

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Delta Air Lines, Inc. :
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Air Line Pilots Association, International, : 1:05-cv-10303-LBS
 :
 : *Appellant,* :
 :
 :
- v - :
 :
Delta Air Lines, Inc., :
 :
 : *Appellee.* :
 :
-----X

BRIEF OF APPELLANT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Babette A. Ceccotti (BC 2690)
Peter D. DeChiara (PD 0719)
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, New York 10036
T: (212) 563-4100
F: (212) 695-5436

Attorneys for Appellant Air Line Pilots Association,
International

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PRELIMINARY STATEMENT

The Air Line Pilots Association, International (“ALPA”), the collective bargaining representative of the pilots employed by Delta Air Lines Inc. (“Delta”), respectfully submits this brief in support of its appeal in the above matter.

This case, and the related appeals (Case Nos. 05-CV-10600 and 05-CV-10601), concern the critical question whether an employer’s bankruptcy filing allows it to escape making contractually-mandated pension payments that come due after the filing. Section 1113(f) of the Bankruptcy Code provides that a debtor must adhere to the terms of its entire collective bargaining agreement unless it rejects the agreement pursuant to Section 1113. Here, Delta ceased making certain pension payments required by its collective bargaining agreement even though it has never rejected the agreement nor been authorized by the court to reject the agreement. Because Delta’s discontinuance of the payments violated Section 1113, the bankruptcy court below erred in denying a motion seeking to compel the payments.

BASIS FOR APPELLATE JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. §158(a)(1), as the bankruptcy court order entered October 31, 2005 [Docket No. 970]¹ was a final order. *See In re 1655 Broadway Restaurant Corp.*, 1997 WL 104961 (S.D.N.Y. 1997), at *2.

STATEMENT OF ISSUES PRESENTED AND APPLICABLE STANDARD OF APPELLATE REVIEW

1. Whether the bankruptcy court erred in denying the motion (“the Motion”) [Docket No. 533] to compel the pension payments, since the payments were post-petition obligations required by a collective bargaining agreement that had not been rejected?

¹ References to docket numbers are to the bankruptcy court docket, Case No. 05-17923 (PCB) (Bankr. S.D.N.Y.)

2. Whether the bankruptcy court erred in denying the Motion on the ground that only a debtor may move for relief under Section 1113 of the Bankruptcy Code?

3. Whether the bankruptcy court erred in denying the Motion on the ground that the relief requested would require the commencement of an adversary proceeding?

The parties have agreed that each of these issue presents a pure issue of law. *See* Oct. 12, 2005 Joint Statement of Stipulated Facts With Respect To The Motion Of DP3, Inc. To Compel The Continued Payment Of Collectively Bargained-For Pension Benefits To The Retired Pilots (“Stip.”) [Docket No. 711], at ¶4. Accordingly, *de novo* review applies. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988-89 (2d Cir. 1990).

STATEMENT OF THE CASE

At all relevant times, ALPA and Delta have been party to a collective bargaining agreement, known as the Pilots Working Agreement (“PWA”), that governs the terms and conditions of the pilots’ employment.² The PWA incorporates by reference the terms of the pilots’ pension plans, Stip. ¶5, and, with exceptions not relevant here, precludes modifications to the plans except by agreement between ALPA and Delta.³

Since 1972, Delta has maintained a tax-qualified defined benefit pension plan for its pilots (“the Qualified Plan”). Stip. ¶18. The Qualified Plan’s assets are held in a trust that is

²The parties did not make an evidentiary record below apart from the October 12, 2005 stipulation. Factual assertions herein that are not based on the stipulation concern background facts that are not in dispute.

³ Section 26 C of the PWA provides: “Irrespective of any contrary provisions of the [...Plans], the Company agrees that the Plans will not be amended, changed, varied, modified, or voluntarily discontinued during the term of this PWA and thereafter until the date the parties have been released to exercise self-help after exhaustion of the dispute resolution procedure of the Railway Labor Act, except as agreed by the pilots in the service of Delta Air Lines, Inc., as represented by the Air Line Pilots Association, International, and the Company, or except as otherwise required by law.”

separate and apart from Delta, *see id.* ¶9; tax-qualified pension payments to retired pilots are made from this trust.

ERISA and the Internal Revenue Code require that tax-qualified defined benefit plans be funded according to a regular funding schedule, generally on a quarterly basis. *See id.* ¶17. In addition, the Qualified Plan, as incorporated in the PWA, requires that Delta make contributions to the Qualified Plan “at reasonable periodic intervals.” *See id.* ¶6 (quoting §10.02 of the Qualified Plan). The PWA makes clear that all contributions to the Plan are to be made by Delta. *See id.* (quoting §26 of PWA).

Generally, a Delta pilot who retires at age 60 is entitled to an annual pension benefit equal in amount to a percentage of the average of the last three years of his earnings, depending on his years of service. *See id.* ¶7. This benefit is paid from the Qualified Plan up to a limit set by the Internal Revenue Code. *See id.* Under the PWA, Delta is required to pay directly to the pilots the balance of pension payments that exceed Internal Revenue Code limits. These payments are made pursuant to the non-qualified pension plans (“the Non-Qualified Plans”) that Delta maintains for its pilots. *See id.* ¶¶5, 47. Delta makes these payments under the Non-Qualified Plans out of its general assets. *See id.* ¶47. Until Delta filed for bankruptcy, it made these payments under the Non-Qualified Plans each month. *See id.* ¶¶48-49.

Delta filed for Chapter 11 bankruptcy protection on September 14, 2005. At no time since its bankruptcy filing has Delta rejected the PWA under Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113, or been authorized by the bankruptcy court to do so. Nonetheless, Delta, in violation of the PWA, ceased making contributions to the Qualified Plan. In particular, a contribution of not less than \$160 million was due to the Qualified Plan on October 15, 2005, *see Stip.* ¶39, but Delta failed to pay it. Since filing for bankruptcy, Delta has

also ceased making pension payments to retirees under the Non-Qualified Plans, depriving these retirees of approximately \$7 million per month. *See id.* ¶50. Delta asserts that it should not be ordered to make the contributions and payments because, it contends, Delta's failure to pay gives rise only to pre-petition, unsecured bankruptcy claims against the Delta estate, *see* Stip. ¶1 -- a contention that ignores the fact that the contractual obligation to make these contributions and payments arose *after* the bankruptcy filing.

On September 23, 2005, DP3, Inc. ("DP3"), an organization that claims to represent the interests of Delta's retired pilots, filed the Motion, seeking an order compelling Delta to make contributions to the Qualified Plan and payments under the Non-Qualified Plans that come due after the bankruptcy filing date. DP3 asserted that Delta's failure to make the contributions and payments would constitute a unilateral modification of the PWA in violation of Section 1113(f) of the Bankruptcy Code. *See* Stip. ¶2. ALPA joined in the Motion. *See id.*

Bankruptcy Judge Prudence Carter Beatty denied the Motion in a ruling from the bench on October 17, 2005, followed by a written order entered October 31, 2005. In her bench ruling, Judge Beatty stated that Section 1113 "requires that the movant be the debtor and the debtor is not the movant and, therefore, there's nothing in 1113 that's relevant." Transcript ("Tr.") of October 17, 2005 hearing at 98. As an additional ground for her decision, the bankruptcy judge stated that a motion was the improper vehicle to enforce Section 1113(f): "if you want that relief it would require the commencement of an adversary proceeding because it is seeking declaratory judgment." *Id.*

DP3, ALPA and Fiduciary Counselors, Inc., which is the independent fiduciary of the Qualified Plan, filed timely notices of appeal.⁴

ARGUMENT

I. THE BANKRUPTCY COURT ERRED IN DENYING THE MOTION BECAUSE SECTION 1113 AND THE PWA REQUIRE DELTA TO PAY ITS PENSION OBLIGATIONS

Congress enacted Section 1113, 11 U.S.C. §1113, in response to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). See *In re Ionosphere Clubs, Inc.* ("*Ionosphere I*"), 922 F.2d 984, 989, 990 (2d Cir. 1990). In *Bildisco*, the Chapter 11 debtor, before rejecting its collective bargaining agreement with the union, failed to meet certain obligations under the agreement, including by not paying required pension benefits. See *id.* at 518. The union argued that the debtor's failure to meet its contractual obligations constituted an unlawful unilateral modification of the agreement. See *id.* at 528-29. In rejecting the union's position, the Court held that the filing of a bankruptcy petition "means that the collective-bargaining agreement is no longer immediately enforceable," *id.* at 532, and that the debtor does not act unlawfully "by unilaterally breaching" it. *Id.* at 534; see also *Ionosphere I*, 922 F.2d at 989 (noting that *Bildisco* held that a debtor "could terminate unilaterally the collective bargaining agreement"). The *Bildisco* Court also held that to reject a collective bargaining agreement, a debtor need show no more than that the agreement burdens the estate and the equities favor rejection. See 465 U.S. at 521-27.

In enacting Section 1113, Congress squarely rejected the Court's holdings in *Bildisco*. First, Congress set forth strict procedural and substantive requirements that a debtor must meet before it is permitted to reject a collective bargaining agreement. See 11 U.S.C.

⁴ The appeals of DP3 and Fiduciary Counselors, Inc. were separately docketed as Case Nos. 05-CV-10600 and 05-CV-10601.

§§1113(b), (c). At the core of these requirements is Section 1113's prohibition on a debtor rejecting a collective bargaining agreement unless it makes a proposal to the union to modify the agreement and then bargains in good faith with the union regarding the proposal. *See id.*

§1113(b)(1)(A), (b)(2). Congress also undid *Bildisco's* second holding, by providing in Section 1113(f) that unless and until a debtor has satisfied the requirements to reject a collective bargaining agreement, it remains bound to the terms of the agreement: "No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." *Id.* §1113(f).

In *Ionosphere I*, the Second Circuit held that Section 1113(f) required the debtor in that case, Eastern Air Lines, to arbitrate a dispute with ALPA under the arbitration clause contained in the parties' unrejected collective bargaining agreement. *See* 922 F.2d at 992-93. In support of its decision, the court quoted with approval a leading bankruptcy treatise which explained that a debtor "'must adhere to the terms of the collective bargaining agreement unless the court approves the application for rejection pursuant to section 1113(c) or grants interim relief under section 1113(e).'" 922 F.2d at 990 (quoting 5 *Collier on Bankruptcy*, ¶1113.01 (15th ed. 1990)). The court further explained that by requiring compliance with the collective bargaining agreement until the debtor satisfied Section 1113's bargaining and other requirements for contract rejection, Section 1113(f) "'encourages the collective bargaining process, so basic to federal labor policy.'" 922 F.2d at 990 (quoting 130 Cong. Rec. S8898 (daily ed. June 29, 1984) (comments of Sen. Packwood))

The Second Circuit's *Ionosphere I* decision makes clear that Section 1113(f) requires Delta to comply with the terms of the PWA unless and until it rejects the PWA under

Section 1113. Because the PWA required Delta to contribute to the Qualified Plan and to make payments to retirees under the Non-Qualified Plans, the bankruptcy court erred in denying the Motion to compel these contributions and payments. Indeed, in *Bildisco*, the debtor failed to make pension payments and, as the Second Circuit has noted, “the events that took place in *Bildisco* are representative of the ill that Congress sought to cure in enacting §1113.” *Ionosphere I*, 922 F.2d at 990.

This Court’s decision in *In re 1655 Broadway Restaurant Corp.* is squarely on point. There, the collective bargaining agreement between the debtor and the union incorporated the terms of certain employee pension and welfare plans and required the debtor to make contributions to the plans. The debtor never rejected the collective bargaining agreement under Section 1113 but failed to make contributions to the plans that came due after the bankruptcy filing. The bankruptcy court denied a motion to compel the contributions but this Court reversed. In his decision, Judge Patterson explained that “[s]ince at no time did the Debtor move to reject or modify the CBA nor receive Court approval for rejection or modification of the CBA, pursuant to 11 U.S.C. 1113(a)-(e), the Debtor’s failure to make payments to the Funds as required under the CBA constitutes a unilateral modification of the CBA not permitted under 11 U.S.C. §1113(f).” 1997 WL 104961, at *2. Similarly here, Delta’s failure to make the pension contributions and payments required by the PWA violates §1113 and requires reversal of the bankruptcy court’s denial of the Motion. *See also In re Hoffman Bros. Packing Co.*, 173 B.R. 177, 185 (B.A.P. 9th Cir. 1994) (debtor’s “failure to perform its pension and health insurance obligations without the unions’ consent and prior to court approval was a unilateral act, and as such, strictly prohibited by §1113(f)”).

In the court below, Delta relied primarily on *In re Ionosphere Clubs, Inc.* (“*Ionosphere II*”), 22 F.3d 403 (2d Cir. 1994), for its argument that it need not make the pension contributions and payments. *Ionosphere II* concerned vacation pay that the employer owed to its unionized employees *before* it filed for bankruptcy. *See id.* at 405. Months after ceasing operation and terminating all of its employees, *see id.*, the debtor moved for an order determining the priority status of the pre-petition vacation pay claims. *See id.* The Second Circuit rejected the unions’ argument that Section 1113(f) gave the claims superpriority status, holding that the claims were subject only to the priority scheme set forth in Section 507 of the Bankruptcy Code, 11 U.S.C. §507. *See id.* at 406.

This Court was fully aware of *Ionosphere II* when it rendered its decision in *1655 Broadway* requiring the debtor to make post-petition pension payments. Indeed, the Court cited *Ionosphere II* in its decision, prefacing the citation with a “*cf.*” *See* 1997 WL 104961, at *2.

The Court was correct in finding that *Ionosphere II* does not control a case involving a post-petition obligation under an unrejected collective bargaining agreement. First, as noted above, the employer in *Ionosphere II* owed the vacation pay to the employees before it filed for bankruptcy, giving the employees only pre-petition claims. Here, Delta’s contribution was due to the Qualified Plan on October 15, 2005, *see* Stip. ¶39, *after* Delta filed for bankruptcy. Delta had *no* obligation to pay the contribution before it filed for bankruptcy. As this Court made clear in *1655 Broadway*, pension contributions that come due after the filing of the bankruptcy petition are post-petition obligations that must be paid absent rejection of the collective bargaining agreement. *See* 1997 WL 104961, at *1 (referring to “post-petition delinquencies” owing to the pension and welfare funds), at *2 (noting, by contrast, that

Ionosphere II concerned “pre-petition vacation pay”). Similarly, the monthly payments under the Non-Qualified Plans that Delta has failed to pay have come due post-petition.

It is also noteworthy that the debtor in *Ionosphere II* had ceased operations, terminated its employees and had begun liquidation. Here, by contrast, Delta continues to operate and to employ its pilots and seeks to reorganize. The application of Section 1113 is more compelling here because, as the text of the statute makes clear, Congress intended Section 1113 to apply to debtors who are seeking to reorganize: a debtor may only obtain relief under Section 1113 if it proves that its proposed modifications to the collective bargaining agreement are “necessary to permit the reorganization of the debtor.” 11 U.S.C. §1113(b)(1)(A). Indeed, this Court, in the decision affirmed by the Second Circuit in *Ionosphere II*, noted that caselaw under Section 1113 “suggests an important distinction between reorganizing and liquidating bankruptcies.” *In re Ionosphere Clubs*, 154 B.R. 623, 629 (S.D.N.Y. 1993).

In particular, application of Section 1113(f) is far more compelling here than in *Ionosphere II* because, as the Second Circuit has explained, Congress intended Section 1113(f) to encourage a reorganizing debtor to bargain with the union over contract changes that it believes it needs. *See Ionosphere*, 922 F.2d at 990; *see also Ionosphere*, 154 B.R. at 630. This well-recognized policy of encouraging collective bargaining has little meaning in a situation like *Ionosphere II*, where the debtor had ceased operations and thereby eliminated any need for collective bargaining concerning the terms under which employees will work. By contrast, in a situation like the instant one where the debtor is seeking to reorganize, the application of Section 1113(f) is critical, as it prevents the debtor’s unilateral noncompliance with the contract and thereby encourages the debtor to bargain with the union over any changes it deems necessary.

Here, allowing Delta to escape its obligation to make pension payments undermines Section 1113's policy by allowing Delta to avoid bargaining over the issue.

That the Delta pilots have continued to work is also a critical distinction from *Ionosphere II* because by providing their post-petition labor to Delta, the pilots as a group have a post-petition right to *all* compensation that came due under the PWA after the bankruptcy filing. This is so because Delta agreed in the PWA that in exchange for the pilots' services, it would not only pay the pilots their wages but would also provide a package of pay and benefits, a package that includes contributions to the Qualified Plan and Non-Qualified Plan payments to retirees. The pilots collectively have upheld their end of the bargain by continuing after the bankruptcy filing to provide Delta with the labor that has allowed it to continue to operate. Delta, therefore, has a post-petition obligation to live up to its end of the bargain, to provide all of the pay and benefits, including pension contributions and payments, that it promised ALPA and the pilots it would make in the PWA.

Caselaw supports the proposition that Section 1113(f) obligates an employer to pay all post-petition compensation required by a collective bargaining agreement. In *In re World Sales, Inc.*, for example, the court explained that post-petition consideration owing to the employees who perform post-petition work "must encompass the *entire bargain* between the parties." 183 B.R. 872, 877 (B.A.P. 9th Cir. 1995) (emphasis added). There, the collective bargaining agreement required a month's contribution to the union benefit plan for each employee who worked at least one day in the month. The debtor argued that since it laid off all of its employees 18 days after filing for bankruptcy, thereby precluding the employees from performing a month's worth of post-petition labor, the employees did not have a post-petition claim for an entire month's plan contribution. The court rejected this argument and held that the

employees had an administrative claim to the full month's contribution, because Section 1113(f) "preserves post-bankruptcy claims arising under an unrejected CBA" and "under the unrejected CBA, [the employees] had a contractual right to [the full month's] coverage." *Id.* at 878.

Similarly, in *In re Colorado Springs Symphony Orchestra Ass'n*, 308 B.R. 508 (Bankr. D. Colo. 2004), the court held that employees had an administrative claim to wages even though they never worked post-petition, because the collective bargaining agreement guaranteed them pay so long as they were willing and ready to perform, and the employees provided the debtor with post-petition consideration by making themselves available. The court reached this conclusion based on "the language of §1113(f) binding [the debtor] to the terms of its collective bargaining agreement unless and until rejection is approved by the bankruptcy court." *Id.* at 517. As long as the employees "provide consideration to a debtor-in-possession as contemplated by the collective bargaining agreement, then *whatever obligation* is owed to the workers under that agreement's unmodified terms, and based upon the consideration provided by the workers, is an allowable administrative expense" *Id.* at 521-22 (emphasis added).

Here, because the Delta pilots have provided consideration to Delta through their post-petition labor, Section 1113(f) dictates that all compensation under the PWA due post-petition, including pension payments and contributions, constitutes a post-petition obligation that Delta must pay. Accordingly, the bankruptcy court erred in denying the Motion.

II. THE BANKRUPTCY COURT ERRED IN DENYING THE MOTION ON THE GROUND THAT ONLY THE DEBTOR MAY MOVE FOR RELIEF UNDER SECTION 1113

In denying the Motion, the bankruptcy court did not address any of the issues discussed in the preceding section. It simply concluded that only a debtor may move for relief under Section 1113 and, because Delta was not a moving party, "there's nothing in 1113 that's relevant." Tr. 98. This was error. It is true that only a debtor may move under Section 1113 to

reject a collective bargaining agreement. See 11 U.S.C. §§1113(b), (c). But here the Motion was not to reject the PWA. The Motion was brought under Section 1113(f) to prevent Delta from unilaterally altering the PWA. See, e.g., In re Acorn Bldg. Components, Inc., 170 B.R. 317 (E.D. Mich. 1994) (granting union's motion under Section 1113(f)); In re 1655 Broadway, 1997 WL 104961 (deeming meritorious motion by pension funds to enforce Section 1113(f)).

III. THE BANKRUPTCY COURT ERRED IN DENYING THE MOTION ON THE GROUND THAT THE RELIEF REQUESTED WOULD REQUIRE THE COMMENCEMENT OF AN ADVERSARY PROCEEDING

The bankruptcy court similarly erred in holding that the relief sought by the Motion could only be obtained through an adversary proceeding. Cases make clear that a party may by motion seek to compel a debtor to comply with its obligations under Section 1113(f). *See, e.g., Acorn Bldg. Components, 170 B.R. 317 (granting union's motion under Section 1113(f)); In re 1655 Broadway, 1997 WL 104961 (deeming meritorious a motion brought to enforce Section 1113(f)).* The bankruptcy court held that an adversary proceeding was necessary because, the judge below believed, the Motion sought declaratory relief. Tr. 98. But the Motion nowhere requested declaratory relief; it requested an order compelling Delta to make the contributions and pension payments. In any event, a party seeking declaratory relief need only use an adversary proceeding if the declaratory relief sought relates to one of the types of proceedings listed in sections (1) through (8) of Bankruptcy Rule 7001. *See Bankr. Rule 7001(9); see, e.g., In re Keeler, 257 B.R. 442, 444 (Bankr. D. Md. 2001).* Here, the Motion did not relate to any such proceedings. *See Bankr. R. 7001(1)-(8).*

CONCLUSION

For the foregoing reasons, this Court should grant the appeal, reverse the bankruptcy court order and remand the matter to the bankruptcy court with instructions to grant the Motion.

January 20, 2006

/s/ Peter D. DeChiara
Babette A. Ceccotti (BC 2690)
Peter D. DeChiara (PD 0719)
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, New York 10036
T: (212) 563-4100
F: (212) 695-5436

Attorneys for Appellant Air Line Pilots Association,
International

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant Air Line Pilots Association, International was served electronically by ECF this 20th day of January 2006 upon:

Benjamin S. Kaminetzky
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

Counsel for Appellee Delta Air Lines, Inc.

I further certify that a copy of the brief was served by facsimile and first-class mail this 20th day of January 2006 upon:

Dean Booth
John A. Christy
Jason W. Graham
Schreeder, Wheeler & Flint, LLP
127 Peachtree Street, N.E.
1600 Candler Building
Atlanta, GA 30303-1845

Counsel for DP3, Inc.

Greg R. Yates
Steptoe & Johnson LLP
750 Seventh Avenue
Suite 1900
New York, NY 10019

Counsel for Fiduciary Counselors, Inc.

Daniel H. Golden
Lisa G. Beckerman
David H. Botter
Akin Gump Strauss Hauer & Feld LLP
590 Madison Avenue
New York, NY 10022

Counsel for the Official Committee of Unsecured Creditors

/s/ Peter D. DeChiara
Peter D. DeChiara