

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 05-17923 (ASH)
DELTA AIR LINES, INC., et al, . White Plains, New York
Debtors. . Tuesday, August 22, 2006
1:54 p.m.
DELTA AIR LINES, INC., et al, .
Plaintiffs, . Adv. Proc. No. 06-01259
vs. .
DAVID L. BIBB, et al, .
Defendants. .
.....

TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE ADLAI S. HARDIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Marshall Scott Huebner, Esq.
Benjamin S. Kaminetzky, Esq.
DAVIS, POLK & WARDWELL
450 Lexington Avenue
New York, New York 10038
J. Scott McClain, Esq.
Assistant General Counsel
DELTA AIR LINES, INC.
Law Department
Atlanta, Georgia 30320

(Appearances continued)

Audio Operator: Electronically Recorded
by Court Personnel

Transcription Company: Rand Transcript Service, Inc.
311 Cheyenne Road
Lafayette, New Jersey 07848
(973) 383-6977

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

1 APPEARANCES: (Continued)

2 For the Official Committee
3 of Unsecured Creditors: Lisa G. Beckerman, Esq.
4 AKIN, GUMP, STRAUSS, HAUER
5 & FELD, LLP
6 590 Madison Avenue, 20th Floor
7 New York, New York 10022

8 For the DP3 Retired Pilots: Dean Booth, Esq.
9 MILLER & MARTIN, PLLC
10 1170 Peachtree Street N.E.
11 Suite 800
12 Atlanta, Georgia 30309

13 Shelley D. Rucker, Esq.
14 MILLER & MARTIN, PLLC
15 Suite 1000, Volunteer Building
16 832 Georgia Avenue
17 Chattanooga, Tennessee 37402

18 For William C. Buergey: Donald L. Sapir, Esq.
19 Jeffrey L. Sapir, Esq.
20 SAPIR & FRUMKIN, LLP
21 399 Knollwood Road
22 White Plains, New York 10603

23 For the Section 1114
24 Non-Pilot Retiree Committee: Lori V. Vaughan, Esq.
25 FOLEY & LARDNER, LLP
100 North Tampa Street
Suite 2700
Tampa, Florida 33602

For the U.S. Government: Pierre G. Armand, Esq.
Assistant U.S. Attorney
U.S. ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF NEW YORK
86 Chambers Street
New York, New York 10007

Participating: Captain Kenneth W. Lewis

1 APPEARANCES: (Continued)

2 Participating Via Telephone: Carl Sciurba
Maurice Cloutier
3 Kerin L. Shaughnessey
Edward L. Madden
4 James Paul Starkey
Charles L. Roedema
5 William C. Buergey
George R. Rickley

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

INDEX

1		
2		
3	<u>STIPULATION WITH DP3</u>	<u>Page</u>
4	Argument by Mr. Huebner	9, 38, 42, 52
5	Argument by Mr. Booth	30
6	Argument by Mr. Sapir	32, 41, 50, 56
7	Comments by Captain Buergey	58
8	Response by Mr. Huebner	60
9	Response by Mr. Sapir	62
10	Argument	64
11	Response by Mr. Booth	68
12	Argument by Captain Lewis	69
13	Colloquy/Discussion	79
14	<u>Court Decision</u>	89
15		
16		
17	<u>ADVERSARY PROCEEDING</u>	102
18	<u>Delta Air Lines, Inc., et al v. Bibb, et al</u>	
19	<u>Motion and Cross-Motion for Summary Judgment</u>	
20	Argument by Mr. Armand	106, 143, 148
21	Argument by Mr. Kaminetzky	112, 146
22	Colloquy/Discussion	140
23	Argument	149
24		
25		

1 (Proceedings commence at 1:54 p.m.)

2 (Counsel and parties confer.)

3 MS. LAHAIE: Hi, this is Meredith, Judge Hardin's law
4 clerk. For those of you that are on the phone, can you please
5 -- if you want to put in an appearance, can you please state
6 your name for the record? Can you hear me people on the phone?

7 TELEPHONE PARTICIPANTS: Yes. Yes.

8 MR. ROEDEMA: Yes, barely. This is Chuck Roedema,
9 Charles Roedema, from Denton, Texas.

10 MS. O'SHEA: Spell your last name.

11 MS. LAHAIE: Can you please spell your last name?

12 MR. ROEDEMA: R-o-e-d-e-m-a, Roedema.

13 MS. LAHAIE: And, gentlemen, I'll have to ask you to
14 speak up because, unfortunately, you're not coming in very
15 clearly.

16 MR. ROEDEMA: Neither are you. It's R-o-e-d-e-m-a.

17 MR. HUEBNER: He's on the agenda letter. He's a pro
18 se claimant.

19 (Participants confer.)

20 MS. O'SHEA: And who else is on the phone?

21 MR. SHAUGHNESSEY: Yes, Kerin Shaughnessey. Hello?

22 MS. LAHAIE: Thank you.

23 (Pause in proceedings - participants confer.)

24 MS. LAHAIE: Is there anyone else on the phone that
25 hasn't put in an appearance?

1 MR. SHAUGHNESSEY: Say that again?

2 MS. LAHAIE: Is there anyone else on the conference
3 call line that has not put in an appearance?

4 MR. ROEDEMA: I'm sorry?

5 MR. HUEBNER: There should only be two people on the
6 phone, according to the Court; one is Mr. Roedema and one is
7 the -- Mr. Shaughnessey. Is there anybody else on the phone?

8 MR. SCIURBA: Yes, Carl Scieurba.

9 MR. HUEBNER: Okay. Thank you.

10 Is there anyone else besides Mr. Scieurba?

11 (No verbal response.)

12 MR. HUEBNER: Okay. Who just joined the judicial
13 conference all?

14 MR. SCIURBA: I'm Carl Scieurba.

15 MR. HUEBNER: Okay.

16 MR. ROEDEMA: Hello?

17 MR. HUEBNER: Yeah. For the parties on the phone, you
18 are in the courtroom now, and we're waiting for the Judge. So
19 I would very strongly suggest that you put your phones on mute,
20 unless and until it's appropriate for you to take part in the
21 hearing.

22 MS. LAHAIE: If you've just joined the conference
23 call, can you please give your name for the transcriptionist?

24 MR. STARKEY: My name is James Paul Starkey --

25 (Off the record. Back on the record.)

1 MS. LAHAIE: I'm sorry. We missed the last name.

2 MR. STARKEY: Starkey and Cloutier.

3 MR. HUEBNER: Is that Mr. Starkey and Mr. Cloutier?

4 MR. CLOUTIER: Yes, sir.

5 MR. STARKEY: Starkey is here.

6 MR. CLOUTIER: It beeps every time you talk here.

7 (Telephone participants confer.)

8 CAPTAIN BUERGEY: I'm sorry. Will Buergey checking
9 in.

10 MR. MADDEN: Ed Madden checking in.

11 MR. RICKLEY: George Rickley checking in.

12 MR. CLOUTIER: And Maurice Cloutier.

13 MR. STARKEY: Paul Starkey checking in.

14 MS. LAHAIE: You're going to have to slow down. We're
15 writing the names down one at a time, so just pause between
16 names, please.

17 CAPTAIN BUERGEY: Will Buergey checking in.

18 MS. LAHAIE: Thank you, Mr. Buergey. We've got you.
19 Who was after Mr. Buergey?

20 MR. MADDEN: Ed Madden, M-a-d-d-e-n.

21 MR. HUEBNER: Okay. And then we have Mr.
22 Shaughnessey.

23 MR. SHAUGHNESSEY: Yes.

24 MR. HUEBNER: And I heard Paul Starkey.

25 MR. STARKEY: Yes.

1 MR. HUEBNER: And Chuck Roedema and Maurice Cloutier.

2 MR. CLOUTIER: Yes, sir.

3 MR. HUEBNER: Is there anyone on the phone, other than
4 the people that we've just named? Oh, I'm sorry.

5 MR. SCIURBA: Carl Scieurba.

6 MR. HUEBNER: Carl Scieurba. I apologize. And then is
7 that it?

8 MR. RICKLEY: No. George Rickley.

9 MR. HUEBNER: George Rickley, yes, absolutely.

10 MS. O'SHEA: I'm sorry. Maurice, what's his last
11 name?

12 MR. HUEBNER: Cloutier. He's number E on the first
13 page of Page 2 -- the first entry on Page 3, right here.

14 Okay.

15 (Recess taken at 2:02 p.m.)

16 (Proceedings resume at 2:11 p.m.)

17 THE COURT: Good afternoon.

18 COUNSEL: Good afternoon. Good afternoon, Judge.

19 THE COURT: Have a seat, please.

20 MS. LAHAIE: You're on the record in the matter of
21 Delta Air Lines.

22 THE COURT: Mr. Huebner, we've got all the appearances
23 in the record that we need.

24 MR. HUEBNER: I think we do, Your Honor. We're going
25 to take the DP3 stipulation first.

1 THE COURT: All right.

2 MR. HUEBNER: There are, I think, about nine of the
3 parties listed on the agenda letter, who are on the phone, and
4 I think a few more that are here in person.

5 THE COURT: All right.

6 MR. HUEBNER: So if I may proceed.

7 THE COURT: Please do.

8 MR. HUEBNER: Good afternoon --

9 THE COURT: Let me first ask with regard to the DP3
10 stipulation. I have the stipulation, and I have a lot of
11 documents in opposition. I don't have any submission by the
12 debtor or DP3.

13 MR. HUEBNER: Sure.

14 THE COURT: Or if I do, I'm not aware of it.

15 MR. HUEBNER: Yeah. I'm happy to explain that, Your
16 Honor, in the course of the presentation.

17 THE COURT: All right.

18 MR. HUEBNER: I think it will all make a lot of sense.

19 Your Honor, before I start that, let me just back up
20 one step, as I often am able to do, which is that, as Your
21 Honor knows, there were originally a great number of items on
22 today's agenda; and, but for the DP3 stipulation and a rather
23 serious dispute with the federal government that will be
24 handled in a few moments by my partner Ben Kaminetzky, we are
25 otherwise -- we are otherwise uncontested; and we, as always,

1 thank you for entering a raft of orders that are critical to
2 the company's restructuring late last week.

3 THE COURT: All right.

4 MR. HUEBNER: Your Honor, in terms of the DP3
5 stipulation, let me back up. And I think, with that, we'll be
6 able to go forward.

7 As Your Honor I'm sure remembers, both in the text of
8 the stipulation and the prior presentations, DP3 is an
9 organization of retired pilots that counts over half of Delta's
10 retired pilots as part of its membership.

11 THE COURT: Well, over or under, that's not clear to
12 me.

13 MR. HUEBNER: It's over, I believe, Your Honor. Their
14 most recent data is that it's above 2,850, which is over half.

15 THE COURT: And what's the universe?

16 MR. HUEBNER: I think it's about 5,300; 5,350,
17 something like that.

18 THE COURT: All right. I have quite a few defections.

19 MR. HUEBNER: Yes. And, Your Honor, we actually asked
20 them about that, presciently or not. Our understanding is that
21 they have received about fifty so far, and that they've counted
22 that in their records, which gives them their most recent
23 membership tally.

24 THE COURT: All right.

25 MR. HUEBNER: Part of what's going on, Your Honor --

1 and, frankly, the letters that you are talking about we have
2 never seen, because it appears that they were not sent to us,
3 not even a courtesy copy to us, not filed on the docket,
4 certainly not served properly as required. But I can guess at
5 what's going on, and I think it's going to be a pretty good
6 guess.

7 These letters are almost surely all of very recent
8 vintage, and they are probably not really about the DP3
9 stipulation at all. There's a new --

10 THE COURT: Hold on just a second. What are we
11 hearing?

12 (Court and court personnel confer.)

13 THE COURT: If anybody on the conference call is
14 talking or making noise, that's going to be the end of the
15 conference call. Do you all understand?

16 TELEPHONE PARTICIPANTS: Yes. Yes. Excuse me?

17 THE COURT: All right. I will just terminate it
18 without further adieu if there's any further talking. Okay?
19 Very good.

20 You may proceed.

21 MR. HUEBNER: Your Honor, until very recently, I think
22 just a few days ago, about a week and a half ago or so, DP3 was
23 the sole organization representing a large group of member
24 retired pilots. And, as Your Honor will hear in a few minutes,
25 they have been fighting with us at many junctures every step of

1 the way in order to protect the rights of retired pilots.

2 Very recently, a small, new splinter group formed that
3 believed that, as to next week's trial, which is the four-day
4 deadly serious trial about the termination of the qualified
5 defined benefit plan. DP3 was not taking the right approach.
6 That group, and others like it, in blogs and e-mail chains,
7 encouraged a great number of pilots to fill out one of a couple
8 of variants of a form letter, both to object -- and there are
9 many objections on the docket, which, again, we got only from
10 the docket, but at least got them because they were at least on
11 the docket -- that are really qualified plan objections, which
12 will be addressed at the four-day trial beginning September 1.

13 For reasons that are not actually clear to me, two of
14 the variants, I think, of that form letter say, I also object
15 to the DP3 stipulation, I have only recently learned of its
16 ramifications, and that it removes the last barrier to the
17 termination of the qualified plan, which is not the subject of
18 the hearing or the stipulation.

19 That is simply not correct. Anybody is free -- and as
20 you, I'm sure, have learned, scores already have objected to
21 the termination of the qualified plan; there is a DP3 response,
22 there is a PBGC response, there is a DP2 response with lots of
23 discovery going on; there are scores of letters. And so, as
24 far as we know -- and that's what I'm actually prepared to
25 present today -- every letter we've ever seen, even the ones

1 that arrive two months late and were never served on us, and we
2 got by happenstance, we actually treated in a way that I'll
3 describe, which is quite seriously and respectfully, and we're
4 not actually trying to bind anybody of the nine people that
5 we've heard from, even though many of their letters arrived as
6 recently as three days ago, two months after the objection
7 deadline, and we got them by coincidence.

8 But if I can actually explain the history of how we
9 got to where we are today, I think it will actually help put
10 that in an even better context, because, in fact, there was
11 tremendous notice, almost unprecedented notice for a motion
12 like this, which will explain why, although we're not in fact
13 trying to enforce this Court's ordered objection deadline of
14 June 20 -- in fact, maybe we should have, which would have made
15 this a much simpler hearing, but we're not, in any event,
16 because it's not how we've tended to do things. So if I may
17 take a step and a half back, and then I think we'll be able to
18 go forward with even more clarity.

19 Your Honor, the DP3 stipulation was presented to this
20 Court and entered at the same hearing at which the very
21 critical contract, LOA 51, the amended contract with ALPA, was
22 presented to the Court. As I'm sure Your Honor remembers, in
23 this very room the PBGC was the sole objector at the time, and
24 we ended up compressing in essence what was going to be a two-
25 day hearing with evidence into a several-hour hearing, where

1 Your Honor ruled as a matter of law that they had no objections
2 that could withstand legal scrutiny, even before getting to the
3 facts. Of the 100,000-plus other parties-in-interest in the
4 Delta bankruptcy case, not one other party had an objection to
5 that contract. I think most recognized that, without it, there
6 was a very real risk that Delta would not survive.

7 One of the parties that had originally objected to LOA
8 51 was DP3; and, like we resolved several of the other
9 objections, we engaged in rather intense negotiations. There
10 was e-mail traffic well past midnight with counsel to DP3, as
11 we were trying to work this deal out in the day -- the two days
12 before the LOA-52 hearing.

13 DP3 had previously brought and still had pending on
14 one level or another three separate of its own litigations
15 against Delta, and those are the vast majority of what was
16 settled by the stipulation. One of those litigations was one
17 in which DP3 sought to be denominated an official
18 representative of all retired pilots for pension matters. Our
19 view -- and we all filed pleadings on this -- was that this
20 concept has no home in bankruptcy law, there's no such thing as
21 an official pension committee, it's never been done before;
22 it's quite expressly outside the ambit of 1114, which covers
23 health and medical, but quite emphatically does not cover
24 pension, et cetera, et cetera, et cetera. I don't need to
25 belabor the pleadings. As part of the settlement, DP3 agreed

1 to withdraw that motion.

2 Second, DP3 had, in fact, objected to LOA 51 itself,
3 and the stipulation also settled the objection to LOA 51. That
4 order, of course, was entered almost, I think, three months
5 ago, on May 31st.

6 Third, DP3 had previously commenced two different
7 actions seeking essentially the same relief, but in two
8 different formats, seeking to compel Delta to pay currently and
9 in cash certain pension benefits that are paid from the Delta
10 treasury to pre-petition retirees. Delta felt then, and feels
11 now -- in fact, in light of an intervening Supreme Court case,
12 we feel even more strongly -- that these are pre-petition
13 claims, pure and simple; they have no connection under the
14 bankruptcy law to do business with the debtor and providing
15 value to the debtor under very well established Second Circuit
16 case law. And, in fact, there's a case even more directly on
17 point from the Second Circuit itself, but let's not argue the
18 motion because it was settled.

19 DP3, by contrast, if I may summarize their pleading,
20 argued that the CBA, the ALPA contract, coupled with 1113
21 itself created sort of a super-priority status and mandated
22 that all claims arising out of the CBA, even if purely pre-
23 petition in nature, had to be paid currently and in cash. So,
24 in essence, we're having a debate about whether pre-petition,
25 non-qualified, paid-by-Delta pension claims were pre-petition

1 or post-petition under the CBA at issue, you know, was dealt
2 with in a way that made it clear.

3 One aspect, one time period of this dispute was
4 settled for consideration. Delta agreed to allow retired
5 pilots a claim for the non-qualified pension benefits arising
6 from the petition date, which is the day we stopped paying them
7 because they're pre-petition in nature and we couldn't and
8 shouldn't have paid them given the financial and legal status;
9 and the day that we expect, hopefully, in light of this Court's
10 ruling, we hope, after next week's trial, will be the effective
11 date of the termination of the plan, which will be September
12 2nd, because it keys off of the termination date of the
13 qualified plan, pursuant to the order previously entered by the
14 Court. What we said was, you know what, we'll pay -- even
15 though we are absolutely comfortable -- to us, it's rather open
16 and shut -- that this is a pre-petition claim, we'll pay \$9
17 million of it in cash.

18 The main reason, if I can sort of open the tent for a
19 moment, we did this was that, essentially, Delta faced a
20 choice: We could either keep fighting through various courts
21 and pay \$9 million to lawyers, or we could do a reasonable
22 settlement and pay \$9 million to Delta retirees who were
23 suffering real losses. And in our judgment, given DP3's
24 tenacity at every step of the way, filing and refiling and
25 discovery -- they were the only party, even at our first-day

1 hearing they showed up, we object to first-day relief. So,
2 frankly, it made more sense. We knew we were going to pay.
3 We'd rather give it to Delta people who were injured
4 economically, not to, frankly, Davis Polk.

5 As explained to the Court on May 31st, the stipulation
6 provided that all Delta retired pilots receiving non-qualified
7 benefits would be able to receive both the benefits and the
8 burdens of the stipulation, unless they filed an objection by
9 June 20th. In other words, we gave people a clear route by
10 June 20th to say, I have a problem with this. We assumed, and
11 we were quite correct, that the vast majority are very pleased
12 that DP3 -- the vast, vast majority -- that DP3 was able to get
13 them, from our perspective, \$9 million real extra dollars by
14 virtue of their tenacity.

15 THE COURT: So that notice was sent to all retired
16 pilots, members of DP3 and nonmembers?

17 MR. HUEBNER: And that's where I'm going next,
18 literally next.

19 THE COURT: All right.

20 MR. HUEBNER: As required by the express terms of the
21 stipulation and order, Delta sent both a plain English letter -
22 - which we try to do when we're dealing with non-represented
23 parties -- explaining the stipulation, as well as the
24 stipulation itself and the objection deadline, to every single
25 one of the 3,642 retired pilots receiving non-qualified

1 benefits.

2 In addition, we were advised by DP3 that, on May 31st,
3 the very day of the hearing, before it was even entered on the
4 docket -- which, of course, you know happened a couple of days
5 later on June 2nd -- DP3 posted a copy of the stipulation in
6 its website, which has since that time been the most frequently
7 viewed document. DP3 member or not, it's a public website.
8 You know, many, many, many people have gone on to get it.

9 I've also been advised that, on May 31st, DP3 sent its
10 own letter by e-mail, directly sent to all 2,700 members, or
11 all the ones for which they had e-mail addresses, and provided
12 yet more information about the stipulation, again pointing out
13 the June 20th deadline.

14 But they did even more. They actually worked with
15 other retiree groups that have their own mailing lists, to make
16 sure -- and one group, I think, has something like 2,500 other
17 people -- obviously, there's a lot of overlap, sometimes
18 there's no overlap.

19 So then, on June 7th, DP3 posted even more information
20 on its website, which included a detailed set of frequently
21 asked questions and the like.

22 So there can be no question that every single retired
23 pilot that we know of got individual, particular notice, both
24 of the document and of a plain English letter. In fact, as my
25 recitation I think makes clear, many of them probably got it

1 three separate times. And that doesn't even count being able
2 to go onto websites, where it's been posted all over the place,
3 as, you know, the hot, hot doc (sic.)

4 (Telephone participants confer.)

5 THE COURT: I'm about to cut you off. I haven't yet.
6 Go ahead.

7 MR. HUEBNER: Of the 3,642 retired pilots, there were
8 a total of five timely objections. And when I say "timely," I
9 don't mean properly served, because we were much more generous
10 than that. If Delta got a phone call, if I got a fax, if the
11 Court called us, we only know of five people in the whole world
12 who actually took cognizance of this Court's June 20th
13 deadline.

14 Of those five, we called every single one of them.
15 And I'm very happy to report that, when they actually
16 understood what the stipulation provided for, four of the five
17 were rather satisfied and withdrew their objections and have
18 nothing further. Thus, out of 3,642 retired pilots, there is
19 only one individual who timely filed, let alone served --
20 which, again, we won't bother with because sometimes that's a
21 little bit unfair -- who timely filed and did not withdraw his
22 objection. That was Captain Buergey.

23 THE COURT: Forgive me to go back for the moment to
24 the numbers. Is the universe of retired pilots three-thousand-
25 some-odd or five-thousand-some-odd.

1 MR. HUEBNER: Your Honor, there are five-thousand-
2 some-odd retired pilots.

3 THE COURT: Yes.

4 MR. HUEBNER: This stipulation only addresses non-
5 qualified pension benefits --

6 THE COURT: Ah.

7 MR. HUEBNER: -- which means you have to have earned
8 enough during your career that you exceed the federal limits
9 that the pension plan is allowed to pay.

10 THE COURT: I see.

11 MR. HUEBNER: So Delta has to have a top hat and pay
12 the rest from its own treasury.

13 THE COURT: I see.

14 MR. HUEBNER: Of the fifty-three-hundred-odd remaining
15 pilot retirees, only 3,642 have non-qualified benefits, and
16 every one of those 3,642 got individualized notice.

17 THE COURT: I now understand.

18 MR. HUEBNER: Right.

19 THE COURT: Thanks.

20 MR. HUEBNER: And, typically, it's obviously the more
21 recent retirees who have higher final average earnings, as
22 opposed to people who retired in the, you know, '60s and '70s,
23 et cetera.

24 THE COURT: Right.

25 MR. HUEBNER: So what the stipulation actually

1 provided, Your Honor, by its terms, was that, if there was an
2 unresolved timely objection, we had agreed with DP3 that they
3 could bind all the objectors in a class action, and that we
4 would actually have a hearing and they would certify a class.
5 But we called them and said, let's not do that, there's one guy
6 who doesn't want to be bound, just let him out. You know, why
7 bother the Court, why go to the trouble and expense of trying
8 to bind a retired pilot against his will to a deal he does not
9 want, when he complied with the Court's order and objected?
10 Let's just let him out.

11 It took a little time to do that because, for obvious
12 reasons, it was a complex decision for a variety of parties.
13 But in our view, it was appropriate, less costly, and more
14 expedient. Rather than saying, too bad, you're bound because
15 we can't have three thousand six four hundred and -- 3,642
16 individual determinations as to the type of claim you have, we
17 said, you know what, let him have his day in court.

18 So we called him up and we had a series of
19 conversations, in which we tried to first convince him that the
20 stipulation was actually a good deal. But then, when that
21 failed, we ultimately sent him a letter on August 11th,
22 clarifying -- as you know, we're very careful about dealing
23 with people unrepresented -- in perfectly clear, plain English
24 what we had discussed: You won, you're carved out, you're not
25 affected, you reserve all your rights, file whatever claim you

1 want, you're done, like, you know, declare victory and go home.

2 Therefore, as far as I understand it, Captain Buergey
3 has nothing left to complain about. Because the only way in
4 which the stipulation bound any party other than DP3 itself was
5 for this treatment for this eleven-month period as to how we
6 would be treating their claim for non-qualified benefits:
7 Partially as a pre-petition claim and \$9 million worth as
8 administrative. We have told them, and the order we sent him,
9 the actual language we were going to put in the actual proposed
10 order, which, of course, we did, that says, you're free, file
11 whatever claim you want, and then we'll deal with it, and we
12 all reserve all of our rights.

13 Obviously, we intend to argue, because we have perfect
14 confidence in the law, that his claim is entirely pre-petition,
15 and we are very confident he will do much worse than the
16 stipulation would have provided, because we settled, frankly,
17 precisely because of the tenacity of DP3 and the expense that
18 it was visiting on the estate. We did not settle because the
19 law is not perfectly clear; it is clear.

20 So if Your Honor would like, I can read you some of
21 the language that was in the letter that we sent to him, but we
22 copied the Court on every one of these letters because we
23 wanted there to be a very clear record in the minds of
24 everybody, you know, that this wasn't a case where we were sort
25 of calling people and, you know, anything like that. It was

1 actually quite meticulous and precise.

2 And you'll see in your hearing binder, behind every
3 single document you will see the letter from Davis Polk. I
4 personally spoke to more than half of the objectors; my
5 colleague Tina Demento (phonetic) spoke to the other half. And
6 I don't say that to preen at all, but as Your Honor knows, I'm
7 running the whole case for Davis Polk. Nonetheless, we are
8 very serious about the pain and unfortunate circumstances that
9 retirees are facing in this case; and, rather than just shoot
10 off a letter saying, we'll see you in court, or you're late and
11 you're going to be bound, or, you know, have your lawyer call
12 my lawyer, we actually took the time to have one of the two of
13 us reach out to every one of them, which, frankly is why -- I
14 hope, at least; I'd like to believe it added some value -- the
15 vast majority of the people we spoke to actually were satisfied
16 and said, you know what, now that I understand that this is all
17 it does, it just treats largely this period, and that you've
18 convinced me that it's an improvement -- and many of them, by
19 the way, are extraordinarily sophisticated; they have read
20 every pleading, they have read transcripts. You know, this is
21 not, as Your Honor will hear, I'm sure in spades at the 4041
22 trial, and certainly has heard before, you know, the pilot
23 group is an extremely sophisticated group. So this was really,
24 I think, a very appropriate and real exchange, despite the
25 absence of counsel on the other side -- you know, since I went

1 to law school, it doesn't really give me much other than
2 something to put in a frame.

3 Then, Your Honor, as far as we know -- and again, we
4 were very liberal in terms of what we, quote, "know." It could
5 have been a phone call to Delta that was routed to us. It
6 could have been a letter sent to only us. It could have been
7 something that appeared on the docket, but was never served.
8 We only know of nine other untimely, improperly served
9 objections. And again, we could have very easily said, there
10 is a final federal court order that says, if you do not object
11 by June 20th, you are bound, period, end of story; you might be
12 pro se, but you don't get a free pass on the orders of a
13 federal court. We didn't do that at all.

14 What did we do instead? Even though the earliest --
15 these were not June 21, 22, 23 -- the earliest of the late
16 objections on the docket is July 7th, almost three weeks after
17 the Court-sanctioned objection deadline; the latest is about
18 two days ago. Some of these were two months' late, Your Honor.
19 But we, once again, tried to reach for a solution, especially
20 given that we're dealing with people in the Delta family, that
21 was both reasonable and practical.

22 What we instead said to them is, you know what, let's
23 defer the issue, we're not going to try to bind you today
24 because, you know what, there's a lot more pension stuff to do
25 be done, and you don't yet know what your whole picture is, so

1 why don't we just defer it as to both sides, we won't try to
2 argue today that you're bound, and you won't even have to,
3 frankly, show up or dial in. We, again, sent every one of them
4 formal letters memorializing the conversation, quoting verbatim
5 the language we were going to put in the proposed order, and
6 explaining in plain English that we meant what we said: That
7 they would fully reserve their rights to argue for whatever
8 claim they wanted to timely, properly file in accordance with
9 the bar dates in the case, but among the rights we reserve is
10 the right to argue that they're bound by the stipulation.

11 Because, Your Honor, what's very important to note is
12 that, again, the stipulation only addresses what we believe
13 will be an eleven-month period, which is: What is the
14 treatment of non-qualified claims from the petition date, the
15 day that we believe will be September 2nd? Obviously, there
16 are decades of claims after September 2006, and a lot of the
17 real action is going to be whether and in what amount the post-
18 termination claims are allowed. My personal --

19 THE COURT: And that's not even dealt with by the --

20 MR. HUEBNER: Not only is it not dealt with, but it is
21 perfectly -- it is carved out of the stipulation with perfect
22 clarity. It says, the parties do not agree as to whether or
23 not there is a claim, and if so in what amount, for post-
24 termination benefits, and all parties reserve all their rights
25 with respect thereto.

1 THE COURT: Right.

2 MR. HUEBNER: So I think that it is actually pretty
3 clear.

4 And the next thing I think it's important to mention
5 is that these nine retirees, the nine untimely objectors, of
6 course are less than one-quarter of -- not less than -- they're
7 .27 percent of the group. So just to keep it in context, as
8 far as we know, about a quarter of one percent of the affected
9 retired pilots group spoke up and said, we don't like this
10 deal; only one actually spoke up timely, let alone procedurally
11 properly.

12 If and when Captain Buergey and the other nine file
13 what I think they hope to file, which is an administrative
14 claim, I want to be very clear, so that there are no illusions.
15 We will argue -- and we have written the briefs already because
16 we had to litigate it twice with DP3 -- that they have a pre-
17 petition claim, and they will not get the benefits of the
18 stipulation. They will not get their pro rata share of the \$9
19 million, is my view now. Things might change, I don't know.
20 But it's not like opting out is necessarily an advantage based
21 on the law, with which we are very comfortable. We believe
22 that they will likely do worse.

23 We believe there is directly governing Second Circuit
24 law directly on point. We believe there is a very recent
25 Supreme Court case that very strongly validates it. With the

1 exception of one circuit that is a total outlier, that the
2 Second Circuit has directly said got the law wrong, it's
3 virtually the unanimous view across the country that these are
4 pre-petition, unsecured claims.

5 One last thing, Your Honor, which I should note, is
6 that, last night -- and it's a good example of the stack that
7 you may be holding -- last night, more than two months after
8 the objection deadline, a new objection, quote, "to proposed
9 DP3 stipulation" hit the docket, filed by James J. Goode, III.

10 But I think it proves the point very well of what I
11 made in the beginning, because the actual letter, which is a
12 form letter that certain new groups have been circulating
13 widely on the web, has nothing to do, in my legal judgment,
14 about the DP3 stipulation. What it actually says is -- and I
15 think many of your letters probably say this -- if DP3's
16 stipulation -- and I'm quoting now, I'm sorry, for the record.
17 And I quote:

18 "If DP3's stipulation is allowed to stand without
19 modification, it will essentially remove the last
20 barrier to Delta's plans to terminate the pilots'
21 defined benefit pension plan. Termination of my
22 qualified retirement benefit would cause great
23 financial distress to my family."

24 This is an objection to next month's trial, which is
25 the termination of the qualified plan. And Captain Goode, just

1 like everyone else in the world, is free to object to that.
2 You know, even DP3 filed a response, suggesting that the motion
3 should not be granted at this time.

4 So I think that part of what's going on, Your Honor --
5 and I certainly don't point any fingers -- this is enormously
6 complicated: Qualified/non-qualified, defined/defined
7 contribution. But in the real world, many of the letters that,
8 again, we've never seen, but we've seen some of them, are not
9 about the terms of the stipulation; they're not about the
10 eleven-month period for non-qualified benefits. They're about
11 the qualified plan. I think that Captain Goode and others, for
12 reasons I cannot explain, were under the misimpression that if
13 this stipulation went final, they would somehow be barred or
14 prejudiced from objecting to the qualified trial that's
15 scheduled for September 1st.

16 Luckily, Your Honor, hundreds of pilots were not under
17 that illusion. And so, as I'm sure Your Honor knows, the
18 docket grew rather extensively until the objection deadline of
19 the 17th, and has even grown since then -- August 17th. So
20 most retirees clearly understood that they were free to
21 continue to file objections to the September 1st. And I just
22 hope that clearing up that confusion will help at least some of
23 these people understand that, in fact, they may not have an
24 issue left.

25 So, Your Honor, based on how we've resolved the

1 issues, which are essentially we have completely ceded to the
2 one person that timely said they had a lot of problems with the
3 stipulation, and have agreed for the present not to press the
4 point, or seek to bind or bar the other nine, we're not sure
5 why anyone else is left to make a presentation to the Court.
6 Clearly, people can say what they want, but we specifically set
7 this up to obviate the need for people to be treated hostilely,
8 which the first step involved convincing DP3 to back off of the
9 terms of the stipulation, which expressly contemplated a
10 mandatory non-opt-out class; and, instead, essentially -- and
11 it took a little bit of work, I have to be candid -- you know,
12 we got -- you know, we played the fiduciary card and said,
13 look, these are people who have direct claims against Delta,
14 and if they want to argue that their claim should get a given
15 treatment, frankly, we're happy to let them, because we don't
16 think they're right, but this is really a privity issue between
17 us and our retirees.

18 So that's how we approached it, Your Honor. You know,
19 we could have obviously chosen many different paths, but I
20 think that, as I hope the Court appreciates, we actually tried
21 pretty hard to balance, sort of humanity with fiduciary
22 obligation with the law and Delta's ability to survive
23 financially. And so what we tried to do is create, frankly,
24 the least aggressive structure we could live with.

25 Therefore, our proposed form of order expressly says,

1 as promised in every one of the letters in your binder, that,
2 as to Captain Buergey, he is totally carved out; and, as to the
3 other nine, both parties reserve all their rights, they can
4 file whatever claims they want, and Delta can respond,
5 including at that time, should it some day be necessary to
6 argue that, in fact, being five weeks, six weeks, eight weeks
7 after the legitimate objection deadline, they no longer have a
8 right to claim that they're not bound.

9 But again, as I said before, my hope -- and it maybe a
10 Pangloss hope, it may be a legitimate hope -- is that when all
11 of the dust settles on the various pension matters, at least
12 some of those nine will go the way many of the other original
13 objectors did, which is to say, you know what, insolvency is a
14 horrible thing, but based on the law and the facts, Delta
15 actually did right by us, and we will accept the terms of the
16 document.

17 THE COURT: Who else wants to be heard?

18 MR. BOOTH: Your Honor, I'm Dean Booth, and I
19 represent DP3. I don't happen to agree with Mr. Huebner on the
20 assessment of the law. And we settled the case, and we don't
21 necessarily agree with everything having to do with his view of
22 what the law would have been had we not settled, but we did
23 settle, and we agree with everything else he says.

24 THE COURT: So with regard to Captain William Buergey,
25 the order that you will ask me to sign will basically say that

1 he is not bound by the stipulation, correct?

2 MR. HUEBNER: Your Honor, if I may quote it verbatim,
3 because it was in the letter, as well.

4 THE COURT: Yeah.

5 MR. HUEBNER: "Ordered that William C." -- we didn't
6 call him "Captain" in the order.

7 "Ordered that William C. Buergey shall not be and
8 shall not be deemed a covered pilot" --

9 Which is a defined term.

10 "-- pursuant to the stipulation."

11 THE COURT: All right.

12 MR. HUEBNER: He's just not covered.

13 THE COURT: I've looked at quite a few --

14 MR. SAPIR: Your Honor?

15 THE COURT: I'm sorry?

16 MR. SAPIR: Are you asking for others to be heard at
17 this point?

18 THE COURT: Sure. Come on up.

19 MR. SAPIR: Thank you, Your Honor.

20 THE COURT: You are?

21 MR. SAPIR: My name, Your Honor, is Donald Sapir, I'm
22 with the firm of Sapir & Frumkin here in White Plains. We have
23 with us, of counsel, Jeffrey Sapir of the firm of Jeffrey
24 Sapir, Esquire. We have been recently retained by Captain
25 William Buergey, the one objector who Mr. Huebner agrees filed

1 his objection timely.

2 We object to the stipulation being ordered by this
3 Court for several reasons, on both procedural grounds and
4 substantive grounds.

5 THE COURT: All right.

6 MR. SAPIR: Incidentally, Your Honor, Captain Buergey
7 is on the phone as a result of Your Honor's making arrangements
8 for objectors to be present via telephone, so I appreciate
9 that.

10 THE COURT: All right.

11 MR. SAPIR: Your Honor may be aware that there is a
12 very recent case that was decided by the Third Circuit Court of
13 Appeals, which I think, although not binding on this Court, is
14 a precedent that Your Honor should take a look at prior to
15 making any decision with respect to this proposed stipulation.
16 In the case, which is In Re: Kaiser Aluminum Corporation, 2006
17 Westlaw, 2061337CA3, decided July 26th, 2006, the Third
18 Circuit, in a situation very similar to the instant case, found
19 that when one tries to make Section 1113 of the bankruptcy law,
20 and to read that in conjunction with ERISA, when an employer in
21 Chapter 11 seeks to terminate more than one retirement plan, in
22 order to be fair and equitable to all parties, that the plans
23 must be considered in the aggregate; that you cannot pick off
24 one plan and have a termination, and then pick off another plan
25 and have a termination, and treat people differently while

1 deciding their individual factors without being aware of how
2 others are treated in the other plans.

3 And that is precisely what the debtor-in-possession is
4 attempting to do today: They are attempting to settle the non-
5 qualified plan, to terminate that plan so that they can then
6 move forward and terminate the qualified plan.

7 THE COURT: I don't know what the static is, but it
8 may be that we'll have to terminate the phone call because it
9 is impairing the audio here in the courtroom.

10 CAPTAIN BUERGEY: Your Honor, if I could speak just a
11 moment, this is Captain Buergey.

12 THE COURT: Yes.

13 CAPTAIN BUERGEY: Yes, sir. This -- the static may be
14 on my phone. I've been disconnected twice from these
15 proceedings already. I went to my next-door neighbor's house,
16 I'm on his phone. I have a vested interest in this, so if
17 there's a -- you know, there's a way to keep me on the line, or
18 if I can call back in. I've had to call back in twice during
19 the period that I started having these phone problems, I've
20 been told about the conference calls, they said the phone
21 company has been out twice to check my line. I'm not sure if
22 the static is coming from my end, but it might be.

23 (Court and court personnel confer.)

24 THE COURT: Why don't you hang up, Mr. Buergey and
25 call back in. All right?

1 CAPTAIN BUERGEY: Yes, sir. Thank you very much, I
2 will try anything.

3 THE COURT: I guess that was the problem.

4 You may proceed.

5 MR. SAPIR: Thank you, Your Honor.

6 I'd like to speak briefly to the notice that was given
7 to the retired pilots and the amount of time that they were
8 given in order to respond.

9 THE COURT: Let me interrupt you because I need your
10 help on something.

11 MR. SAPIR: Yes, Your Honor.

12 THE COURT: What's the --

13 UNIDENTIFIED: Your Honor (indiscernible).

14 THE COURT: What? Who said that?

15 UNIDENTIFIED: Yes, sir. For your information, sir, I
16 hear you clearly and distinctly, but when other gentlemen
17 speak, it is rather hard for them -- rather, hard for me to
18 understand what they're saying, so I would ask that they please
19 speak closely to whatever device they're using for their
20 speaking. Again, I hear you very clearly and distinctly, but I
21 just have a hard time getting the other people. I'm not sure
22 if that just applies to me --

23 THE COURT: All right.

24 UNIDENTIFIED: -- and I appreciate you
25 (indiscernible). Thank you.

1 THE COURT: I'm sure Mr. Sapir will keep his voice up.

2 MR. SAPIR: Thank you, Your Honor. I will attempt to
3 do so.

4 THE COURT: All right. Now here's my question. What
5 is your understanding of what this stipulation does for or to
6 the retired pilots who will be bound by and will be the
7 beneficiaries of the terms of the stipulation? Could you
8 summarize that for us?

9 MR. SAPIR: Yes, Your Honor. My understanding --

10 CAPTAIN BUERGEY: Your Honor, Captain Buergey is back
11 on.

12 THE COURT: All right. Thank you, Captain Buergey.
13 Just for your information, I have asked Mr. Sapir -- is that
14 right, Mr. Sapir?

15 MR. SAPIR: Yes, Your Honor.

16 THE COURT: [T]o summarize his understanding of what
17 this DP3 stipulation does with respect to the rights and
18 interests of the retired pilots. What does it do for the
19 retired pilots, and how does it harm the retired pilots who
20 will be affected by it?

21 MR. SAPIR: Your Honor, my --

22 THE COURT: Bullet points.

23 MR. SAPIR: Yes.

24 THE COURT: Very concise bullet points, that's all I
25 want.

1 MR. SAPIR: Yes, Your Honor.

2 My understanding is that, for the retired pilots,
3 there will be a nine-million-dollar payment that will be in
4 satisfaction of the entire amount that they allege is due and
5 owed to them as a result of the debtor-in-possession, what we
6 think was unlawfully, ceased making payments to those retirees
7 who were receiving monthly benefits, retirement benefits, from
8 the non-qualified retirement plan, except that they will then
9 be thrown into the general unsecured pool with respect to any
10 additional payments that they may believe is due and owing to
11 them. That is what I understand to be the sum and substance of
12 the benefit to the retired pilots.

13 Now on the downside.

14 THE COURT: Okay. Go ahead. Down --

15 MR. SAPIR: I'm sorry, Your Honor. Is there something
16 you'd like to add?

17 THE COURT: No, no. Downside. Go ahead.

18 MR. SAPIR: Yeah, and here -- you know, and I think
19 that there is -- there are very important downsides to this.

20 Number one, I think Your Honor may be aware that the
21 payments to the individuals, non-qualified benefits, is part of
22 the pilots' working agreement that, up until the time that it
23 was modified, required that the payment and funding of these
24 benefits be made on an ongoing basis.

25 My client Mr. Buergey -- and I can't speak for the

1 other retired pilots, but I think there are many, many people
2 in the same category as he -- received a qualified retirement
3 benefit and a non-qualified retirement benefit. He elected to
4 receive his qualified benefit in a fifty percent lump sum, and
5 to receive the remainder of his qualified benefits on an
6 ongoing annuity basis. With respect to his non-qualified
7 benefits, all were to received on that -- were to be received
8 on that basis.

9 Seventy percent of my client's monthly benefit is
10 received through -- or was received through the non-qualified
11 plan. So that when the debtor-in-possession unlawfully ceased
12 making those payments, which had never been told, I am told, in
13 any airline bankruptcy before, regardless of the fact that all
14 pilots in all airlines that had gone bankrupt had had a similar
15 non-qualified plan, all of them had continued to make those
16 payments. He was cut off from seventy percent of his monthly
17 benefit that he relied on.

18 The \$9 million that is offered is a pittance compared
19 to what I believe is the eleven months. Now I believe that Mr.
20 Huebner had indicated that it was -- or the stipulation had
21 indicated that it was ten months, but my understanding is that
22 it was October when the payments were cut off, and it's going
23 through -- the end of October, and it's going through the end
24 of September, which is the proposed termination date. I think
25 that that is eleven months. So I think that they were

1 shortchanged there by one month, even within the understanding
2 of the stipulation.

3 THE COURT: Let me just ask Mr. Huebner for a moment.
4 Am I correct that the \$9 million would be a fund that would be
5 -- out of which would be paid all of those retired pilots who
6 are covered by the stipulation for the post-cutoff period,
7 October on, what they would otherwise have received under the
8 non-qualified plan on a monthly basis, and they would receive
9 that pro rata, correct?

10 MR. SAPIR: That's correct, which I believe, Your
11 Honor --

12 THE COURT: No.

13 MR. HUEBNER: Sir.

14 THE COURT: Mr. Huebner.

15 MR. HUEBNER: I'm Mr. Huebner. It's actually not
16 correct, Your Honor.

17 THE COURT: All right. State it correctly.

18 MR. HUEBNER: Thank you. There's a lot that's not
19 correct, and we'll talk about that in a minute. But for right
20 now, the treatment that the pilots will receive for the first
21 eleven months is a combination of an unsecured claim, which is
22 currently trading at about thirty cents on the dollar, plus
23 their pro rata share of 9 million, which means, if you assume
24 current trading prices on the debt of their ultimate recovery,
25 they will get almost forty percent of the value of their non-

1 qualified benefits for this period.

2 THE COURT: For the ten months or eleven months,
3 whenever it is.

4 MR. HUEBNER: Yes. And nor do I believe is there any
5 reference in the stipulation to a ten-month period. And we'll
6 talk in a few minutes about Kaiser Steel, which is about as
7 miscited as I've heard a case miscited in a long time.

8 THE COURT: I'm just trying to understand the -- do I
9 recall from the stipulation that there's a recitation that the
10 average amount payable is about \$7 million a month.

11 MR. HUEBNER: Yes, Your Honor. And let me just --

12 THE COURT: And that entitlement under the non-
13 qualified plans, which would equate to -- if we're talking
14 about ten months, that would equate to \$70 million.

15 MR. HUEBNER: Yes.

16 THE COURT: That's being settled for \$9 million, to be
17 divided pro rata, plus an unsecured claim for the balance.

18 MR. HUEBNER: Exactly. It's about eleven and a half
19 percent, paid in cash; eighty-eight and a half percent in a
20 claim. The eighty-eight and a half percent times, you know,
21 roughly .3, today's market value, yields about a twenty-seven-
22 cent recovery on the claim side, plus the eleven-and-a-half-
23 percent recovery on the cash side, for an all-in, again,
24 assuming current market values of what the market believes
25 Delta claims will be worth, approaching almost forty

1 percent. Clearly, if the claims go up in value -- and they have
2 been steadily climbing since the day we filed, when they were
3 about half of what they are right now -- they could receive a
4 recovery well in excess of forty percent.

5 But we were very clear in talking to people -- and
6 this is exactly how we explained it -- and we'll be equally
7 clear here. We don't know what the actual market value of
8 reorganization securities will be at the time. So the best we
9 can do is say, look, right now, if you go to the pink sheets
10 and you say, what are Delta claims being sold for, it's twenty-
11 six, twenty-seven, twenty-nine, thirty cents. So based on
12 those numbers, you split it like that.

13 But to say that all they're getting is \$9 million, and
14 they have to share it, that's simply untrue. Their recovery,
15 we believe, is going to be well into the thirties, and possibly
16 very substantially above that if we do our job right and can
17 finish saving this company.

18 THE COURT: All right.

19 MR. SAPIR: Your Honor, I apologize if I misspoke. I
20 don't think I have, but I've had a lot of material to digest in
21 a very short period of time.

22 THE COURT: Me, too. I can relate.

23 MR. SAPIR: I appreciate that.

24 Just to go further on the downside, Your Honor --

25 THE COURT: So what do you want me to do, just vacate

1 the stipulation?

2 MR. SAPIR: Yes, Your Honor. I think that the pilot -
3 - the retired pilots are entitled to an 1113 hearing. And I
4 think that you will hear from many, many more pilots at that
5 time procedurally.

6 My understanding is that the notices were given to a
7 third party to mail, that they were mailed first class on June
8 7th. The pilots were given until June 20th to respond.

9 Now I realize Mr. Huebner says that they are not being
10 bound by that date, although by the fact that they are carving
11 only Mr. Buergey out, it appears that maybe that's what the sum
12 of the activity is.

13 Retired pilots have a lot of time on their hands.
14 They have free flight benefits or very low-cost flight
15 benefits. Many of them travel quite a bit. Many of them live
16 in small towns. My client, for instance, lives in Wisconsin
17 but receives his mail from Delta in Michigan at a post office
18 box. They are not required to live in any large city or town.

19 As a result of that, the mail that they receive in
20 many cases, my client tells me -- now obviously, he hasn't
21 canvassed 3,000 pilots, but he's spoken to many people who
22 received notice as he did a few days before the cutoff date, in
23 some cases after the cutoff date.

24 THE COURT: Let me interrupt you again. And I'll ask
25 a question to Mr. Huebner. Don't leave the podium.

1 Now suppose X number of retired pilots would elect to
2 forego the benefits of this stipulation. You pick the X. What
3 then? Would those who did not opt out, so to speak, would they
4 then split up the \$9 million?

5 MR. HUEBNER: Your Honor, and that's the problem. If
6 I could set the context for a second before I answer.

7 Number one, this gentleman keeps speaking as if he's
8 counsel to the retired pilots.

9 THE COURT: Oh, I know that. I know that. You don't
10 have to give me that.

11 MR. HUEBNER: His client is carved out. We're done.

12 Number two, we acted exactly as this Rule 2019 new
13 class lawyer is suggesting. People might -- and, by the way,
14 on Captain Buergey's address, I actually personally noticed the
15 discrepancy between the address on this cover letter and the
16 address Delta had. And I said, Captain Buergey, which is
17 faster, where would you prefer your mail? He said, please keep
18 it the original address even though I live in Land O'Lakes, I
19 need the other one for mailing. So just to show you the level
20 of meticulousness to which we went to be better than perfect.

21 But let me be clear. We've already done that. We've
22 added two months to the objection deadline and pretended that
23 people did not timely serve --

24 THE COURT: That's not my question. My question is:
25 Suppose X number opt out. Then do those who did not opt out

1 share pro rata new pro rata in the \$9 million and the rest are
2 left to their own devices, and if you prevail, then their
3 entire claim is just an unsecured claim?

4 MR. HUEBNER: And that's exactly the problem, Your
5 Honor. We had a DP3 who at the time had proxies, frankly,
6 which is a different issue, for all these pilots including
7 Captain Buergey. So there's a whole other issue I didn't even
8 get into which is none of these people even had a right to file
9 anything because at the time we did the stip they actually had
10 really made DP3 their proxy. But let's leave that to the side
11 also, as are the many other things.

12 We in DP3 cut a deal that said we will pay the retired
13 pilots as a whole with these benefits, \$9 million. And the
14 mechanic was that there would be a mandatory class action
15 precisely so that we knew and they knew that we would not be
16 paying twice and three times and four times.

17 I had to pressure a little bit my own client and then
18 DP3 to say, look, there's only ten of them, let -- you know,
19 let's deal with them as they come and if we have to pay 9
20 million to the group minus the ten and then possibly something
21 to the ten, probably nothing, Delta will take that on its
22 balance sheet.

23 But to now open up a possibility which Your Honor is
24 asking is, you know, what if we do a new thing where everyone
25 will be sent a form and say, I'd like to opt out, the whole

1 thing crumbles because then we would be bound to pay 9 million
2 to whoever remained and have a whole new fight with people
3 seeking, as you heard, five, six, seven times that.

4 What's important to note, Your Honor, is that DP3
5 withdrew multiple lawsuits at the time in exchange for the
6 benefits of this stipulation with an understanding that June
7 20th was the objection deadline and that people would be bound.
8 That's why probably they went -- he talks about the June 7th
9 mailing but, of course, ignores the May 31st multiple direct
10 notices with their own explanatory cover letter. He ignores
11 the second May 31st mailing. He ignores the e-mail. He
12 ignores the web posting. He ignores the frequently asked
13 questions. He ignores the most frequently viewed document.

14 So we can't really live with the situation. We've
15 already bent so far to allow all these people --

16 THE COURT: No. This is why I asked the question. I
17 want to know what if.

18 MR. HUEBNER: But to say, you know, let's just blow it
19 open and -- it's not appropriate to Delta and it's not
20 appropriate to DP3 and its membership. I just -- it's not
21 appropriate at all. And I guess the other thing I --

22 THE COURT: I have another question. Another
23 question. We have received a vast stack of letters. I would
24 suppose, I haven't counted them, but I would suppose a great
25 majority of which do confuse the terms of the stipulation with

1 the hearing on the termination of the qualified plans. And,
2 indeed, Captain Buergey's letter appears to do that to some
3 extent also. But it --

4 CAPTAIN BUERGEY: Excuse me, Your Honor. This is
5 Captain Buergey. Could I speak for a moment to that?

6 THE COURT: No, sir.

7 CAPTAIN BUERGEY: I'm sorry.

8 THE COURT: I'm sorry. I'm sorry. This will not work
9 if we have many people that are not in court trying to speak on
10 the phone.

11 I'm sorry. I've lost my train of thought with that.

12 MR. HUEBNER: Well, you were first saying that you
13 thought that some of the letters referred to the --

14 THE COURT: Yes, sorry. I have this vast stack of
15 letters, including quite a few opt outs, purported opt outs,
16 from members of DP3, even including a letter from Captain
17 Charles Chuck Roedema who was a member of the DP3 organization
18 and has written a letter. Do you have it? Have you seen it?

19 MR. HUEBNER: I don't, Your Honor. But the good news
20 is we already pre-bent on that one, also. Again, we're not
21 trying to hold anybody to the proxy that they originally sent
22 in. And I will bet dollars-to-donuts that ninety percent of
23 the letters that you are holding are dated after August 8th
24 when the new group formed and decided to fight the qualified
25 plan and got a huge mail list going and saying not serve an

1 objection, not let Delta's counsel know, but rather write to
2 the Judge as fast as you can.

3 THE COURT: Here is my question. Were the letters and
4 communications -- excuse me, I'm sorry -- which you have
5 indicated were sent to the members of -- not just the members
6 of DP3, but all of the persons affected by the stipulation, did
7 those give clear instructions that in order to object they were
8 required to file an objection so it would be a matter of record
9 as opposed to simply writing to the judge?

10 MR. HUEBNER: Yes, Your Honor. Again, it's a little
11 bit complicated because in a mega case like this filing an
12 objection under the case management order includes both filing
13 with the Court and serving it on some -- most parties -- we
14 actually did a thing which, in fact, I've never seen before
15 which is filing with the Court is deemed service on most
16 parties, so you don't have this endless set of huge mailings
17 you have to do. But you do have to serve some parties, the
18 SEC, the U.S. Trustee, the IRS, and others --

19 THE COURT: But were these instructions clearly given?

20 MR. HUEBNER: Well, what the claim language notice
21 says, which is that it has to be served in accordance with the
22 Bankruptcy Court's procedure by June 20th as provided for in
23 the stipulation. And then when you turn to the stipulation, it
24 expressly not only sends them to the case management order, but
25 even gives them the docket number. And, as Your Honor knows,

1 or may know, may remember, we actually, again, at Delta's own
2 expense have maintained since the first day of this case a free
3 website for anyone in the world without paying a penny to go at
4 any time by docket number and download documents.

5 And so what it says is that you have to file your
6 objection -- appropriately file your objection in compliance
7 with the case management order, Docket No. 660, on or before
8 June 20, 2006.

9 THE COURT: So that is the protection for all parties;
10 namely, if you wanted to object and opt out, you had to file
11 something on ECF.

12 MR. HUEBNER: Correct. Yeah. Well, not really, Your
13 Honor, because we've also enabled -- we've, as your chambers
14 knows very well, we have filed a lot of pleadings on behalf of
15 pro se people. If they send us a document, we say, you know,
16 we'll just file it for them. So, again, we treated all of
17 these however they came as being properly filed and served.

18 The reason, in case anyone on the phone is wondering
19 why we didn't say in the stipulation, you will serve it on all
20 the following people, one, two, three, four, is because it
21 changes all the time because as new, for example, governmental
22 parties come and are allowed to refuse service by e-mail, they
23 get added to a non-ECF list.

24 THE COURT: I think what I'm concerned with is the
25 number of letters that have been sent to the Court which I

1 don't maintain a docket of.

2 MR. HUEBNER: Your Honor, can I make a suggestion?

3 THE COURT: Yes.

4 MR. HUEBNER: I'm willing to take my bet that the vast
5 majority of these letters arrived very recently --

6 THE COURT: Did you look at it?

7 MR. HUEBNER: -- two months after the objection
8 deadline, they probably follow one of three or one of four
9 forms that the new splinter group has been using, and that
10 they're really not about the stipulation at all. In fact, Your
11 Honor, the new splinter group, if I may explain, actually
12 posted on its website, unfortunately, it's too late for us to
13 challenge the DP3 stipulation because the objection deadline
14 was June 20. They actually tried to provide money to Captain
15 Buergey. There's a whole exchange of letters on their website,
16 we're trying to feed them money so that they can actually try
17 to break it open for all of us because he's the only legitimate
18 objector.

19 Then the next day there's a letter, his counsel has
20 decided that we're not allowed to accept money so he's going to
21 have to do it himself.

22 So, Your Honor, just understand. There's a lot of
23 subtext here that we were hoping to spare the Court about the
24 propriety of this. But here is what I'll say.

25 Any letter that Your Honor has that predates August

1 1st and in any way actually says, the terms of the DP3 stip and
2 the non-qualified benefits are my cause for concern, I'd like
3 to turn around for one second and check with my client, but I'm
4 willing to say that we will add them to the list of parties as
5 to whom both sides reserve their rights.

6 That way, we will add a full six weeks --

7 (Counsel confer.)

8 MR. HUEBNER: We will add a full six weeks to the
9 deadline. Any letter you got by August 1 when these new
10 events, shall we say, started to take place, and you'll be
11 hearing a lot about the new events, I promise you, during our
12 qualified trial, a lot.

13 But I'm willing to say right now, and I have Delta's
14 approval, any letter in your stack that's before August 1st,
15 which is six weeks after the original objection deadline, even
16 if it came just to you and we never even saw it, we will add
17 them to the so-ordered paragraph that says as to these parties
18 both sides reserve their rights.

19 I think that in addition to the many, many, many other
20 liberal things we did there can be no question that that is
21 orders of magnitude of departure from the terms of the order
22 that this Court entered and was sent immediately individual
23 notice, three different -- two or three different
24 organizations, plain English cover letter, websites, e-mails,
25 the whole shebang. We'll do it.

1 We understand that the Court wants to be comfortable
2 that there are no unfortunate pro se parties that really didn't
3 learn about it in time. I'm more than a little bit skeptical,
4 given the sophistication and light speed of communication among
5 Delta's retired pilots that, you know, people just didn't get
6 back until July 9th. But, you know, we'll take it. You know,
7 you cut, we choose. August 1 and before, if they complained
8 about the stip, they're in the new category.

9 THE COURT: Back to you, Mr. Sapir. What more do you
10 have to say, given the fact that your client has prevailed?

11 MR. SAPIR: Your Honor, the --

12 THE COURT: It may not be prevailing. You may have
13 lost, but --

14 MR. SAPIR: -- the problem -- well, because I think my
15 client is being left to hang out to dry and I think that there
16 are --

17 THE COURT: What do you mean by that?

18 MR. SAPIR: Well, Your Honor, my --

19 THE COURT: I'm offended by that. Why do you say
20 that?

21 MR. SAPIR: I say that because --

22 THE COURT: You have requested and he has requested to
23 be carved out of the stipulation and he has been granted that
24 right. So what more do you want to say?

25 MR. SAPIR: What I would like to say, Your Honor, is

1 that he is now being required to bear the entire cost of the
2 objection to this stipulation.

3 Now Mr. Huebner has said several things --

4 THE COURT: What do you want me to do about that?

5 MR. SAPIR: Well, Your Honor, I -- my understanding,
6 based on information that I've received from my client, is that
7 DP3 had asked for additional contribution from those who had
8 been supporting it and that after this stipulation was
9 promulgated, approximately 1,100 have refused to contribute.

10 THE COURT: What do you want me to do about it?

11 MR. SAPIR: Well, my belief, Your Honor, is that the
12 brevity of the objection period, to begin with, cannot be cured
13 by counsel at this time saying, we will allow late objections
14 to be filed.

15 They in the joint stipulation recognize DP3 as the
16 class representative for everybody. However, it wasn't until
17 midnight of the night that the stipulation was prepared that
18 they were willing to entertain that.

19 Those pilots who were given notice that they had until
20 June 20th to object had no reason to believe, notwithstanding
21 the fact that several did object, there must be hundreds or
22 thousands out there who took the stipulation and the notice at
23 its word, that June 20th was the cutoff. They were too late
24 for June 20th; therefore, they did not bother to file an
25 objection.

1 But, Your Honor, I think that I can persuade you that
2 there is a strong likelihood that there are hundreds, if not
3 thousands, of retired pilots who object to this stipulation.
4 And if I may, Your Honor, I'd like to explain why I believe
5 that's the case. It's why client is so strenuously objecting
6 to the stipulation.

7 THE COURT: Mr. Huebner?

8 MR. HUEBNER: Your Honor, let me just say a few more
9 things if we're going to proceed with any sort of argument.
10 The Court should know a few things.

11 Number one, he cited the Third Circuit's recent case
12 in Kaiser. Let me tell you what it actually says, because as
13 you know, I often have to tell you what cases actually say.

14 MR. SAPIR: Your Honor, I object to that kind of
15 sarcasm from counsel.

16 MR. HUEBNER: Kaiser Center, 1341(a) of ERISA which
17 governs the termination of qualified defined benefit plans.
18 The debtor said, I can afford -- I can't afford all of them,
19 but I can afford some of them, but I want to terminate all of
20 them anyway under ERISA.

21 The PBGC appealed and said, you need to go plan-by-
22 plan. And the PBGC lost. And you'll be hearing about this
23 case next week. The Third Circuit said, you know what, if the
24 -- even if the debtor can still afford a couple of them it
25 doesn't matter, let him terminate all of them.

1 This case has nothing in the world to do with non-
2 qualified benefits, nothing in the world to do with the
3 stipulation, nothing in the world to do with fundamental
4 fairness. It's the opposite.

5 The Court gave the debtor a blank check over the
6 strenuous appeal of the PBGC. And the case that has
7 reverberated throughout the ERISA world to terminate all of its
8 qualified defined benefit plans under ERISA, even though it
9 couldn't prove that it couldn't afford one or two of them. To
10 say that that case suggests that this stipulation which has
11 nothing to do with 1341, nothing to do with ERISA, nothing to
12 do with qualified plan termination, is really not acceptable.

13 Two, but let's take -- let's assume that it applies.
14 He wants to talk about fairness? Every single non-qualified
15 benefit of every single non-pilot was terminated on the
16 petition date. Not one non-pilot has received one penny of
17 non-qualified pension benefits, nor will they ever again.
18 Pilots did better than everybody else.

19 So to even create a specter before this Court that,
20 you know, fundamental fairness requires that we look across.
21 You want to talk fairness? They're the only ones getting an
22 administrative claim for their non-qualified pension benefits
23 which we should also note are the benefits that are so high
24 they can't even be paid out of the qualified plan because they
25 exceed tax limits. This is the highest level benefit of the

1 highest level group and, of course, as a matter of fairness and
2 equity, Delta stopped paying them for everybody, pilot and non-
3 pilot alike, the day we filed because that is what the law
4 requires.

5 Three, he stated that Captain Buergey elected fifty
6 percent of his qualified benefit as a lump sum and the rest as
7 being paid out of the non-qualified. Totally wrong.

8 The way the pension plans work, he elected fifty
9 percent of his total benefit as a lump sum which includes non-
10 qualified and got a huge lump sum when he retired, like many
11 pilots did. And I can't blame them. You'll be hearing about
12 that a lot over the next few days of trial.

13 If I were retiring and I were concerned about my
14 employer's solvency and the plan solvency, I would absolutely
15 take a lump sum. But to be clear, that fifty percent that he
16 got, as Your Honor will hear they average not that far south of
17 a million dollars cash on the barrel head, \$2.5 billion of lump
18 sums were paid from the qualified plan since 2001. They got it
19 already. And it was their total benefit, not their qualified
20 benefit.

21 THE COURT: The qualified and unqualified?

22 MR. HUEBNER: Correct.

23 THE COURT: I'm sure you didn't mean to misspeak.

24 MR. HUEBNER: Then the rest is paid as a combination
25 of qualified and non-qualified. So to say, I'm losing seventy

1 percent of my remaining annuity; well, yeah, because you got
2 the first half. The whole thing present value in a multi,
3 multi, possibly even above a million dollars, in one day. So,
4 yes, that's true. Once you ignore -- and, again, I want to be
5 very clear, there's no moral judgment here. I would have done
6 exactly the same thing because you know what? I love my family
7 more than I love my employer. And my job is to do the best by
8 the people that I'm responsible for. Of course you take a lump
9 sum.

10 But you can't then say, oh, I'm losing most of my
11 pension. Your pension is your overall right. If you got a
12 full half of it on the first day and you're still getting forty
13 percent of what's left, you got eighty percent. You're not
14 losing seventy percent.

15 Your Honor, the allegations about what every other
16 airline did, those have no place here. Let's just say they're
17 totally untrue and leave it at that.

18 So, again, I'm happy to keep proceeding. But to have
19 the one guy who's actually carved out get up and keep
20 purporting to speak like a class representative when we've not
21 only agreed that the ones that are two months late and hit the
22 docket, we're treating them all as timely. But now, even to go
23 further and say ones that we know -- I don't even know what's
24 in those letters. But I'm making a pledge that if it's before
25 August 1st we'll add it to the we reserve rights category.

1 He has no further right to be heard, especially when
2 you consider that there's a lot of stuff going on on the side
3 about sort of, you know, secret funds and representation. This
4 is beyond inappropriate. His client is carved out. He should
5 sit down.

6 THE COURT: All right. Anything you want --

7 MR. SAPIR: Your Honor, I would propose that notice
8 again be sent and that the pilots again have an opportunity to
9 make objection to this proposed stipulation and order. I'm
10 quite confident, Your Honor, that the number of pilots who will
11 be objecting to this stipulation will not be fifty, will not be
12 a hundred, but will be in excess of 1,000.

13 And I'd like Your Honor to understand why I am so
14 confident of that. As Mr. Huebner knows, prior to Delta's
15 filing of its bankruptcy petition, in collective bargaining
16 negotiations with the pilots' union ALPA, the pilots gave
17 tremendous concessions, I'm told in excess of \$1 billion.

18 And I am also told that Delta said that that would be
19 remembered and that should bankruptcy be filed, that would be
20 made known to all of the creditors so that the pilots would not
21 have to take a double whammy before the bankruptcy to try and
22 stave off bankruptcy and after the bankruptcy.

23 DP3, I am told, was started approximately three years
24 prior to the bankruptcy was actually filed in this case. And
25 that's important for a specific reason.

1 DP3 had trustees who acted as a committee, if you
2 will, a committee of class representatives, in DP3's dealings
3 with the debtor. The trustees, I am told, are primarily in
4 three categories: Number one, people who are receiving
5 disability pensions. Those individuals, I am told, are in a
6 plan that will not be terminated. They will not be affected.

7 Number two, there were pilots who had been retired
8 more than three years or who will have been retired more than
9 three years as of today. That's important because if their
10 plan is terminated --

11 THE COURT: Let me tell you a problem that I have with
12 your presentation, Mr. Sapir. You have one client.

13 MR. SAPIR: Yes.

14 THE COURT: And that client has been granted the
15 relief that you seek. And you are now making an argument that
16 would threaten the benefits, whatever they are, of this
17 stipulation for all members. And I don't think you have a
18 portfolio to do that.

19 Does anyone else have any --

20 MR. SAPIR: I agree with you, Your Honor.

21 CAPTAIN BUERGEY: Your Honor, this is Captain Buergey.
22 Could I speak just for a moment, sir?

23 THE COURT: No, I'm sorry.

24 MR. SAPIR: Your Honor, I would like Mr. Buergey to be
25 heard. He's very knowledgeable and I have just been having a

1 difficult time grasping all of the elements of this in such a
2 short time.

3 THE COURT: Mr. Buergey, you've got a minute.

4 CAPTAIN BUERGEY: Yes, sir. Thank you very much, Your
5 Honor. I appreciate the indulgence. I realize this has been a
6 very difficult and confused Bankruptcy case because of some of
7 the events leading up to today, the fact that the original
8 bankruptcy judge was replaced for medical reasons --

9 THE COURT: It's a minute, Mr. Buergey -- Captain
10 Buergey, excuse me.

11 CAPTAIN BUERGEY: Yes, sir.

12 THE COURT: Get to the point.

13 CAPTAIN BUERGEY: Yes, sir. My point is I know you
14 have not been privy to everything that's happened up until
15 today, but the important point is that part of my objection --
16 or my objection is not just to the settlement. It's to the
17 stipulation itself and the fact that it's a very important fact
18 that the stipulation pulls down all of DP3's prior motions
19 because one of those motions was on the first day of the
20 hearing.

21 There was a motion to compel payment of the funding of
22 the pension plan itself and the non-qualified benefits. There
23 was a hearing held on October 27th. Judge Beatty, after a full
24 day's hearing, she ruled that DP3 had filed an 1113 motion
25 which only the creditor could file.

1 DP3 appealed that ruling to the Second Circuit Court
2 of Appeals. Judge Sand ruled that the Bankruptcy Court had
3 erred and directed that the motion to compel payments, which
4 was for the funding of the plan post-petition and the payment
5 of all non-qualified benefits post-petition, that there should
6 be a hearing on May 31st, 2006 to re-hear that case.

7 That hearing was never held because DP3 agreed to this
8 stipulation on May 23rd, and the stipulation pulled down the
9 protective motion that called for the hearing on the motion to
10 compel payments.

11 So because of the lack -- I am -- the reason I am
12 objecting to the stipulation is we never had a fair hearing in
13 court as directed by the Second Circuit Court of Appeals on the
14 motion to compel payments which would have required Delta to
15 meet its contractual obligations that are still contained
16 within the current pilot working agreement which is being
17 honored by the working pilots that says that Delta will pay the
18 entire -- they will fund the qualified plan. The working
19 pilots are still working, so Delta should be funding the plan
20 until they receive 1113 relief which they've never requested
21 through the Court.

22 And it also says that the efforts of the working
23 pilots are funding the non-qualified benefit. That benefit is
24 still contained in the pilot working agreement. Delta did not
25 modify that when they had 1113 hearings which were overseen by

1 a neutral panel and not by the Court. The Delta pilots did
2 modify the working agreement through Letter 51, but that letter
3 did not change the obligation of Delta Airlines to fund the
4 benefit -- the entire pilots' pension plan post-petition, nor
5 did it allow them to stop paying in qualified benefits, which
6 are still contained in the pilot working agreement which is
7 still being honored by the working pilots.

8 And that's the sum of my objection. It is that the
9 whole stipulation is flawed because it never allowed the light
10 of the day of that May 31st hearing as directed by the Second
11 Circuit Court of Appeals.

12 MR. HUEBNER: Your Honor, let me clarify --

13 THE COURT: This is Mr. Huebner speaking now.

14 MR. HUEBNER: Captain Buergey is very knowledgeable,
15 but he is not a lawyer. And I think I can say what happened in
16 a way that is both more clear and actually accurate.

17 DP3 originally brought a motion to compel -- this is
18 the Ionosphere argument, that it's all a post-petition claim.
19 Judge Beatty ruled that they were not the proper party to bring
20 it and dismissed it on procedural grounds.

21 They appealed that and Judge Sand said, you know what,
22 I -- Judge Sand of the District Court, obviously. It's not the
23 Second Circuit which was never involved -- I remand, the form
24 isn't so important, they should have their day in court.

25 At that point, DP3 had a motion pending to compel the

1 payments as administrative claims. We in DP3 put it on an
2 agenda letter when it looked like we were going to be moving
3 towards a hearing. Nobody ever ordered us to have any hearing.
4 As you know, that's not what District Courts do. They say,
5 this was denied on procedural grounds, I reverse, it should go
6 back to the Trial Court.

7 Then DP3 settled DP3's motion that DP3 had brought to
8 compel these payments for material consideration that we
9 believe will give all pilots who are retired and have these
10 benefits hopefully, you know, thirty-five, forty, fifty cents
11 on the dollar depending on how claims trade.

12 Captain Buergey has no standing to say that another
13 party that filed a motion is not allowed to settle its own
14 motion. What Captain Buergey does have a right to do, which I
15 have now told him in about four phone calls and for the last
16 hour, is file his own motion saying, I'm carved out, I believe
17 I have an administrative claim. He is free to argue that
18 Ionosphere is wrong, that the Supreme Court case is wrong, that
19 all the other circuits got it wrong, that UniMed is right, and
20 that he believes that he can compel us to pay him a hundred
21 cents on the dollar, unlike almost everyone else who wants the
22 benefits of the stipulation because they believe they're
23 getting more money than they would get if they brought that
24 litigation. He doesn't. And that's fine.

25 But as Your Honor, of course, I hope and trust knows,

1 Captain Buergey cannot tell an organization that it is not
2 allowed to withdraw its litigation against a third party.
3 That's just not how law works.

4 We could have bound him. We were supposed to bind
5 him. Every minute that passes I wish we'd bound him. But we
6 didn't. We were rather nice. And we said, let him be carved
7 out, let him file his claim, let him have his day in court.
8 That day is not today.

9 His lawyer representing him is welcome to make a
10 motion to compel payment of an administrative claim for his
11 pre-termination non-qualified claim. And we will fight it and
12 we will win. But that is not today.

13 THE COURT: All right.

14 MR. SAPIR: Your Honor, the flaw in Mr. Huebner's
15 argument is that now he is arguing on behalf of all of the
16 other retired pilots.

17 THE COURT: Actually, he's not.

18 MR. SAPIR: The flaw is that in a class certification
19 motion that any person who would be asked to consider whether
20 or not to -- in a class case, any person who would be asked to
21 consider a settlement would be given a minimum of thirty days,
22 and more likely sixty days, before any time they would have to
23 respond with any objection or any letter asking or statement
24 that they wished to opt out.

25 Now, as a result of this stipulation, DP3, which at

1 that time had been speaking for many pilots, still probably
2 less than half, at that time as a result of the stipulation,
3 they are being treated as the class representative. They are,
4 as a part of the stipulation, pulling, as my client indicated,
5 pulling away from the Court a motion that was my client's only
6 opportunity to be heard and the opportunity of the thousands of
7 other pilots.

8 Your Honor, I would ask that before you render any
9 decision, that Your Honor take a look at a letter that was sent
10 by a Jim High, H-i-g-h. Mr. High was a trustee of DP3 who was
11 --

12 MR. HUEBNER: Your Honor --

13 THE COURT: Haigh, H-a-i-g-h, I think it is.

14 MR. SAPIR: Yes. Who was summarily --

15 MR. HUEBNER: His client is --

16 MR. SAPIR: -- who was summarily --

17 THE COURT: I've read it. I have read it.

18 MR. SAPIR: You have?

19 THE COURT: Yes.

20 MR. SAPIR: So you're familiar with the process under
21 which this was presented. And Your Honor might also be aware,
22 you were asking me to name the pros and cons of the settlement.
23 One of the cons of this settlement is that the attorneys for
24 DP3 are to receive a fee of up to ten percent of the pot, of
25 the pool.

1 My client has told me that because he was part of DP3
2 that it was made very clear that DP3's attorneys would be paid
3 only out of the contributions that were being made by the DP3
4 members.

5 MR. HUEBNER: Your Honor, we carved that one out as
6 well. The stipulation by its terms says that any party in the
7 world is free -- DP3 has to make a motion to this Court upon
8 proper notice to all beneficiaries for any attorneys' fees. It
9 provides that any covered pilot is entitled to object.

10 Given that his client is not even in the stipulation,
11 for him to be complaining about attorneys' fees that his client
12 will never even have a whisper of a connection to, we're so far
13 beyond the pale of legitimate it's incredible.

14 But, to be clear, I'm -- because we are fiduciaries to
15 everybody, including retired pilots, we were actually very
16 meticulous in negotiating that no covered pilot would be bound
17 by any request for attorneys' fees. It had to be to this Court
18 on proper notice and, because the retired pilots don't all
19 understand this, this fee of up to ten percent, all that we and
20 the committee agreed to was that we will not object if it's
21 below ten percent. But everyone else is free to.

22 But here's the catch: That up to ten percent has to
23 cover not only all this work, but all of their work on the
24 post-termination claim also, whose value they believe is in the
25 hundreds of millions of dollars. But the ten percent is only

1 off of this piece. So they have to work the whole back end
2 where the real action is for a total fee that's only off of
3 these two pieces, which is the fee in the very -- so, you know,
4 just so you understand because we're not cavalier with retired
5 pilots. We're very respectful and serious about caring about
6 them as members of the Delta family.

7 We thought about every one of these things. And if
8 you look at the words of the stip and DP3 was asked to confirm
9 it because one of the objectors that withdrew his objection,
10 one of the guys who actually, unlike his client, properly,
11 timely filed and served an objection, his big point was, this
12 is ridiculous, the back end claim which may be hundreds of
13 millions in pre-petition claim, I believe that's a slam dunk,
14 why should we pay them anything of that? And I said, go read
15 the stip, that's not what it says, it says they have to do all
16 that work for free because the only fee that they get is ten
17 percent of these first two little pieces. He said, will you
18 send it to me in writing? I said, I'll do better, I'll copy
19 DP3 and make them send it to you in writing.

20 So I know there are a lot of retired pilots on the
21 phone and I know that there's a lot of anger at Delta. But
22 people, not him and not his client, who have no right to be
23 talking about this need to understand we actually tried very
24 hard to look out for everybody's interest, including on many of
25 the individual elements that we should not be discussing today,

1 but nonetheless are.

2 THE COURT: All right. Well --

3 MR. SAPIR: Your Honor, may I speak?

4 THE COURT: Will you wind up whatever your remarks are
5 very, very promptly?

6 MR. SAPIR: Yes. Thank you, Your Honor.

7 Okay, Your Honor. I just want to help Your Honor
8 understand why the individuals who negotiated this stipulation
9 were not adequate representatives of a large number of these
10 pilots who are retired --

11 THE COURT: I'm not going to litigate that now. I'm
12 sorry. I'm not even sure that's for this Court to litigate.
13 All right.

14 Anything else?

15 MR. SAPIR: Yes, Your Honor. I'll just say that in
16 considering this change in the fee structure of counsel that
17 Your Honor consider that as an adequacy of counsel argument
18 because I think Your Honor is being asked to certify a class as
19 a result of this stipulation. And as --

20 THE COURT: No, I'm not. Come on. Please.

21 MR. HUEBNER: Your Honor, let me help with that one.
22 First of all, there's no change in the fee structure. The
23 stipulation is perfectly clear on its terms. One person
24 misunderstood it.

25 Two, maybe for the benefit of people who are not

1 bankruptcy lawyers, claims objections that are applied to
2 hundreds of people get filed on fourteen days notice every
3 single day in Bankruptcy Court. This whole notion that, you
4 know, there should have been a sixty-day period, that's not the
5 bankruptcy world and it's not the real world.

6 We take action, as all debtors do, both to help and
7 with respect to parties under case management orders in every
8 single Chapter 11 corporate case that contemplate notices that,
9 as you know, as I could give you ten transcripts, we always
10 exceed whenever we possibly can, often by days, weeks,
11 sometimes longer.

12 So to say, you know, they're not knowing, and I don't
13 begrudge them for not knowing it, there's actually a case
14 management order in this case that governs length of notice.
15 There's actually very -- Bankruptcy practice, there are
16 bankruptcy rules. To say that there was some required implied
17 sixty-day time period because -- this is just totally not
18 appropriate and not correct.

19 We've bent over. We're now going to add a whole new
20 raft of people that are two months late. Enough is enough.

21 MR. SAPIR: Your Honor, I think --

22 THE COURT: Is there anybody else that wishes to be
23 heard in the --

24 MR. SAPIR: Your Honor, I think based -- oh, excuse
25 me, Your Honor. I think based on the groundswell of objection,

1 albeit perhaps tardily, I think that there is no need for Your
2 Honor to act so swiftly that those who retirement benefits are
3 at stake are not given the opportunity to be heard in a full-
4 blown Section 1113 hearing. Thank you, Your Honor.

5 THE COURT: All right. Anybody -- yes?

6 MR. BOOTH: Would you like to hear from DP3?

7 THE COURT: Yes. Why don't you tell us what's on your
8 mind, sir, once again? And give us your name again for the
9 record.

10 MR. BOOTH: Your Honor, my name is Dean Booth and I
11 represent DP3 and several individual pilots. It's true, as it
12 has been represented, that we filed a claim early in the case
13 under Section 1113. We argued what has been used as shorthand,
14 a UniMed decision which is a Circuit Court decision. It's
15 certainly arguable that there's a Second Circuit case against
16 us. We thought that it was distinguishable but Davis Polk did
17 not. Another roughly eight circuits have addressed this issue
18 slightly and none of them, of course, are precisely on point.
19 There was always some serious confusion, shall we say, at best,
20 at least among the circuits.

21 We would, to prevail, had to either thread a needle
22 with the Second Circuit or convince them an earlier decision
23 was wrong. Given the amount of money involved, we felt it was
24 very certain to go to the U.S. Supreme Court. We did not feel
25 like we could predict a result.

1 And so after serious negotiations with the lawyers for
2 Delta, we reached a settlement. And we did settle the 1113
3 claim.

4 My colleague, who just spoke, is arguing that perhaps
5 the 1113 issue would have gone our way. And perhaps he's
6 right. But we thought this was a sound judgment on the part of
7 our clients and Delta thought it was a sound judgment on the
8 part of their clients. Someday the Supreme Court will probably
9 resolve this issue. But we don't think this is the case for
10 it.

11 Thank you, Judge.

12 THE COURT: Thank you very much, Mr. Booth.

13 Anybody else in the court wish to be heard?

14 CAPTAIN LEWIS: Your Honor, I'm a retired pilot
15 opposing the DP3 stipulation.

16 THE COURT: Yes, sir. Why don't you come to the
17 podium? And your name, Captain?

18 CAPTAIN LEWIS: Sir, my name is Kenneth Lewis. I'm a
19 retired Delta pilot.

20 THE COURT: Okay.

21 CAPTAIN LEWIS: And I have two motions before the
22 Court, I believe. One for attorneys' fees and representation
23 and also in opposition to the DP3 stipulation.

24 THE COURT: Tell me first very briefly bullet points.
25 What's the basis for your opposition of the DP3 stipulation?

1 CAPTAIN LEWIS: Sir, I have a statement I'd like to
2 read. I'm not a speaker or a lawyer. I beg the Court's
3 indulgence for a few minutes while I read that.

4 THE COURT: All right. By the way, have you filed an
5 objection?

6 CAPTAIN LEWIS: Yes, sir, I have.

7 THE COURT: When did you do that?

8 CAPTAIN LEWIS: July 7th was the original objection
9 and I've since filed an objection to the attorneys' --

10 THE COURT: So under Mr. Huebner's proffer of a few
11 moments ago, you will be carved out of the stipulation. Is
12 that correct?

13 MR. HUEBNER: Your Honor, let me clarify two things.
14 Captain Lewis is one of the people with whom we communicated
15 and sent a letter. He's already in the category of -- it's not
16 a true carve-out like Captain Buergey, but he is free to file
17 whatever claims he likes. We're not trying to bind him today.

18 Two things I should -- so that he has in essence
19 reserved all his rights. His original objection which was
20 filed on July 7th I would note, because I think again there's a
21 lot of subtext here, is Captain Buergey's letter.

22 THE COURT: All right.

23 MR. HUEBNER: What he did was Captain Buergey wrote a
24 very long impassioned letter --

25 THE COURT: Right.

1 MR. HUEBNER: -- and I believe, unless -- and I might
2 be misspeaking, but I doubt it, that he removed Captain
3 Buergey's signature and put on his own, which is totally fine.

4 I just want to make sure that we're not about to hear
5 Captain Buergey's six-page letter read into the record by yet
6 another class representative as another avenue to try to get
7 Captain Buergey's views back in.

8 THE COURT: I will not permit that.

9 CAPTAIN LEWIS: No, sir, that's not my intention.

10 THE COURT: How long is what you want to read?

11 CAPTAIN LEWIS: About five minutes, sir. I'd be happy
12 to provide you with a copy.

13 THE COURT: All right.

14 CAPTAIN LEWIS: Your Honor, I would like the following
15 statement read into the record -- in the court record.

16 THE COURT: Just a moment. Have you read this, Mr.
17 Huebner?

18 MR. HUEBNER: No, Your Honor. I don't think this was
19 previously provided to us. I'm reading it now as well.

20 THE COURT: I'll tell you what I'll do, Captain Lewis.
21 I will see that it's docketed. It will be a part of the
22 electronic record. But I'm not going to take the time to have
23 you read this. We've spent a great deal of time on this.

24 If there's any one or two bullet points that you want
25 to make, and I'm not really talking about -- and I don't mean

1 to be disrespectful of your letter, but I'm not talking about
2 general statements or claims that the airline has generally
3 speaking acted improperly vis-a-vis the pilots. What is the
4 basic fundamental core of your argument that I should not
5 approve this stipulation?

6 CAPTAIN LEWIS: Sir, I believe that's reflected in the
7 trustee's statement of Mr. James Haigh that this stipulation
8 was reached by coercion, hollow threats and effectively muting
9 the voice of the retired pilots in fighting the termination of
10 the defined benefit program. That includes removing DP3's
11 objections to the previous motions.

12 THE COURT: All right.

13 CAPTAIN LEWIS: Sir --

14 THE COURT: I appreciate it.

15 CAPTAIN LEWIS: Excuse me.

16 THE COURT: Yes?

17 CAPTAIN LEWIS: I've given twenty-seven years of my
18 life to this airline. They are now talking about the next
19 twenty years of my retirement. I feel like the Court could
20 spare ten minutes to listen to my statement.

21 THE COURT: All right. Everyone will listen to you.
22 Read it all.

23 CAPTAIN LEWIS: Thank you, sir.

24 I'm not a lawyer or public speaker. I have dedicated
25 my life to being the best pilot possible and utilizing those

1 skills to bring people safely to where they are going. I would
2 rather fly through a thunderstorm upside down than stand before
3 this Court. I can fly a seven-hundred-thousand-pound airplane
4 around the world and land at a 180-miles-per-hour in the fog,
5 never seeing the runway until after touchdown, and have less
6 anxiety than I have before you today.

7 I've been thrust in this role by circumstances beyond
8 my control and comprehension. Delta Airlines has chosen an
9 assault upon the lives of its employees in the name of saving
10 the company. Delta has hired the best legal team that money
11 could buy.

12 The individuals who are impacted the most do not have
13 the resources available to them to fight a mighty corporation
14 aided by creditors with millions at stake. Delta shows up with
15 its staff of attorneys and aides, reams of legal maneuvers to
16 attack the individuals that have built the company.

17 I stand representing thousands of loyal employees who
18 have contributed significant portions of their lives to
19 building a once proud company. It has caused all of us a great
20 deal of pain as we have watched the company destroyed by a lack
21 of leadership and greed by individuals who have no
22 accountability or conscience.

23 Delta has chosen to ignore the mistakes of the past
24 and not even tried to recover the assets stolen by self-serving
25 individuals and executives. At the same time, they've

1 continued to ask for more and more from the employees.

2 Many of Delta's pilots, including myself, are from a
3 military background. We have fought in wars and faced enemies
4 of the United States. Many have faced the shells of missiles
5 of the enemy in combat willing to sacrifice their lives to
6 maintain the freedoms that we all enjoy. Delta now asks the
7 retired pilots to stand up and take a shot to the heart by
8 destroying their retirement at a time when we no longer have
9 the means to recover or return to the jobs that we loved. I do
10 not believe that any of Delta's pilots, retired pilots, deserve
11 to be cast aside and treated with disdain and disregard.

12 I stand today feeling like David before Goliath.
13 Goliath is standing in the valley of glory for anyone to dare
14 to oppose what they would like to do. Through manipulations
15 and maneuverings they are trying to use the Bankruptcy Court to
16 shed their responsibilities and promises.

17 They have purposely imposed deadlines for objections
18 that are impossible to meet. They send out notices of
19 deadlines to individuals with no confirmation that these
20 notices were ever received. They have coated themselves with
21 an armor of lawyers and legal representatives and pleadings to
22 destroy the lives of employees who sacrificed for the company.

23 Americans and their families believe in the rule of
24 law and trust the legal system for equal representation and
25 protection of our rights. We look to this Court for that

1 right.

2 Your Honor, I have only a few stones and one shot.
3 That shot is a stone of honesty. This is a stone that is
4 rarely found in today's corporations. The corporate philosophy
5 today, it seems to be getting all they can and damn the
6 employees.

7 A recap of the statements of executives will show that
8 honesty seems to have disappeared like the executives to fled
9 with bankruptcy-proof pensions. The statement of the CEO
10 during contract negotiations in 2004 indicated do it once and
11 do it right regarding cutbacks and sacrifices by the pilots.

12 The pilots gave Delta over \$1 billion in savings.
13 Using the shield of Bankruptcy Court, Delta used Letter of
14 Agreement 51 to force deeper cuts and prove that honesty is not
15 in their culture.

16 We as retirees have been abandoned and sold out. We
17 contributed for many years to the Air Line Pilots Association
18 and upon retirement were given a cold card indicating a
19 lifetime membership. This same association now says they do
20 not and will not represent retired pilots.

21 In The United Retired Pilots Benefit Protection
22 Association v. United Airlines in a filing before the Supreme
23 Court of the United States, a decision could be rendered on
24 whether or not retired pilots should be represented. Unlike
25 Delta's other creditors, the retired pilots never even had an

1 opportunity to protect their vested contract rights before they
2 were taken away.

3 It is clear that the retired pilots who were not given
4 access to the replacement benefits ALPA received from Letter of
5 Agreement 51 were not treated equitably and afforded the
6 Bankruptcy Code protections to which we were entitled.

7 Our retirement is covered by the Pilot Working
8 Agreement, but we have no ability to enforce it or even vote on
9 its contents. Delta has pleaded before Congress of the United
10 States for pension relief and then said it is only for the
11 other employees and does not apply to pilots.

12 Some of the retired pilots put their trust in an
13 organization called DP3. As stated in the letter to the
14 Bankruptcy Court by James D. Haigh, a trustee of the
15 organization, the DP3 stipulation agreement concerning retirees
16 was reached by coercion and hollow threats and effectively
17 muted the voice of the retired pilots in fighting the
18 termination of the defined benefit program. Again, the retired
19 pilots were not represented.

20 As pilots trying to decide on an early retirement, we
21 were assured by the Air Line Pilots Association that all
22 eligible pilots could retire and it would not put a strain on
23 the available funds. When Delta was asked for an accounting of
24 the funds in the retirement fund, the company would delay such
25 requests up to twelve months.

1 How many times in the past eleven months has Delta
2 been able to provide a supposedly detailed accounting and dire
3 predictions of shortfalls within the fund? Why was this
4 information withheld? We could not get an honest accounting of
5 the fund. Perhaps a forensic audit of the funds would reveal
6 exactly what happened. Would that not be in the best interests
7 of the Court, the employees and the company, if they have
8 nothing to hide?

9 Delta is now saying they must terminate the pilots'
10 retirement plan because of shortfalls and the threat of massive
11 retirements. Virtually all of the early retirements have been
12 and are precipitated by the company through their threats of
13 bankruptcy and termination.

14 I loved my job and would have liked to continue my
15 career and retire from the FAA at the mandatory age of sixty.
16 I would be flying today and anticipating an earned retirement
17 at sixty if Delta were trustworthy and honest.

18 I and almost 100 percent of those who retired early
19 would have stayed if Delta had not threatened our pensions with
20 termination. Delta stated in their affidavits that 800 to
21 1,200 would retire early and cripple the airline. Delta can
22 stop almost all of those early retirements with the words, "We
23 will honor your pensions."

24 Delta has purposely created the problem they now cite
25 to disregard our promised pensions and dumped them on the

1 federal government. Delta Airlines has stopped payment of my
2 pension. It is against the law. They stopped the payment of
3 the non-qualified portion the day after filing for bankruptcy.
4 That payment is part of the Pilot Working Agreement that
5 remains in force today.

6 A decision to stop payment was not upheld by the
7 Federal District Appeals Court and has been remanded back to
8 the Bankruptcy Court. Awaiting a resolution of that decision,
9 Delta is still withholding payments illegally.

10 Your Honor, there is only one thing standing in the
11 way of this Goliath. It is this Bankruptcy Court. Will this
12 Court allow this company to deliberately coerce pilots to
13 retire and then claim they cannot pay their pensions because
14 they retired? The employees and the retirees who proudly built
15 this company and served many years are at the mercy of this
16 Court.

17 This Court can go down in history as a defender of
18 what is right and honest. It can be the beginnings of a
19 tradition in a decision that can echo through the corporate
20 halls of America as Your Honor affirms the right of all
21 Americans to an earned and enjoyable retirement.

22 Thank you, Your Honor. I'll be happy to answer any --

23 THE COURT: Captain Lewis, I am very grateful for your
24 letter. It's a fine letter.

25 CAPTAIN LEWIS: I'd be happy to answer any questions.

1 THE COURT: I appreciate it and I will ask that it be
2 docketed so it can be a matter of record. And I appreciate
3 many of the things that you have articulated in your letter.
4 And you have articulated them with great passion and emotion
5 and intensity and I appreciate that.

6 There are several themes that you touched on. One is
7 alleged mismanagement, et cetera, in the past. That's
8 something, if it is so, if there's been improper conduct in the
9 past, that is something that is up to the professionals to deal
10 with. That's not before the Court today. There's nothing I
11 can do about that today.

12 I will say this. I have had enough exposure to the
13 economic realities of the airline industry through my contact
14 with this case and the factual presentations by experts and the
15 professionals as to the various causes of economic woe that
16 have afflicted all of the airlines since September 11, 2001,
17 causes that are ongoing today and will continue into the
18 foreseeable future such as, for example, absolutely
19 unprecedented fuel costs. I've seen enough of that evidence
20 from both sides of the aisle, both the union side and their
21 experts and the company's side and their experts, to have a
22 reasonable understanding of the many complex and difficult
23 problems that have confronted the airline industry and,
24 particularly, the so-called legacy airlines like Delta, cost
25 structures, fuel costs, et cetera, that have driven so many of

1 the legacy airlines into bankruptcy. It's not just Delta.
2 It's many of them.

3 One of the problems in any bankruptcy, any situation
4 where the funds and the assets of the business entity are not
5 sufficient to pay debts as they come due and to carry on in
6 business is by definition everyone gets hurt. There can be no
7 doubt that the pilots, as well as other unions, I've had a good
8 deal of litigation in my court on this issue, that there can be
9 no doubt that the pilots have made enormous sacrifices, both
10 before and since the filing of the bankruptcy. There's no
11 issue about that.

12 What is at stake here is not simply whether or not it
13 would be honest or right or fair to continue paying this
14 pension or that emolument. What is at stake here is not simply
15 whether these particular elements of obligation by the company
16 will or should or ought to be paid. They all ought to be paid.

17 The issue is whether any of it will be paid if the
18 company doesn't survive. And that's what a reorganization and
19 a restructuring is. It is a lot of grief and a lot of pain for
20 every constituency. I've written two decisions recently in
21 connection with another union matter with a Delta subsidiary in
22 which I've discussed at least my view of the law on these
23 issues.

24 There are no easy solutions. I have no idea what the
25 outcome of the company's application under 1113 is it, that's

1 coming up early in September?

2 MR. HUEBNER: The Comair is 1113 and then the upcoming
3 pension is 4041.

4 THE COURT: Okay. I haven't looked at the Delta
5 papers at all yet. I have no idea what the outcome of that
6 will be.

7 What is before me today is this stipulation which was
8 negotiated by an organization purporting to represent many,
9 many of the pilots. Like every settlement stipulation, it is a
10 compromise. Who knows whether it is ultimately going to turn
11 out to be beneficial to the members of DP3 or the retired
12 pilots for whose benefit it was negotiated or not.

13 A lot depends, I guess there, on the basic question
14 that both counsel have addressed, which is whether or not --
15 what the merits of the underlying argument are. Mr. Huebner
16 has expressed great confidence in the company's position and
17 has explained the willingness of the company to compromise the
18 issue.

19 Apparently, the DP3 management, not including Captain
20 Haigh, and counsel for DP3 felt that this was a good and valid
21 compromise. And what I'm now being asked to do is to make a
22 determination that will affect everybody, everybody, because if
23 I reject this stipulation, then none of the retired pilots will
24 realize the benefits of the stipulation. So you and others who
25 oppose the stipulation want to make a bet that I should reject

1 this stipulation, reject the \$9 million of post-petition
2 dollar-for-dollar payment that has been proffered, and leave it
3 for further litigation, which may result in the pilots being
4 entitled to full payment if the company is able to do that, but
5 may also result in a flat out loss for the retired pilots. Now
6 that's the problem that I have to deal with.

7 And so how do we resolve that problem? Well, we try
8 to resolve it by a procedure. And the procedure is to give
9 notice to everybody who would be affected by this stipulation
10 and say, if you want to object, do it by X date. That date has
11 now been extended, and that's until August 1, I believe. Isn't
12 that what you said?

13 MR. HUEBNER: Yeah. Your Honor, again, we stand by
14 our commitment. Captain Lewis, just to be clear, is already in
15 the group that actually did file.

16 THE COURT: Right.

17 MR. HUEBNER: But, in addition, any letter that you
18 guys hand to us that predates August 1st, we will revise the
19 order and add all of those named individuals to the category of
20 people as to whom both sides reserve their rights, and they
21 will not be found to be covered pilots as of today.

22 THE COURT: All right. So the procedure -- bear in
23 mind that the stipulation has benefits for the retired pilots
24 that they might lose if the matter had to be litigated. And
25 every retired pilot, I think it's fair to say, was given

1 notice.

2 Now there's been an objection that it wasn't enough
3 notice. Well, that notice has been greatly extended.

4 CAPTAIN LEWIS: Sir, may I respond to that?

5 THE COURT: If I may --

6 CAPTAIN BUERGEY: Your Honor, this is Will Buergey. I
7 got disconnected. I apologize again for breaking in.

8 THE COURT: Thank you, sir.

9 So I have to decide whether or not a very few people
10 who have objected are going to deprive all of those who didn't
11 object of the benefit of this stipulation.

12 CAPTAIN LEWIS: Yes, sir. I understand.

13 THE COURT: Do you understand that?

14 CAPTAIN LEWIS: Yes, sir. I understand and I don't
15 take --

16 THE COURT: And is that what you want me to do?
17 Because I don't think you know whether or not the great
18 majority of the retired pilots do or don't want the benefit of
19 this stipulation.

20 Mr. Huebner is entirely confident that if you don't
21 have the benefit of this stipulation you're going to lose. I
22 haven't read the cases that deal with the merits. I don't know
23 what the merits are. Apparently, DP3, I'm not going to put
24 words in their mouth, but apparently DP3 and the management of
25 DP3, except for Captain Haigh, and DP3's counsel concluded that

1 this stipulation was better than litigating. That's what
2 happens every time there's a stipulation.

3 And, as I said before, it's true that this is not like
4 a union contract where the union members were given the right
5 to reject it in a vote. But every retired pilot was given
6 notice and was given the right to object. And everyone who did
7 object will be carved out.

8 Why isn't that sufficient? Why should the views of
9 you and Captain Buergey and a few others who objected, and are
10 out, why should your views be imposed on everyone else who did
11 not object?

12 CAPTAIN LEWIS: I understand that, sir. And I can
13 only respond to some --

14 THE COURT: You're not harmed by this stipulation.

15 CAPTAIN LEWIS: By this stipulation I am, sir. If I'm
16 covered under the stipulation.

17 THE COURT: You are not covered. You've been
18 excluded.

19 MR. HUEBNER: Your Honor, just to clarify, the
20 approach that was laid out in the letters is that Captain
21 Buergey as the only timely objector is truly carved out. He is
22 defined in the order that we propose as not being a covered
23 pilot.

24 For Captain Lewis and the others that we knew about,
25 and then the rest that I assume that we will be handed a sheaf

1 of letters to sort through and add to the list. (Pause in
2 proceedings. Static on telephone line.) What we had described
3 to the Court before is that as to those people, including
4 Captain Lewis, each reserves their rights. We're not trying to
5 --

6 THE COURT: I don't know what that means.

7 MR. HUEBNER: In other words, we're --

8 THE COURT: If you reserve your rights, does that mean
9 that he doesn't get the benefit of the stipulation?

10 MR. HUEBNER: No. What it means is that we will, if
11 we need to, come to the Court at a later date and they can make
12 their objection that they should not be bound, and we will be
13 able to object to their administrative claim on any number of
14 grounds, including that they should be bound. In other words,
15 we're -- as to the nine and maybe five or six more is my guess,
16 we're deferring the issue.

17 They're not getting a true carve-out.

18 THE COURT: I see.

19 MR. HUEBNER: But both sides -- we're not trying to
20 rope them in.

21 THE COURT: Well, that's the best of all possible
22 worlds. You can still argue it.

23 MR. HUEBNER: We're leaving them in the middle. And,
24 again, what I said in my opening presentation is exactly what
25 Your Honor just said is where we were, which is I actually,

1 maybe naively, truly believe that when some or all these people
2 understand what the deal is and that we actually gave
3 additional value above what we believe the law requires, like
4 many of the objectors we spoke to, they will say, you know
5 what, now that I know how it's all sorted out I'd like to be
6 included.

7 THE COURT: All right.

8 MR. HUEBNER: And I don't want to foreclose the option
9 in either direction because, frankly, people don't have enough
10 information necessarily to know where they want to be.

11 THE COURT: I understand that, yeah.

12 CAPTAIN LEWIS: Sir, didn't you just say people don't
13 have enough information and now he's telling us pilots that we
14 have enough information to decide.

15 MR. HUEBNER: No. What I'm saying is that as to the
16 individual objectors who believe that they oppose the
17 stipulation, I would rather let them wait and see how the rest
18 of the pension situation shakes itself out and then seeing what
19 has transpired, Captain Lewis and others can decide either,
20 yes, I want to file my admin. claim, I want to object, I don't
21 want to be part of this stipulation; or, now that XYZ has
22 happened, even I am satisfied and I'm happy to be part of it.

23 THE COURT: Captain, thank you very much for your
24 submission. I am grateful to you and I hope you understand a
25 little better now the issue that confronts the Court.

1 CAPTAIN LEWIS: Thank you, sir.

2 THE COURT: Thank you. Anybody else? All right.

3 MR. HUEBNER: Your Honor, what I would propose to do,
4 although I am tempted again for the benefit of some to list how
5 aggressive and litigious DP3 has been with us every step of the
6 way so that it would not -- should not be thought by Captain
7 Lewis or anyone that they laid down on this one for some
8 undescribed reason, but I'll spare the Court that.

9 I think probably the appropriate thing to do since we
10 do -- will stick to our new, new, new procedural liberalism is,
11 and if I can represent to the Court that I will take the stack
12 of letters from your clerk, we will make a set of copies and
13 return the originals back to chambers. We will then adhere to
14 what we represented on the record, which is that any party that
15 filed a letter before August 1, we will add them to this second
16 category in which Captain Lewis and others are found, which is
17 it is not being determined today whether you are a covered
18 pilot. You reserve your rights; we reserve our rights. Let's
19 see what the future brings. If you really don't want to be
20 bound someday, you can argue that you shouldn't be, and we will
21 reserve our rights, especially for ones that are frankly more
22 than two months late, to argue that you should be.

23 And you can decide then the very issues raised by
24 Captain Buergey, which is, you know, I didn't get it, you used
25 the wrong address. There may be excusable neglect in a couple

1 of cases. I'm not saying there may not be. But we didn't try
2 to force it today precisely to not force people to come to
3 court and face what I take a little bit of umbrage at. Goliath
4 was not just big; he was evil. Insolvency is not satanic. The
5 fact that Delta is insolvent does not mean that it is bad. And
6 so I would note that, you know, there is a lot that one could
7 say back. But in light of the circumstances, I think we'll
8 leave it at that for now.

9 THE COURT: All right. I appreciate that.

10 I will take a very brief five minutes, and then we
11 will resume. And we have another matter to argue.

12 MR. HUEBNER: Your Honor, we will just -- two final
13 things. One, I assume we'll just send in the order with a
14 letter representing that we've added all the additional
15 parties.

16 THE COURT: Well, I'm going to make a ruling on it in
17 a moment when I return.

18 MR. HUEBNER: Okay.

19 (Recess taken at 4:11 p.m.)

20 (Proceedings resume at 4:25 p.m.)

21 THE COURT: Have a seat, please. All right.

22 Before me is an application to approve the stipulation
23 between the DP3 organization and Delta dated May 25, 2006.

24 The stipulation is at bottom rather simple. It
25 provides for the withdrawal of certain DP3 claims and

1 objections that have been filed in connection with these
2 bankruptcy proceedings. I'm sorry. And it provides for a
3 compromise in respect of non-qualified pension benefits payable
4 between the filing of the bankruptcy and the resolution of
5 Delta's motion to terminate the plan. Is this correct in
6 substance?

7 MR. HUEBNER: Your Honor, the non-qualified plan
8 terminates by its terms and the order of LOA 51, when the
9 qualified plan is terminated.

10 THE COURT: Right.

11 MR. HUEBNER: Which is why the expected effective date
12 of termination of the non-qualified plan is also September 2nd.
13 That was also expressly addressed in LOA 51.

14 THE COURT: Right. What is resolved, and correct me
15 if I don't have this correct, in the stipulation in essence is
16 simply the claim or the claims that covered pilots, as defined,
17 will have in respect of their entitlement under the non-
18 qualified pension plans during that period from the date of
19 filing to the date of termination of the non-qualified plans,
20 that period of time being the period in which Delta has not
21 paid any benefits under the non-qualified plan.

22 And the fundamental question is whether or not the
23 amounts to be paid during that relevant period of time will be
24 deemed in effect a post-petition obligation or a pre-petition
25 obligation unsecured, correct?

1 MR. HUEBNER: Yes, Your Honor.

2 THE COURT: The compromise that was reached provides
3 simply stated that Delta will set aside a fund of \$9 million
4 representing approximately what percentage?

5 MR. HUEBNER: Assuming September 2nd, 2006
6 termination, Your Honor, it is 11.5 percent approximately.

7 THE COURT: Okay. Assuming that date, the \$9 million
8 represents approximately eleven and a half percent of the total
9 amount of the post-petition non-qualified pension payments.
10 Have I stated that correctly?

11 MR. HUEBNER: Yes, Your Honor. Of the amount that
12 accrued subsequent to the petition date.

13 THE COURT: Yes. That amount would be shared pro rata
14 between covered pilots, correct?

15 MR. HUEBNER: Yes, Your Honor.

16 THE COURT: And the amount of the covered pilots'
17 claims not discharged by that pro rata payment would be an
18 unsecured pre-petition claim. Is that correct?

19 MR. HUEBNER: Yes, Your Honor. Our view is that the
20 88.5 percent that's left, I believe the stipulation expressly
21 says we agree that it is an allowed pre-petition general
22 unsecured claim also resolving the argument that there actually
23 is no claim at all. So that's true as well.

24 THE COURT: All right. DP3 is an organization
25 claiming to represent some significant portion of all the

1 retired pilots, the precise amount I'm not clear, but somewhere
2 north or south of fifty percent of all of the retired pilots.

3 DP3 has, I think the record will be very clear,
4 vigorously litigated a variety of positions on behalf of its
5 constituency since the filing of these Delta cases.

6 The question is whether or not this stipulation should
7 be approved by the Court. That's the only thing that's before
8 me today. Am I correct, gentlemen? Counsel?

9 MR. HUEBNER: Yes. I mean, as a technical matter,
10 Your Honor, the stipulation actually was approved on May 31st.

11 THE COURT: It was approved, but subject to objection.

12 MR. HUEBNER: Exactly. So, really, I think to be
13 technical, we are addressing the objections that have been
14 filed.

15 THE COURT: That is a better statement of it.

16 One of the objections that has been filed has been
17 resolved by Delta, Captain Buergey's objection, by simply
18 agreeing that he will not be a covered pilot. Am I correct?

19 MR. HUEBNER: Yes, Your Honor. The letter that we
20 sent him had the words of the proposed order which, in fact,
21 are found in the proposed order that provide that he is not and
22 shall not be deemed a covered pilot as set forth in the DP3
23 stipulation.

24 THE COURT: The debtors have agreed with regard to
25 letters or formal objections filed on or before August 1 to in

1 effect reserve all rights as between all persons who sent
2 letters or objections, whether timely filed, indeed, whether
3 filed or not, to a future date. I will ask you, Mr. Huebner,
4 to restate precisely the language you wish.

5 MR. HUEBNER: Okay, Your Honor. It's actually even a
6 little bit more generous than that.

7 THE COURT: All right.

8 MR. HUEBNER: Anything that actually appeared on the
9 docket up until I think August 16th, we listed on the agenda
10 letter. And those nine people, many of them were actually well
11 after August 1st, we were already willing to treat all of them
12 as deferred.

13 In addition to that group what we represented today is
14 that we would take the letters that were received only by Your
15 Honor and seemingly not on the docket and certainly not sent to
16 us, and that we would also -- or if chambers would like to send
17 us only the pre-August 1st ones. That actually might be
18 easier. Then there can be no allegation that we did any
19 sorting. Maybe that's actually, just for the sake of perfect
20 un-Goliath-like punctiliousness, what I would ask, then, if
21 your chambers could e-mail us, here are the X letters that we
22 have that pre-date August 1st, please add them to the list of
23 we are deferring as to whether or not they're covered pilots.
24 Then there can be no question as to the perfection of the
25 treatment of each individual.

1 THE COURT: All right. The question that now remains
2 is whether the Court should in effect enter an order vacating
3 the Court's prior approval of the stipulation. And it is my
4 conclusion that I cannot do that, that I will and do approve
5 the stipulation.

6 It is a fact that the stipulation will cover pilots
7 who were not formerly a member of DP3. Virtually every order
8 entered by a Bankruptcy Court or proposed to be entered by a
9 Bankruptcy Court affects many parties in interest over and
10 above the parties that are the proponents or opponents of any
11 particular order.

12 How do we deal with that as a matter of procedure? We
13 deal with that in the Bankruptcy Code as generally in American
14 jurisprudence by giving notice to persons affected and an
15 opportunity to be heard. That was done in this case. There
16 have been some objections that the notice period -- the notice
17 deadline for filing objections was too short. Many people,
18 many of the retired pilots, would not necessarily being laymen
19 have known how to file a formal objection on ECF.

20 All issues of that sort I believe have been resolved
21 as best they can be by the company's I believe quite generous
22 proffer as articulated by Mr. Huebner carving out those nine
23 people and preserving their rights who had filed objections on
24 ECF by August 16 did you say?

25 MR. HUEBNER: Again, Your Honor, not to gild the lily,

1 but many of them, in fact, we filed on their behalf where they
2 were only sent to us. But we nonetheless treated them as
3 having been properly, timely served and filed.

4 THE COURT: Very good.

5 MR. HUEBNER: And I believe that the cutoff that is
6 used is August 16th. The only one I think we know of is that
7 James Goode one which, as I read to the Court, appears to be
8 entirely about the qualified plan.

9 THE COURT: Right.

10 MR. HUEBNER: So it's not that there are others that
11 we intentionally cut off. That's pretty much the world.

12 THE COURT: Right. The Court has received many
13 letters from people who have expressed their earnest concerns
14 about either the DP3 stipulation or, more likely, the company's
15 motion which has not yet been heard to terminate the qualified
16 pension plans.

17 I have read, I think, all of those letters. I am
18 obviously very concerned about them and the concerns that they
19 speak.

20 And those people who have written prior to August 1
21 will be put in the same category that Mr. Huebner articulated,
22 namely, their rights will be reserved and resolved at a later
23 date.

24 The bottom line is an organization that has held
25 itself out as representing the interests of retired pilots

1 filed objections and claims. Those were, to the extent
2 provided in the stipulation, resolved by the stipulation. A
3 stipulation has within it potential benefits for retired
4 pilots. It also gives up potential legal rights of retired
5 pilots, as is always the case of any compromise, any
6 settlement, any stipulation.

7 I am not in the position to reject a stipulation as to
8 which only a relatively tiny handful of persons affected by it
9 have chosen to express objections. Virtually all of those who
10 have expressed objections will have their rights to argue pro
11 and con reserved to a later date. That means that if I were to
12 reject this stipulation, I would be rejecting without any basis
13 to believe that the thousands of retired pilots who have not
14 been heard from would seek to object to this stipulation.

15 There has been ample opportunity by not for those who
16 object to the stipulation to express themselves. Those who
17 have done so, even on a very untimely basis, will have their
18 rights reserved to a later date. On that basis, I will approve
19 the stipulation with the modification that Mr. Huebner has
20 articulated and I will ask you to provide me with an
21 appropriate order to do that.

22 MR. HUEBNER: Thank you, Your Honor. Two very small
23 housekeeping matters?

24 THE COURT: Yes, sir.

25 MR. HUEBNER: As Captain Lewis said at the outset, he

1 sent actually two letters. One of his letters -- and again, we
2 were very I think -- quite fair in terms of how we docket and
3 also set the agenda letters. One of his letters does contain a
4 request for the appointment of counsel, which I believe he
5 actually mentioned at the outset, but then did not come back
6 to, and I don't think we should leave the docket open on that
7 point.

8 In other words, clearly, we would have a lot to say
9 back to an individual pilot or retiree seeks counsel and
10 Delta's expense, but given that -- if you were likely to deem
11 as better his motion, he may need to say something about it and
12 then I can respond, but I don't want to leave it unstated that
13 he did seek to have Delta pay for his attorney to -- pay for
14 him to get an attorney and the like.

15 THE COURT: Captain Lewis?

16 CAPTAIN LEWIS: Sir, to date Delta has withheld over
17 \$53,000 of my pension and used that money out of the general
18 ledger to pay their attorneys' fees to use against me. I feel
19 it only appropriate that Delta pay my attorney's fees in
20 regards to this case.

21 THE COURT: All right. I have no authority under the
22 Bankruptcy Code to authorize the payment of either an
23 individual's attorney's fees or a group attorneys' fees without
24 an appropriate application. There is -- there are limited
25 circumstances in which that may be appropriate, but without an

1 appropriate application on motion on notice to parties in
2 interest, I have absolutely no authority to do that. I'm
3 sorry, I can't help you.

4 MR. HUEBNER: And, Your Honor, to address that just
5 for a minute so that the docket -- that the transcript is not
6 read as an invitation for any number of new groups to then say,
7 oh, the judge invited people to come apply, I just want to, if
8 I may, take just thirty seconds.

9 THE COURT: Please do.

10 MR. HUEBNER: This is one of the matters that was
11 withdrawn by DP3, the question of whether the bankruptcy court
12 has any authority ever to appoint either a group representative
13 or the payment of fees for pension matters. And in our view,
14 the law is crystalline clear that 1114, which is a specific
15 provision of the code, governs the appointment of counsel paid
16 for by the estate for health, medical, and welfare and
17 insurance benefits.

18 As Your Honor may remember, this is only the second
19 case in the history of the U.S. Bankruptcy Court as far as we
20 know to be paying the fees of two 1114 committees.

21 THE COURT: Yes.

22 MR. HUEBNER: The thought that on top of that we would
23 make yet newer law and say that there's also going to be an
24 estate-financed pension committee on top of our three official
25 committees is obviously something that we believe has no place

1 in the code. We know of no case in the records of U.S.
2 bankruptcy jurisprudence where a pension committee has ever
3 been formed or paid for by the estate and I think that, again,
4 I would never, ever put words in Mr. Booth's mouth, but I think
5 that we believe that we've filed a rather intense and
6 convincing set of pleadings as to why the so-called Century
7 Brass motion for an official representative was one of the
8 things that they ended up withdrawing as part of the
9 stipulation so I just don't want people to view that because
10 there is a lot going on in the backgrounds I think Your Honor
11 has a little bit of a glimmer into about different groups with
12 different views jockeying for position and we are very
13 confident that that motion has no chance of succeeding under
14 the law.

15 The other thing I would note, and I think this is
16 important on the other side, is that whether it was September
17 14th, 2005 or whether it is today, any retiree, any group, any
18 pilot is free to make whatever motion that they believe is
19 legally appropriate, whether it was objecting to LOA 51, which
20 anyone could have done; whether it was making a motion side by
21 side to DP3's to compel these payments, which I would note ALPA
22 and the PBGC and fiduciary counselors joined. There was never
23 a bar at any point in this case of any party making any motion.

24 And one of the things that we tried to make very clear
25 in the letters to all the pro se objectors, including Captain

1 Lewis, I won't read the language, but you have it in your
2 binder, is to be clear, irrespective of the stipulation, you
3 have the right at any time to make any motion that you believe
4 appropriate in connection with this case, so I don't want
5 anyone to get the opposite impression that somehow they were
6 barred at some point in time by doing something because of DP3
7 or DP2 or DP9.

8 This is a court of law that is open to anyone that
9 files a proper application and there is nothing in any
10 stipulation that has ever barred that. There's nothing in even
11 these prior proxies -- which, in fact, you know, may or may not
12 be proxies and we're not even addressing those -- that barred
13 that. If people wanted to object or make a motion to compel or
14 try to take down LOA 51, they were free to and chose not to.
15 This stipulation only governs -- and we won't even repeat it at
16 all -- the very narrow universe of claims that relate to the
17 pre-termination period for non-qualified benefits.

18 So I apologize, Your Honor. We've really belabored
19 this quite long, but I wanted the record to be very clear in
20 both directions, both as individuals people are free, but as a
21 group we will not pay for yet another committee.

22 THE COURT: I think that's the answer. I believe that
23 I was the one who entered the order for a second 1114 committee
24 over the company's strong objection. I think the record will
25 show that I did that solely based upon my reading of the

1 statute. I will not be appointing counsel at the expense of
2 the estate unless it is mandated, in my view, by the statute.
3 I think that's a good point to admit.

4 MR. HUEBNER: Thank you, Your Honor. So we will wait,
5 I guess, for the e-mail with the PDF attachments from chambers
6 of the pre-August 1st letters. We will add the names as
7 directed for a form of order, and then I guess we will submit
8 it for entry.

9 THE COURT: Very good. Thank you.

10 Now what's next?

11 MR. SAPIR: Your Honor, may I be heard briefly
12 regarding what Mr. Huebner just said regarding motions, DP3?

13 THE COURT: What do you want to say?

14 MR. SAPIR: My request, Your Honor, is that those
15 objectors such as my clients who believe that DP3 was acting in
16 their behalf and, indeed, was at that time, had no motivation
17 whatsoever to bring any motion. I would respectfully ask Your
18 Honor that you grant a limited period of time for objectors who
19 have been carved out or who will be carved out to pursue any of
20 those motions on their own behalf.

21 THE COURT: I don't know what you're talking about.

22 MR. SAPIR: As part of the stipulation of settlement
23 DP3 gave up certain motions -- withdrew certain motions. When
24 those motions were filed, they were filed not only on behalf of
25 DP3 but on behalf of the individuals who were a part of DP3.

1 My client was one of those individuals so my client at that
2 time would have had no basis whatsoever or motivation
3 whatsoever to file any motion because any motions in his
4 interest were filed by DP3.

5 THE COURT: What do you want me to do?

6 MR. SAPIR: I would like Your Honor to give leave of
7 ten days for any of the objectors who are being reserved rights
8 to pursue their claims separately, to pursue or to bring any
9 motions that were the same motions that DP3 had brought.

10 THE COURT: You wish to set a time limit?

11 MR. SAPIR: Yes, Your Honor.

12 MR. HUEBNER: Your Honor, can I explain? What he
13 wants to do is retroactively object to LOA 51, which was
14 entered three months ago, arguing --

15 THE COURT: You're not seeking that.

16 MR. SAPIR: Well, if DP3 had that ability to pursue
17 that motion, then I would request that ability.

18 THE COURT: That's water over the dam. I'm sorry.
19 All right. Thank you.

20 MR. SAPIR: Thank you.

21 THE COURT: What's next?

22 MR. HUEBNER: Your Honor, if I may be excused because
23 I actually have to attend to other Delta matters. My long-
24 suffering and very-angry-at-me partner Ben Kaminetzky, to whom
25 I promised the first thing will be rather brief, is now ready

1 to proceed.

2 THE COURT: All right.

3 MR. HUEBNER: Also, quite serious motion relating to
4 the U.S. Government and certain claims that they have.

5 THE COURT: Thank you very much, Mr. Huebner.

6 MR. KAMINETZKY: A moment, Your Honor, to switch
7 places?

8 THE COURT: Yes. Who is going to be appearing for the
9 Government?

10 MR. ARMAND: Pierre Armand, U.S. Attorney's Office,
11 for --

12 THE COURT: How do you spell your last name?

13 MR. ARMAND: A-r-m-a-n-d. First name is Pierre, P---
14 I-e-r-r-e.

15 THE COURT: Okay.

16 MR. ARMAND: I also have with me David Kennedy, who is
17 an AUSA in our office as well.

18 THE COURT: All right. Mr. Kennedy.

19 MR. KENNEDY: Afternoon, Your Honor.

20 THE COURT: All right. Mr. Kaminetzky, you're going
21 to be arguing for the debtor here, right?

22 MR. KAMINETZKY: The good old debtor, yes. That's
23 correct, Your Honor.

24 THE COURT: Let me ask both counsel, I take it the
25 Government has not answered?

1 MR. ARMAND: No, we did not, Your Honor.

2 THE COURT: Usually motions for summary judgment are
3 made after issue is joined, I had always thought. Maybe not.
4 Maybe the rules are different.

5 MR. KAMINETZKY: I think the rules provide that you're
6 allowed to serve a motion for summary judgment federal rules
7 provide even without an answer.

8 THE COURT: Okay.

9 MR. ARMAND: And also the parties agreed shortly after
10 the administrative -- the adversary proceeding complaint was
11 filed that the issue would be resolved by motions for summary
12 judgment so it didn't seem to make sense --

13 THE COURT: Does this resolve the case?

14 MR. KAMINETZKY: It should, Your Honor.

15 MR. ARMAND: It should, Your Honor, yes.

16 THE COURT: This is everything? This is the whole
17 ball of wax?

18 MR. KAMINETZKY: This is the big show. According --
19 we don't think we have any factual disputes and we think the
20 summary judgment motion should resolve the adversary
21 proceeding.

22 THE COURT: Okay. Well, that was my next question.
23 You each have lengthy Rule 7056 statements. Have you responded
24 to theirs?

25 MR. KAMINETZKY: Yes, we have, Your Honor.

1 THE COURT: Did you admit everything?

2 MR. KAMINETZKY: I think it's clear from our response
3 that there's no factual -- we don't believe there's any --

4 THE COURT: That wasn't my question.

5 MR. KAMINETZKY: We didn't admit to everything. We
6 think a lot of things may be -- a number of things we -- kind
7 of are beside the point and aren't relevant.

8 THE COURT: But you disputed?

9 MR. KAMINETZKY: We disputed some but nothing that's
10 relevant we think to --

11 THE COURT: Okay. Well, the Government also disputed
12 quite a few of your statements of undisputed fact.

13 MR. KAMINETZKY: That's correct. But again, I don't
14 think --

15 THE COURT: Well, what is the matrix then? Am I going
16 to have to pick and choose as to what I think is relevant?

17 MR. ARMAND: Well, Your Honor, I think the issue of
18 whether or not the Transportation Act allows the Government to
19 either recoup or deduct these funds is really going to decide
20 the issue, regardless of whether or not there are particular
21 facts where each --

22 THE COURT: Then why can't you give me an agreed state
23 of facts, an agreed matrix of facts, so I don't have to worry
24 about whether any particular facts that I might look to or
25 recite are or are not in dispute because a lot of them are in

1 dispute.

2 MR. ARMAND: I believe certain of the Government's
3 facts were disputed by Delta and vice versa.

4 THE COURT: Right.

5 MR. ARMAND: I think primarily a lot of them have to
6 deal with the way that the facts were worded.

7 THE COURT: Then I should think you would both welcome
8 an opportunity to have a joint statement of undisputed facts so
9 that I really know what is and what isn't disputed and what is
10 and what isn't material.

11 MR. KAMINETZKY: We could just do that, Your Honor,
12 but I think we made our clear in our response to their
13 statement of facts that we don't believe the things that we
14 dispute are material to deciding this motion or the summary
15 judgment motion. So I think you're right, Your Honor.
16 Technically there are things that we dispute, there are things
17 that they dispute, but it really doesn't matter at the end of
18 the day to the legal issues that both sides I think agree is
19 dispositive of the issue of this adversary proceeding.

20 So we could engage in that exercise, but I don't think
21 it really matters at the end of the day.

22 THE COURT: Well, let me ask Mr. Armand a question or
23 two. Don't go away.

24 One of your arguments is that this isn't really a
25 matter of set-off or recoupment. Your argument is that the

1 statute provides that what you were to pay at any point in time
2 is net of your rights to recover overpayments and overcharges,
3 right?

4 MR. ARMAND: In a sense, Your Honor, yes. The
5 Government is arguing that in addition to providing a right of
6 recoupment, the statute also reduces the Government's
7 substantive -- present substantive liability to the extent of
8 any overcharges and overpayments that the Government identifies
9 after conducting a post-payment audit. And the Government
10 believes that that is reflected in --

11 THE COURT: Tell me, shouldn't I be able to look at
12 the statute and find out what is it in the Transportation Act
13 that "reduces the Government's substantive liability with
14 respect to present and future claims of transportation services
15 to the extent of any prior overcharge or overpayment"? What do
16 I look at? Help me with the actual language.

17 MR. ARMAND: Certainly, Your Honor. There -- the
18 Government's view of the statute is certainly reflected in the
19 plain text of the statute.

20 THE COURT: Okay. Let's look at the plain text. It
21 begins at Page 5 of your brief.

22 MR. ARMAND: Well, Your Honor, first the -- Subchapter
23 3 of Chapter 37, under which the Transportation Act is
24 codified, is entitled "claims against the United States
25 Government," and Section 3726 itself is entitled "payment for

1 transportation." Section 3726(h) permits the Government to pay
2 transportation service providers --

3 THE COURT: Wait a minute, I have to find it.

4 (Court reviews documents.)

5 THE COURT: Where is it in your -- where do I look?

6 MR. ARMAND: If you look on Page 6 of the Government's
7 brief --

8 THE COURT: Yes. Okay. H.

9 MR. ARMAND: 3726.

10 MR. KAMINETZKY: Your Honor, I can be helpful to you.
11 I have here copies of I think any statute you'll need. It's
12 just the --

13 THE COURT: Oh.

14 MR. KAMINETZKY: -- and I think it might help. I've
15 highlighted the relevant areas. It's really just the statute.
16 I think it will make it a lot easier for both sides.

17 THE COURT: Mind if I look at it?

18 MR. ARMAND: I don't have any objection, Your Honor.

19 THE COURT: Okay.

20 MR. ARMAND: This is the first time I've looked at --

21 MR. KAMINETZKY: May I approach?

22 THE COURT: Sure.

23 MR. ARMAND: -- what they're providing.

24 MR. KAMINETZKY: Under "FD" in this book. Here's the
25 book we're looking at. It's the second page I think, what

1 you're referring to.

2 THE COURT: Okay.

3 MR. ARMAND: Are there additional materials that
4 weren't provided in the papers?

5 (Counsel confer.)

6 MR. ARMAND: Well, the Government would just object to
7 the extent that Delta's attempting to provide additional
8 authorities that weren't already briefed, but --

9 THE COURT: It's just the statute, isn't it?

10 MR. KAMINETZKY: The statute that you're looking at
11 was briefed extensively. There is a Supreme Court case that
12 came out on June 15th that we've included. That was decided
13 after we submitted our last brief that I might touch on later
14 in the argument, but has nothing to do with the statute that
15 we're talking about now.

16 THE COURT: All right.

17 MR. ARMAND: That's fine. 3726(h) permits the
18 Government to pay transportation service providers in advance,
19 but reserves for the Government the right to deduct any
20 overpayments. It specifically states payment for
21 transportation ordered but not provided may be recovered by
22 deduction or other means.

23 And in Supreme Court case law that the Government
24 cited in its brief, the New York, New Haven Railroad case and
25 also the Western Pacific Railroad case, both of which are cited

1 in our brief, explain that Congress's purpose in creating this
2 deduction right was to relieve the Government of any obligation
3 to assume the role of a creditor with regard to overpayments
4 and overcharges that were discovered after post-payment audit.
5 Instead, what Congress intended was for the transportation
6 service provider to assume the burden of re-collecting any
7 overcharges or overpayments that were discovered after a post-
8 payment audit.

9 And that's precisely what is in the statute. It
10 allows for the Government to deduct any overpayments and --

11 THE COURT: I know it does. I know that.

12 MR. ARMAND: In addition, it allows the transportation
13 service provider to file an administrative claim if it seeks to
14 challenge any deduction that the Government makes in the first
15 instance. But it was Congress's intent --

16 THE COURT: I know. Please, please, please, sir.
17 Please function on what I'm asking you.

18 MR. ARMAND: Certainly, Your Honor.

19 THE COURT: Your argument in Point I(a) and (b) is
20 that your liability in the context of what we're doing --
21 dealing with here, your liability, the amount that you owe
22 Delta post-petition, under the terms of the statute, that the
23 liability itself is net of amounts claimed for refund for
24 overcharge or overpayment.

25 Now, I know there's a right to recover by deducting

1 from what you owe what you claim. I know that. But your
2 argument in Point I is beyond that. The argument in Point I is
3 that, in effect, no, Delta, we don't owe you, as a consequence
4 of what the statute says, for amounts that we otherwise would
5 owe you post-petition for post-petition work. Our liability to
6 you must be calculated as something that is net of the amount
7 that we would be entitled to deduct, and I don't find that.
8 You have to know that I have a problem with that argument
9 because that's not what the statute says.

10 It doesn't say that the liability of what you owe
11 Delta at any point in time as a liability must always be
12 determined by reference to the amount that could be deducted.
13 Rather, it says that you may deduct it from what you owe. The
14 Government may deduct it from what it owes.

15 MR. ARMAND: The Government's position is based on the
16 text of the statute, but also based on the legislative history
17 and, most importantly, the Supreme Court case law interpreting
18 the statute.

19 THE COURT: Is there any Supreme Court or other court
20 that fortifies this argument? And if so, what is it?

21 MR. ARMAND: Yes. It's -- the Government quoted the
22 New York, New Haven Railroad case, as well as the Western
23 Pacific Railroad case.

24 THE COURT: Page? Page of your brief?

25 MR. ARMAND: If you look at, Your Honor, Pages 16, 17,

1 and 18.

2 THE COURT: Beginning with the carryover paragraph,
3 bottom of 16?

4 MR. ARMAND: There -- on Page 16 it begins with
5 explaining the context about how the Government is generally
6 prohibited from paying contractors in advance and prior to
7 audit. And then the next paragraph explains how the statute
8 was amended by the Transportation Act to allow payment prior to
9 audit and in advance. And on the next page, on Page 17, and in
10 particular I would direct the Court's attention to the block
11 quote at the bottom of 17 going over to 18, the right of the
12 United States to deduct overpayments from subsequent bills was
13 the carrier's own proposal for securing the Government against
14 the burden of having to prove the overpayment and proceedings
15 for reimbursement.

16 And there's another quote on Page 17 of a New York,
17 New Haven case, 355 US 259. The TSP, meaning "transportation
18 service provider," has the right to make further effort to re-
19 collect in the event it does not believe the proper charges
20 resulted from the Government's audit.

21 So what's going on here is that the Government --
22 Congress decided, because of complaints from carriers about
23 delays in receiving payments after audit, Congress decided,
24 okay, we will amend the Transportation Act and we'll allow you
25 to receive payments up front and prior to audit. However, if

1 we discover after post-payment audit that you received funds
2 that you weren't otherwise entitled to, the Government will not
3 have to assume the role of a creditor and will not have to take
4 affirmative steps to recover any of these funds. And in a
5 sense, the Government will not be liable for any of those funds
6 until -- unless and until --

7 THE COURT: Wait, wait, wait. Wait. That's not
8 actually what it says, though.

9 MR. ARMAND: When you say "it," are you referring to
10 the text of the statute?

11 THE COURT: Yes. I will be required to be governed by
12 the text of the statute.

13 MR. KAMINETZKY: Your Honor, can I respond?

14 THE COURT: Yes, why don't you be heard on the point?

15 MR. KAMINETZKY: Just the two cases that Mr. Armand
16 refers to, the 1950 cases from the Supreme Court, they're not
17 bankruptcy cases. They have absolutely nothing to do with the
18 question which is before the Court on whether there's a
19 reduction of substantive liability. Why? Because out of
20 bankruptcy, it --

21 THE COURT: It doesn't matter.

22 MR. KAMINETZKY: -- it's a semantic aid. If I overpay
23 at Walmart by \$10, is it that Walmart never owes -- never
24 really had the money or does it owe it to me back? It's just a
25 game outside of bankruptcy.

1 Here it's the whole enchilada, if you will, because
2 the question is whether or not it's property of the estate.
3 These two cases are 1950s, were about the underlying issue of
4 whether or not refunds are owed, which is completely carved out
5 of this matter by stipulation with the Government. These 1950s
6 cases had nothing to do with bankruptcy and they certainly
7 didn't address what we call the "substantive liability issue"
8 that Your Honor is inquiring about.

9 But let me continue, because I think the words of the
10 statutes here matter and what the Government is saying is that
11 these what I'm going to call the "magic words," these few
12 words, "payment for transportation ordered but not provided may
13 be recovered by deduction or other means," kind of changes the
14 entire Bankruptcy Code. Because according to the Government's
15 theory, it's no longer property of the estate so it's an
16 exception to 541 of the Code. All of a sudden, it's a super
17 priority, 100 cents on the dollar administrative expense.

18 507, as Your Honor knows, has a very carefully,
19 deliberate, exacting pages after pages of priorities in
20 bankruptcy. And case law, case after case, including this
21 Supreme Court case that I have at the beginning of the binder
22 that was just decided a few weeks ago, says that those -- that
23 priority scheme in 507 should not be touched by judicial fiat.
24 Not only that, but if something is a little ambiguous on
25 whether or not it belongs in 507 of the Code -- and in that

1 case it had to do with workmen's compensation, workman
2 compensation dues that were required that the debtor was
3 required to pay and the question was did that fit within one of
4 the exceptions of 507 to the priority scheme. And the Supreme
5 Court held -- again, this is two months ago -- that unless it's
6 really clear in 507, courts should not make up and put things
7 in 507 that don't belong there.

8 THE COURT: I don't have this in your brief, do I?

9 MR. KAMINETZKY: It just came out. It's Tab A. It's
10 the Howard Delivery case. On the very first page.

11 THE COURT: Tab A. In the volume?

12 MR. KAMINETZKY: In the binder I just --

13 THE COURT: Oh, oh.

14 MR. KAMINETZKY: -- gave you.

15 THE COURT: In this binder here?

16 MR. KAMINETZKY: Yeah, yeah. If you just look at the
17 very first case.

18 THE COURT: Oh, okay. Yes.

19 MR. KAMINETZKY: And if you turn to Page 8 of that
20 case, and if you just look at the area that I highlighted.

21 THE COURT: Oh, yes.

22 MR. KAMINETZKY: I could read it to the Court, but
23 it's late and we're tired, so Your Honor could read it.

24 THE COURT: Sure.

25 MR. KAMINETZKY: But basically what the court is

1 saying is be careful. Unless it's unambiguously in the text of
2 507, don't create priorities that Congress didn't tell you
3 explicitly to create. And this is one of a line of cases
4 including the CFI cases from the Supreme Court in the Tenth
5 Circuit that says even if another statute maybe kind of
6 suggests that it doesn't apply in bankruptcy, no. Bankruptcy
7 507, that's where you look for priorities. You don't look in
8 another places.

9 Certainly -- and now going back to what Your Honor
10 said about the language of the statute. Certainly these magic
11 words according to the Government just doesn't cut it to make
12 an exception to the automatic stay, property of the estate, and
13 the priorities in 507.

14 Your Honor, the only case --

15 MR. ARMAND: If I could respond, Your Honor?

16 THE COURT: Of course you will in a moment.

17 MR. KAMINETZKY: The only case they have, Your Honor,
18 the only case they point to, there's a single case about --
19 that addresses substantive liability and that's the Consumer
20 Health case out of the DC circuit. That's their most favored
21 case. And I really implore you to read that case carefully
22 because that entire case was based on the Medicare statute and
23 not the Transportation Act statute.

24 And if Your Honor will indulge me and just turn to Tab
25 C of the volume I just gave you and there we have the Medicare

1 statute. And you'll see that the -- and if you look at the
2 highlighted area, what does it say? It says payments to
3 providers of services. It says determination of amount, how do
4 you determine the amount.

5 "The secretary shall periodically determine the amount
6 which should be paid under this part to each provider
7 of services with respect to the services furnished by
8 it and the provider of service shall be paid at such
9 times or time as the secretary believes appropriate,
10 but not less often than monthly and prior to audit or
11 settlement by the general accounting office from the
12 Federal Hospital Insurance Trust Fund in the amount so
13 determined with necessary adjustments on account of
14 previously made overpayments and underpayments."

15 So what does the statute say? How do you determine
16 the amount owed? It's with reference to necessary adjustments.
17 And the regs kind of bear that out. If you just look at the
18 next -- after the next blue separator, the regs make it
19 entirely clear. If you look after the blue divider at the
20 first regulation, the second page, where it says "retroactive
21 adjustments," it makes it exceedingly -- Medicare providers --
22 sorry.

23 "Medicare provides that providers of services will be
24 paid amounts determined to be due but not less often
25 than monthly with necessary adjustments due to

1 previously made overpayments or underpayments.

2 Interim payments are made on the basis of estimated
3 costs," et cetera.

4 So Medicare has this very unique kind of odd system
5 where you're necessarily making guesstimated monthly payments,
6 knowing full well that you're going to have to make later
7 adjustments based on actual costs, as the statute lays out.
8 That has nothing to do with the Transportation Act.

9 The Transportation Act, just like everyone else, the
10 Government pays as you go. They usually pay with a credit
11 card, they walk up, they buy a ticket. If they decide not to
12 fly, their own regulations require them to return the ticket,
13 just like everyone else.

14 I'm sorry to make you keep flipping, but if you look,
15 just to try to contrast what we're talking about, if you look
16 under Tab B, after I cited the 3726, which is the statute at
17 issue here, I put some of the governing regulations just to
18 show what we're talking about here, that the government is
19 required to seek refunds in the ordinary course of business,
20 just like you and me if we decide not to fly.

21 And again, this is in Tab B. It's right after --

22 THE COURT: That' Tab B?

23 MR. KAMINETZKY: B for boy.

24 THE COURT: Oh, yes.

25 MR. KAMINETZKY: And then you have the statute. Right

1 after the statute, you have the first of the regulations. It's
2 301-10-114. What does it say? Are you there, Your Honor?

3 THE COURT: Yes.

4 MR. KAMINETZKY: It says:

5 "What must I do with unused GTRs, tickets, or refund
6 applications? You must submit any unused GTR, unused
7 ticket coupon, unused e-ticket, or refund application
8 to your agency in accordance with your agency's
9 procedures."

10 Now, if you go to the next thing, what I copied for
11 Your Honor is the U.S. Government passenger transportation
12 handbook. And if you turn to the second page, in a big box in
13 bold in all caps, what does it say? You see in that box in the
14 middle?

15 THE COURT: Right. Right.

16 MR. KAMINETZKY: "Unused tickets have monetary value.
17 Government travelers should always be instructed to
18 return all unused or partially unused tickets to their
19 agency for processing of the refund due to the
20 Government. Under no circumstances should unused or
21 partially unused tickets be filed, destroyed, or
22 thrown away."

23 And then finally the last -- after the next blue
24 divider sheet, it then makes it again mandatory for each agency
25 to return these tickets and get a refund. So what's going on

1 here? This has nothing to do with the Medicare statute.

2 The Transportation Act works like the way you and I
3 travel. We buy a ticket. If we don't want it, if we don't --
4 we decide not to fly or we can't fly, we're mandated by the
5 federal regulations to return the ticket and get a refund.
6 What does 3726(h) do to the magic words? It then gives them,
7 the Government, a backup. If all that fails, if people don't
8 follow the regs, then you could deduct it from future payments.
9 But to say that that's the exact same system of Medicare, which
10 is based on guesstimated payments and necessary adjustments, is
11 just not true.

12 And how do we know it's not true? Because you look at
13 the statutes and they're completely different. One says how do
14 you determine the payments. Well, you guess once a month and
15 then you adjust. Here you pay as you go. You're then required
16 to return the tickets in the ordinary course of business and
17 you saw we submitted an affidavit or declaration by Mr. Charles
18 Doring (phonetic). That's what happens every day. One day we
19 got requests for \$20,000 in refunds from the Government in
20 ordinary course of business. That's how it works.

21 Yeah, 3726(h) says, yeah, we'll give the Government a
22 backup. If all else fails, we'll let the GSA deduct. But to
23 say that that transforms the Bankruptcy Code, that that
24 transforms the entire bankruptcy process and gives them a super
25 priority, 100-cent-on-the-dollar claim is just, I think,

1 completely, completely made out of whole cloth and it's never
2 been accepted by a court. It's actually never been asserted
3 before and I think there's no basis by reading the statute.

4 So I think we're left with recruitment.

5 THE COURT: Okay. Before we turn to recruitment --

6 MR. ARMAND: Your Honor, with regard to first starting
7 with counsel's comment that we're asking the Court to issue a
8 judicial fiat, that's not what is at issue here. We have a
9 federal statute and that's not something -- we're not
10 requesting that the Court make up any law here. We have a
11 federal statute that compels this result.

12 And in Consumer Health, yes, that involved the
13 Medicare statute and the Medicare statute does not specifically
14 state either that it reduces the Government's liability.

15 THE COURT: I think it does.

16 MR. ARMAND: Well, Your Honor, it does --

17 THE COURT: It says how is like liability -- how is
18 liability determined, and it's determined that -- refunds.
19 That is a very different --

20 MR. ARMAND: Well, Your Honor, the way they're trying
21 to distinguish this case by saying that --

22 THE COURT: Just a moment. Just a moment.

23 Do we know what this buzzing is?

24 (Court and court personnel confer.)

25 MR. KAMINETZKY: If everyone could shut their

1 Blackberry off, I think that will help.

2 THE COURT: Carry on. I'm sorry.

3 It doesn't say that liability is reduced. It's a
4 completely different statutory scheme.

5 MR. ARMAND: Well, there are only two statutes that
6 the Government is aware of: the Transportation Act and the
7 Medicare statute where typically the Government is not allowed
8 to pay for any services until after the services have been
9 fully provided and the bills have been audited. And in both of
10 these contexts, both Medicare and with transportation, the
11 Government or the Congress decided that it was appropriate to
12 waive this sovereign bar and to allow overpayments in advance
13 and prior to audit, subject to a right of deduction. That's
14 precisely what's going on in Medicare.

15 Granted, in the transportation context, the Government
16 isn't paying an estimated amount in advance, but that doesn't
17 mean that overpayments and overcharges are not something that's
18 contemplated. That's the whole reason why the deduction right
19 was created in the first place.

20 THE COURT: I guess there's nothing more to be said on
21 Point I, other than it seems to me to look at the statute. And
22 I need your help if there's something more to it, but as I look
23 at the statute, I don't see any statutory predicate for the
24 proposition that the liability that the Government owes post-
25 petition to Delta is -- that the liability itself is determined

1 by reason of netting out refunds or overcharges for some
2 indeterminate period in the past, especially several years
3 before.

4 MR. ARMAND: I think it's also a question of
5 discretion, and that was something that Delta --

6 THE COURT: Whose?

7 MR. ARMAND: The Government's discretion in
8 determining when a deduction is necessary. And in the Medicare
9 context, in the Consumer Health case, the Court concluded that
10 the Government has the discretion to determine when a
11 particular deduction is necessary. And in a lot of cases, and
12 the Medicare regulations specifically allow the Government to
13 settle or compromise a particular overpayment.

14 And because in certain cases, a deduction may not be
15 necessary, and that's the reality of the airline industry as
16 well, because really there's only a very small amount of
17 government travel where the Government receives a bill after
18 the services have been provided and they haven't already been
19 paid. So the Government did enact a series of regulations that
20 require employees, federal employees, to receive refunds.

21 However, one regulation that he did not point out is
22 42-CFR-102-118.196, which requires --

23 THE COURT: Page? Page of your brief?

24 MR. ARMAND: If you give me one moment, it's in one of
25 the footnotes, Your Honor.

1 (Counsel reviews documents.)

2 MR. ARMAND: Page 14, Note 6. Actually, it should
3 read -- it's 41-CFR-102-118.196. It actually states there 996.
4 It's 196.

5 THE COURT: Okay.

6 MR. ARMAND: And the regulation states that the TSP
7 must refund the value of unused tickets after expiration to the
8 GSA audit division if no redemption of unused tickets is
9 received. So it's not that the Government is saying that if
10 refunds aren't sought, that Delta is able to keep the money and
11 --

12 THE COURT: Oh, no, that's not the issue. There is no
13 question that it is a liability of Delta, or as stated
14 differently, it's a claim of the Government against Delta.
15 That's not the question.

16 MR. KAMINETZKY: It's an unsecured claim like every
17 other claim. It's --

18 MR. ARMAND: But that's precisely contrary to what the
19 Supreme Court said in both of the cases that the Government has
20 cited, the New York, New Hampshire case and the West Pacific
21 Railroad case.

22 MR. KAMINETZKY: Your Honor, those weren't --

23 MR. ARMAND: Now, granted, those were not bankruptcy
24 context cases, but the Bankruptcy Code -- and it certainly
25 existed at the time when the Transportation Act was modified

1 and certainly --

2 THE COURT: What are you saying that those cases say?

3 MR. ARMAND: That they say that the Government was not
4 supposed to be in the place of a creditor when overpayments and
5 overcharges were found after post-payment audit. The burden --
6 and this was the quid pro quo for allowing transportation
7 service providers like Delta to receive this immense benefit of
8 receiving advance payment prior to audit.

9 The general rule is that the Government will not pay
10 until after it has received a bill and the services have been
11 completed. And it's a very good rule because it prevents the
12 waste of taxpayer dollars and that's why, when the carriers
13 sought to --

14 THE COURT: Okay. Well, I understand your argument.
15 I understand your argument.

16 MR. KAMINETZKY: Your Honor, can I --

17 MR. ARMAND: Congress said, well, that's fine. If you
18 want to be able to receive this enormous benefit of having
19 advance payment prior to audit, that's fine, but we reserve the
20 right to deduct and put you in the position of a creditor and
21 not the Government. The Government will not be liable for any
22 of these overcharges and overpayments until you, the carrier,
23 bring an affirmative collection action against us, either
24 administratively or through the courts, and prove that
25 overcharges and overpayments did not occur.

1 And this is not something that's unfair. This was
2 simply the status quo before the Transportation Act was amended
3 in this way. And this has an enormous benefit to all carriers,
4 and specifically Delta, which has received billions of dollars
5 of federal money, taxpayer dollars. And even during the case,
6 since the bankruptcy petition, Delta has received hundreds of
7 millions of dollars. The Government is only seeking to
8 exercise its right to place them in the position of a creditor
9 to recover the overpayments and overcharges that the Government
10 has identified after post-payment audit.

11 And it doesn't matter that these cases were not
12 bankruptcy cases. These rights are defined outside of
13 bankruptcy law and the Bankruptcy Code certainly existed at
14 this time when the amendments happened. If Congress wanted to,
15 it could have carved out an exception and said, well, you know
16 what. If a TSP is going to go into bankruptcy, you actually
17 will have to be a creditor --

18 MR. KAMINETZKY: Your Honor, could I --

19 MR. ARMAND: -- and you are going to have to get in
20 line and the Government will only get whatever, five cents or
21 ten cents on the dollar with respect to these wrongful outlays.
22 But that's not what happened.

23 Congress said no, we will be able to deduct these
24 amounts and -- if you'd like to continue --

25 MR. KAMINETZKY: Your Honor, he has it exactly

1 precisely backwards and he had it exactly precisely backwards
2 on Page 23 of his opening brief. He said the exact same thing
3 and I'm shocked because I actually didn't want to mention this,
4 but this is a quote from their brief:

5 "If Congress has intended to compromise the statutory
6 provisions" --

7 And that's referring to the Transportation Act

8 "-- by providing specific payment rules for
9 financially troubled TSBs" --

10 That means airlines.

11 "-- it could have said so in the text of the
12 Transportation Act."

13 Now, you have to read that a few times -- I had to --
14 before I appreciated what they're saying. They're saying,
15 again, the precise opposite of the law.

16 The Government is stating that a specific statute like
17 the Transportation Act must indicate on its face that the
18 Bankruptcy Code applies unless you assume it doesn't, and
19 that's precisely wrong. It's just the opposite. The Supreme
20 Court has said over and over again that the Bankruptcy Code
21 always applies. And if there's an exception to the Bankruptcy
22 Code, to the priority scheme in the Bankruptcy Code, it's in
23 507. You don't look at the act and say --

24 THE COURT: Or in the statute that --

25 MR. KAMINETZKY: Maybe. You know what --

1 MR. ARMAND: If that were true, Your Honor, there
2 wouldn't be any deduction in Medicare because that case, in
3 Medicare, the statute doesn't say specifically that it reduces
4 the Government's liability either. And 507 doesn't carve out
5 an exception for Medicare either, so it's really you have to
6 look at the statute and Congress's intent in the purpose of the
7 statute.

8 MR. KAMINETZKY: I have to have -- okay. But we've
9 already looked at the Medicare statute and it has no
10 resemblance whatsoever to the Transportation Act.

11 Mr. Armand, again, very, very unfortunately he
12 mentioned that one regulation. And again, I was hoping he
13 wouldn't because, Mr. Armand, they didn't tell you that that
14 regulation, that single regulation he referred to was struck
15 down by a court in United Airlines v. Golden in 1989 saying
16 that that regulation wasn't promulgated in accordance with the
17 requirements of the public contracts.

18 MR. ARMAND: That's actually not the same regulation.

19 MR. KAMINETZKY: Your Honor, please. Mr. Armand, let
20 me go on.

21 Then they tried to re-enact that regulation and once
22 again it failed to comply with the rules of regulation
23 promulgating. So I have in my hand here, Your Honor, a letter
24 from February 10th, 2006, which I'll provide to counsel and to
25 Your Honor. And again, this is really important here.

1 THE COURT: Thank you.

2 MR. KAMINETZKY: And it's a letter from Robert T.
3 Hoff, senior assistant, general counsel of the personal
4 property division of the GSA, Mr. Armand's client, to James
5 Regan, who is the lawyer at Crowell & Mooring representing the
6 airlines in the underlying refund dispute. And what does it
7 say? Because after we complained saying, hey, this regulation,
8 it's crept its way back, it's not allowed because you didn't
9 follow your own internal procedures for promulgating
10 regulation. Oh, by the way, the date is wrong. It should be
11 February 10th, 2006. That's a typo.

12 What does it say? We've agreed to rescind 41-CFR-102-
13 118.196. The action will now take place in due course.

14 So for them to walk into court here relying on a
15 regulation that they've already -- they a few months ago said
16 that they're rescinding I think is a little, shall we say,
17 unjust.

18 MR. ARMAND: First of all, Your Honor, I've never seen
19 this letter before and the regulation is still on the books.

20 MR. KAMINETZKY: It's from his client, Your Honor.
21 But --

22 MR. ARMAND: In any event, even if the regulation did
23 not exist, Your Honor, there's still 3726(h), which provides
24 the deduction right.

25 THE COURT: Well, I think we've -- well, I think we're

1 repeating ourselves now on Point I. Now, on --

2 MR. KAMINETZKY: Would you like me to talk about
3 recoupment, Your Honor?

4 THE COURT: Yes, recoupment, please.

5 MR. KAMINETZKY: Shall I begin?

6 THE COURT: Sure. Why don't you briefly summarize.

7 MR. KAMINETZKY: Well, I guess the good news is I
8 think we're halfway there to recoupment as well because the
9 Consumer Health case, that's their very favorite case from the
10 CD circuit, said -- that is the only court that decided both
11 issues in the Medicare context. In the Medicare context they
12 said both substantive liability and a right of recoupment and
13 what did the court say? We see these two arguments, meaning
14 substantive liability and recoupment, not as true alternatives
15 but rather as closely related.

16 But let's start here. Now, we all agree for the test
17 for recoupment in the Second Circuit. Step one, you see if
18 there is a potential right of recoupment. And, step two, if
19 there is, are the two debts -- do the two debts arise out of a
20 single integrated transaction. And Your Honor was supplied
21 with the relevant case law with respect to single integrated
22 transaction. I don't have to go through it now, but just one
23 quote from Malinowski. That's the seminal case in the Second
24 Circuit.

25 "When the circumstances that gave rise to the credit

1 and those giving rise to the creditor's obligation to
2 the debtor do not result from the same set of
3 reciprocal contractual obligations or from the same
4 set of facts, they are not part of the same
5 transaction."

6 Westinghouse, 2002, Second Circuit:

7 "Where the contract itself contemplates the business
8 to be transacted as discreet and independent units,
9 even claims predicated on a single contract will be
10 ineligible for recoupment."

11 So what's the Government trying to recoup here? In
12 2001 Sergeant Smith bought a ticket for the Delta shuttle for
13 \$200. Sergeant Smith works for the Army. Okay? Last minute
14 he decides, you know what, I can't go on the shuttle, I can't
15 make it to Washington, so he puts the ticket in a drawer.
16 Okay? 2006 Admiral Adams from the Navy flies -- decides he
17 wants -- he needs to fly from New York to Tokyo. That ticket,
18 under the city pair contract or it really doesn't matter, costs
19 \$1,000. What are they trying to recoup? They're trying to not
20 pay us the \$1,000 because we owe a -- let me say that again.

21 They're now not paying the \$1,000 in 2006 post-
22 petition -- this is post-petition flying -- because we owe a
23 refund on 2001. And they say, well, that's one single
24 integrated transaction to Sergeant Smith and Admiral Adams.

25 Now, as I said, there's two parts to the test. Is

1 there an underlying of recoupment and if so, is it a single
2 integrated transaction? So I don't think we should spend much
3 time talking about the first part of the test, that it is an
4 underlying right of -- whether there's an underlying right of
5 recoupment.

6 Again, what does the statute say? It says recovered
7 by deduction or other means. And they may be right that that
8 language is maybe broad enough to encompass recoupment. I
9 would note, however, that the word "recoupment" appears nowhere
10 in the statute and regs, although they do refer specifically to
11 offset refund deduction. And I will note that other
12 regulations, including Medicare regulations use the word
13 "recoupment" often, so the word "recoupment" is known in
14 Washington and the fact that it's not in any of the regs
15 related to the TPA or in the statute may have some
16 significance.

17 THE COURT: Can I ask a question? What's the
18 difference between recoupment and let's say offset?

19 MR. KAMINETZKY: These are all words I think outside
20 of bankruptcy, as we saw on the American Airlines case that --

21 THE COURT: Interchangeable.

22 MR. KAMINETZKY: -- people just use them
23 interchangeably because, you know, can I deduct, can I recoup,
24 could I offset. It really makes no difference. That's why I'm
25 not going to argue with them. If they want to say that

1 deduction by -- deduction or other means encompasses
2 recoupment, maybe, maybe not, but it doesn't matter here.

3 Why? Because this case, it utterly fails the single
4 integrated transaction test.

5 THE COURT: Can I just ask Mr. Armand --

6 MR. KAMINETZKY: I didn't get to the best part yet,
7 but okay.

8 THE COURT: No, no. I'm coming back. Don't go away.
9 Don't leave the podium.

10 What is the difference between recoupment and setoff
11 or deduction?

12 MR. ARMAND: In the bankruptcy context, recoupment
13 allows you to --

14 THE COURT: Aside from the bankruptcy context.

15 MR. ARMAND: They're -- I think I would agree with
16 counsel's statement that they are -- they can be
17 interchangeable.

18 THE COURT: Okay. So basically recoupment is not
19 materially different from offset, except that in the bankruptcy
20 context you cannot offset pre- against post-petition
21 obligations, whereas with -- if you call it recoupment, you
22 can. And therefore, you have to look at the case law that
23 defines what recoupment is for bankruptcy purposes and when
24 it's allowed. Isn't that the bottom line?

25 MR. ARMAND: Well, Your Honor, recoupment is

1 essentially an offset when -- or the deduction of -- or
2 offsetting two respective obligations that arise from the same
3 transaction.

4 THE COURT: Pre- and post-?

5 MR. ARMAND: Pre- and post-. Now this -- you can
6 have, outside of bankruptcy, two respective obligations that
7 arise from the same transaction and so that's --

8 THE COURT: So the concept of recoupment insofar as
9 it's to be differentiated from the notion colloquially of
10 offset or deduction, is meaningful only in the context of
11 bankruptcy, as I would understand it.

12 MR. ARMAND: I think so, Your Honor, but not
13 necessarily. I think that if recoupment is a deduction when
14 it's the same transaction between the parties, I'm not sure why
15 that would need to come up outside of bankruptcy, but it's
16 possible that it may.

17 THE COURT: Okay. Anyway, we are on the same
18 wavelength I think so far.

19 MR. KAMINETZKY: Just to be accurate, it's not really
20 offset, it's setoff is the concept that's discussed in
21 bankruptcy in 553 of the Code. As Your Honor pointed out, the
22 big limitation on setoff is it has to be pre- against pre-.

23 THE COURT: Right.

24 MR. KAMINETZKY: And the clear words of 553 said Pre-
25 against post- doesn't work, so then you're defaulted to

1 recoupment which, obviously, is a much narrower, limited
2 doctrine. Those are quotes from Second Circuit and that's the
3 single integrated transaction test, therefore it's recoupment.

4 So going back to that, the Government can't cite a
5 single case supporting recoupment in the transfer case in that
6 context. So what does it do? It once again refers back to
7 Medicare and goes back to Consumer Health. As an alternative
8 to the substantive liability holding, in fact, the Consumer
9 Health court said that the Government can recoup. And to be
10 fair, it's not just the DC circuit in Consumer Health. While
11 the Third Circuit in University Medical Center went the other
12 way and said that this wasn't a single integrated transaction,
13 both the First Circuit in Holyoke as well as the Ninth Circuit
14 in TLC Hospitals followed Consumer Health in the Medicare
15 context and said that you could recoup. Although the Ninth
16 Circuit applied a much more liberal test. They didn't apply
17 single integrated transaction, but it doesn't matter.

18 Now, as we detailed in our brief, there's a lot of
19 ways to differentiate Medicare from the Transportation Act.
20 And just to tick them off, but I won't go into any length,
21 Medicare there's a single contract, here there are multiple
22 contracts. There are the city pair contracts, as well as
23 hundreds and thousands of individual tickets that we all agree
24 are contracts. Medicare, recoupment isn't by a single third-
25 party provider; here, it's different agencies. We have the

1 Army, you have the Navy trying to recoup against each other.

2 But let's remember that GSA has made no effort to kind
3 of match up Army with Army and Navy with Navy, but it all
4 doesn't matter. These are all secondary. The main difference,
5 the critical distinction, and the basis for the holdings in
6 each of the cases applying recoupment in the Medicare context
7 was, once again, the language of the Medicare statute and the
8 unique payment methods set up in the statute, one based on
9 guesstimated monthly payments followed by adjustment.

10 Your Honor, and I think it's necessary for me to show
11 you this. If you turn to Tab D in the binder I just handed to
12 you --

13 THE COURT: B as in Boy?

14 MR. KAMINETZKY: D as in David.

15 THE COURT: D. Okay.

16 MR. KAMINETZKY: D as in David. The first case you
17 see is the Consumer Health case. Again, the Government's case.
18 You turn to Page 3. And this is the Government. Again, they
19 just decided the substantive liability issue. What does the
20 Court say then?

21 "Nor does our analysis differ significantly under the
22 doctrine of equitable recoupment, which exempts a debt
23 from the automatic stay when the debt is inextricably
24 tied up in the post-petition claim."

25 Now, if you turn the page, Your Honor, the next

1 section that's highlighted, look -- very careful -- the Court
2 is very careful there. What do they base their holding on?

3 "In determining whether the pre-petition and post-
4 petition services should be thought of as one
5 transaction, the key to us is the Medicare statute,
6 since it requires a secretary to take into account
7 pre-petition overpayments in order to calculate a
8 post-petition claim, as we have described above.
9 Congress rather clearly indicated that it wanted a
10 provider's stream of services considered one
11 transaction for the purposes of any claim the
12 Government would have against the provider."

13 That was Consumer Health.

14 Your Honor, if you may please turn after the next blue
15 divider to the Holyoke case. That's the case, their case, from
16 the First Circuit. And if you turn to the second page of that
17 decision, again, what's the basis for their holding that there
18 can be recoupment in the Medicare context? What does the court
19 say?

20 Are you there, Your Honor?

21 THE COURT: Yes.

22 MR. KAMINETZKY: "Both the Medicare statute and the
23 provider, by contemplating HCFA's payment of estimated
24 cost, corrective audits, and retroactive adjustments
25 or partial adjustments for overpayments and

1 underpayments in determining HCFA's net liability for
2 current costs year services strongly indicate that the
3 contractual relationship between HCFA and Holyoke
4 constituted one ongoing integrated transaction."

5 And finally, Your Honor, after the next blue divider,
6 you have the Ninth Circuit case. And what did the Ninth
7 Circuit say? Why did they allow recoupment? And if you turn
8 to Page 3 of this TLC Hospitals decision for the Ninth Circuit,
9 what does it say? On Page 3:

10 "The Medicare statute specifies an accelerated payment
11 system to ensure that providers are paid promptly.

12 Under this system, a Medicare provider like TLC
13 receives periodic payments for its service on an
14 *estimated* basis prior to an audit which determines the
15 precise amount reimbursement due to the provider."

16 Then it cites a case.

17 "Consequently, underpayments and overpayments are an
18 expected and inevitable result of this payment
19 system."

20 Jumping to the next column:

21 "We conclude, under this specialized and continuous
22 system of estimate payments and subsequent
23 adjustments, HHH's overpayments and underpayments in a
24 subsequent fiscal year were parts of the same
25 transactions for the purposes of recoupment."

1 Those are their cases. That's the basis for their
2 holding. Okay?

3 Your Honor, we could debate until the cows come home,
4 Mr. Armand and I, whether recoupment is exclusively a
5 contractual remedy, whether it's ever possible to recoup across
6 different contracts, and I'm happy to do so as late as you want
7 to stay, but the bottom line is it just doesn't matter.

8 Why is that? Because, for the sake of argument, we
9 could agree with Mr. Armand that the only thing that matters is
10 the statute. But unfortunately for the GSA, the statute at
11 issue here is not the Medicare statute where all these cases
12 appear, it's the Transportation Act. And unlike the Medicare
13 statute, which requires mandatory estimated payments followed
14 by the adjustment, the Transportation Act sets up an entirely
15 different system.

16 It's a pay-as-you-go system followed by a requirement
17 that personnel return unused tickets for refund, as we saw in
18 the regulations; and finally, the ability to recover by
19 deduction or other means as a backup. These are two entirely
20 different statutes, two entirely different systems. It's
21 trying to put a round block into a square hole. It just
22 doesn't fit, Your Honor.

23 And for them to try to obfuscate the difference
24 between the statutes I think is dishonest and is not -- there
25 should not be consonance by the Court. And again, I think it's

1 important to look at the specific holdings of their cases. I
2 didn't cite any of our cases, which explain why, in this unique
3 context of this unique statute; i.e., the Medicare statute, you
4 could somehow say that it's a single integrated transaction.

5 But Sergeant Smith's flying in 2001 and Admiral Adams
6 flying in 2006, I don't see that -- if words are going to mean
7 anything, that certainly can't mean a single integrated
8 transaction.

9 Thank you, Your Honor.

10 THE COURT: Well, thank you, sir.

11 I will hear whatever you have and I had a question
12 that I wanted to ask.

13 (Court reviews documents.)

14 THE COURT: I guess the question is this. I'll ask it
15 to you both. I'm afraid I'm not so interested in the
16 nomenclature as I ought to be, but you have different ways -- I
17 can't put my finger on it. You have different ways in which a
18 military person, let us say, can fly on a Delta aircraft. One
19 of them is with a credit card and one of them is with a --

20 MR. KAMINETZKY: GTR.

21 THE COURT: A GTR. Now, the -- what are the GTRs?

22 MR. ARMAND: "GTR" stands for --

23 MR. KAMINETZKY: Government Travel -- who are you
24 talking to? Would you like me --

25 THE COURT: I'm sorry. Yeah.

1 MR. KAMINETZKY: It's a Government Travel Request. I
2 could explain just what it is.

3 Credit card, the way -- most of the Government
4 traveling is by credit card, which is the way we travel. You
5 pay for a ticket by credit card, you do the flying, and you
6 move on with your life or you don't do the flying, you return
7 the ticket.

8 A GTR is the way in which the Government flies first
9 and pays later. A GTR is a kind of -- looks like a cardboard
10 certificate and you take that card with you, meaning the
11 government official, takes that cardboard certificate, as far
12 as I understand gives it to a travel agent, the travel agent
13 gives them an actual airline ticket, and then the person
14 travels. Then these GTRs are then consolidated and eventually
15 sent to the government for payment. They audit and they pay
16 it.

17 So what's unique about the GTR is rather than paying
18 first and then traveling, with the GTR you're using a voucher
19 so that the voucher, you know, of the person who is traveling,
20 Admiral Adams is traveling to Tokyo before Delta gets paid for
21 that flight.

22 Why that's relevant here is because that's -- it's the
23 GTR travel where they owe us money post-petition.

24 THE COURT: That's what I wanted to get to.

25 MR. KAMINETZKY: Yeah. So that's -- what's going on

1 here is --

2 THE COURT: Just a second. That's correct, isn't it?

3 MR. ARMAND: That is the only amount that the
4 Government is withholding. It's the only amount that the
5 Government really could withhold because Delta is paid before -
6 - in advance and prior to audit for probably ninety-nine
7 percent of all Government travel. They receive billions of
8 dollars in advance.

9 It is, as he says, pay before you go, but it's pay
10 before you go, even if you don't go.

11 THE COURT: But that's the credit cards.

12 MR. KAMINETZKY: Right.

13 MR. ARMAND: Yes. The GTR is for --

14 THE COURT: Like the rest of the world. We all pay
15 before we go, right?

16 MR. KAMINETZKY: Right, we pay by credit card. That's
17 the -- the Transportation Act actually says the reason for the
18 act, one of the reasons is that they wanted the Government to
19 be more like a regular commercial traveler. Like Your Honor
20 said, they give government-issued credit cards and then the
21 Government just acts like a regular party.

22 THE COURT: Okay. Now here's my question. Are these
23 overpayments and overcharges, is that what it is?

24 MR. ARMAND: Correct, Your Honor.

25 THE COURT: That you're seeking to deduct?

1 MR. ARMAND: Yes, Your Honor.

2 THE COURT: Are the overpayments and overcharges in
3 respect of GTRs or credit cards?

4 MR. ARMAND: The overpayments and overcharges relate
5 to credit card purchased tickets.

6 THE COURT: Okay. So --

7 MR. ARMAND: If it was GTRs we wouldn't need to do any
8 deduction because the Government, through its normal practice,
9 does the audit --

10 THE COURT: Does the audit before --

11 MR. ARMAND: Correct.

12 THE COURT: Before the bill.

13 MR. ARMAND: Correct.

14 MR. KAMINETZKY: In other words, like Sergeant Smith,
15 he paid by credit card, Admiral Adams by GTR.

16 THE COURT: So these are two quite separate means of
17 flying and paying, right?

18 MR. ARMAND: Well, they're separate in that -- in the
19 respect that, yes, the Government pays -- doesn't pay in
20 advance, it receives the bill afterwards, but it's for the same
21 exact services flying a person from Point A to Point B who is a
22 Government employee. And really, the GTR --

23 THE COURT: Now what about the city pair contracts?

24 MR. ARMAND: There are --

25 THE COURT: The city pair contracts cover both GTRs

1 and credit cards?

2 MR. KAMINETZKY: Yes.

3 MR. ARMAND: Yes. However, not all Government travel
4 is subject to the city pair contracts. The city pair contracts
5 only apply to certain -- they call them "city pairs." If, for
6 instance --

7 THE COURT: So you could have a credit card charge or
8 a GTR situation in respect of city pair travel. Is that
9 correct?

10 MR. ARMAND: Yes. You can, although there are
11 regulations which govern when employees are permitted to use
12 GTRs. Typically, federal employees should buy via credit card,
13 but there are various conditions wherein a GTR can be used.
14 And a lot of the times it's military personnel. In this case,
15 they're all Department of Defense employees. And --

16 THE COURT: Who used GTRs?

17 MR. ARMAND: Who used GTRs, correct. And this is the
18 only -- really the only pool of money that the Government is
19 able to use to exercise its deduction right because Delta
20 receives billions of dollars --

21 THE COURT: Well, the question that I have for you
22 then, if what you're trying to do is to offset credit
23 overcharges and overpayments against GTRs, doesn't that further
24 undermine the Government's position on the single integrated
25 transaction? Because it is -- it would seem to me, in my lack

1 of understanding perhaps -- and I'll ask you to comment on
2 this, too -- that the fact that you're trying to offset credit
3 card overcharges and overpayments against GTRs further
4 compounds the apples and oranges or not one integrated
5 transaction aspect of the Government's position.

6 MR. ARMAND: Well, the key here is, Your Honor, is
7 that we're dealing with federal statute that permits
8 recoupment, like the Medicare statute. And in the cases that
9 the Government cites and that counsel pointed out, the key in
10 those cases was looking to the statute. In order to determine,
11 Congress can decide whether it would like for a stream of
12 services that a particular contractor provides to the
13 Government to be considered a single integrated transaction.

14 THE COURT: But it's a very different stream of
15 services, isn't it? GTRs fly first, pay later and you're
16 trying to offset that obligation, those obligations against a
17 completely different form of transaction, namely credit cards,
18 which, like for the rest of us, you pay to buy your ticket and
19 then fly. You must -- I articulate this so that you know that
20 I have a problem and that I need your help if I'm going to
21 overcome it.

22 MR. ARMAND: I understand, Your Honor. But I think,
23 as in the Medicare context, that the key is looking to the
24 statute and the purpose of the statute. And in the
25 Transportation Act context, just like with Medicare, the

1 Government provided a limit waiver of the sovereign bar on
2 paying in advance prior to audit and created a right -- in this
3 context now we're talking about recoupment -- but the analysis
4 is virtually the same.

5 THE COURT: Well, wait a second. That's very
6 interesting which I'm going to stand up simply so that I don't
7 freeze to my chair or become solidified in my joints.

8 That's very interesting what you just said. The
9 Government created this because of this special circumstance of
10 allowing the airline to be paid before, but that's not the
11 situation with GTRs, is it?

12 MR. ARMAND: No, but that's --

13 THE COURT: So it's a completely different sort of
14 system. It's a completely different payment system.

15 MR. ARMAND: It's only different in that the
16 Government pays in advance with credit card travel and it pays
17 afterwards with regard to GTRs. There is a waiver allowing --

18 THE COURT: Actually -- no, it's not even paying in
19 advance, is it, because it may be charged to your credit card
20 but, in fact, it doesn't get paid in almost 100 percent of the
21 cases until they actually -- after you actually fly. I suppose
22 that you could get paid in advance if you're contracting in
23 September for a December flight.

24 MR. ARMAND: Are you talking about with regard to
25 credit card transactions?

1 THE COURT: Yeah.

2 MR. ARMAND: No, the Government certainly does pay in
3 advance and Delta receives all of those funds, most definitely.

4 THE COURT: Before they fly?

5 MR. ARMAND: Yes, it could be before they fly or it
6 could be -- it is before they fly because in order to have a
7 ticket -- in order to fly, you have to have a ticket. In order
8 to have a ticket, you have to purchase it in advance. They
9 won't let you on the plane unless you've already purchased a
10 ticket. What happens is that Government employees or agencies
11 use charge cards and the carrier is paid immediately by the
12 issuing bank and then the Government reimburses the charge card
13 bank, essentially.

14 THE COURT: Two or three months later.

15 MR. ARMAND: I don't know how long it takes, but it
16 does reimburse them and it doesn't -- it hasn't --

17 THE COURT: In all likelihood after the --

18 MR. ARMAND: -- ever tried to not reimburse its
19 employees or not pay the credit card companies. It does.

20 THE COURT: Let me ask you the same question, Mr.
21 Kaminetzky. Do you make the argument that I just articulated?

22 MR. KAMINETZKY: I think we do, but, Your Honor --

23 THE COURT: Because if you didn't make it, then I may
24 be completely off the mark and --

25 MR. KAMINETZKY: No, we did make the argument, but

1 it's only part of our -- again, what they're trying to do, and
2 let's be very clear about this, they're trying to recoup from
3 2001, from four years before the petition date, some Sergeant
4 Smith flew -- I'm sorry, bought a ticket and didn't fly and now
5 in 2006, yesterday, someone flew and they're not paying us and
6 they're saying --

7 THE COURT: Well, not only that, but they're trying to
8 match a credit card type of payment against the GTR.

9 MR. KAMINETZKY: I agree. So think about -- to say
10 that that's a single integrated -- I mean, you're -- for us to
11 lose, Your Honor is going to have to find, under Malinowski and
12 Westinghouse, that that was a single integrated transaction.
13 Flights five years apart, different people, different places,
14 different method of payments, different agencies, that that's a
15 single integrated transaction. And you're right, there's so
16 many -- there's a host of differences. Again, different
17 places, different agencies, different city pair contracts, so
18 we made that argument, Your Honor.

19 But again, it's just a host of differences for them to
20 string for us to kind of show that how could one ever say that
21 these two flights in 2001 and 2006 were part of a single
22 integrated transaction? I mean, the words have to mean
23 something for the test to hold any water, or else we're back
24 into setoff under 553.

25 THE COURT: I'll return to you.

1 MR. ARMAND: But again, Your Honor, the issue here
2 isn't whether or not it's a single integrated transaction under
3 Malinowski. The issue is whether the statute, when enacting
4 the statute, Congress intended for transportation, Government
5 transportation, which is comprised of thousands and thousands
6 and thousands of individual transportation procurements,
7 whether Congress intended for those procurements to be
8 considered one single integrated transaction. The Government
9 submits that this is correct, this is what is the case.

10 The same argument can be made with Medicare where you
11 have thousands of different patients. You could have services
12 for medical equipment versus for drugs versus for, you know, if
13 a surgeon is performing a surgery. I mean, you could millions
14 of different ways to distinguish the two respective
15 obligations, but the point here is that you have one contractor
16 providing a stream of services over and over and over to the
17 Government and the Government has agreed to pay in advance and
18 prior to audit for all of this stuff in advance.

19 THE COURT: Not the GTRs.

20 MR. ARMAND: Except -- well, there is this one
21 exception where GTRs --

22 THE COURT: And that's what you're trying to offset
23 against, or recoup against.

24 MR. ARMAND: Correct. But if -- there wouldn't other
25 -- there wouldn't be any other way for the Government to

1 exercise its deduction right.

2 THE COURT: I think I have it. Is there anything
3 else?

4 MR. KAMINETZKY: I don't have anything else other than
5 -- could I just make one final point?

6 THE COURT: Sure.

7 MR. KAMINETZKY: I guess I get the right of reply. I
8 mean, again, Mr. Armand just tripped into the Medicare statute
9 and I hate to do this, but I think this is the best way to
10 drive home the point.

11 My wife has a shopping problem. She loves shopping in
12 Nordstrom.

13 THE COURT: This is hypothetical, of course.

14 MR. KAMINETZKY: Hypothetical, of course.

15 THE COURT: A hypothetical wife.

16 MR. KAMINETZKY: And there's two possible ways I could
17 pay Nordstrom. One is the way I pay them. I get a credit card
18 bill every month and I pay. It's a pay-as-you-go system. If
19 my wife wants to return something, we get a credit.

20 I guess theoretically, I could have a deal with
21 Nordstrom. You know what? I'll pay you \$500 a month no matter
22 what and every few months we'll top up or top down. Okay?

23 Those are two different payment systems. Okay? The
24 Medicare statute is the latter, guesstimated payments followed
25 by adjustment. There it could make sense that that substantive

1 liability is defined by the adjustment. It could make sense
2 that it's really a single integrated transaction because no one
3 thought the \$500 would do it, everyone knew it was off because
4 it's a guesstimate pursuant to the statute, just like Medicare.
5 But that's not the Transportation Act.

6 The Transportation Act is a pay-as-you-go system. And
7 just like the shoes that my wife bought for me for Christmas,
8 it's not an integrated transaction with the shirt she bought me
9 for my birthday. So, too, here Sergeant Smith's ticket from
10 New York to Washington in 2001 is just not a single integrated
11 transaction with Admiral Adams's flight five years later to
12 Tokyo. You just can't say it is or else the entire recoupment
13 distinction to setoff, as required under the Second Circuit in
14 553 of the Code, is rendered completely nugatory.

15 Thank you.

16 THE COURT: Thank you, sir.

17 MR. ARMAND: Also, Your Honor, the point that counsel
18 is trying to make about paying in estimates in Medicare, it's
19 that overpayments and underpayments are contemplated in
20 Medicare. But overpayments are certainly contemplated in the
21 transportation context as well. Any time the Government has
22 waived its right to pay after post-payment audit and it has
23 decided to pay in advance, and in this case where you have
24 thousands and thousands of employees flying all around the
25 country, it's not just airline, it's also bus. It's for any

1 type of transportation. Overcharges and overpayments are
2 inevitable and the Government has put in evidence from the GSA
3 explaining that every year the Government recovers tens of
4 millions of dollars through deduction, overcharges because the
5 Government is frequently paying the incorrect amount.

6 And even with Delta, the Government recovers hundreds
7 of thousands of dollars every year.

8 MR. KAMINETZKY: Recovers, Your Honor. He was very
9 careful. It recovers the way you're supposed to recover under
10 the regulations. They don't fly, so they return the ticket,
11 just like you and me. When --

12 MR. ARMAND: No, no, I'm talking through deduction,
13 actually.

14 MR. KAMINETZKY: Excuse me, Mr. Armand. But --

15 MR. ARMAND: No, you interrupted me. We're talking
16 about deduction.

17 MR. KAMINETZKY: What Mr. Armand just said is because
18 my wife shops a lot and inevitably I'm going to have -- she's
19 going to have to return stuff, then it's a single integrated
20 transaction. That's what they said, because there's flight
21 after flight after flight after flight, there's always going to
22 be some, you know, flights that are -- there's going to be
23 overpayments, overcharges, so it transforms it into the
24 Medicare system. Just doesn't work. It's a pay-as-you-go
25 system. It's I pay my credit card bill.

1 MR. ARMAND: But it's not exactly a pay-as-you-go
2 system with transportation because the Government is still
3 required -- they get to keep the money if -- even if the
4 Government employee ends up not using the ticket. And so it's
5 really not a pay-as-you-go system.

6 And in addition to that, they're overlooking the whole
7 equitable component of the recoupment doctrine. And in this
8 case, public interest and the interest of fairness and equity
9 compel the application of recoupment here. Here, the statute -
10 -

11 THE COURT: Let me just interrupt you because, as I
12 often say, equity, to me, that concept that measures in
13 accordance with the length of the chancellor's order (sic), how
14 you feel when you get out of bed in the morning, I've always
15 found to be a very slippery slope, even though I know myself to
16 be probably the most equitable person east of the Mississippi,
17 if not in the whole country. That doesn't help the person who
18 has been gored by my notion of what's fair and equitable. And
19 you can argue for fair and equity both ways. There are other
20 creditors who will be disadvantaged, which is the whole concept
21 of the Bankruptcy Code, it's not fair and equitable for
22 creditors to be treated differently.

23 So I -- that's not going to be the key element in my
24 analysis here, but I appreciate the point.

25 Anything else? I think we've touched on it all,

1 right?

2 MR. ARMAND: It seems like the Court has made its
3 decision, so --

4 THE COURT: I haven't made my decision. I have tried
5 to raise issues that were of concern to me. And I guess the
6 question is: Is there anything to add to what we've already
7 said?

8 MR. ARMAND: The only thing that the Government would
9 emphasize here is that the key here is Congress's intent in
10 amending the Transportation Act to afford this immeasurable
11 benefit to Delta. The whole quid pro quo was that the
12 Government would be able to deduct overcharges and overpayments
13 that were discovered after a post-payment audit. If the
14 Government -- if Congress wanted to, it certainly could have
15 carved out an exception for transportation service providers
16 who were in financial problems going into bankruptcy, and it
17 did not -- it's certainly foreseeable --

18 THE COURT: Let me mention one thing on that point.
19 We're not talking about TSPs who are in financial difficult and
20 who may go into bankruptcy. As to those people, the Government
21 can deduct. It's the filing of a petition in bankruptcy.

22 MR. ARMAND: Correct, Your Honor.

23 THE COURT: And the priority scheme of the Bankruptcy
24 Code that is involved. So that's what we have to deal with.

25 MR. ARMAND: Correct. I mean, we have two federal

1 statutes here, and one allows the Government a recoupment
2 right; and, as the cases in the Medicare context made clear,
3 the purpose is to try and discern what Congress's intent was.
4 And the Government submits that it was the intent of Congress
5 to allow transportation services provided to the Government to
6 be considered, as in Medicare, a stream of services provided by
7 a healthcare provider, to be considered a single integrated
8 transaction. And that's really the key here.

9 And I would again refer the Court to the two Supreme
10 Court cases that I cited, in which the point was to allow the
11 Government to not be in the position of a creditor with regard
12 to the overpayments and overcharges. And we're dealing with
13 taxpayer dollars here. And that's all, Your Honor.

14 THE COURT: By the way, is the Government's interest
15 of not being a creditor because we're dealing with taxpayer
16 dollars any less compelling than the Government's interest of
17 not being treated as a creditor as a tax collector? Because
18 certainly nothing can be more important to the federal fisc.
19 than the Government's role as tax collector. But the
20 Government, as tax collector, is subject to the Bankruptcy
21 Code.

22 MR. KAMINETZKY: Your Honor, can I just add to that?
23 507(a)(5), this is just -- I think drives the nail right in.
24 That provides for taxes, a fifth priority for three years of
25 taxes. 507(a)(5) of the Bankruptcy Code.

1 If you adopted the Government's position, the
2 Government, for transportation, for ticket refunds, although
3 there's not a word about it in the code, would get an unlimited
4 super-priority -- not fifth priority -- super-priority for ten
5 years. That's their position. Despite the fact 507(a)(5),
6 very clear, taxes, fifth priority, three years; here, super-
7 priority, ten years.

8 And I think that just shows what -- he's asking you to
9 look at the congressional intent. He asks you to look at cases
10 from the 1950s. Please look at the case from two months ago,
11 where the Supreme Court told courts, be careful, 507(a)(5)
12 means what it says. There's no penumbras to 507(a)(5). Don't
13 read things into it because that's a carefully reticulated
14 list.

15 And just one last point on the equity point. I just
16 don't want it to go unsaid. In Slater, which is the First
17 Circuit case, another Medicare case, one of the cases they
18 cite. And I quote, it says:

19 "In at least most cases, analysis of the recruitment
20 issue should both begin and end with the same
21 transaction question, without discussing other
22 equitable issues."

23 In other words, the single integrated transaction test
24 is the equity test.

25 THE COURT: Is the equity test.

1 MR. KAMINETZKY: Thank you, Your Honor.

2 MR. ARMAND: I'm sorry. I would also --

3 MR. KAMINETZKY: 507 -- thank you so much, Mr. Winnick
4 (phonetic). I misspoke. 507(a)(8). It's an eighth priority
5 for three years of taxes, not a fifth priority. And I
6 apologize for that error.

7 MR. ARMAND: There's also, as I've said before,
8 there's no exception for Medicare, either. And the courts have
9 looked at congressional intent and concluded that recruitment
10 should be allowed, and that it's an exception to the automatic
11 stay, and that's what the Government is requesting here.

12 THE COURT: All right. Well --

13 MR. ARMAND: And in regard to -- just briefly --

14 THE COURT: Yes.

15 MR. ARMAND: -- with regard to the equities issue.
16 The other Medicare cases, the Consumer Health case, and I think
17 also the TLC Hospitals case, specifically referred to the fact
18 that it would be improper for contractors to retain funds that
19 had been earmarked for other purposes, and to be able to use
20 those taxpayer funds to pay to creditors or to fund their
21 reorganization. And that's very clear here. For the most
22 part, they've been steering away of the equities here and have
23 been trying to focus on the contract, and they've actually
24 dropped that argument here, now, because they've realized that
25 it doesn't have much merit, and that really what we have to

1 focus on is the statute.

2 And also, the Supreme Court case law interpreting the
3 statute, the legislative history, the Government submits that,
4 if the Court looks at those things, it will agree with the
5 Government.

6 THE COURT: Thank you very much.

7 MR. ARMAND: Thank you, Your Honor.

8 THE COURT: Counsel, both sides. Thank you.

9 I think we're done, eh? All right. Good day.

10 (Proceedings concluded at 6:10 p.m.)

11 *****

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

1
2 We certify that the foregoing is a correct transcript
3 from the electronic sound recording of the proceedings in the
4 above-entitled matter to the best of our knowledge and ability.
5
6
7

8 

August 23, 2006

9
10 Coleen Rand, AAERT Cert. No. 340
11 Certified Court Transcriptionist/Agency Director
12 Rand Transcript Service, Inc.
13
14

15 

August 23, 2006

17 Cathryn Lynch, NJ Cert. No. 565
18 Certified Court Transcriptionist
19 For Rand Transcript Service, Inc.
20
21

22 

August 23, 2006

24 Lisa Luciano, AAERT Cert. No. 327
25 Certified Court Transcriptionist
For Rand Transcript Service, Inc.