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, et. al. Defendants.	Civil Action 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	Civil Action No.: 3:15-CV-480-RJC-DCK

COMBINED MEMORANDUM OF LAW (1) IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS [DOC. 87, 87-1, 96], AND (2) RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION [DOC. 88]

Plaintiffs Eddie Bollmeier, Bill Tracy, and Simon Parrott, by and through their attorneys, submit this Memorandum of Law in Opposition to Defendants Diorio, Frear, Nelson and Music's Motions to Dismiss [Docs. 87, 87-1, 96], and Motion for Reconsideration. [Doc. 88]

INTRODUCTION

Defendants Diorio, Frear and Nelson, joined by Music, have based their motions on either a misreading or a misapprehension of Plaintiffs' Complaint, and repeat an argument that this Court has already rejected. Moreover, the case on which they rely, *Nellis v. Air Lines Pilots Association*, 815 F.Supp. 1522 (1993), aff'd, 15 F.3d 50 (4th Cir.1994), adds nothing to their argument. Indeed, because *Nellis* concerned the actions of the officers and directors of union that was still a certified bargaining agent, it is mostly inapplicable here, and certainly not dispositive. The biggest flaw in the Defendants' Motion, however, is that it fails to give any effect to the ramifications of USAPA's decertification on September 16, 2014. The Defendants' attitude, apparently, is that dissolution had no impact on them or USAPA and so it was just business as usual after that. More perplexing, Defendants clearly do not recognize that the Court has already decided that after decertification, Article I, Section 3(C) of USAPA's Constitution applied so that "actions on behalf of a group must be for purposes of advancing the interests of the group as a whole, or in this case, the pilot group as a whole. Therefore, any actions, or expenditures supporting such actions, taken

on behalf of a distinct subset of a group which are directly adverse to another substantial subset of that group cannot be taken on behalf of the group as a whole." Doc. 75, at p. 9.

In other words, after decertification, the Defendants could no longer single-mindedly pursue USAPA's date-of-hire list objective as they had done for years because upon the event of decertification Article I, Section 3(C) trumped Article I, Section 8(D). After September 16, 2014, the only "safe haven" for the Defendants under the *Nellis* decision was to follow the policies in Section 3(C) (collective legal action on behalf of the pilot group) and not Section 8(D) (uniform principles of seniority based on date-of-hire). In short, the Defendants' problem is that they fail to recognize that Section 3(D) trumped Section 8(D) on September 16, 2014.

I. Plaintiffs Seek Relief on Behalf of USAPA And Its Members.

Through the consolidated action, Plaintiffs seek relief under Title V of the Labor-Management Reporting and Disclosure Act ("LMRDA") against Defendants' past and ongoing breaches of the fiduciary duties they owed to all members of the US Airline Pilots Association ("USAPA") commencing on September 16, 2014.[1] Their Complaint alleges the individual Defendants have, since USAPA's decertification on September 16, 2014,

[1] As the Plaintiffs explained at oral argument on June 30, 2015, they are deliberately not seeking relief here for anyone's efforts to achieve a date-of-hire seniority list while USAPA was their certified bargaining agent. From April 11, 2008 through September 15, 2014, date-of-hire was USAPA's official seniority objective as a certified bargaining agent, so all of those who did everything they could to adhere to that goal were immune from personal liability pursuant to the principles articulated in *Nellis* and all authorities regarding the DFR. Indeed, this is why the Plaintiffs in the three *Addington* cases were restricted to suing only USAPA on DFR claims. But as explained here, that changed on September 16, 2014 when USAPA's controlling policies changed.

authorized the expenditure of and have spent USAPA funds[2] **to advance their personal interests in a manner not authorized post decertification on September 16, 2014 by USAPA's Constitution, specifically Article I, Section 3(C).** Plaintiffs seek reimbursement for USAPA from the Defendants, and to enjoin any further spending that is not in conformance with USAPA's governing documents.

II. This Case is Not Controlled by *Nellis v. Airline Pilots Association*, 815 F.Supp. 1522 (E.D. Va. 1993) aff'd by, 15 F.3d 50 (4th Cir. 1994).

Defendants boldly claim that this case is controlled by *Nellis*. It is not, although there are legal principles discussed in *Nellis* that are pertinent here, principals which this Court applied in its Order dated August 26, 2015.

In *Nellis*, the union was, at all relevant times, a certified bargaining agent constrained by the DFR, which is different from our scenario here because USAPA lost its status as a bargaining representative on September 16, 2014.

The Court framed the claims and issues in *Nellis* as follows:

> This class action labor dispute grew out of the widely-lamented demise of Eastern Airlines, Inc. ("Eastern"). More specifically, the case involves an allegation by former Eastern pilots that their union failed to represent their interests fairly during the breakup of Eastern and the subsequent sale of its assets to other airlines. Resolution of defendants' motion for summary judgment requires the Court to address novel questions concerning the scope of the federal duty of fair representation.

815 F. Supp. at 1524. The *Nellis* Court focused most of its analysis on the DFR aspects of the claims, and correctly acknowledged the deference that Courts afford union officials

[2] Plaintiffs believe that Defendants have improperly spent over $1.8 million since decertification on seniority/merger-related issues, discussed infra.

under labor law. *Id.* at 1540. But, the entire portion of the *Nellis* opinion regarding federal DFR law is not relevant at all to this case because USAPA lost its bargaining representative status on September 16, 2014. It is true that the plaintiffs' claims in *Nellis* also included an LMRDA claim, stemming from whether various union officials had properly implemented the union's "Fragmentation Policy," which applied as a result of the several transactions that occurred as part of Eastern Airlines' demise.

The *Nellis* Court, in analyzing summary judgment motions brought based upon a well-developed factual record, evaluated the union officers' implementation of **the single policy at issue**, and found that the officers acted within their authority at all times correctly following and implementing Union policy.

With its DFR analysis as a backdrop, the Court then addressed Count V of the *Nellis* plaintiffs' complaint, which alleged that individual union officials breached section 501 of the LMRDA by not treating them fairly in the implementation of the union's Fragmentation Policy. The Court ultimately held that because the union did not breach its DFR obligation, because at all times it "complied with the literal terms of its Fragmentation Policy,…the Union as a whole has no claim that any individual defendant violated a fiduciary duty by failing to implement union policy." So, because the union as a whole had no claim against the individual Defendants, the *Nellis* plaintiffs had no derivative claim.

However, as this Court stated during oral argument on June 30, 2015, the game changed here for USAPA on September 16, 2014. ". . . [I]n terms to use Mr. Harper's word game changer, there seems like there's potential two game changers here. One is the Ninth Circuit opinion on Friday (June 26, 2015) and the other one is the decertification on

September 16, 2014. What might have been collective legal action when you were the certified bargaining organization might not be afterwards." (Rough Transcript of hearing held June 30, 2015, at p. 27, lines 20-25; p. 28, line 1, excerpts attached as Exhibit A.)

The individual Defendants' argument either rejects or fails to recognize this distinction. They contend that from the beginning in April, 2008, and apparently through today, they are immune from a Section 501 LMRDA suit because they have always, both before and after decertification, been zealously pursuing "uniform principals of seniority based on date of hire. . ." objectives.[3] (Art. 1, Sec. 8.D).

But the "game charger" on September 16, 2014 significantly altered the controlling principals in USAPA's Constitution, a point the Defendants ignore entirely. USAPA's Constitution expressly provides that, upon dissolution triggered by decertification, "[a]ll [USAPA] assets shall be liquidated and, less any indebtedness, shall then be prorated to the active members of good standing of USAPA as of the time of such dissolution." Ex. 1 to original Compl. at Art. I, § 3(A). In other words, the mandate at decertification is to shut USAPA down.

But, the Constitution provides that, upon dissolution triggered by decertification the Officers may delay disbursement of only those funds needed for "collective legal action on behalf of the pilot group." Id. at 3(C). Therefore, USAPA's decertification on September 16, 2014 triggered the dissolution provisions of the USAPA Constitution, thus limiting what USAPA treasury funds officers and directors could spend to those needed for

[3] Plaintiffs will assume without conceding that a set of aspirational "objectives" has the same status as other USAPA constitutional governance provisions.

"collective legal action on behalf of the pilot group." And as noted above, this Court already decided in its August 26, 2015 Order that what constitutes "collective legal action on behalf of the pilot group" does *not* include actions "taken on behalf of a distinct subset of a group which are directly adverse to another substantial subset of that group." Post-decertification neither the USAPA constitution nor the LMRDA permit Defendants to continue to adhere to their almost religious dedication to the continued pursuit of date-of-hire principles to the tune of almost $1.8 million.[4]

The central issue post-decertification, therefore, is the meaning of "collective legal action on behalf of the pilot group." As the Court has already correctly decided, "such actions on behalf of a group must be for purposes of advancing the interests of the group as a whole, or in this case, the pilot group as a whole. Therefore, any actions, or expenditures supporting such actions, taken on behalf of a distinct subset of a group which are directly adverse to another substantial subset of that group cannot be taken on behalf of the group as a whole." Doc. 75, at page 9. Defendants here, as the original defendants before them, concede in their argument that USAPA under their leadership continued to expend USAPA treasure funds in pursuit date-of-hire seniority objectives after decertification on September 16, 2014. Nothing in *Nellis* or any other case requires this Court to alter its decision on what "collective legal action on behalf of the pilot group" means.

[4] See Grant Thornton Report, attached as Exhibit B.

Plaintiffs have confirmed that USAPA, under the control of its Officers and Directors, spent more than $1.8 million pursuing date-of-hire seniority from its decertification on September 16, 2014 through November 25, 2015. During this time period, the Defendants were not faithfully following USAPA's controlling constitutional principal of spending money solely "for collective legal action on behalf of the pilot group." If they were, then the $1.8 million would not have been spent on date-of-hire objectives to benefit a faction of the members, and would therefore still be in USAPA's treasury.

The $1.8 million has been spent, however. Post-decertification USAPA had several claims against the Defendants which, after demand, USAPA refused to pursue. The Plaintiffs therefore stepped forward to bring this derivative suit, which the *Nellis* decision does not preclude. *Nellis* holds that when union officials faithfully follow a single, applicable union policy, they cannot be sued under Title V. But when, as here, union officials fail to follow the applicable and correct union policy, they can be sued in a derivation action. The Court in its Order on August 26, 2015 confirmed the viability of the Plaintiffs' Complaint. On the facts of the case before this Court, *Nellis* does not require the Court to change its position.

North Carolina law regarding non-profit membership associations is also on point, and supports Plaintiffs' arguments and this Court's previous ruling. As the Court and counsel for the original LMRDA defendants discussed on June 30, 2015, USAPA is currently a North Carolina non-for-profit organization, and no longer certified bargaining agent. (Ex. A, at page 29, lines 17-22.) North Carolina's Uniform Unincorporated

Nonprofit Association Act defines nonprofit associations like USAPA as an organization consisting of "members **joined by mutual consent for a common, nonprofit purpose**." See Uniform Unincorporated Nonprofit Association Act, § 59B(2)(emphasis added.) Just as "collective legal action on behalf of the pilot group," cannot reasonably be construed to include activity that benefits one faction of the group at the expense of the other, a "common, nonprofit purpose" cannot reasonably be construed to benefit one faction of the group at the expense of the other. Accordingly, whether the Court analyzes Defendants' actions under Section 3(C) of the USAPA Constitution or § 59B(2) of North Carolina's Uniform Unincorporated Nonprofit Association Act, the result is the same. Defendants violated their duties to USAPA under the LMRDA by misspending USAPA treasury funds on actions that benefit themselves and their fellow East Pilots to the detriment of the West Pilots.

III. Defendants Speciously Advise The Court That If It Dismisses The Title V Suit Against The Defendants, The Plaintiff Can Still Sue USAPA.

At page 8 of their argument, Defendants make a huge misstatement that if the Court dismisses the suit against the Defendants, the Plaintiffs can make an about-face and sue USAPA on a DFR claim. (Doc. 87-1, at p. 8).

Perhaps in making this argument Defendants intent was to lessen any concerns the Court might have about the Plaintiffs being left without a remedy if Defendants' Motion is granted. But, if that was their intent, they should not have based their argument on a patently false and seriously misleading premise.

Plaintiffs are suing on behalf of USAPA for money that was misspent after decertification on September 16, 2014. The Plaintiffs do not seek through their LMRDA action to recover for USAPA any monies misspent before then. After September 16, 2014, USAPA was no longer a certified bargaining representative. Thus, the Plaintiffs cannot sue USAPA on a DFR basis for actions taken post-decertification. Defendants know this, so why they would try to mislead the Court on this point is hard to understand. In reality, if the Court dismisses all of the Plaintiffs' claims in both LMRDA actions, then there will be no way for any former USAPA member to force the Defendants to replenish USAPA's treasury for the monies they caused to be misspent post-decertification.

IV. Plaintiffs Have Stated A Claim Upon Which Relief Can Be Granted.

Although Plaintiffs are confident that their analysis of *Nellis* above is sufficient for this Court to deny Defendants' motion, they will address the remainder of Defendants' arguments here. Plaintiffs' Complaint must be accepted as true for purposes of a 12(b)(6) motion to dismiss, because it "contain[s] sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 627 (2009). This matter is not at the summary judgment phase, in contrast with *Nellis*, so this Court must accept Plaintiffs' allegations that Article I, Section 3(C) of the USAPA Constitution is the operative provision as of decertification on September 16, 2014.

A. USAPA was harmed by Defendants' actions in the amount of $1.8 million.

Defendants argue a tautology when they state that USAPA wasn't harmed because they followed one of USAPA's policies, and if they followed a USAPA policy USAPA wasn't harmed. Plaintiffs' Complaint alleges that Defendants harmed USAPA by refusing

to follow the *applicable* USAPA policy that became operative at decertification – i.e., Article I, Section 3(C). Plaintiffs alleged that USAPA was harmed by wrongful spending that occurred as a result of Defendants' failure to follow to the operative policy after decertification.

In granting the Bollmeier Plaintiffs' Motion for Preliminary Injunction, this Court declined to order an accounting of USAPA to determine the wrongful spending, but noted that the parties should address accounting issues through standard discovery. USAPA and the Plaintiffs have done so. USAPA cooperated in this effort by providing limited access to some USAPA financial materials to the Plaintiffs' forensic accounting experts at Grant Thornton ("GT"). GT has now rendered a report based on the limited information it was provided about USAPA's treasury, its accounts, spending, invoices, etc. GT's analysis of the spending that all LMRDA Defendants have authorized since September 16, 2014 shows that the LMRDA Defendants wrongfully authorized spending of more than $1.8 million on date-of-hire seniority efforts. (See GT's report at Exhibit A). This shows that USAPA's treasury was improperly depleted by approximately $1.8 million on date-of-hire matters that were not authorized by USAPA's Constitution after decertification. This constitutes real and tangible injury to USAPA that Plaintiffs seek to remedy through reimbursement to the USAPA treasury from Defendants.

B. Defendants personally benefit from the expenditures they have authorized and made in violation of USAPA's Constitution, and their unreasonable interpretation of the USAPA Constitution is entitled to no judicial deference.

Under Title V, "[i]n cases where a union official profits personally through the use or receipt of union funds . . . the official bears the burden of proving that the transaction was validly authorized in accordance with the union's constitution and bylaws after adequate disclosure, and that it does not exceed a fair range of reasonableness." *Brink v. DaLesio*, 667 F.2d 420, 424 (4th Cir. 1981). As pleaded and previously explained, these Defendants stand to profit personally through the wrongful use of USAPA funds to advocate a date-of-hire list that solely benefits the East Pilots' seniority interests and is directly adverse to the interests of collective West Pilots in seniority integration proceedings.

As alleged in the original Complaint and as shown in the Declaration of Brian Stockdell and the exhibits attached to that declaration, *see* Docs 16-3, 16-4, each Defendant will obtain a higher position on an integrated seniority list for American Airlines if the airlines uses Defendants' preferred date-of-hire integration principle for the placement of East and West Pilots *vis a vis* one another to be integrated with the American pilots. Unsurprisingly, Defendants' personal gain comes at the direct expense of West Pilots, who would fall hundreds of positions on an integrated seniority list following Defendants' preferred principles. *See id.* This is necessarily true because seniority is a zero sum game. This is why then all of the LMRDA Defendants collectively authorized the spending of approximately $1.8 million pursuing a date-of-hire list after decertification, thereby

violating the USAPA constitutional provision that spending after decertification was to be limited to "collective action on behalf of the pilot group."

Defendants claim that they did not receive any money personally and that seniority benefits are an "incidental indirect benefit" that are not actionable. *See, e.g., Ray v. Young*, 753 F.2d 386, 390 (5th Cir. 1985) (noting that receiving a complimentary business dinner paid for with union funds is, in some sense, a benefit but not sufficient to give rise to Title V liability). But, as the Plaintiffs have explained previously, a pilot's relative seniority position is anything but "incidental" or "indirect." Rather, a pilot's position on the seniority list is vitally important to his or her career, as it determines, *inter alia*, compensation, work schedule, and the type of aircrafts he or she will fly relative to all other pilots forever.

Seniority terms and conditions are hardly incidental or indirect benefits. That is why since January 1, 2013, the Officers and Directors of USAPA have spent more than $4.3 million from the USAPA treasury ($1.8 million post-certification) on their and their fellow East Pilots' pursuit of a date-of-hire list. This is in addition to almost $7 million USAPA spent opposing the West Pilots' efforts in the three *Addington* cases seeking the benefit of the arbitrated Nicolau Award. Rational persons do not spend more than $11 million pursing mere "incidental or indirect" benefits.

Defendants bear the burden of showing that such expenditures were authorized pursuant to a reasonable interpretation of USAPA's Constitution after decertification on September 16, 2014. *See Brink v. DaLesio*, 667 F.2d. 420, 424 (4th Cir. 1981) (citing *Morrisey*, 650 F.2d at 1274-75). Where the interpreting officers as here have a self-interest in the advanced interpretation, their interpretation is not entitled to the usual deference

accorded to a union's interpretation of its governing documents. *Loretangeli v. Critelli*, 853 F.2d 186, 195 (3d Cir. 1988) (union officials may not adopt a "contorted reading" of their constitution to justify use of union funds in breach of their fiduciary duties); *see also Morrisey*, 650 F.2d at 1273-74. *Nellis* doesn't change this, because *Nellis* concerned one union policy at issue while the union was still the bargaining agent, and the defendants' actions there were analyzed under the rubric of a DFR case. Here, we have a specific USAPA constitutional provision that was triggered by USAPA's decertification, at which point everything changed. Defendants refuse to concede that anything changed at decertification.[5] This Court should find that Defendants' continued myopic adherence to a USAPA objective that no longer applies after decertification does not insulate them from liability to USAPA under the LMRDA.

CONCLUSION

There is no reason for the Court to change its position as set forth in its August 26, 2015 Order. Doc. 75. *Nellis* does not compel a different result for the reasons noted above. Accordingly, Defendants Motions to Dismiss [Docs. 87, 87-1, 96] and Motion for Reconsideration [Doc. 88] should be denied.

[5] As the Court insightfully observed on June 30, 2015, the game indeed changed at decertification. For example, after decertification, besides the date-of-hire seniority objective, USAPA could no longer pursue two other of the main objectives listed in Section 8 of the constitution: to establish and exercise the right of collective bargaining for the purpose of negotiating and maintaining employment agreements (Sec. 8(C)), and to levy dues and assessments (Sec. 8(G)). Defendants already conceded that USAPA lost the right to pursue these union objectives as a result of decertification, but still claim their right to pursue date-of-hire objectives (Sec. 8(D)) was not impacted, without explaining why some important objectives were lost but not others.

Respectfully submitted this 23rd day of December,

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I hereby certify that I electronically filed the foregoing Combined Memorandum Of Law (1) In Opposition To Defendants' Motions To Dismiss [Doc. 87, 87-1, 96] And (2) Response To Defendants' Motion For Reconsideration [Doc. 88] 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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