West Pilots.

This is not to say that the West Pilots have no remedy. As their prior litigation demonstrates, the West Pilots can challenge USAPAôs actions here as a breach of USAPAôs duty of fair representation. But *Nellis* dictates that those actions cannot be a breach of the individual defendantsô fiduciary duty to USAPA.

I. Union Actions That Follow the Constitution and Bylaws Cannot Breach an Officer's Fiduciary Duty to the Union, Regardless of the Detrimental Impact on Some Members.

Section 501 of the Labor Management Reporting and Disclosure Act ("LMRDA") imposes the fiduciary duty on union officers to hold the union's "money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder[.]" 29 U.S.C. § 501(a) (emphasis added). "Section 501's language and the legislative history of the Landrum-Griffin Act make it clear that Congress placed primary reliance on union rules and policies to establish the scope of a union representative's fiduciary obligations." *McNamara v. Johnston*, 522 F.2d 1157, 1163 (7th Cir. 1975) (noting legislative history that described proper spending as that with "purposes which were proper under the union's constitution"). *Nellis* establishes that as long as a union officer follows the union's constitution, bylaws, and resolutions, he cannot have breached his fiduciary duty under Section 501, even if his actions disadvantage a portion of the union's membership.

In *Nellis*, pilots of Eastern Airlines, Inc. ("Eastern") brought suit against their union, the Air Line Pilots Association, International ("ALPA"), as well as ten current and former ALPA officers. *Nellis*, 815 F. Supp. at 1524. ALPA represented pilots at over thirty airlines, including Eastern. *Id.* Eastern filed for bankruptcy while Eastern pilots were on strike in 1989, and eventually sold many of its assets to other airlines. *Id.* at 1525. The plaintiffs alleged that in Eastern's sales transactions, ALPA failed to negotiate on their behalf for jobs with seniority or actively obstructed plans to hire the plaintiffs to jobs with seniority. *Id.* The plaintiffs brought claims, *inter alia*, for breach of the duty of fair representation and for breach of fiduciary duty under Section 501. *Id.* at 1530.

In dealing with the disintegration of Eastern, ALPA faced a conflict between its members. ALPA members who were Eastern pilots wanted employment at other airlines with seniority. Meanwhile, ALPA members at those other airlines were concerned that Eastern pilots would be hired with seniority over them. *Id.* at 1531. To address this issue, ALPA had a specific ñFragmentation Policyò that set out ALPAôs obligations in such situations. *Id.* at 1526. The district court ultimately concluded that ALPA did not violate the terms of the Fragmentation Policy in the Eastern transactions. *Id.* at 1538-40.

Regarding the plaintiffsô claims under Section 501, the district court emphasized that in Section 501 suits, ñthe plaintiff sues derivatively ófor the benefit of the labor organization.ôò *Id.* at 1541 (quoting 29 U.S.C. § 501(b)). Because ALPA complied with its own Fragmentation Policy, ALPA ñas a whole has no claim that any individual defendant violated a fiduciary duty by failing to implement union policy.ò *Id.* ñPlaintiffs can assert no derivative claim on behalf of ALPA, because ALPA itself has no claim against its officials.ò *Id.*

In rejecting the plaintiffsô Section 501 claims, the district court acknowledged evidence that some ALPA officers took actions contrary to the plaintiffsô interests in the Eastern transactions. *Id.* at 1542. ñSuch evidence is not, however, sufficient by itself to support an action under section 501. Instead, section 501 requires a showing that the union itself suffered harm.ò *Id.* ñAs long as a union leadership remains in compliance with the unionôs internal policies, then the union itself suffers no harm, even if subgroups within the union are disadvantaged.ò *Id.* (emphasis added).

The district court explained why a contrary result was untenable. ñWithout a requirement that the union as a whole be harmed, the loser of any internal union dispute could always sue the representatives of the winners, alleging breach of fiduciary duty under section 501 for taking a

position contrary to the loserôs interests.ò *Id.* ñThat is plainly not the law, and accordingly, plaintiffs cannot sue members of the ALPA leadership merely because they advocated positions, not in violation of ALPAôs internal policies, that were contrary to the interests of the subgroup to which plaintiffs belonged.ò *Id.* (emphasis added).

The Fourth Circuit subsequently affirmed, ñadopt[ing] the thorough reasoning of the district courtò and agreeing ñfor the reasons set forth by the district court . . . that the pilots do not have a viable claim against the Union officials under 29 U.S.C. § 501.ò *Nellis v. Air Line Pilots Ass'n*, 15 F.3d 50, 51-52 (4th Cir. 1994).

Other courts have similarly rejected Section 501 suits when union officers followed the unionôs constitution, bylaws, or policies. For example, the Seventh Circuit held that ñso long as an officer expends funds without personal gain in compliance with [the unionôs constitution, bylaws, and resolutions], there is no breach of any duty imposed by [section] 501.ò *McNamara*, 522 F.2d at 1163. Because the union constitution in *McNamara* authorized the expenditure of union funds for political purposes, the court rejected a Section 501 suit challenging such spending. *Id.* at 1164; *see also id.* at 1165 (holding that ñso long as the expenditures were authorized in some fashion, plaintiffs can have no cause of action on behalf of the union for breach of fiduciary dutyò); *see also Council 49, AFSCME v. Reach*, 843 F.2d 1343, 1347 (11th Cir. 1988) (ñ[W]here decisions regarding the use of union funds have been authorized in accordance with the unionôs constitution, by-laws, or other applicable governing provisions, óa court will typically not have cause to review the reasonableness of the decision.ôòò (quoting *Ray v. Young*, 753 F.2d 386, 390 (5th Cir. 1985))).

II. Defendants' Actions All Followed USAPA's Constitutional Objective to Pursue Date-of-Hire Seniority and Cannot Have Breached Defendants' Fiduciary Duty to USAPA.

Under *Nellis*, plaintiffs cannot assert Section 501 claims against officers who ñremain[ed] in compliance with the unionôs internal policies, . . . even if subgroups within the union are disadvantaged.ò *Nellis*, 815 F. Supp. at 1541-42. In this case, the USAPA Constitution itself commits USAPA to pursuing date-of-hire principles in seniority, which favor the East Pilots, and which are contrary to the Nicolau Award and the interests of West Pilots. Therefore, because defendantsô actions in the seniority integration process followed the express objective of the USAPA Constitution, they cannot constitute a breach of fiduciary duty, regardless of any detrimental impact on the West Pilots.

USAPA was formed in 2007 because the East Pilots opposed the Nicolau Award, which disadvantaged East Pilots compared to a seniority list based on a pilotôs date of hire. (Bollmeier II Complaint, ¶¶ 14-15); *see also Addington II*, 791 F.3d at 972-73 (ñ[D]issatisfied with ALPAôs commitment to the Nicolau Award and hoping to prevent the Award from ever going into effect, the East Pilots decided to leave ALPA and form a new union.ò).

When USAPA was formed, the date-of-hire seniority principle favored by the East Pilots was enshrined in the Constitution. The USAPA Constitution expressly states that one of its objectives is to ñmaintain uniform principles of seniority based on date of hire and the perpetuation thereof[.]ò (USAPA Constitution, Bollmeier II Complaint, Ex. 1, p. 8.)

By committing to date-of hire seniority principles, the USAPA Constitution was fundamentally opposed to the seniority order in the Nicolau Award. (Bollmeier II Complaint, ¶¶ 14-15); *see also Addington II*, 791 F.3d at 986 (ñThis principle flatly contradicted the Nicolau Award[.]ò). As the Ninth Circuit put it, ñ[f]rom the outset, USAPA was irreconcilably opposed

to the negotiating position of the West Pilots[,]ò and was instead ñconstitutionally committed to a date-of-hire list that favored the East Pilots[.]ò *Addington II*, 791 F.3d at 986 (emphasis added).

After its formation, USAPA worked toward achieving date-of-hire seniority rather than the Nicolau Award, which generated the prior lawsuits with the West Pilots. *See Addington I*, 606 F.3d at 1177-78 (addressing West Pilotsô challenge to USAPA proposing a date-of-hire seniority list to US Airways instead of the Nicolau Award); *Addington II*, 791 F.3d at 976 (addressing West Pilotsô challenge to USAPA agreeing to MOU that did not include Nicolau Award-based seniority, which permitted USAPA to seek date-of-hire-based seniority in subsequent proceedings).

Here, the West Pilots again challenge USAPAôs pursuit of date-of-hire seniority rather than the Nicolau Award. Specifically, plaintiffs challenge USAPAôs spending of funds in the seniority list integration process for the American-US Airways merger as favoring the East Pilots and disfavoring the West Pilots. But rather than allege a breach of the duty of fair representation by USAPA, plaintiffs allege a Section 501 breach of fiduciary duty by the individual defendants. As *Nellis* dictates, these Section 501 claims fail as a matter of law.

In *Nellis*, the individual defendants did not breach their fiduciary duty because they followed a specific union policy. *Nellis*, 815 F. Supp. at 1541. Here, the individual defendants were following the primary objective of USAPA as set forth in its Constitution. Given the Constitution, defendants were plainly ñin compliance with the unionôs internal policiesò by spending money to advocate date-of-hire seniority rather than the Nicolau Award. *See Nellis*, 815 F. Supp. at 1542; *McNamara*, 522 F.2d at 1163-64 (holding that there can be no breach of fiduciary duty where officers follow the goals of the union Constitution). Such advocacy was the very reason for USAPAôs existence, as its history and accompanying litigation make clear. It is

absurd to claim that the individual defendants breached a fiduciary duty to USAPA by funding advocacy for date-of-hire seniority when USAPA was constitutionally committed to such advocacy from its outset. Because USAPA itself has no claim against defendants for following its Constitutional objectives, the plaintiffs ñcan assert no derivative claim on behalf ofò USAPA. *Nellis*, 815 F. Supp. at 1541.

Nellis also makes clear that plaintiffsô Section 501 claims must be rejected even if defendantsô conduct had some detrimental effect on the West Pilots. *Id.* at 1542. In fact, the plaintiffs here are trying to achieve the very result *Nellis* explicitly precluded. The *Nellis* court stated that if such Section 501 suits were permitted, ñthe loser of any internal union dispute could always sue the representatives of the winners, alleging breach of fiduciary duty under section 501 for taking a position contrary to the loserôs interests.ò *Id.* ñThat is plainly not the law[.]ò *Id.* Therefore, the Bollmeier Plaintiffs ñcannot sue members of the [USAPA] leadership merely because they advocated positions, not in violation of [USAPAôs] internal policies, that were contrary to the interests of the subgroup to which plaintiffs belonged.ò *Id.*

Finally, plaintiffs may argue that the phrase ñcollective legal actionò in Article I, Section 3(C) of the USAPA Constitution somehow overrides the Constitutionôs commitment to date-of-hire seniority. Such an argument is plainly untenable. Article I, Section 3(C) of the USAPA Constitution specifically contemplates that post-decertification actions could include actions ñin seniority integration proceedings.ò Given that USAPA was founded to pursue date-of-hire seniority and specified that goal as a Constitutional objective, ñcollective legal action . . . in seniority integration proceedingsò must mean action to pursue date-of-hire seniority. It makes no sense for the Constitution to call for date-of-hire seniority throughout USAPAôs tenure as a collective bargaining organization, but then require some other seniority position in post-

decertification proceedings. Therefore, the individual defendants complied with the USAPA Constitution in pursuing date-of-hire seniority in the post-decertification proceedings.

Accordingly, under the Fourth Circuitôs decision in *Nellis*, plaintiffsô claims against the Moving Defendants must be dismissed.

III. Defendants Did Not Receive Any Direct Personal Benefit From the Actions Challenged by the Plaintiffs.

Plaintiffs may argue that defendants received a personal benefit from the seniority-related actions challenged in their Section 501 claims. When a union officer expends union funds for his direct personal benefit, some courts have found Section 501 liability even if the officer complied with the unionôs internal policies. However, under established law, advocating for a particular seniority system does not confer a direct personal benefit on defendants. Any benefit to defendants was indirect, and the challenged actions also benefited USAPA by furthering its objective to seek date-of-hire seniority. Because defendantsô conduct was plainly authorized by the Constitution and did not confer a direct personal benefit, their conduct did not violate their fiduciary duty to USAPA.

In *Ray v. Young*, 753 F.2d 386 (5th Cir. 1985), the Fifth Circuit comprehensively addressed the issue of personal benefit in Section 501 cases. In cases where a union officer receives a direct personal benefit, the court recognized that judicial scrutiny of the transaction is appropriate under Section 501, even if the transaction was authorized. *Id.* at 390. The court described different types of direct personal benefits to union officers than can arise in a Section 501 case: (1) ñcash flowing directly to the union officer from the union treasury,ò such as his compensation or ñthe conversion of union funds to his own use;ò (2) the ñexpenditure of union funds to purchase things for [the officerôs] personal use or for his family and friends;ò (3) ñthe

use of union property for personal purposes;ò or (4) ñreceiving reimbursement for expenses not related to union business.ò *Id.*; *see also Brink v. DaLesio*, 667 F.2d 420, 424 (4th Cir. 1981) (applying scrutiny ñwhere a union official profits personally through the use or receipt of union fundsò).

However, in cases where direct personal benefit is absent, a transaction ñin compliance with the unionôs constitution, bylaws, and resolutionsò will not breach the officerôs fiduciary duty. *Ray*, 753 F.2d at 390 & n.3. Moreover, if a ñunion officer receives an indirect benefit from a transaction in which the union also benefits, valid authorization will normally be a complete defense.ò *Id.* at 391 (emphasis added). For example, when a union officer enjoys a legitimate business dinner at union expense, that is an indirect benefit. *Id.* at 390.

In this case, the actions challenged by the Bollmeier Plaintiffs did confer any direct personal benefit on defendants. There is no allegation that the individual defendants received any USAPA funds themselves, purchased items with USAPA funds, used USAPA property, or received non-union-related reimbursements. The individual defendants might have eventually received some seniority benefit by USAPA advocating for date-of-hire seniority, but any such benefit would merely be the indirect result of East Pilots benefitting as a whole. *See Hoffman v. Kramer*, 362 F.3d 308, 323 (5th Cir. 2004) (rejecting Section 501 claim for alleged improper negotiations in part because ñthe defendants are not alleged to have benefitted personally any more than similarly-situated pilots who fared better under the contractò).

Moreover, USAPA itself benefitted from the actions challenged by plaintiffs because the advocacy for date-of-hire seniority furthered USAPAôs primary Constitutional objective and founding purpose. *See* Section II, *supra*. Because the challenged actions were authorized by the

USAPA Constitution, and did not confer any direct personal benefit, there was no breach of the defendantsô fiduciary duty to USAPA. *See Ray*, 753 F.2d at 390-91.

IV. The West Pilots Still Have a Potential Remedy Even Though Section 501 Suits Are Barred Against the Individual Defendants.

The absence of a Section 501 claim against the individual defendants does not leave the Bollmeier Plaintiffs and West Pilots without a potential remedy. As their prior litigation amply demonstrates, the West Pilots can challenge USAPAôs actions at issue here as a breach of USAPAôs duty of fair representation. If such an action were successful, USAPA itself would be liable to the West Pilots.

But under the controlling authority of *Nellis*, the challenged actions here cannot be a breach of the individual defendantsô fiduciary duty under Section 501. *See Nellis v. Air Line Pilots Association*, 815 F. Supp. 1522, 1541-42 (E.D. Va. 1993) *aff'd by*, 15 F.3d 50, 51-52 (4th Cir. 1994). The individual defendants were simply advocating for date-of-hire seniority in line with USAPAôs primary Constitutional objective. There is no basis to hold them personally liable for such conduct.

V. The Court Should Reconsider Its Prior Orders Granting a Preliminary Injunction and Denying a Motion to Dismiss.

This Court has the authority to reconsider interlocutory rulings ñat any time prior to final judgment when such is warranted.ò *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). In exercising that authority, the ñultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law.ò *Id.* Here, the other partiesô failure to identify controlling Fourth Circuit authority warrants this Courtôs reconsideration of its prior orders.

Because plaintiffsô claims against the Bollmeier I Defendants are identical to those against the Moving Defendants, those claims also fail as a matter of law under *Nellis v. Air Line Pilots Association*, 815 F. Supp. 1522, 1541-42 (E.D. Va. 1993) *aff'd by*, 15 F.3d 50, 51-52 (4th Cir. 1994). *See* Section II, *supra*. The Court should therefore reconsider and reverse its prior decisions granting plaintiffsô motion for a preliminary injunction and denying the Bollmeier I Defendantsô motion to dismiss.

CONCLUSION

For the reasons stated above, the Moving Defendants respectfully request that the Court (1) enter an order granting their motion to dismiss and dismissing plaintiffsô claims against them, with prejudice; and (2) reconsider and reverse its prior decisions granting plaintiffsô motion for a preliminary injunction and denying the Bollmeier I Defendantsô motion to dismiss.

This the 2nd day of December, 2015.

/s/ Narendra K. Ghosh
Narendra K. Ghosh, NC Bar No. 37649
Patterson Harkavy LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
Tel: 919.942.5200
Fax: 866.397.8671
nghosh@pathlaw.com

Counsel for Defendants Robert Frear, Ronald Nelson, and Paul DiOrio.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Defendantsô Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to C. Grainger Pierce, Jr., Jeffrey R. Freund, Kelly Flood, Marty Harper, Zachary Ista, John Gresham, Brian Oô Dwyer, Gary Silverman, Joy Mele, and Zachary Harkin, Attorneys for the other parties.

Dated: December 2, 2015.

/s/ Narendra K. Ghosh
Narendra K. Ghosh, NC Bar No. 37649
Patterson Harkavy LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
Tel: 919.942.5200
Fax: 866.397.8671
nghosh@pathlaw.com