UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: | Chapter 11 (Jointly Administered) No. 05-17923 (ASH)

DELTA AIR LINES, INC.,

Debtors.

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WILLIAM C. BUERGEY, *et al.*

Appellants,

v. | Case No. 06-cv-09418 (DLC)(RLE)

DELTA AIR LINES, INC.,

Debtor-Appellee,

and

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF DELTA AIR LINES, INC., *et al.*,

Appellee.

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APPEALLANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPEAL FROM THE BANKRUPTCY COURT'S ORDER GRANTING DEBTORS' MOTION SEEKING A DETERMINATION THAT THEY SATISFY THE FINANCIAL REQUIREMENTS FOR A DISTRESS TERMINATION OF THE DELTA PILOTS RETIREMENT PLAN AND APPROVAL OF SUCH TERMINATION

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STATEMENT OF APPELLATTE JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 158(a)(1), which provides for appeals from bankruptcy courts' final judgments, orders and decrees. *See* 28 U.S.C. § 158(a)(1). *See also Solomon v. Smith (In re Moody)*, 41 F.3d 1024 (5th Cir. 1995) (Appeals from decisions of Bankruptcy Court lie with District Court under 28 U.S.C. § 158(a)(1); *In re Financial News Network, Inc.*, 931 F.2d 217 (2d. Cir. 1991).

STATEMENT OF ISSUES

1. Was the Bankruptcy Court clearly erroneous in making its conclusory findings that each of the Debtors satisfied the rigorous requirements for the Bankruptcy Court's authorization to seek distress termiantion of the Pilot Plan?

2. Did the Bankruptcy Court err by issuing its Order without setting forth the legal and factual basis or rationale for its decision?

3. Did the Bankruptcy Court fail to properly apply the relevant legal analysis in making its determination to permit the Debtors to take the steps necessary to obtain a voluntary distress termination?

4. Were the Appellants' rights to due process violated in that Appellants were denied adequate notice of the motion and its consequences, in part due to material misrepresentations in Debtors' notice, and were they denied the opportunity to be heard in opposition to the motion?

STANDARD OF REVIEW

A district court sits as an appellate court in reviewing bankruptcy cases and applies dual standards of review. Questions of law are reviewed *de novo* and findings of fact are set aside if clearly erroneous. *See e.g. Williams v. New York State Higher Ed. Servs. Corp.*, 296 B.R. 298

(S.D.N.Y. 2003), *aff'd*, 84 Fed. Appx. 158 (2004); *In Re MacMillan, Inc.*, 1996 U.S. Dist. LEXIS 8315 (S.D.N.Y.); *Fellows, Read & Associates, Inc. v. Rieder*, 194 B.R. 734 (S.D.N.Y. 1996).

STATEMENT OF THE CASE

On September 14, 2005, Delta Airlines, Inc. ("Delta") and 18 of its 25 subsidiaries (hereinafter collectively "Debtors") each filed a voluntary petitioon for relief from their creditors under Chapter 11 of the U.S. Bankruptcy Code. The Debtors continue to operate their business as debtors in possession. As part of the Chapter 11 proceeding, Debtors sought the Bankruptcy Court's determination that each satisfies the financial requirements for a distress termiantion of one of their creditors, the Delta Pilots Retirement Plan ("Pilot Plan" or "Pilots Plan"). Delta has sponsored and administered the Pilots Plan to provide retirement benefits for its pilot employees and their spouses for many years and has funded the Pilots Plan with contributions paid pursuant to a series of successive collective bargaining agreements between Delta and the pilots' collective bargaining agent, the Air Line Pilots Association, International ("ALPA").

By motion dated, August 4, 2006, Debtors filed their joint Motion Seeking a Determination That They Satisfy the Financial Requirements for a Distress Termiantion of the Delta Pilots Retirement Plan and Approval of Such Termination (hereinafter, "Debtors' Motion"). Written objections were filed by several retired Delta pilots, who are participants in the Pilots Plan, and by which was entitled Delta Pilots Pension Termination Opposition, LLC ("DP2"), an organization created and funded by a group of retired pilots to oppose the termination of the Pilots Plan.

In addition, the Pension Benefit Guaranty Corporation ("PBGC"), the wholly-owned United States government corporation that administers the defined benefit pension plan termination insurance program established by Title IV of ERISA, filed a response without supporting or

opposing Debtors' Motion to advise the Court of the agency's views regarding the interpretation and application of the distress termination provisions of ERISA.[1] *See Response of the Pension Benefit Guaranty Corporation to Debtors Motion*, at 1. When a pension plan covered by Title IV terminates without sufficient assets to pay all of its promised benefits, as would be the case with the Pilots Plan, PBGC typically becomes trustee of the plan and pays plan participants their pension benefits, but only up to the limits established by Title IV. *See* 29 U.S.C. §§ 1321, 1322, and 1361.

A hearing was held on Debtors' Motion on September 1, 2006. When the hearing resumed on September 5, after Labor Day Weekend, DP2 withdrew its objections, Debtors ceased their presentation of evidence, and the Bankruptcy Court, after receiving no response to its question if anyone present in the courtroom wanted to be heard, signed its Findings of Fact, Conclusions of Law and Order Granting Debtors' Motion, dated September 5, 2005, a document that Debtors submitted to the Court. (Hereinafter "Order"). The Order was entered by the Clerk on September 6.

Appellants filed their appeal from the Bankruptcy Judge's Order on September 18, 2006, Appellants are 223 retired pilots, who receive retirement benefits from the Pilots Plan. They oppose termination of the Pilots Plan because its termination and takeover by PBGC will result in a discontinuation or drastic curtailment of their retirement benefits due to the limits established by Title IV of ERISA. Some Appellants submitted written objections to Debtors' Motion. Others did not object because they were lulled into inactivity by reliance on representations by the Debtors that, if the Pilots Plan were terminated, their benefits would be diminished minimally. Still others did not object because they believed that an organization they had helped fund, DP2, would voice their

[1]The Court is respectfully referred to the PBGC's *Response*, which contains an excellent explanation of the law applicable to Debtors' requirements for a distress termination of the Pilots Plan and the proof Debtors need to meet the requirements.

objections to the Bankruptcy Court, and when DP2 suddenly withdrew its objections, they had no opportunity to present their objections themselves. Still others did not object because they failed to receive the motion. Still others did not know how to file objections electronically with the Bankruptcy Court and were impeded in their ability to object because of difficulty or inability to access the into-net.

This Memorandum of Law is submitted by Appellants in support of their appeal from the Bankruptcy Judge's Order, which they respectfully request be reversed for the reasons set forth herein.

STATEMENT OF FACTS

I. Overview of the Retired Pilots' Pension Plans

The Pilot Plan is a tax qualified, defined benefit pension plan covered by PBGC's insurance program under Title IV of the Employee Retirement Income Security Act. 29 U.S.C. §§ 1341, *et seq*. ("ERISA"). See Joint Statement of Stipulated Facts With Respect to the Motion of DP3, Inc. to Compel the Continued Payment of Collectively Bargained for Pension Benefits to the Retired Pilots (hereinafter "Joint Statement"), ¶ 18. Delta and its affiliated entities, the Debtors in this case and Delta's other subsidiaries that are not in Chapter 11 , are "controlled group" members. who are jointly and severally liable for the unfunded benefit liabilities of a terminated pension plan sponsored by Delta and covered by Title IV of ERISA. *See* PBGC Response at p. 2; 29 U.S.C. § 1301(14)(A)(B); (C); 26 C.F.R.§§ 1.414(b)-1; 1.414(c)-2. Debtors unfunded benefit liability is estimated to be $3 billion [2]. PBGC Response at p. 3.

Upon retirement, a pilot may elect to take a one time lump sum payment equal to 50% of the

[2]Delta, however, estimates that its pension funding obligation to the Pilots Plan due upon emergence from Chpater 11 is $1.4 billion to $1.7 billion. *See* Declaration of Edward H. Bastian in Support of Debtors' Motion at ¶ 13.

present value of his or her Pension Benefit, with the remainder payable monthly as an annuity. *See* Joint Statement, ¶ 8. The 50% lump sum benefit is paid entirely from the assets of the Pilots Plan. *See* Joint Statement, ¶ 26 Federal law currently obligates pilots to retire at age 60, though under the Pilot Plan, pilots are allowed to take "early retirement" once they reach age 50. *See* Joint Statement, ¶ 27-28. Pursuant to the Letter of Agreement #45, Delta and ALPA agreed that for a limited period of time, pilots could retire and receive their lump sum benefits under the Pilots Plan and subsequently be rehired by Delta on a contract basis. *See* PBGC Response at p. 4.

For the years of 2002-2004, Delta made only the minimum amount of contributions required under ERISA and the Internal Revenue Code into the Pilot Plan. *See* PBGC Response at p. 4 This problem was compounded once Delta filed for bankruptcy, when it ceased funding the Pilot Plan altogether. *See* Declaration of Edward H. Bastian in Support of Debtors' Motion. The result was that as of October I. 2005, the Pilot Plan was deemed to be in "liquidity shortfall," which means that the Pilot Plan did not meet the Internal Revenue Code requirement that three times the total disbursements for the 12 -month period ending on the last day of the quarter be liquid. *See* 26 U.S.C. § 412 (m)(5); 29 U.S.C. § 1082 (c)(5). Under ERISA, as the Pilots Plan was in liquidity shortfall, it was prohibited from paying lump sum retirement benefits. *See* 29 U.S.C. § 1082 (e)(5).

Contrary to its statutorily mandated responsibility, since filing bankruptcy, Delta has continued to refuse to pay the full amount of its minimum funding requirements and the supplemental contributions to eliminate the liquidity shortfalls. *See* Debtors' Motion at p. 12-13. Instead, Delta unilaterally decided to make only de minimis contributions to the Pilots Plan that Delta has determined to be attributable to post petition services. *Id.* This self imposed funding shortfall is a primary part of Delta's argument as to why the Pilot Plan should be terminated. *See*

Debtors' Motion at p. 3. However, the Pension Protection Act of 2006 enacted August 17, 2006, allows employers to make payments to eradicate pension plan funding shortfalls over a seventeen year period. *See* H.R. 4, 109th Congr. § 402 (2006).

II. Union Abandons Retired Pilots

The Pilots Plan has been historically sponsored and administered pursuant to a collective bargaining agreement between Delta and the Air Line Pilots Association, International ("ALPA"). ALPA has refused to represent its retired pilots with respect to their retiree pension or medical benefits in this case. *See* DP3. Inc. Reply Brief in Support of Amended Motion to Appoint an Official Committee of Retired Pilots Pursuant to 11 U.S.C. § 1114 at p. 7. ALPA's position has been that it does not represent the interests of retired pilots. *Id.* On October 12, 2005, a Joint Statement of Stipulated Facts With Respect to the Motion of DP3, Inc.

On November 1, 2005, Delta filed a motion pursuant to section 1113 of the Bankruptcy Code to reject the pilots' collective bargaining agreement. On December 12. 2005, Delta and ALPA reached an interim agreement while they continued negotiations. On April 14, 2006, they reached a proposed final settlement agreement-Letter of Agreement #51. Notably, the PBGC argued that this Agreement violated the provisions of ERISA. *See* Objection of Pension Benefit Guaranty Corporation to Debtors' Motion Pursuant to Section 363 of the Bankruptcy Code for Authority to Enter Into Amendments to Pilot Working Agreement With Air Line Pilots Association, International However. the Court approved this Agreement in its order dated May 31, 2006. *See* Order Authorizing Debtors to Enter Into Amendments to Pilot Working Agreement With Air Line Pilots Association, International.

ALPA had granted significant financial concessions to Delta pre-bankruptcy. In September 2004, Delta was provided with $5 billion in relief pursuant to Letter 46. As a result of such

concessions, ALPA received a bankruptcy protection letter from Delta stating that in view of the concessions of $1 billion per year, if it became necessary for Delta to file bankruptcy in spite of the significant pilot concessions, Delta would advise its creditors of the huge concessions already granted by the pilots. *See* Letter 46 Delta further agreed in this letter that it would not ask for any more than was absolutely necessary if a bankruptcy filing was made. *Id.*

Despite these negotiations and earlier concessions, Delta demanded over $300 million per year in additional concessions from ALPA. Notably, under the provisions of Letter of Agreement #51 modifying the collective bargaining agreement between Delta and ALPA, Delta intends to compensate its active pilots for unfunded Pilots Plan by giving them 5650 million in notes, explicitly conditioned on the termination of the Pilots Plan, and a $2.1 billion general unsecured claim. During these negotiations, Delta demanded a hard freeze of the qualified pension plan. *See* Letter #51. Furthermore, during the Letter #51 negotiations, Delta evaluated a concessions offer by ALPA as being worth $90 million per year in cost savings. However, shortly after the Letter #51 deal was reached, wherein ALPA agreed not to oppose pension termination, Delta tripled its evaluation of ALPA's concessions from $90 million per year to $280 million per year. This letter also froze the Pilots Plan and ceased contributions going forward. *See* Letter #51. PBGC has appealed the Bankruptcy Court's approval of Letter #51, contending that the deal between ALPA and Delta improperly and impermissibly gave the benefits of the deal only to the active working pilots with no part of the benefit going to the retired pilots. The retired pilots were harmed because funding of their retirement plan ceased as a result of Letter #51, thereby freezing and jeopardizing payment of benefits. PBGC's appeal is pending.

III. Debtors Attack Retired Pilots' Non-qualified Pension Plans

As the Delta retired pilots now had no representative with respect to their pension benefits.

Delta Pilots' Pension Preservation Organization ("DP3") a non-profit Delaware corporation, was for a time the voluntary, self-appointed champion of some of the retired pilots. It had the support of a considerable segment of the retired pilot population, and its stated intent was "to preserve pensions, health insurance, and other benefits of retired Delta pilots."

On June 2, 2006, the Court approved a Stipulation and Consent Order Between the Debtors, the Committee, and DP3, Inc., allowing for the termination of the retired pilots' non-qualified pension plans and provided settlement of claims for the lost non-qualified benefits (from filing bankruptcy through termination) for pennies on the dollar thereunder and payment of DP3's attorney's fees. DP3 abandoned the retired pilots' cause, leaving the pilots without a voice.

IV. Debtors Go For The Kill: Seek To Terminate P1ension Plan

Delta predicted that it would finally come out of liquidity shortfall on July 1, 2006. However. prior to doing so, it filed the instant Motion. A deluge of objections from retired pilots followed.[3] A new voluntarily established entity, the Delta Pilots Pension Termination Opposition, LLC (a.k.a. "DPTTO" or "DP2.") formed on or about August 6, 2006, supposedly to pick up where DP3

[3]On August 14, 2006. K. Wendell Lewis filed an Objection to Delta Air Lines Motion for Distress Termination of the Delta Pilots Retirement Plan. On August 15, 2006, Christopher N. Wagerer, Warren B. Hendrickson, Craig H. Cosgray, William K. Goeken, and George R. Rickley filed objections. On August 17, 2006, Capt. C.J. Lundquist, Charles L. Roedeman. David D. Dempsey. Nancy Fisher (wife of a deceased retired pilot), Robert Berger (together with other retired pilots), Roger Edson, filed objections. On August 18, 2006, John D. Rowe and Barry Yunes filed objections. On August 21, 2006. James J. Goode, III filed an objection. On August 25.2006, retired pilot William C. Dvorak filed an objection. On August 17, 2006, retired pilots William C. Buergey, Richard P. Deakers, David J. Rist, Terry K. Ward, Harvey L. Hayden, K.R. Matthews. Evan Gost, James G. George. Robert Allen, Richard E. Glantz, John D. Rowe, Jeffrey F. I fall, and Edward L. Madden filed objections. On August 13, 2006, retired pilot Paul M. Borgatti filed an objection. On August 16.2006, Capt. Anthony Azemar filed an objection. On August 16.2006, retired pilots John M. McLain, Roger A. Lewis, Vern T. Hammett, Sr., Kerin L. Shaughnessey, III, Paul Barrett, Harry A. Nelson, Thomas P. Butt, and Barry Steiner filed objections. On August 18, 2006, retired pilots Michael J. Walton and William L. Ippolito filed objections. On August 14, 2006, retired pilots Gary W. Cunningham, Donald Davis, Roger T. Horrell, Buford Ness, Don J. Teeple, Gerald G. Simpson, and Patrick J. Burke, Jr. filed objections.

dropped the ball. Delta has not sought the termination of any other employee class' pension plans.

In Delta's Motion papers, Delta made the following representation to the Bankruptcy Court and retirees: if "the Pilot Plan is terminated prior to the lump sum door reopening, retirees are expected to receive. on average. 85-90% of their qualified plan benefits." *See* Debtors' Motion at '¶ 38. At the hearing on September 1, 2006, Delta counsel reasserted: "Fact: Retired pilots will still get, **on average, eighty-five to ninety percent of their qualified plan benefits** if the relief requested by Delta is granted. And on average, seventy-five percent of their total pension benefits, even including the losses on the non-qualified plan, and assuming, Your Honor, that they get zero claim for that and zero recovery, these are the **minimum averages**." *See* Hearing Transcript p. 1-24) (emphasis added).

In direct contradiction to the representations of Delta. on September 22, 2006, when the ink was barely dry on the Bankruptcy Court's Order authorizing termination of the Pilot Plan approximately 1400 retired pilots received letters from Delta stating that they would receive no additional monthly pension benefit. *See* attached Exhibit V. Adding insult to injury, the letter further explained that to continue receiving retiree medical benefits, these retired pilots would now have to send Delta monthly out-of-pocket checks to pay medical benefit premiums. *Id.* This was a tremendous shock to the letter recipients, who believed based on the repeated statements of Delta counsel, that they would receive the vast majority of their pension benefits, rather than being cut off entirely -- instantly.

Notably, the **Court itself** expressed its confusion and concern about this misrepresentation in the subsequent hearing regarding the Motion to Approve Agreements With Retiree Committees with respect to their medical benefits on October 19, 2006. Judge Hardin stated: "By the way, I actually was going to raise that issue ... simply to put it out on the table as a concern that has been

expressed to me in numerous letters, and because of the **stark contrast between my recollection of the representations in the papers and to the Court**... and these letters that I'm getting, people saying that I was reduced from this amount to zero, or I have been told by the PBGC that my pension benefit will be cut by seventy-eight percent...I've just gotten a lot of those letters...it's something that I would think Delta would want to address." *See* attached Transcript as Exhibit W, p. 81-82 (emphasis added).

In Debtors' Motion. Delta argued that if the pension plan were not terminated, if the plan was no longer in liquidity shortfall, the lump sum option would again become available to all Delta pilots over age 50. *See* Debtors' Motion p. 21 They further argued that this option would result in a "concentrated wave of mass early retirements ... unlike anything Delta or any other airline has previously experienced." *Id.* Their estimate, based on pure conjecture and speculation, was that 800 to 1,000 pilots would immediately exercise the lump sum option. *Id.* at p. 22-23 Delta alleges that this result would result in an operational disaster that would ground a large percentage of Delta's fleet. *Id.* at p. 24.

Delta further alleged that without terminating the Pilot Plan, it would not be able to obtain the exit financing needed to successfully emerge from bankruptcy or to submit a feasible plan of organization. *Id.* at p. 28 Delta asserted that the financial obligations under the Pilot Plan would make Delta an unattractive borrower and that potential lenders unwilling to provide the level of exit financing required by Delta. *Id* at p. 29.

The Court held that "[b]ut for the termination of the Pilot Plan. each of the Debtors will be unable to (i) obtain exit financing that would allow them to emerge from bankruptcy, (ii) submit a feasible plan of reorganization that would satisfy the standards of section 1129 of the Bankruptcy code. (iii) pay all of their debts pursuant to a plan of reorganization and (iv) continue in business

outside of the chapter 11 reorganization process." *See* Order p. 3 Significantly, the Court made its findings irrespective of the number of Delta pilots who would actually choose to retire early at any specific point(s) in time." *Id.*

V. Debtors Attack Retired Pilots' Medical Benefits

As if the potential termination of their pension benefits were not injurious enough, on October 5, 2006, Delta filed a Motion to Approve Agreements Between the Debtors and Section 1114 Retiree Committees to Modify Retiree Benefits. This motion, which sought approval to increase the contribution amount with respect to medical insurance premiums that retired pilots would be required to pay, despite the facts that many of these pilots were left without any income, was approved.

VI. Debtors Seek An Extension of Their Exclusive Period Within Which To File A Plan of Reorganization

Section 1121(b) of the Bankruptcy Code provides for an initial period of 120 days after the date of the order for relief during which the debtor has the exclusive right to file a reorganization plan. Thereafter, it has a period of 180 days after the date of the order for relief to solicit and obtain acceptances, during which time competing plans may not be filed. On June 29, 2006, the Bankruptcy Court entered an order extending the Debtors' exclusive period until November 8, 2006, and the attendant solicitation period expires on January 8, 2007. However, on October 20, 2006, Debtors' filed a Motion for an Order Extending Debtors' Exclusive Periods Within Which to File a Plan of Reorganization and Solicit Votes Thereon. Debtors seek to have this exclusive period extended for a third time from November 8, 2006 and January 8, 2007, respectively, to February 15, 2007 and April 16, 2007, respectively.

ARGUMENT

POINT I. THE BANKRUPTCY COURT MUST BE REVERSED BECAUSE

THE DEBTORS DID NOT MEET THEIR SUBSTANTIAL BURDEN TO PROVE THAT TERMINATION OF THE PLAN IS NECESSARY OR WARRANTED AND THE EVIDENTIARY BASIS FOR THE COURT'S DECISION CANNOT BE DISCERNED AND/OR IS NON-EXISTENT

A. The Evidentiary Basis For The Court's Decision Cannot Be Discerned and/or Is Non-Existent

In the instant case, the Bankruptcy Court erroneously made the following findings of fact:

> But for the termination of the Pilot Plan, each of the Debtors will be unable to: (i) obtain exit financing that would allow them to emerge from bankruptcy, (ii) submit a feasible plan of reorganization that would satisfy the standards of section 1129 of the Bankruptcy Code, (iii) pay all of their debts pursuant to a plan of reorganization and (iv) continue in business outside of the chapter 11 reorganization process.

See Bankruptcy Court Order, at 2-3. The Bankruptcy Court's findings are conclusory and give no indication of the evidence relied upon or the rationale for their adoption. If a bankruptcy court makes findings in a conclusory fashion and the record below does not enable the district court to meaningfully review the decision and be sure of its basis, a remand to the Bankruptcy Court for further proceedings is required. *See In re 599 Consumer Electronics, Inc.*, 195 B.R. 244 (S. D.N.Y. 1996)(unclear whether a factor of governing legal test had been considered, and the case was remanded). In *Spangler v. Aleet Leasing Associates II*, 56 B.R. 990 (I). Md. 1986), the District Court held that "in view of the absence of specific factual analyses and determinations by the Bankruptcy Court, a remand to that court is required."

The premise of Debtors'[4] Motion was that, if the Pilots Plan was not terminated. 800 to 1000

[4]The Debtors are the following entities: Delta Air Lines, Inc. (hereinafter, "Delta") and eighteen (18) members of the controlled group of Delta Airlines, Inc. as of September 2, 2006: ASA Holdings, Inc.; Comair holdings, LLC; Comair, Inc.; Comair Services, Inc.; Crown Rooms, Inc.; DAL Aircraft Trading, Inc.; DAL Global Services, LLC; DAL Moscow, Inc.; Delta AirElite Business Jets. Inc.: Delta Benefits Management, Inc.; Delta Connection Academy, Inc.; Delta Corporate Identity, Inc.; Delta Loyalty Management Services, LLC; Delta Technology, LLC; Delta

pilots would retire immediately and exercise the lump sum benefit if the Pilots Plan causing insurmountable operational and financial issues. As instructed by the PBGC in its Response, "Debtors must prove to this Court that if the lump sum window opens, 800 to 1,000 Delta pilots will in fact immediately retire and elect to receive a lump sum." PBGC Response, at p. 11. Debtors' premise was rejected by the Bankruptcy Court, when it expressly made no finding that any Delta pilots would actually choose to retire early at any specific point(s) in time or choose a lump sum retirement benefit. Order, at 3 ("[The Court's] findings are made irrespective of the number of Delta pilots who would actually choose to retire early at any specific times").

B. <u>The Record Is Devoid of Evidence That Each of the Debtors Proved That Each One Meets the Requirements for a Court to Find That Termination of the Pilots Plan is Necessary or Warranted</u>

Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") establishes the exclusive means of terminating single-employer pension plans, places the burden of proving that the requirements for termination are met squarely on the Debtors, and sets forth the strict criteria for obtaining a distress termination of a pension plan. *See* 29 U.S.C. §§ 1341(a)(1); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999); *In re Wire Rope Corp. of Am.*, 287 B R., *supra*, at 773 (noting ERISA's strict criteria for distress terminations).

A single-employer plan may terminate in a distress termination only if the plan administrator provides affected parties with at least sixty days of advance written notice of its intent to terminate,

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Ventures III, N C; Epsilon Trading, Inc.; Kappa Capital Management, Inc.; and Song, LLC. *See* Notice of Motion Regarding Distress Termination of Delta Pilots Retirement Plan, dated August 5, 2006.

"Controlled group" refers to a group of trades or business under common control. For example, a parent and its 80% owned subsidiaries. *See* 29 U.S.C. §1301(14)(A),(B); 26 U.S.C. § 414(6). (c); 26 C.F.R. §§ 1.414(h)-I, 1.414(c)-2.

29 U.S.C. §§ 1341(b)(2)(B); 29 C.F.R. § 4041.43, and the PBGC determines that the plan sponsor and each member of its controlled group satisfy one of the three statutory distress tests under 29 U.S.C. § 1341(e)(2)(B), which are: (i) the liquidation test, (ii) the reorganization in bankruptcy test, and (iii) the business continuation/pension cost test. *See* 29 U.S.C. § 1341(c)(1)(A)-(C), (2)(B)(i)-(iii); 29 C.F.R. §§ 4041.41. *See In re Kaiser Aluminum Corp.*, 456 F.3d 328, 335 (3rd Cir. 2006). In its Notice of Intent to Terminate the Pilots Plan, Delta stated that the Debtors expect to meet the reorganization in bankruptcy" distress test under 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).[5] *See* Delta's Notice of Intent to Terminate, dated, June 19, 2006. The Bankruptcy Court had jurisdiction to make the limited factual finding as to whether Delta and each member of its controlled group in Chapter 11 satisfied this test under ERISA's strict criteria. *See In re Sewell Mfg. Co.*, 195 B.R. at 183.

A plan sponsor seeking reorganization in Chapter 11 bankruptcy may terminate a pension plan under the reorganization test if the plan administrator satisfies certain notice requirements[6], provides the PBGC with certain actuarial and financial information; and each debtor that is a plan

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[5] Delta also claimed that its non-bankrupt controlled group members expected to satisfy the "termination required to enable payment of debts while staying in business" distress test under 29 § U.S.C. 1341(c)(2)(B)(iii). *See* Delta's Notice of Intent to Terminate. The Bankruptcy Court, however. did not have jurisdiction to decide whether Delta's non-bankruptcy controlled group members satisfied that distress test. Rather, the PBGC has sole authority to make this determination. *See* 29 § U.S.C. 1341(c)(2)(B)(iii); *In re Sewell Mfg. Co.*, 195 B.R. at 183. Thus, the Bankruptcy Court's decision does not address this aspect of Delta's claim.

[6]Four requirements must be satisfied for a distress termination under the reorganization test. First, the plan sponsor must have filed a petition seeking reorganization in bankruptcy. Second, the bankruptcy case must not have been dismissed as of the proposed termination date. Third, the plan sponsor must submit to the PBGC a request for bankruptcy court approval of the plan termination. 29 U.S.C. §§ 1341(c)(2)(B)(ii)(I)-(III). Finally, the bankruptcy court must "determine' [] that, unless the plan is terminated, [the plan sponsor and its subsidiaries] will be unable to pay all its debts pursuant to a plan or reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approve[] the termination." 29 U.S.C. §§ 1341(c)(2)(B)(ii)(IV).

sponsor or controlled group member demonstrates to a bankruptcy court that it will he unable to pay its debts and continue in business outside of Chapter 11 unless the pension plan is terminated. *See* 29 U.S.C. §§ 1341(c)(2)(B)(ii)(IV). *See also* C.F.R. § 4041.41(a)(3). *See also In re Kaiser Aluminum Corp.*, 456 F.3d 328, 330 (3rd Cir. 2006); *In re Sewell Mfg. Co.*, 195 B.R. at 185. The debtors bear the burden of proof and must make a showing that "but for" termination of a plan, the debtors will liquidate. *See In re Phillip Set-vs. Corp.*, 310 B.R. at 807. *See also In re US Airways Group*, 296 B.R. at 743; *In re Wire Rope Corp. of Am.*, 287 B.R. at 777 (Bank. W.D.Mo. 2002); *In re Sewell Mfg. Co.*, 195 B.R. at 184; *In re Resol Mfg, Co.*, 110 B.R. at 862. Importantly, ERISA requires that the distress test must he met by each debtor that is a plan sponsor or controlled group member. *See In re Sewell Mfg. Co.*, 195 B.R. at 185 ("[L]ike the Debtor's own showing of 'distress,' the qualification of any 'controlled group' entities under section 1341(c)(2)(B) will form a key element in the Debtor's final application for termination and a precondition to the Debtor's success in terminating its pension liability.").

The Bankruptcy Court's findings that Delta and each of its eighteen (18) controlled group members ('Debtors')[7] satisfied the requirements set forth in 29 U.S.C. § 1341(c)(2)(B)(ii)(IV) for a voluntary distress termination of the Pilot Plan was clearly erroneous because the record does not support a finding that but for" the termination of the pension plan, each of the Debtors would be forced to liquidate. *See In re Phillip Servs. Corp.*, 310 B.R. 802, 807 (Bankr. S.D.Tex 2004)(noting the statutory language of ERISA requires a showing that "but for" termination of a plan, the debtors will liquidate); *In re US Airways Group*, 296 B.R. 734, 743 (Bank.E.D.Va. 2003); *In re Wire Rope Corp. of Am.* 287 B.R. 771, 777 (Bank. W.D.Mo. 2002); *In re Sewell Mfg. Co.*, 195 13.R. 180, 184

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[7]*See* FN 5.

(Bank.N.D. Ga. 1996); *In re Resol Mfg. Co.*, 110 B.R. 858, 862 (Bankr. N.D.Ill. 1990). The record lacks evidence demonstrating that Delta or any of its 18 controlled group members pursued and exhausted all realistic measures that would enable them to pay their debts under a plan of reorganization and continue in business outside chapter 11. *See In re USA Airways Group*, 296 B.R. at 744-46; *In re Phillip Servs. Corp*., 310 B.R. at 808. In fact, contrary to the specific requirements of ERISA that a bankruptcy court specifically determine whether each controlled group member can satisfy ERISA's requirements for a voluntary distress termination of the Pilot Plan, the record is completely devoid of evidence with respect to the ability of any of Delta's eighteen controlled group members to meet that test. Id Instead, Delta's motion papers and expert testimony is insufficiently premised solely on Delta's ability to satisfy the ERISA test for a distress termination. *See e.g.*, Debtors' Motion: Declaration of Edward H. Bastian in Support of Debtor's Motion; Declaration of Timothy R. Coleman in Support of the Debtor's Motion; and Declaration of Margaret M. McDaniel in Support of the Debtor's Motion.

In making its determination, the Bankruptcy Court was required to inquire whether (and Delta was required to prove that) Delta and each of its 18 controlled group members pursued and exhausted all realistic measures that would enable it to pay its debts (including debts to a pension plan) under a plan of reorganization and continue in business outside Chapter 11. *See* Response of the Pension Benefit Guaranty Corporation to the Debtor's Motion, (hereinafter. “PBGC Response”) at page 10. *citing, In re Phillip Servs. Corp*., 310 B.R. at 808; *In re US Airways Group*, 296 B.R. at 744-46: *In re Wire Rope Corp. of Am*, 287 B.R. at 777. The Bankruptcy Court's inquiry should have addressed whether Delta presented evidence of the following:

> .... evidence on the costs of maintaining the plan if funding waivers are obtained, evidence on the costs of maintaining the plan if a freeze

> on future accrual of benefits were put in place, evidence on the projected costs of the pension plan(s) using different actuarial assumptions or costs methods, and evidence on whether there are other cost savings or discretionary spending in the debtor's business plan that can be used to fund the plan.

See PBGC Response, at 10. The Bankruptcy Court could not properly determine whether Delta and each of its controlled group members met ERISA's stringent requirements for a distress termination without development of a record regarding Delta and each controlled group member's efforts, if any, to retain the pension plan and continue with a successful reorganization. *See* PBGC Response at 10. Here, the record is devoid of evidence demonstrating the following: (1) that there was no prospect of elimination or modification of the lump sum option,(2) that Delta could not find interim pilots to avoid the alleged spectre of an operational crisis, (3) Delta and each controlled group member's actual attempts and inability to obtain exit financing, (4) actual savings to Delta if the Plan was terminated, and (5) Delta would gain any material benefit in paying its funding obligations if the Plan was terminated. In the absence of such inquiry and evidence, the Bankruptcy Court failed to apply the law correctly causing its conclusory findings to be clearly erroneous.

C. <u>Delta's Evidence Regarding Its Ability to Secure Exit Financing Is Unreliable: There Is No Evidence in The Record That Delta Applied For and Was Denied Exit Financing</u>

The Bankruptcy Court's finding that Delta and each of its 18 controlled group members could not secure exit financing to enable it to emerge from Chapter I I was clearly erroneous. Delta alleged that it would not he able to obtain exit financing because the mass exodus of retiring pilots would leave Delta without enough pilots to fly its planes, crippling Delta's operations and hurting Delta's earnings. When Delta's purely speculative estimation of the number of pilots who may elect early retirement was challenged, it retreated to a different position. At the hearing, Delta's expert, Timothy

R. Coleman, offered his opinion, with no evidentiary basis, that what is relevant to lenders is an alleged (but not proven) probability that a large number of pilots may retire early and disrupt Delta's operations. *See* Trans. 226-230(September 1, 2006 hearing date).

Delta's claim that it could not obtain exit financing for this reason is wholly unsupported by evidence. Neither this Court nor the Bankruptcy Court may credit the testimony of Delta's expert, who presented an opinion, without any evidentiary basis, that Delta would be unable to obtain exit financing for the reasons testified. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)(noting to be admissible, expert testimony must be both relevant and reliable); *Lippe et al. v. Bairnco Corp. el al.*, 288 B.R. 678, 685-686 (S.D.N.Y. 2003)(to be reliable, expert testimony must be based on sufficient facts and should be excluded if it is speculative or conjectural.); *Certain Underwriters at Lloyd's, London, et at, v. McDermott In'I, Inc., et al.* 2002 U.S. Dist. LEXIS 278 at 10 (E.D.La. 2002)(the party offering expert testimony bears the burden of establishing its reliability and that expert testimony based merely on subjective belief or unsupported speculation must be excluded). The conclusion of Delta's expert is predicated on future behavior of pilots without any polling of pilots to determine when they plan to retire or if they intend to exercise the 50% lump sum benefit option. Lenders were not shown to be any more likely to be deterred from providing exit financing due to speculative pilot retirements than due to other unpredictable catastrophic future events that may significantly impair the operations of Delta or substantially curtail the willingness of the flying public to fly with Delta, such as an act of terrorism (like 9/11/01), a spate of airplane collisions, climatic natural disasters, disruption in fuel supplies, war, employee strike, a severe drop in stock market, or recession.

Additionally, Delta offered conclusory, self serving testimony that it would be unable to

secure such financing given its financial obligations, and its pledge of “substantially all of its assets” as collateral for $2.2 billion in DIP loans. *See* Debtors' Motion at ¶¶ 14, 56-64. The record lacks evidence that Delta even attempted to obtain exit financing to emerge from chapter 11 without termination of the Plan. In contrast, Delta's CFO made public statements which highlight Delta's utter failure to attempt to secure exit financing. After the hearing, on September 13, 2006, in an interview with Reuters, Delta CFO Edward Bastian told the news organization that Delta had not yet sought exit financing and that it would start that process in a couple of months. *See* Airwise News Article, dated September 14, 2006, Delta's failure to seek exit financing reporting attached as Exhibit Z.

The record is equally devoid of evidence demonstrating that any of Delta's controlled group members (ASA Holdings, Inc.; Comair Holdings, LLC; Comair, Inc.; Comair Services, Inc.; Crown Rooms, Inc.; DAL Aircraft Trading. Inc.; DAL Global Services, LLC; DAL Moscow, Inc.; Delta AirElite Business Jets, Inc.; Delta Benefits Management, Inc.; Delta Connection Academy, Inc.; Delta Corporate Identity, Inc.; Delta Loyalty Management Services, LLC; Delta Technology, LLC; Delta Ventures Ill, LLC: Epsilon Trading, Inc.; Kappa Capital Management, Inc.; and Song, LLC) sought and were denied exit financing despite ERISA's clear requirement that the Bankruptcy Court consider such evidence for a distress termination. *See In re Sewell Mfg. Co.*, 195 B.R. at 183-185. The evidence presented by Delta regarding its alleged inability to obtain exit financing relates solely to Delta and not to any of its controlled group members. *See* Debtors' Motion; Declaration of Edward H. Bastian in Support of Debtor's Motion; Declaration of Timothy R. Coleman in Support of the Debtor's Motion; and Declaration of Margaret M. McDaniel in Support of the Debtor's Motion.

The stringent requirements for a distress termination mandate that Delta and each of its 18 controlled group members at the very least apply for exit financing and be turned down in order to demonstrate that the Debtors "pursued and exhausted" the exit financing needed to emerge from chapter 11. *See In re Phillip Servs. Corp.*, 310 B.R. 802 (Bankr. S.D.Tex. 2004)(denying plan termination where debtor merely presented speculative, hedged, self-serving testimony that it could not obtain financing); *In re Wire Rope Corp. of Am.*, 287 B.R. at 778 (Bank.W.D.Mo. 2002)(approving termination of plan because there was substantial evidence that debtor sought financing from at least 59 entities and was denied). Because there is no evidence in the record demonstrating that Delta or any of its 18 controlled group members made any effort to obtain exit financing, the Bankruptcy Court's finding that each of the Debtors satisfied the requirements for a voluntary distress termination of the Pilots Plan was clearly erroneous and this Court must reverse.

D. <u>There Is No Credible Evidence in The Record That Continuation of The Plan Will Impede Debtors' Ability to Emerge From Chapter 11 as Financially Viable Entities</u>

There is no credible evidence in the record demonstrating that Delta would benefit from the termination of the Pension Plan in light of Delta's agreement with ALPA to freeze the Pilot Defined Benefit Plan and cease contributions to that Plan going forward. *See* Letter of Agreement (#51) between Delta Air Lines, Inc. and the Air Line Pilots in the service of Delta Air Lines, Inc. as represented by the Air Line Pilots Association, International, at § 26.[8] Delta and ALPA agreed that going forward contributions to the Pilot Plan would be replaced with a defined-contribution 401(k) plan for active pilots. *See Id.* Delta and ALPA's agreement discontinues Delta's responsibility for

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[8]*See also* Objection of the Official Committee of Unsecured Creditors of Delta Air Lines, Inc. et al., to Motion of DP3 to Compel the Continued Payment of Collectively Bargained For Pension Benefits To the Retired Pilots, at page 5.

contributions to the Pilots Plan going forward. Accordingly, Delta's liability for funding contributions under the Internal Revenue Code and ERISA is limited to the time period prior to the agreement between ALPA and Delta to freeze the pension plan[9]. The PBGC estimates that Delta's liability for unpaid minimum funding contributions is approximately $3 billion. *See* PBGC Response, at 3.

Critically, Debtors are liable for the unpaid minimum funding contributions regardless of whether the Pilots Plan is terminated. If the plan is not terminated, Delta will owe the plan approximately $3 billion[10], however, if the plan is terminated, Delta will still owe the same amount of money to the PBGC, who by statute becomes a trustee of a terminated plan[11] with the power to collect unpaid funding contributions.[12] *See In re Kaiser Aluminum Corp.*, 456 F.3d 328, 343 (3rd Cir. 2006)(noting that the Pension Protection Act of 1987 makes employers liable to the PBGC for the full amount of unfunded benefit liabilities to all participants and beneficiaries under the plan). Therefore, a plan termination does nothing to limit Delta's financial liability arising from its obligation to the Pilots Plan.

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[9]The Internal Revenue Code requires a plan sponsor such as Delta to pay annual minimum funding contributions to its defined benefit pension plan on a quarterly and annual basis. 26 U.S.C. § 412; 29 U.S.C. § 1082. Delta and each of its controlled group members are jointly and severally liable for the unfunded benefit liabilities of any terminated pension plan sponsored by Delta and covered by Title VI of ERISA, and for any unpaid minimum funding contributions and unpaid premiums. *See* 29 U.S.C. §§ 1301(a)(18), 1307(e), 1362; 26 U.S.C. § 412(c)(11).

[10]This figure is based on the PBGC's estimation. *See* 29 U.S.C. §§ 1322, 1361.

[11]*See* 29 U.S.C. §§ 1322, 1361.

[12]ERISA and the Internal Revenue Code provide that unpaid minimum funding contributions that exceed $1 million "shall be treated as taxes due and owing to the United States." 26 U.S.C. § 412(n)(4)(C); 29 U.S.C. § 1082(0(4)(C). The PBGC has the exclusive authority to enforce and collect amounts due under the statutory lien. *See* 26 U.S.C. § 412(n)(5); 29 U.S.C. §§ 1082(f)(5), 1303(e)(1).

In addition to its failure to address the impact of the agreement between ALPA and Delta as described above, the Bankruptcy Court failed to consider the impact of recent legislation that enables Delta to manage and pay down the approximately $3 billion owed in funding contributions over a seventeen year period. On August 17, 2006, President Bush signed into law the Pension Protection Act of 2006 ("PPA") which among other things, provides special pension funding relief for commercial airlines, including Delta. *See* Pension Protection Act of 2006, 109 Pub.L. 280, 210 Stat. 780 (2006). The PPA gives an airline that freezes benefit accruals under its defined benefit pension plans up to seventeen years to fund the pension plan's unfunded liability. *See* Section 402 of PPA. Therefore, this legislation allows Delta to pay off its debt to the plan over a seventeen year period. There is, however, no evidence in the record demonstrating that Delta could not pay the debt to the Pilots Plan over the course of seventeen years. Thus, there is no credible evidence to demonstrate that "but for" the termination of the plan, Delta would be forced to liquidate and the Bankruptcy Court's failure to consider the impact of the PPA renders its findings clearly erroneous.

POINT II. THE BANKRUPTCY COURT FAILED TO CONSIDER EQUITABLE PRINCIPLES THAT CLEARLY FAVOR CONTINUING THE PILOT PLAN

The Supreme Court has long recognized that bankruptcy courts are courts of equity that apply equitable principles in the administration of bankruptcy proceedings. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) ("[c]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity"); *Young v. United States*, 535 U.S. 43, 50 (2002) ("[b]ankruptcy courts ... are courts of equity and apply the principles and rules of equity jurisprudence.") Bankruptcy courts have broad authority to prevent injustice or unfairness in the administration of bankruptcy estates by, inter alia, eschewing mechanical rules, modifying

creditor-debtor relationships, and crafting flexible remedies, that while not expressly authorized by the Bankruptcy Code, effect the result the Code was designed to obtain. *See Id.* (other citations omitted). *See also* 11 U.S.C. §105(a) (authorizing bankruptcy courts to take any action or make any determination necessary or appropriate to prevent an abuse of process.) Thus, a basic tenet of bankruptcy is that a bankruptcy court must treat all affected parties fairly and equally- particularly in the context of retirement benefits. *See In re Kaiser Aluminum Corp*., 456 F.3d 32g,340 (3r**!** Cir. 2006)(noting that in the context of retirement benefits, a bankruptcy court must treat all affected parties fairly and equally); *In re U.S Airways Group, Inc*., 296 B.R. 734, 746 (Bankr. E.D.Va. 2003)(holding that the requirement under 29 U.S.C. § 1341(c)(2)(B)(ii)(IV) that the bankruptcy court "approve the termination" of an ERISA plan authorized the court to consider the "equities in the case.").

In the case *sub judice*, the findings of the Bankruptcy Court were clearly erroneous because in authorizing Delta to seek a distress termination of the Pilot Pension Plan, the Bankruptcy Court failed to consider equitable principles that clearly favor maintaining the Plan. The termination of the Plan will result in injustice and unfairness to retired Delta pilots, who have been singled out by Delta to hear the brunt of Delta's proposed debt reduction. Delta has not sought termination of any other qualified employee defined benefit pension plan, including that of its executives. No other group of employees stand to lose the retirement income they depend on and planned for during the course of their twenty-five or more years of dedicated employment service with Delta[13]. *See* Debtors' Motion,

[13]Additionally, Delta has pitted the active Delta pilots against the retired Delta pilots. During negotiations pursuant to section 1113 of the Bankruptcy Code to reject the pilots' collective bargaining agreement, Delta essentially bribed ALPA to stand aside without objection to Delta's efforts to terminate the Pension Plan. Delta promised active pilots $650 million in notes for the unfunded Pilots Plan. explicitly conditioned on the termination of the Pilots Plan, and a $3.1 billion

at ¶ 55. The loss of retirement income affects pilots in a unique and particularly devastating way since under federal law, pilots over the age of 60 are prohibited from flying commercially, and thus, the vast majority of this group of retired employees cannot return to flying planes in order to earn a living.

Delta has further targeted the retired pilots. The retired pilots have had the following benefits discontinued or reduced by Delta with the approval of the Bankruptcy Court:

1. Pre-bankruptcy concessions of $1 billion per year for 5 years;

2. Pre-bankruptcy failure to pay contributions to Pilots Plan;

3. Post-bankruptcy modifications of collective bargaining agreement to discontinue contributions to the qualified defined benefit plan and to a non-qualified defined benefit plan;

4. Diminution of retiree medical benefits.

Thus, termination of the Pension Plan will result in an injustice. and equitable principles warrant maintaining the Plan.

Additionally, the Bankruptcy Court's findings must be reversed because the record demonstrates that Delta deceived the Bankruptcy Court by presenting false estimates regarding the amount of benefits retired pilots would receive if the Plan was terminated. In its Motion papers, Delta represented that if "the Pilots Plan is terminated prior to the lump sum door reopening, retirees are expected to receive, on average, 85-90% of their qualified plan benefits." *See* Debtor's Motion, at ¶ 38. Delta continued to make that false assertion to the Court throughout the course of the

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general unsecured claim. Further, ALPA and Delta agreed to freeze the Plan and cease contributions going forward. *See* Letter of Agreement 451. *See also*, Order Authorizing Debtors to Enter Into Amendments to Pilot Working Agreement With Air Line Pilots Association, International.

hearing. At the hearing on September 1, 2006, Delta's counsel stated:

> Retired pilots will still get, **on average, eighty-five to ninety percent of their qualified plan benefits** if the relief requested by Delta is granted. And on average, seventy-five percent of their total pension benefits, even including the losses on the non-qualified plan, and assuming, Your Honor, that they get zero claim for that and zero recovery, these are the minimum averages.

See Transcript p. 1-24. (emphasis added)[14]. In stark contrast to its representation during the hearing process, after the Bankruptcy Court rendered its September 5, 2006 findings, Delta sent notices to approximately 1,400 retired pilots on September 22, 2006, in connection with Delta's efforts to significantly reduce retired pilot's medical benefits, informing the retired pilots that they would receive **absolutely no monthly pension benefit** if the plan was terminated[15]. This was a tremendous shock to the letter recipients, who believed based on Delta's repeated assertions that they would receive the vast majority of their pension benefits, rather than being cut off entirely if the plan was terminated.

Notably, the Bankruptcy Court itself expressed its confusion and concern about Delta's misrepresentation at the subsequent hearing on October 19, 2006 addressing Delta's Motion to approve its agreement with the retiree committees to reduce medical benefits. Judge Hardin stated:

> By the way, I actually was going to raise that issue...simply to put it out on the table as a concern that has been expressed to me in

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[14]Delta also represented, "the average pilot retiree will still recover at a minimum on an average annualized basis more than seventy five percent of what they were hoping to get when they retired. And that excludes what may end up, I'm not conceding it, we don't know yet, a very material claim in recovery in connection with the termination of the nonqualified pension benefits for which they do have a direct claim against Delta." *See* Transcript p. 1-71 (emphasis added).

[15] This letter further explained that despite having no income, these retired pilots would now have to pay medical benefit premiums. *See* letter to William Buergey from Delta, dated September 22, 2006, attached as Exhibit V.

> numerous letters, and because of the stark contrast between my recollection of the representations in the papers and to the Court... and these letters that I'm getting, people saying that I was reduced from this amount to zero, or I have been told by the PBGC that my pension benefit will be cut by seventy-eight percent...I've just gotten a lot of those letters...it's something that I would think Delta would want to address.

Transcript of October 19, 2006 hearing, p. 81-82.

Because terminating the Pension Plan would not result in all parties being treated fairly and equitably, the Bankruptcy Court's findings were clearly erroneous and must be reversed. *See In re Kaiser Aluminum Corp*., 456 F.3d 328,340 (3rd Cir. 2006)(in the context of retirement benefits, a bankruptcy court must treat all affected parties fairly and equally). *See also In re US. Airways Group, Inc*., 296 B.R. 734, 746 (Bankr. E.D.Va. 2003)(equities should be considered in the termination of an ERISA plan).

POINT III. ALTERNATIVELY, THE MATTER SHOULD BE REMANDED TO THE BANKRUPTCY COURT FOR FURTHER HEARING

A. The Bankruptcy Court's Order Is Premature and must Be Reversed Because Debtors Did Not Explore Alternatives To Termination

The record does not support a finding, as required, that "but for" the termination of the Pilots Plan, the Debtors would be forced to liquidate. *See* 29 U.S.C. § 1341(c)(2)(B(ii)(IV). The record lacks evidence demonstrating that the Debtors pursued and exhausted all realistic measures that

would enable them to pay their debts under a plan of reorganization and continue in business outside chapter 11. *See In re Wire Rope Corp. of Amer.*, 287 B.R. 771, 777-78 (Bankr. W.D. Mo. 2002) (finding that debtor demonstrated that it could not obtain confirmation of *any* plan of reorganization that did not include termination of the pension plan where it actively solicited lenders who declined to provide financing if the plan survived). In essence, the Bankruptcy Court was rushed by Delta to judgment, when the facts of the case warranted, and the law required, a slower more deliberate approach, which would not have prejudiced the Debtors.

Any need to rush termination of the Pilots Plan is directly contradicted by the Debtors' subsequent motion to extend the exclusive period to file a reorganization plan. It their October 20, 2006 motion, the debtors make their third request for an extension of the exclusive period to complete work currently underway on a variety of issues, including labor, pension, aircraft fleet, claims reconciliation and exit structuring, from both a corporate and capital markets prospective. Motion, p. 5. Although Debtors curtailed the hearing for the submission of evidentiary proof in support of Plan termination, they now seek additional time to, inter alto, develop a plan of reorganization that maximizes creditor recovery. *Id* p. 11-12. Three requests for extensions of time, and possibly more to follow, cannot be reconciled with the debtors' previous rush to judgment seeking the termination of the Plan and undercuts the soundness of that overly hasty decision.

At the time the Plan termination order was entered, only the testimony of Delta's reorganization and restructuring consultant, Timothy Coleman, was completed before the purported settlement was announced. Notably, Delta's actuarial expert did not complete her direct testimony, nor was she subjected to cross-examination. Delta’s CFO did not testify in support of his declaration and could not be cross-examined.

After the settlement with DP2 was announced, the Court heard no more evidence. Delta made a proffer of its alleged evidence to complete the hearing. Tr., pp. 3-16:3 - 3-23. Delta's counsel advised the Court that his retained expert, Ms. McDaniel. and Delta's Chief Financial Officer, Edward Bastian, " would have testified" to a series of facts allegedly supportive of Delta's motion. *Id.* Delta's counsel opined that the Court "would have found" Mr. Bastian's nonexistent testimony powerful, credible and unimpeachable. *Id.* At 3-21:10-13. For reasons known only to Delta, (its counsel stated that the time "could be better used for other things"), Delta's attorney offered only hearsay statements of counsel, rather than admissible evidence of witnesses. Tr., pp. 3-20:14-17. Counsel's statements are not evidence. F.R.E. Rules 602, 603, 801, 802; *See US. v. Reed*, 114 F.3d 1067, (10th Cir. 1997) (holding that an attorney "proffer is not evidence, into facto."); *U.S. v. Casoni*, 950 F.2d 893, 907-913 (attorney's proffer constituted double hearsay and should not have been admitted as evidence); *Greenway v. The Buffalo Hilton Hotel*, 951 F. Supp. 1039, 1055 (W.D.N.Y. 1997) ("statements by the attorneys are not evidence"); *c.f., U S. v. Modica*, 663 F.2d 1173, 1178-81 (2d Cir. 1981) (closing statements by prosecutor regarding evidence not submitted and characterizing credibility of witnesses not proper in criminal trial). Upon the completion of Delta's "proffer," the Court, without making a finding as to any underlying facts in the record, adopted its Order, which was submitted by Delta.

The record raises more questions than it answers and undermines the Court's Order, rather than supports it. Delta alleged that the possibility of severe operational shortfall resulting from exercise of the lump-sum option by experienced pilots necessitates termination of the Plan. Delta alleged that the loss of pilots caused by their presumed exercise of early retirement and the lump-sum option will cripple Delta's ability to maintain its existing level of flight operations,

causing a decrease in earnings and resultant violation of the DIPS covenants. Its expert, Mr. Coleman, testified that because of the **possibility** of this severe operational interruption, exit financing could not be obtained. Tr., pp. 2-27:6-2-28:9

Delta presented no evidence that it pursued and exhausted all realistic measures (or any measures) to modify or amend the Plan to eliminate the lump sum option as it was required to do. *See* PBGC Response at p. 10. There is no evidence showing that Delta requested a waiver of the ERISA provision that proscribes a reduction in accrued benefits. Delta failed to state any reason for its failure to avail itself of the statutory waiver that is incorporated in the anti-cutback provision. 29 U.S.C. § 1054(g)(1). Section 1054(g) prohibits a plan amendment that decreases an accrued benefit of a plan unless the amendment is approved by the Secretary of the Treasury. 29 U.S.C. § 302(c)(8)(C). The Secretary's approval must be predicated on a substantial business hardship. Id Notwithstanding the monumental business hardship Delta faced, and the imminent termination of the Plan, Delta took no steps to procure approval from the Secretary of the Treasury to eliminate the lump-sum option.

In addition to failing to seek or obtain permission from the Secretary of the Treasury to amend the Plan, Delta failed to show any effort, if any, it exercised to lobby for legislation to permit it to be exempted from the lump-sum provision. In light of the extraordinary efforts Delta took to lobby for the exemption granted to it as part of the PPA, it is reasonable that Delta should have pursued and exhausted efforts to achieve a legislative solution to the anti-cutback prohibition. Delta was aware of the purported severity of the lump-sum issue at the time it pursued legislative relief for the funding of the non-Pilots Plans and that, but for the elimination of the lump-sum option, the Plan would survive. Nevertheless, Delta provided no evidence that it took any steps whatsoever to

incorporate lobbying efforts to ameliorate the burden of the lump-sum option when it lobbied for funding relief granted to it under the PPA.

Second, Delta failed to show that it pursued a rehire agreement with ALPA to permit the re-employment of pilots who exercised the lump-sum option. Delta did not prove that it sought to resolve the speculative depletion of qualified pilots by negotiating a pilot rehire plan. In or about October 2004, Delta and ALPA entered into exactly such an agreement whereby the company was permitted to rehire retired pilots as independent contractors both to operate aircraft and train actively employed pilots to do the same. With no evidentiary basis, Delta declared that “past experience suggests that such a program would not be effective,” and that Delta “does not believe that ALPA or the active pilots will agree” to a new rehire program. Omnibus Reply, pp. 44-47. Delta further opined, without any evidence whatsoever, that the IRS was likely to oppose such a program. *Id.* at 47.

Delta's out-of-hand dismissal of a rehire program for retired pilots falls short of the requirement that it pursue and exhaust all alternatives to Plan termination. Contrary to Delta's contention, a rehire program. as it had in the past, can satisfy the operational shortfalls that Mr. Coleman predicted would impede the procurement of exit financing. Delta would have at its disposal a pool of available professionals, familiar with the company's aircraft and operation, that it could retain as independent contractors without the burden of paying for benefits and other costs associated with employees. Moreover, in light of Delta's precarious future, and the future of the pilots' retirement benefits, the retired pilots (as well as active pilots) would have a significant financial incentive to continue earning income, while saving their pension plan and keeping their full retirement benefits intact.

Lastly, Delta's evidence failed to acknowledge or account for the decrease in jet fuel costs since the date they filed for bankruptcy. In September 2005, the cost of U.S. Gulf Coast jet fuel was $2.2323 per gallon. Exh. AA, *Weekly Petroleum Status Report, Energy Information Administration, Table 15*. As of October 20, 2006, the same fuel was priced at $1.7153 per gallon. Id Given that every one cent increase in Delta's fuel costs resulted in approximately $25 million increase in Delta's annual expenses, the $.517 decrease in fuel costs per gallon has reduced Delta's fuel expenses approximately $1.275 billion since filing for bankruptcy. Exh. BB, Delta.com Press Release. dated July 21, 2005, p. 3. The fuel savings alone was sufficient to make up the funding shortfall over a 3 year period.

The direct testimony of Delta's actuary (Tr., pp. 2:95-97) further highlights the fallacy of Delta's arguments in favor of Plan termination. Delta's attorney elicited from its actuary that, as of July 1, 2006, the Plan was underfunded by $2.5 billion[16], which is approximately the same amount of the lump sums paid to pilots during the period from 2001 to 2006. By leading question, the attorney then had the actuary conclude that payment of lump sums was the reason for the underfunding (along with the decline in interest rates, lower asset performance and higher pilot earnings as possible causes). *Id.* The payment of 50% lump sum benefits was a red herring concocted to confuse the Bankruptcy Court. Neither the actuary nor the attorney informed the Court that, while reducing the Plan's assets, payment of $2.5 billion in lump sums also reduced the future benefits payable by the Plan, thereby lowering the required level of funding by a commensurate amount. Termination of the pension plan does not relieve Debtors of their obligations to pay the

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[16]As noted at p. 22, *supra*, the amount that Delta underfunded the Plan is immaterial to whether the Plan should be continued or not, in that it is a payment owed by Delta to the Plan if it continues or to the PBGC regardless if the Plan is terminated.

alleged $2.5 billion underfunding. If the pension plan is terminated, the amount of underfunding is payable to PBGC, instead of the pension plan. *Se*e footnote 12, *supra*. Delta's actuary did not inform the Court that for two of the years in the period cited, 2001-2006, Delta chose to pay only the statutory minimum contributions required under ERISA, rather than the amount set forth in the Plan, or that Delta ceased all contributions post-petition in defiance of applicable ERISA requirements. *See* 26 U.S.C. § 412; 29 U.S.C. § 1082. Rather, Delta's counsel elicited the misleading response that Delta made all statutorily required funding contributions for the period from 2001 until bankruptcy filing. Again, this response obfuscates the fact that Delta made only minimal contribution payments in 2002 and 2003 which was, in large part, the cause of the Plan's underfunding.

B. The Bankruptcy Court's Conclusory And Unsupported Findings Warrant a Remand For Further Proceedings

If the decision of the Bankruptcy Court is not reversed outright because the findings of that Court were clearly erroneous, in the alternative, this Court should reverse and remand to the Bankruptcy Court for further proceedings because the Bankruptcy Court's findings are conclusory and the record below does not enable the District Court to meaningfully review the decision. *See In Re 599 Consumer Electronics, Inc*., 195 B.R. 244 (S.D.N.Y. 1996) (remanding case to Bankruptcy Court where it was not clear to the District Court whether the Bankruptcy Court considered a factor of a governing legal test). *See also Spangler v. Aleet Leasing Associates II*, 56 B.R. 990 (D. Md. 1986)(holding, "in view of the absence of specific factual analyses and determinations by the Bankruptcy court, a remand to that court is required"); *Crystal Apparel Inc. v. Official Committee of Unsecured Creditors of Crystal Apparel, Inc.*, 207 B.R. 406 (S.D.N.Y. 1997)(remanding case because it was unclear from the transcript of the Bankruptcy Court's decision, and from the Order itself. to what extent the Bankruptcy Court relied on erroneous standards of law in deciding

defendants' motion for summary judgment).

C. <u>Appellants were not afforded notice and an opportunity to be heard regarding the proceedings and Order approving the termination of the Plan.</u>

The Bankruptcy Code provides that “[t]here shall be given such notice as is appropriate ... of an order for relief in a case under this title.” *See* 11 U.S.C. § 342(a). “Due process requires the provision of reasonable notice to those parties whose claims are to be discharged: ‘An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections’.” *In re Waterman S.S. Corp.*, 157 B.R. 220, 221 (S.D.N.Y. 1993), *quoting Mulane v. Central Hanover Bank& Trust Ca.* 339 U.S. 306, 314 (1950) (emphasis added).

Appellants were not afforded the opportunity, in several respects as explained below, to voice their objections to the Debtors' Motion. The Debtors filed a Notice of Motion Regarding Distress Termination of Delta Pilots Retirement Plan, (“Notice of Motion”), dated August 5, 2006, stating that: 1) the Debtors recently filed a motion for approval of the voluntary distress termination of the Plan; 2) objections to the Motion must be filed and served by August 17, 2006 at 4:00 p.m. in accordance with the Order Approving Notice. Case Management and Administrative Procedures, (the “Case Management Order”), (Docket No. 660); 3) the hearing on the Motion would commence on September 1, 2006; 4) the hearing may be adjourned; and 5) the Motion and its accompanying filings were available online at www.dcltadocket.com. (*See* Notice of Motion).

The Case Management Order incorporates the Debtors' Case Management Motion by reference. stating that the Case Management Motion was “for authorization ... to establish certain notice, case management and administrative procedures ... , as more fully described in the Case Management Motion ... “ (*See* Case Management Order, dated October 6, 2005, Docket No. 660).

The Case Management Motion contains the procedure for "Notices of Motion." (*See* Debtors' Motion Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 1015(c) to Implement Certain Notice, Case Management and Administrative Procedures, dated September 14, 2005. Docket No. 15,11 15). The Case Management Motion provides:

> A "Notice of Motion" shall be affixed to all Motions and shall include the following: (i) the title of the Motion, (ii) the parties upon whom any Objection to the Motion is required to be served, (iii) the date and time of the applicable Objection Deadline, (iv) the date of the Omnibus Hearing at which the Motion shall be considered by the Court and (v) a statement that the relief requested may be granted without a hearing if no Objection is timely filed and served in accordance with these Procedures. The applicable Objection Deadline and hearing date shall also appear in the upper right corner of the first page of the Notice of Motion. *Id.*

The Debtors' Notice of Motion contained false and misleading information, and did not comply with the Case Management Order in several respects. First, it was not affixed to the Debtor's Motion, and states only that the Motion and accompanying filings ... are available online at www.deltadocket.com." (*See* Notice of Motion, p. 2). Second, the Notice of Motion does not indicate the parties upon whom any objection to the Motion was required to be served. Rather. it states that "Objections to the Motion must be filed and served by August 17, 2006 at 4:00 p.m. in accordance with the Order Approving Notice, Case Management and Administrative Procedures, (the 'Case Management Order') entered in these cases (Docket No. 660)." *Id.*, p. 1.

The third, and *most significant* omission from the Notice of Motion, is the lack of "a statement that the relief requested may be granted without a hearing if no Objection is timely filed and served in accordance with these Procedures," (*id.*), which was required by the Case Management Order. (*See* Case Management Order, Docket No.660, p. 1; Case Management Motion, Docket No. 15, ¶ 15). This omission of significant information rendered the Notice of Motion false and

misleading in that retired pilots were not afforded notice of what might happen to their pension benefits if they did not: I) find a computer with Internet access, 2) navigate the Internet to locate the procedures for filing an objection, 3) obtain assistance with navigating the Internet, if necessary, 4) and get the objection to all necessary parties by the Debtor-imposed deadline Had the retired pilots been afforded proper notice of the impending elimination of their pensions, they could have physically appeared at the hearing to try to prevent the occurrence of what the Notice of Motion omitted (relief granted to Debtors).

The Debtors are aware that the potential objectors are retired, older individuals, who are known to be less likely to possess computers, are less likely to have access to computers or access to the Internet/highspeed Internet, and are likely to have no familiarity with ECF filing rules and procedures. The failure to attach the Debtors' Motion to the Notice of Motion, as required by the Case Management Motion and Case Management Order, and instead forcing potential objectors to navigate the Internet to attempt to locate the Motion, appears calculated to prejudice and did prejudice the retired pilots. Since the Motion was filed electronically on August 4, 2006, the Debtors' easily could have attached it to the Notice of Motion, as required, when they allegedly served the Notice of Motion on August 5, 2006.

The Notice of Motion's omission of the parties upon whom any objection to the Motion was required to be served is highly prejudicial to retired, older pilots who are not computer savvy. By stating that objections had to be served and filed "in accordance with the Order Approving Notice, Case Management and Administrative Procedures, (the ' Case Management Order') entered in these cases (Docket No. 660)." (*see* Notice of Motion), the Debtors rendered the locating of objection

instructions extremely burdensome for the retired pilots.

Indeed, Captain John D. Rowe explained in his letter to Judge Hardin, dated August 18, 2006, the difficulty of locating information on how to file objections. (*See* Letter to Judge Hardin from Captain John D. Rowe, dated August 18, 2006, Docket No. 3097). Captain Rowe pointed out that neither the Bankruptcy Court, Delta, BSI, DP3, or DP2 ever informed him of where to send the objections. *Id.* Captain Rowe further noted that obtaining the form and instructions for objecting "would require one to have a computer, and to be able to find its location hidden somewhere on the www.deltadocket.com website." *Id.* Captain Rowe also asserted that the retired pilots "were never informed in writing" of the instructions for objecting. *Id.*

"The burden of establishing that a creditor has received adequate notice rests with the debtor." *Massa v. Addona (In re Massa)*, 187 F.3d 292, 296 (2d Cir. 1999), *citing In re Horton*, 149 B.R. 49, 57 (Banks S.D.N.Y. 1992). The Debtors filed an Affidavit of Mailing, sworn to by Hugo Suarez on August 11, 2006, ("Affidavit of Mailing"), stating the following:

> On August 5, 2006, I supervised the mailing of the "Notice of Motion Regarding Distress Termination of Delta Pilots Retirement Plan". dated August 5. 2006, by causing true and correct copies, enclosed securely in separate postage pre-paid envelopes, to be delivered by first class mail to each Pilot's last known address as shown on a list maintained by Delta Airlines, Inc. for the purpose of communicating with the Pilots.

(*See* Docket No. 3043).

The Affidavit of Mailing is defective. Mr. Suarez swears to supervising the mailing and causing true and correct copies of the Notice of Motion to be delivered by first class mail. *Id.* It appears that Mr. Suarez attested to supervising *other people* who caused the Notice of Motion to he delivered by mail. The statement that the Notice of Motion was caused to he delivered by first class mail "to each Pilot's last known address as shown on a list maintained by Delta Air Lines, Inc. for

the purpose of communicating with the Pilots," (*id.*), is self-serving and vague. The Affidavit of Mailing fails to describe or define the "list maintained by Delta Air Lines, Inc. for the purpose of communicating with the Pilots," (*id.*), and no such list is attached. Based on the foregoing, the Affidavit of Mailing is defective and inconclusive with respect to whether retired pilots were served with the Notice of Motion.

The Debtors chose August 17, 2006 as the deadline for retired pilots to object to the Motion. (*See* Debtors' Motion, Cover Sheet. Docket No. 3013; Notice of Motion). In addition, the Debtors selected, and were granted, a hearing date of September 1, 2006, which was the Friday before Labor Day weekend. Notably, the Bankruptcy Court's website indicated that the Court was closed on September 4, 2006 for Labor Day. Retired pilots would be hard pressed to fly to New York on Friday and then again on Monday, or alternatively, bear the cost of a hotel for the three day weekend.

It appears that the Debtors elected to shorten the objection time by (i) delaying mailing the Notice of Motion to potential objectors until a day after it was electronically filed; (ii) filing the Motion just prior to a I Holiday weekend; and (iii) only allowing until 4:00 p.m. on August 17, 2006 to file an objection, despite the fact that the Clerk's office is open until 5:00 p.m. and the ECF system permits filing until midnight . The Debtors delayed in mailing written notices to the pilot retirees until Saturday, August 5, 2006, (*see* Affidavit of Mailing, Docket No. 3043). despite having electronically filed the Motion on August 4, 2006.

Several Appellants explained to the Bankruptcy Court the difficulty they experienced in obtaining information on objecting to the Debtors' Motion, which suggests that many of them did not have the information, and therefore were deprived of the opportunity to file objections. Evidence in the record demonstrates that several retired pilots did not know they could file objections to the

Debtors' Motion until after the deadline to do so, and that they experienced difficulty locating instructions.

Captain George R. Rickley wrote the following in his letter to the Bankruptcy Judge, dated August 18, 2006:

> I have just been made aware of the required format for a letter of objection to the termination of my Delta Airlines pension. No one, not my previous employer, not DP3, nor the court has given me one iota of information about this, or what one needs to do to try to protect his life's retirement. The timeline has been *unfairly short* for submission of comments on an issue of this great importance.

(*See* Letter to Judge Hardin from Captain George R. Rickley, dated August 18, 2006, Docket No. 3096) (emphasis added).

Yet another retired Captain, Roger Lee Edson, asserted that Delta, BSI, DP3 and DP2 never informed Appellants that any pilot filing an objection to the Plan termination was supposed to file the objection with 13 different groups. (*See* Letter to Judge Hardin from Captain Roger Lee Edson, dated August 18. 2006, Docket No. 3082). Captain Edson pointed out that the retirees "only discovered this fact because one of the retirees happened to locate this information as he was scanning across the Delta Docket website." *Id.*

The Debtors misled retired pilots by stating that organizations that retired pilots would assume to share their interests did not oppose to the Debtors' Motion. The Debtors' Motion states, "[i]mportantly, the representatives of the majority of beneficiaries of the Pilot Plan do not oppose its termination." *Id.*, ¶ 4. The Motion further states:

> The Air Line Pilots Association, International ("ALPA"), which represents over 6,800 Delta pilots, ... does not oppose this motion. DP3, Inc., a Delaware not-for-profit corporation that represents that it has 2,700 retired Delta pilots as members, likewise has indicated that it will not oppose this motion. Moreover, the Official Committee

> of Unsecured Creditors (the "Creditors' Committee") also supports termination of the Pilot Plan ...

Id., ¶ 4, 36-38. Omitted was ALPA's declaration that it did not represent the interests of retired pilots and that, in its zeal to represent active pilots, it acted contrary to the best interests of retired pilots in its agreement with Delta not to oppose termination of the Pilot Plan. Also omitted was Debtors' knowledge that the number of retired pilots supporting DP3 had dwindled remarkably after DP3 agreed to abandon its opposition to termination of the Pilot Plan in return for payment of its attorney's fees.

Delta Pilots Pension Termination Opposition, ("DP2"), was the only organization that filed an opposition to the Debtors' Motion. (*See* Objection By Delta Pilots Pension Termination Opposition LLC to Debtors' Motion ("DP2's Objection"), Docket No. 3090).

In his opening statement at the hearing held on September 1, 2006, Sherwin S. Kaplan, Esq., attorney for DP2. opposed the Debtors' Motion. (*See* Transcript of Evidentiary Hearing, Section 4041(c) Motion, dated September 1, 2006, ("September 1, 2006 Transcript"), pp. 1-38 through 1 -51). Mr. Kaplan pointed out that the Debtors' reply papers contained an argument regarding exit financing that was not mentioned in their initial motion. *Id.*, p. 1-44. Mr. Kaplan represented to the Court that DP2 was prepared to go forward with the hearing to address the issues of whether the Debtors' met the standard for a voluntary distress termination, and whether there were no other alternatives to terminating the Plan. *Id.* at 1-46. In addition, Mr. Kaplan explained the testimony that the Court would hear to refute the Debtors' arguments. *Id.*, p. 1-48. Notably, Mr. Kaplan stated that the Court would hear testimony from pilots who have no income alternative to the termination of the Plan. *Id.*, p. 1-49. Based on the foregoing, the Bankruptcy Judge was aware that there were valid

arguments to be made in opposition to terminating the Plan, and that retired pilots were planning to testify with respect to their objections.

The Bankruptcy Court never heard testimony from any retired pilots. In a sudden shift in its alleged representation of retired pilots, DP2 agreed to settle with the Debtors on September 4, 2006, a day the Court was closed. As part of the settlement, DP2 agreed to withdraw its objection to terminating the Plan. On September 5, 2006, Debtors' attorney, stated on the record that "the parties reached out to one another over the course of the holiday weekend and had some ultimately very productive dialogue and were able to reach what is a settlement in essence with the DP2 group that will resolve their objection that ... will be deemed withdrawn as of just a minute or two from now." (*See* Transcript of Evidentiary Hearing, Section 4041(c) Motion. dated September 5, 2006, ("September 5, 2006 Transcript"), p. 3-6). The significant terms of the settlement, read into the record. were that Delta would pay $500,000 to DP2 for its costs, fees, and expenses: DP2 will withdraw its objection; and DP2 would not further cross-examine any of Delta's witnesses or put on its own witnesses. *Id.*, p. 3-8. Mr. Kaplan withdrew DP2's objection on the record. *Id.*, p. 3-12, Lines 21-22.

Appellants were denied the opportunity to be heard not only regarding the hearing itself, but also with respect to the Debtors' settlement agreement with DP2 that culminated in the Court's granting of the Debtors' Motion. After DP2 withdrew its objection and settled with the Debtors on September 4, 2006, (Labor Day), no effort was made on the part of the Court, the Debtors, or DP2 to allow retired pilots a meaningful opportunity to be heard. Therefore, no retired pilots opposing termination were present in the Court on September 5, 2006, when the Bankruptcy Judge stated regarding the Debtors' motion, "I will sign the order. Indeed, I have signed it." *Id.*, p. 3-27, Line 25.

Why the rush? As noted above, the Bankruptcy Judge knew there was opposition to termination. He knew that counsel for Debtors indicated that testimony from their witnesses would continue through September 5 and counsel for DP2 indicated that its witnesses would go well into the week. Moreover. retired pilots believed that DP2 would protect their interests and had no advance notice that DP2 would settle for attorneys' fees.

"The opportunity for a creditor to participate in bankruptcy proceedings is of obvious importance." *Massa*, 187 F.3d at 296 (emphasis added) (additional citations omitted). The Bankruptcy Judge should have adjourned the proceedings to allow retired pilots a chance to be heard regarding the DP2 settlement. By rushing to sign the Order and effectively eliminating the retirees' pension benefits, the Bankruptcy Judge did not afford Appellants due process regarding their opposition to termination of the Plan. At the very least, fairness to the retired pilots required a brief adjournment of the hearing for them to come to New York to give testimony in opposition.

Critically, as noted above, the Notice of Motion did not contain the statement, (as required by the Case Management Order), "that the relief requested may be granted without a hearing if no Objection is timely filed and served in accordance with these Procedures." (*See* Notice of Motion; Case Management Order, p. 1; Case Management Motion, ¶ 15). Appellants were not afforded notice that the hearing ended because of a settlement. In his Order granting the Debtors' Motion and approving the termination of the Plan, the Bankruptcy Judge stated that "no other or further notice need be provided ..." (*See* Findings of Fact, Conclusions of Law and Order Granting Debtors' Motion Seeking A Determination That They Satisfy The Financial Requirements For A Distress Termination of the Delta Pilots Retirement Plan and Approval of Such Termination. dated September 5. 2006. (the "Order"), p. 2). Based on the foregoing, Appellants were deprived of the

opportunity to be heard and to object to the settlement and Order approving the Plan's termination.

Notwithstanding that some retired pilots may have received the Notice of Motion, and/or located the objection instructions on the Internet, such retired pilots were not afforded due process in that the Debtors misrepresented the pension benefits that retirees would receive even if the Man was terminated. Delta's Motion states that if "the Pilot Plan is terminated prior to the lump sum door reopening. retirees are expected to receive, on average, 85-90% of their qualified plan benefits." (*See* Debtors' Motion, ¶ 38). At the hearing on September 1, 2006, Debtors' counsel reasserted that "[r]etired pilots [would] still get, on average, eighty-five to ninety percent of their qualified plan benefits if the relief requested by Delta is granted." (*See* September 1, 2006 Transcript, p. 1-23). Counsel further stated that retired pilots would receive "on average, seventy-five percent of their total pension benefits, even including the losses on the non-qualified plan, and assuming.... that they get zero claim for that and zero recovery, *these are the minimum averages*." (*Id.*, p. 1-23, 1-24) (emphasis added).

Despite the Debtors' aforementioned representations, after the hearing, Delta sent 1300 retired pilots a letter, dated September 22, 2006, stating that effective October 1, 2006, their monthly benefit would be "reduced to zero." (*See* Letter to Mr. Buergey, from Kelley A. Torpey, Director - Benefits and Retirement Plans, dated September 22, 2006, Exhibit A). Not only did the Debtors misrepresent the pension benefits retirees would still have during the hearing, as soon as the hearing ended. partly because of the misrepresentation, the Debtors rushed out the September 22, 2006 to retirees stating they will get nothing.

The misrepresentations made by the Debtors served as a disincentive to object to the termination of the Plan. Retired pilots believed, based on misrepresentations by the Debtors, that

they still would have the lion's share of their pension benefits, even if the Plan was terminated. The Debtors' misrepresentations warrant, at the very least, a hearing based upon proper notice. The Bankruptcy Court's Order must be overturned, since it was based on false and misleading notice to the retired pilots and misrepresentations of the benefit amount retired pilots would receive. *See In re U.S.N. Co.*, 1980 Bankr. LEXIS 4430, *5 (Bankr. S.D.N.Y. Sept. 23, 1980) (noting that a misleading notice to a creditor justifies reversal of judgment for debtor).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Order of the Hon. Adlai S. Hardin, Jr., dated September 5, 2006 and entered September 6, 2006, granting the motion of debtor Delta Air Lines, Inc. and those of its subsidiaries that are debtors and debtors in possession which sought a determination that they satisfy the financial requirements for a voluntary distress termination of the Pilots Plan and approval of such termination under 29 U.S.C. § 1341(c)(2)(B)(ii)(IV) be reversed. Alternatively, Appellants request that the Bankruptcy Court's Order be reversed and remanded for further hearing on adequate notice to retired pilots and with a meaningful opportunity to be heard.

Dated: White Plains. New York
October 31, 2006

Respectfully submitted,

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