

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Delta Air Lines, Inc. :
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Air Line Pilots Association, International, et al., : 1:05-CV-10303-LBS
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Appellants, : (consolidated with 1:05-CV-10600-
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:
:
- v- : LBS and 1:05-CV-10601-LBS)
:
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Delta Air Lines, Inc., et al., :
:
:
Appellees. :
:
:
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**BRIEF OF APPELLEE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF DELTA AIR LINES, INC., ET AL**

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PRELIMINARY STATEMENT

Delta Pilots' Pension Preservation Organization ("DP3"), the Air Line Pilots Association, International ("ALPA") and Fiduciary Counselors, Inc. ("FC") (collectively, "Appellants") appeal the Bankruptcy Court's order denying DP3's Motion to Compel Payment of Pension Benefits Pursuant to a Collective Bargaining Agreement ("CBA") between the pilots' union and Delta Air Lines, Inc., which filed for Chapter 11 relief in September 2005. Appellees are Delta Air Lines, Inc. and those of its subsidiaries that are debtors and debtors in possession in these proceedings (collectively, "Delta" or "Debtors") and the Official Committee of Unsecured Creditors of Delta (the "Committee").

Appellants argue that section 1113 of the Bankruptcy Code – which accords certain protections to CBA-based claims – requires Delta to pay pension payments and contributions that come due during bankruptcy immediately and in full, as if they were administrative expenses – *i.e.*, payment for services rendered to the Debtors during bankruptcy.¹ FC further argues that because Delta was obligated under the Employee Retirement Income Security Act of 1974 ("ERISA") to make contributions to the tax-qualified pension plan, these contributions are administrative expenses under section 503. These arguments completely overlook the fact that the services on which these claims are based were rendered to Delta before it entered bankruptcy, and not to the Debtors during the bankruptcy proceedings. Unless and until the CBA is expressly assumed by Delta, these pre-petition pension claims are not entitled to any such "superpriority." Instead, they are unsecured claims to be paid according to the Code's overarching priority

¹ Unless specifically noted otherwise, all references to a statutory "section" or "sections" refer to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, and all references to the "Code" refer to the Bankruptcy Code.

system, which seeks to distribute the assets of an estate in a way that balances the interests of all creditors, including the debtors' employees, with that of the debtors in possession who seek to keep the enterprise afloat.

The Bankruptcy Court's order denying the Motion should be affirmed because it is compelled by controlling Second Circuit caselaw, which holds that section 1113 must be read in conjunction with the Code's priority scheme. *In re Ionosphere Clubs, Inc. (Ionosphere II)*, 22 F.3d 403 (2d Cir. 1994). The *Ionosphere II* court considered and rejected the very argument asserted by Appellants here, namely, that a debtor's failure to meet its obligations under a yet-to-be rejected CBA constituted a "unilateral modification" of the CBA in contravention of section 1113. *Id.* at 408 (citing *In re Ionosphere Clubs, Inc. (Ionosphere I)*, 922 F.2d 984 (2d Cir. 1990)). Specifically, the Court held that claims for vacation pay earned pre-petition were not entitled to administrative expense priority, but, like all pre-petition claims, were subject to the remedies afforded by the Code's priority scheme. *Id.* at 409.

Appellants' efforts to distinguish *Ionosphere II* are unavailing. Their main arguments may be summarized as follows:

Appellants argue that, unlike *Ionosphere II*, this case involves *post*-petition obligations. They imply that the pension obligations are based on current services or by improperly characterizing obligations that *come due* post-petition as ones that are *earned* post-petition. These strained efforts are belied by the stipulated facts and by *Ionosphere II* and other controlling Second Circuit cases.

DP3 argues that Delta should be deemed to have "assumed" the CBA until the Bankruptcy Court approves the Debtors' pending request to reject it, and must therefore fulfill its obligations under the CBA and cure all defaults at once. This argument, which DP3 supports by

reference to Fourth Circuit caselaw, fails because it is squarely contradicted by *Ionosphere II* and other Second Circuit precedent holding that executory contracts, including CBAs, cannot be assumed by implication.

DP3 and ALPA try to distinguish *Ionosphere II* by arguing that it is limited to chapter 11 liquidation cases and does not apply to chapter 11 reorganization cases, though the case itself makes no such distinction. The policy reasons proposed by DP3 and ALPA for creating such a distinction fall flat and are, in any event, without support in the caselaw, the Code, or the text of section 1113, which applies to *all* chapter 11 cases.

FC, for its part, argues that *Ionosphere II* is distinguishable because it involved vacation pay, not pension benefits, which FC claims are subject to different treatment in bankruptcy than any other kind of benefit. This argument fails because it has absolutely no support in the Code or in controlling caselaw. FC's bold assertion that "virtually all courts" agree with its position is not only false, it ignores the fact that virtually all of the cases it cites have been squarely rejected by the Second Circuit.

Appellants' remaining hastily-drawn and unsupported arguments are also meritless. The order should be affirmed.

BASIS FOR APPELLATE JURISDICTION

The Committee agrees with Appellants that the Court has jurisdiction over this appeal from the Bankruptcy Court's final order of October 31, 2005, denying DP3's Motion. (Docket No. 970.) 28 U.S.C. §158(a)(1).

STATEMENT OF ISSUES PRESENTED AND
STANDARD OF REVIEW

1. Whether this Court should affirm the Bankruptcy Court’s decision denying DP3’s motion to compel chapter 11 Debtors to pay pension contributions arising from pre-petition services under a collective bargaining agreement that Debtors have not assumed because, under Second Circuit precedent, such claims are entitled to administrative expense priority only to the extent they are attributable to post-petition services. *In re Ionosphere Clubs, Inc.*, 22 F.3d 403 (2d Cir 1994) (“*Ionosphere II*”).

2. Whether this Court should affirm the Bankruptcy Court’s decision because neither section 1113(f) of the Bankruptcy Code, nor any other applicable provision of federal law, provides a legal basis to compel the Debtors to contribute to pension funds and make benefits payments arising from pre-petition services under a collective bargaining agreement that has not been assumed.

Both issues present questions of law that this Court reviews *de novo*. *In re Chateaugay Corp.*, 94 F.3d 772, 780 (2d Cir. 1996). This Court may affirm the lower court’s decision on any legal grounds supported by the record, including grounds on which that court did not rely. *Id.*; *see also In re Best Products Co.*, 68 F.3d 26, 30 (2d Cir. 1995); *Richardson v. Selsky*, 5 F.3d 616, 621 (2d Cir. 1993); *In re Carvalho*, 335 F.3d 45, 49 (1st Cir. 2003) (when a core dispute is over a question of law, the reviewing court is not “wedded to the bankruptcy court’s rationale.”).

The Committee does not contest Appellants’ arguments on appeal regarding the following decisional grounds asserted by the Bankruptcy Court: (1) the Motion must be denied because the Debtor alone has standing to seek relief under section 1113(f); and (2) the Motion must be denied

because the relief sought can be obtained only in an adversary proceeding.² The Committee seeks affirmance on the grounds set forth in the issues presented and discussed below, which were fully briefed before the Bankruptcy Court.

STATEMENT OF THE CASE

A. Factual Background.

1. The parties have stipulated to the following relevant facts. Oct. 12, 2005 Joint Statement of Stipulated Facts (“Stip.”) (Docket No. 711).

2. Pursuant to the Pilot Working Agreement (the “PWA”), Delta’s CBA with ALPA, Delta agreed to make contributions to the Pilots Retirement Plan, a tax-qualified benefits pension plan (“the Qualified Plan”) governed by ERISA. Stip. at 5, 18. Because the IRS imposes limits on the size of payments that can be made to a qualified plan, Delta agreed to pay any above-limit retirement benefits itself, through a non-qualified plan (the “Non-Qualified Plan”). Stip. at 13. It is undisputed that the Non-Qualified Plan specifies that the right to such above-limit payments is “no greater than that of an unsecured general creditor of the company.” Committee’s Objection at 8 (Docket No. 589).

3. In November 2004, Delta and ALPA negotiated and reached an agreement whereby Delta would reduce and/or eliminate further benefit accruals under the Qualified and Non-Qualified Plans as of December 31, 2004. Debtors’ Objection at 7 (Docket No. 566). Instead,

² While the Committee believes that DP3 lacks standing to raise the issues set forth in the Motion because it is not a party to the PWA, this Court need not reach the issue in this appeal because ALPA, the pilots’ authorized representative, which *does* possess standing under section 1113, filed a response in support of the Motion. The Committee agrees with Appellants that a motion to compel is a procedurally proper means of seeking the relief requested.

beginning January 1, 2005, Delta would provide its pilots with a pay-as-they-work pension benefit. *Id.* There is no dispute that Delta met and continues to meet this obligation.

4. On September 14, 2005 (the “Petition Date”), Delta filed voluntary petitions for relief in the Southern District of New York under chapter 11. On the same day, Delta filed a Wages and Benefits Motion seeking authority to pay contributions to the Qualified Plan and make payments to the Non-Qualified Plan to the extent such contributions and payments were attributable to the post-petition services of Delta’s pilots. Wages & Benefits Motion (Docket No. 21) at 12. It is undisputed that Delta continues to operate its business as a debtor in possession.

B. Procedural History.

5. On September 23, 2005, DP3 filed its Motion to Compel the Continued Payment of Collectively Bargained For Pension Benefits to the Retired Pilots (the “Motion”) (Docket No. 396), seeking an order requiring Delta to continue making contributions to the Qualified Plan and payments to the Non-Qualified Plan. ALPA and FC each filed a Response in support of the Motion. (Docket Nos. 558 and 533). DP3, ALPA and FC argued under a variety of theories that these contributions and payments are entitled to administrative expense priority.

6. Appellees filed objections to the Motion, observing, *inter alia*, that because the Qualified Plan was frozen as of December 31, 2004, all contributions that have since come due necessarily relate to services performed *prior* to January 1, 2005 – *i.e.*, well before the Petition Date. Further, Appellees noted in their objections to the Motion that all payments due under the Non-Qualified Plan relate to the services of pilots who retired before the Petition Date. (Docket Nos. 566 and 589.) Because the contributions and payments demanded by DP3 arise entirely from pre-petition services, these contributions and payments are not entitled to administrative expense priority, but will be paid in due course pursuant to the priority scheme for unsecured

claims established by section 507, under controlling Second Circuit law. (Docket Nos. 566 and 589, citing *Ionosphere II*, 22 F.3d 403).

7. On October 17, 2005, following a hearing, the Bankruptcy Court orally denied the Motion on the grounds that: a) section 1113 “requires that the movant be the debtor and the debtor is not the movant,” Transcript of October 17, 2005 hearing at 98 (Docket No. 1096); and b) the Motion was not a proper vehicle to seek enforcement of section 1113(f), which “would require the commencement of an adversary proceeding because [the relief sought is a] declaratory judgment.” *Id.*

8. On October 31, 2005, the Bankruptcy Court entered an order summarily denying the Motion. (Docket No. 970.)

LEGAL DISCUSSION

I. THIS COURT SHOULD AFFIRM THE BANKRUPTCY COURT’S DECISION DENYING THE MOTION TO COMPEL.

A. Bankruptcy Code Provisions Should Be Construed to Avoid Conflict and Advance the Policies Underlying the Code.

9. It is hornbook law that the various sections of a legislative enactment should be harmonized and read in terms of their overall context to avoid conflict with one another. *E.g.*, *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 370 (1986). If a provision is susceptible to more than one interpretation, the construction adopted should advance the overall statutory policy. *Rake v. Wade*, 508 U.S. 464, 471 (1993) (one provision in a statute should not be construed so as to suspend or supercede another); *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (a statutory term “that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme”; from among the

permissible meanings, court should select the one that “produces a substantive effect . . . compatible with the rest of the law”); *accord, Ionosphere II*, 22 F.3d at 407.

10. In keeping with these well-established principles, the Supreme Court has held that statutory construction of the Bankruptcy Code is a “holistic endeavor” requiring consideration of the entire statutory scheme. *Timbers of Inwood*, 484 U.S. at 371. As bankruptcy courts have elaborated:

“The Bankruptcy Code is not a fragmented and disconnected collection of miscellaneous rules. It is a complex tapestry of ideas. The colors and patterns that are woven into its fabric combine to compliment and reinforce each other, in order to create a single unifying theme - the equitable treatment of creditors and financial relief for overburdened debtors. In doing so, the tensions between these seemingly inconsistent objectives have been balanced and harmonized. Consequently, Title 11’s various provisions should not be viewed in isolation. Instead, their interpretation should reflect the interplay between all of its different parts, so that the Bankruptcy Code can operate as a coherent whole. The meaning given to any one portion must be consistent with the remaining provisions of the Bankruptcy Code.”

In re Certified Air Techs., Inc., 300 B.R. 355, 367 (Bankr. D. Cal. 2003) (quoting *In re Depew*, 115 B.R. 965, 969 (Bankr. N.D. Ind. 1989)).

11. Courts should depart from these harmonizing principles only when Congress has made plain its intent to create an exception. *E.g., Ionosphere II*, 22 F.3d at 408 (“We must . . . assume that Congress intended that the priorities . . . should apply” in the absence of explicit direction to the contrary); *United States v. Noland*, 517 U.S. 535, 540-43 (1996) (admonishing courts against fashioning bankruptcy rules independent of congressional direction).

12. Accordingly, section 1113, which includes special provisions for the rejection and assumption of CBAs, must be read in conjunction with the rest of the Code, including the Code’s overarching priority scheme, set forth in sections 503 and 507, and provisions dealing with

executory contracts generally, set forth in section 365. See §§ 507, 503, 365, 1113. We discuss these provisions briefly in turn.

1. The Code's priority scheme.

13. Section 507 defines those expenses and claims against a bankrupt estate that are entitled to priority in a bankruptcy proceeding. Because the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among its creditors, statutory priorities are narrowly construed. *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100-01 (2d Cir. 1986) (*McFarlin's*) (citing *Joint Industry Board v. United States*, 391 U.S. 224, 228 (1968)); *Nathanson v. N.L.R.B.*, 344 U.S. 25, 29 (1952) ("If one claimant is to be preferred over others, the purpose should be clear from the statute"); see *In re United Merchants & Mfrs., Inc.*, 597 F.2d 348, 349 (2d Cir. 1979); *In re Mammoth Mart, Inc.*, 536 F.2d 950, 953 (1st Cir. 1976). The party seeking administrative priority bears the burden of proving entitlement. *In re FBI Distribution Corp.*, 330 F.3d 36, 42 (1st Cir. 2003); *In re Enron Corp.*, 300 B.R. 201, 207 (Bankr. S.D.N.Y. 2003). "Treating pre-filing debts as 'administrative' claims against the post-filing entity would impair the ability of bankruptcy law to prevent old debts from sinking a viable firm." *In re Kmart Corp.*, 359 F.3d 866, 872 (7th Cir. 2004).

14. Section 507 gives first priority to administrative expenses allowed under section 503(b) – *e.g.*, "the actual, necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case."

§ 503(b)(1)(A). The Second Circuit has held that "an expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession, and 'only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.'"

McFarlin's, 789 F.2d at 101 (citations omitted). “A debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate.” *Id.*

15. Consistent with these tenets, the Code draws a clear distinction, for priority purposes, between wages earned *pre-petition* and those earned *post-petition*. Only wages earned after the filing enjoy first priority status, 11 U.S.C. § 507(a)(1) and § 503(b)(1)(A), on the theory that services rendered to a debtor in bankruptcy help preserve the value of the estate. *E.g., In re Continental Airlines, Inc.*, 148 B.R. 207, 212 (D. Del. 1992) (only those wage claims that are paid to induce employees to continue to work for an employer who has filed a petition for chapter 11 are necessary for the preservation of the estate and thus are an administrative priority); *In re Fleming Packaging Corp.*, No. 03-82408, 2004 Bankr. LEXIS 1384, *7 (Bankr. C.D. Ill. Aug. 31, 2004) (“simply because vacation pay becomes payable postpetition, does not mean that the full amount due under the [CBA] automatically qualifies for administrative priority status. Instead, it must be determined what portion was earned after the bankruptcy filing.”); *see In re Chateaugay Corp.*, 130 B.R. 690, 697 (S.D.N.Y. 1991) (PBGC’s claims for pension obligations were unsecured claims because the labor giving rise to them was performed pre-petition), *vacated and withdrawn as moot*, 1993 WL 388809 (S.D.N.Y. June 16, 2003); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 891 (Bankr. S.D.N.Y. 1993) (pension plan obligation was properly classified as a general unsecured claim because all services relating to the pension benefits were performed pre-petition).³

³ *See also In re Sunarhauserman, Inc.*, 126 F.3d 811, 821 (6th Cir. 1997) (acts giving rise to debtor’s pension debts were the pre-petition labor of its employees, rather than the post-petition termination of the plan); *In re CF&I Fabricators of Utah, Inc.*, 150 F.3d 1293, 1300 (10th Cir. 1998) (administrative priority applied only to the post-petition cost component of PBGC claim); *In re Bayly Corp.*, 163 F.3d 1205, 1211 (10th Cir. 1998) (claim for minimum

2. Debtor's right to reject executory contracts under sections 365 and 1113.

16. Section 365 permits the debtor “to go through [its] inventory of executory contracts . . . and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject.” *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098 (2d Cir. 1993); *see* § 365(a) (“the trustee, subject to the court’s approval, may . . . reject any executory contract or unexpired lease of the debtor”); *In re Chateaugay Corp.*, 10 F.3d 944, 954-55 (2d Cir. 1993) (“The main purpose of Section 365 is to allow a debtor to reject executory contracts in order to relieve the estate of burdensome obligations while at the same time providing a means whereby a debtor can force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so.”) (quotations and citations omitted).

17. The debtor’s rejection of a contract or lease is deemed a pre-petition breach, and damages claims are treated as pre-petition debts paid according to section 507’s priority scheme. § 365(g); *see In re Orion Pictures*, 4 F.3d at 1098 (if the debtor “rejects an executory contract pursuant to § 365, the other party to the rejected contract becomes a general [unsecured] creditor of the estate for any damages flowing from the rejection”) (quotations and citation omitted).

18. CBAs are executory contracts that are rejected or assumed subject to the special provisions of section 1113. *E.g.*, *In re Leslie Fay Cos.*, 168 B.R. 294, 300 (Bankr. S.D.N.Y. 1994); *In re Moline Corp.*, 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992) (CBAs “are simply executory contracts with a special provision governing their assumption or rejection . . .”). Section 1113

funding contributions was not entitled to administrative priority status); *In re Kent Plastics Corp.*, 183 B.R. 841, 847-48 (Bankr. S.D. Ind. 1995) (PBGC’s claim for unfunded benefit liabilities was predicated on pre-petition employment and thus represented a pre-petition contingent claim not entitled to priority).

was enacted subsequent to a Supreme Court decision permitting an employer in bankruptcy to reduce workers' wages post-bankruptcy without renegotiating its CBA. *In re Century Brass Prods., Inc.*, 795 F.2d 265, 271-72 (2d Cir. 1986) (citing *NLRB v. Bildisco*, 465 U.S. 513 (1984)). It was designed “to prevent employers from using a threat of bankruptcy, and a subsequent unilateral rejection of the [CBA], as leverage in labor contract negotiations.” *In re Kitty Hawk, Inc.*, 255 B.R. 428, 432 (Bankr. N.D. Tex. 2000); *see also Ionosphere II*, 922 F.2d at 407-08 (the goal of section 1113 is “to give special consideration to a [CBA] and encourage the debtor and the union to reach a mutually acceptable agreement while the provisions of the current agreement remain in effect”) (quoting *In re Roth Am., Inc.*, 975 F.2d 949, 957 (3d Cir. 1992)).

19. Specifically, section 1113 requires a debtor to honor the terms of a CBA unless and until it has been rejected (subsection (c)), the parties have agreed on changes (subsection (b)), or the court has approved modifications proposed by the debtor upon a showing of necessity or irreparable harm (subsection (e)). *See* § 1113(b), (c) and (e); *see also* § 1113(f) (debtor may not “unilaterally terminate or alter any provisions of a [CBA]” prior to rejection or assumption of the contract under the statute); *Ionosphere II*, 22 F.3d at 407-08 (interpreting § 1113(f)).

20. Section 1113 is silent as to the priority of claims arising under a CBA, pre-petition or post-petition, prior to its assumption or rejection by the debtor. In light of this silence, Circuit Courts have split on the issue whether 1113 should be read in harmony with the rest of the Code, or whether it trumps sections 507 and 365 to grant “superpriority” to claims arising under a CBA – notwithstanding the absence of support for such an approach in the statute or its legislative history.

B. Ionosphere II Holds that 1113 Must Be Read In Harmony with Section 507.

21. In *Ionosphere II*, the Second Circuit rejected a union’s argument that an airline in chapter 11 bankruptcy must treat employees’ claims for unused vacation pay *earned prior* to the petition date as administrative expense claims instead of general unsecured claims under section 507. The union argued there – as it does here – that section 1113 supersedes the priority scheme and turns claims that would ordinarily be granted third-priority status under section 507 into the equivalent of administrative expense claims. 22 F.3d at 405-06. The Court emphatically disagreed. It recognized that “section 1113(f) ‘prohibit[s] the application of any other provision of the Bankruptcy Code when such application would permit a debtor to achieve a unilateral termination or modification of a [CBA] without meeting the requirements of § 1113.’” *Id.* (quoting *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 990-91 (2d Cir. 1990) (“*Ionosphere I*”). But it concluded that application of the priority scheme would not run afoul of this rule because “[j]udicial ordering of benefit claims pursuant to § 507 is not equivalent to employer avoidance of obligations under a [CBA].” *Id.* at 407 (emphasis added).

22. *Ionosphere II* followed the Third Circuit in concluding that “application of the priority scheme does not conflict with the purpose of section 1113 . . . [to] ‘encourage the debtor and the union to reach a mutually acceptable agreement while the provisions of the current agreement remain in effect,’” *i.e.*, until rejection or modification of the agreement pursuant to section 1113. *Id.* at 407-08 (quoting *Roth*, 975 F.2d at 957); *see Roth*, 975 F.2d at 951, 958 (rejecting the union’s assertion that section 1113 gives “superpriority status” to claims for

vacation and severance pay earned pre-petition, and holding that such claims constitute general unsecured claims).⁴

23. The Court held that conflict would arise, however, if courts were to adopt the superpriority theory advanced by the union in reliance on the Sixth Circuit's opinion in *In re Unimet Corp.*, 842 F.2d 879 (6th Cir. 1988).⁵ *Ionosphere II*, 22 F.3d at 408 (expressly rejecting *Unimet* "to the extent [it] can be read" to "require a superpriority for all claims for collectively bargained benefits."). The union's approach would "disrupt the careful balancing of competing policies embodied in section 507" and contradict the Bankruptcy Act's "'theme of . . . equality of distribution.'" *Ionosphere II*, 22 F.3d at 408, (quoting *Nathanson*, 344 U.S. at 29); see *In re Murray Indus., Inc.*, 110 B.R. 585, 587 (Bankr. M.D. Fla. 1990) ("to give priority to a claimant not clearly entitled thereto is not only inconsistent with the policy of equality of distribution, it dilutes the value of the priority for those creditors Congress intended to prefer") *vacated as moot*, 140 B.R. 298 (M.D. Fla. 1992); *Roth*, 975 F.2d at 956 (observing that it would be inconsistent to give "the very same pre-petition obligations . . . an unlimited first priority if the employer debtor files under Chapter 11 but only a third or fourth priority, limited in dollar amount per employee, if the case is filed under Chapter 7[] If post-petition administrative expenses can be, in

⁴ The Fourth Circuit agrees that the statutes should be harmonized, but parts company with the Second Circuit in holding that CBAs should be deemed assumed until they are rejected. *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 797 (4th Cir. 1998). See discussion of this case in section C, below.

⁵ *Unimet* held that a debtor "could not escape its obligations" to make retirees' health insurance benefit payments that came due post-petition under a CBA "merely because the requirements of section 503 arguably have not been satisfied." 842 F.2d at 884. While it is not entirely clear what the Court meant, lower courts have read it to impose superpriority on section 1113 claims. See discussion in *In re Typocraft Co.*, 229 B.R. 685, 691 (Bankr. E.D. Mich. 1999) (sharply criticizing *Unimet* but following it as controlling Sixth Circuit precedent).

effect, wiped out by pre-petition employment related obligations a strong disincentive to reorganization under Chapter 11 would be created.”) (citation omitted).

24. The *Ionosphere II* Court further held that it was particularly “loath to create a class of claims with superpriority status absent express statutory authority.” *Ionosphere II*, 22 F.3d at 408. When Congress has intended to alter the general priority scheme, it has done so explicitly. *Id.* The Court’s observation is borne out by comparing section 1113 with sections 1110 and 1114, both of which explicitly override the priority scheme set forth in section 507. Section 1110(a) expressly mandates payment of all pre-petition claims as the price of preserving the option of assuming an aircraft lease or financing arrangement, while section 1114 explicitly accords administrative expense status to certain retiree benefits (not including pension plans). § 1110(a); § 1114(e)(1) and (2). Had Congress intended section 1113 to create a similar superpriority for pre-petition pension claims, it could, and presumably would, have done so. It did not. *See Certified Air Tech.*, 300 B.R. at 367-69 (Congress’s lack of inclusion in section 1113 of language creating an exemption for immediate payment of any wages or benefits due under a collective bargaining agreement is evidence that Congress did not intend section 1113 to be exempt from the priorities set forth in 507(a)).⁶

⁶ The majority of lower courts to consider the issue have followed the lead of *Roth* and *Ionosphere II*, denying superpriority, or administrative expense status, to claims arising under a CBA that has yet to be modified or rejected pursuant to section 1113. *E.g.*, *Certified Air Tech.*, 300 B.R. at 369; *In re Fleming Packaging Corp.*, 2004 Bankr. LEXIS 1384, at *10–12; *In re Chateaugay Corp.*, 130 B.R. at 700 n.13; *In re Kitty Hawk, Inc.*, 255 B.R. at 436; *In re Family Snacks Inc.*, 249 B.R. 915, 922 (Bankr. W.D. Mo. 2000), *aff’d in part, rev’d in part*, 257 B.R. 884 (8th Cir. B.A.P. 2001); *In re Rayman, Martin & Fader, Inc.*, 170 B.R. 286, 291 (D. Md. 1994); *In re Wean Inc.*, 171 B.R. 528, 531-32 (Bankr. W.D. Pa. 1994); *In re Moline Corp.*, 144 B.R. at 79; *In re Murray Indus., Inc.*, 110 B.R. at 589.

C. Under *Ionosphere II*, the Claims at Issue Here Are Not Entitled to Superpriority Status.

25. Delta and ALPA agreed in November 2004, some ten months before the Petition Date, that Delta would reduce and/or eliminate benefit accruals under the Qualified and Non-Qualified Plans as of December 31, 2004, and would instead provide pilots with a pay-as-they-work pension benefit starting in January 1, 2005. Debtors' Objection (Docket No. 566) at 7. It is undisputed that Delta has met and continues to meet this obligation. Because the Qualified Plan was frozen by agreement with the union, all contributions due under the Qualified Plan relate to services rendered by the pilots in the pre-January 1, 2005 period. Moreover, it is undisputed that a claim under the Non-Qualified Plan is "no greater than that of an unsecured general creditor of the company." Committee's Objection (Docket No. 589) at 8.

26. Accordingly, while Appellants imply otherwise (*e.g.*, FC at 16, 20; ALPA at 10), all of the contributions and pension plan payments at issue here constitute compensation for services provided *prior* to Delta's proceeding in bankruptcy. The pilots are not being deprived of wages or benefits for work they have performed or continue to perform *during* the bankruptcy.

27. Under the rule of *Ionosphere II*, Delta's *post*-petition failure to make contributions to the Qualified Plan or payments to the Non-Qualified Plan does not "terminate or alter" the

Likewise, the Bankruptcy Court for the Northern District of Illinois followed *Ionosphere II*'s approach in the UAL Corp. chapter 11 cases (United Airlines), which raised issues identical to those in question here. *See* UAL 3/18/2005 Hearing Tr. at 63 (observing that "most of the reported decisions have held that a claim for breach of a collective bargaining agreement gives rise to an administrative expense only if the claim meets the requirements for administrative expense treatment under Sections 503 and 507," and concluding that "[t]he reasoning of these decisions . . . is entirely persuasive."). *In re UAL Corp.*, Case No. 02 B 48191 (Bankr. N.D. Ill.), *appeal dismissed as moot*, *Ind. Fid. Serv. Inc. v. UAL Corp. et. al*, Case No. 05-02139 (N.D. Ill.).

PWA in violation of section 1113(f), regardless when they came due. *Ionosphere II*, 22 F.3d at 406; see *McFarlin's*, 789 F.2d at 101 (“A debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate.”). Nor do claims based on these contributions and payments constitute administrative expenses pending the bankruptcy court’s approval or denial of Delta’s petition for rejection of the PWA. *Ionosphere II* at 407-08. Until the PWA is assumed, rejected, or modified under section 1113, the contract remains intact and the Debtors are bound by it. If the contract is assumed, the Debtors will be required to cure all past defaults; if it is rejected, creditors will have an opportunity to assert claims against the Debtors’ estates for unpaid pre-petition accruals under the Code’s priority scheme; if it is modified, the new terms will prevail. No payments are due in the meantime.

28. FC’s argument (FC 9-10) that the contribution claims are entitled to administrative priority under section 503 because they arise under ERISA fares no better. “It is well established that the Bankruptcy Code, not ERISA, determines the priority of claims against a bankrupt estate.” *Pension Benefit Guar. Corp. v. Skeen (In re Bayly Corp.)*, 163 F.3d 1205, 1206 (10th Cir. 1998) (quoting *In re Sunarhauserman*, 126 F.3d at 818); see also *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959) (“We construe the priority section of the Bankruptcy Act, not these statutes. It specifically fixes the priority of classes of creditors.”).

29. The *Bayly* Court rejected an argument that a claim for a termination payment arising under ERISA was entitled to administrative priority because it came due after the filing date, stating that, “[r]egardless of the substantive law on which the claim is based, the proper standard for determining that claim’s administrative priority looks to when the acts giving rise to a liability took place.” 163 F.3d at 1206 (citation omitted); see also *PBGC v. LTV Corp. (In re Chateaugay Corp.)*, 87 B.R. 779, 797 (S.D.N.Y. 1988), *aff’d on other grounds*, 875 F.2d 1008 (2d

Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990) (PBGC's right to payment of unfunded benefit liabilities at plan termination was not a post-petition claim, but was analogous to a claim for withdrawal liability for plan benefits earned through pre-petition employment, which constitutes a pre-petition claim); *McFarlin's*, 46 B.R. at 103-04 (confirmation order providing for rejection of a CBA results in the treatment of the withdrawal liability claim as a general unsecured claim).

30. In sum, a claim for unfunded benefit liabilities, predicated solely on benefits accrued by Debtors' employees as a result of pre-petition labor, represents a pre-petition claim contingent on plan termination. Consequently, liability is not incurred by the bankruptcy estate and does not qualify as an administrative expense under section 503(b)(1)(B).

D. Appellants' Arguments that the Pension Plan Benefits Earned Pre-Petition Are Entitled to Administrative Expense Priority Are All Meritless.

1. In the Second Circuit, executory contracts, including CBAs, must be expressly assumed.

31. DP3 contends that the Debtors "necessarily assumed" the PWA by operation of § 1113(f). In support of this assertion, DP3 relies on the Fourth Circuit's decision in *Adventure Resources*, 137 F.3d 786. (DP3 at 24.) The *Adventure Resources* court held that claims for pension fund contributions that arose under CBAs and that accrued pre-petition, but came due post-petition, were entitled to first priority administrative expense status because the debtors had assumed the CBAs "as a result of their failure to reject the CBAs in accordance with § 1113." *Adventure*, 137 F.3d at 798. Under the Fourth Circuit's reading of section 1113, CBAs are

assumed by implication as a result of the debtor's inaction, or even pending a decision by the bankruptcy court regarding the debtor's motion to modify or reject the contract.⁷

32. The Second Circuit has squarely rejected the notion that executory contracts, which include CBAs, can be assumed by implication in bankruptcy. *In re Burger Boys, Inc.*, 94 F.3d 755, 763 (2d Cir. 1996) (assumption or rejection of a contract “must be done, as suggested by the Bankruptcy Rules, through a formal motion to the court”); *see McFarlin's*, 789 F.2d at 102 n.4 (observing in dicta that employer's compliance with CBA and later inaction until it was rejected did not constitute either an assumption or a rejection of the contract). The majority of courts agree. *See In re Typocraft Co.*, 229 B.R. at 688 (“the majority, and better reasoned view is that, except for assumption or rejection as part of a plan, the trustee can manifest the intention to assume or reject an executory contract or unexpired lease *only by formal motion* filed in accordance with the requirements of Rules 6006(a), 9014 and 9013, or in a confirmed plan.”) (original emphasis) (citing 10 Collier on Bankruptcy, ¶ 6006.01[3], at 6006-5 (15th ed. 1998); *Sea Harvest Corp. v. Riveria Land Co.*, 868 F.2d 1077, 1079 (9th Cir. 1989); and *In re Uly-Pak, Inc.*, 128 B.R. 763, 765 (Bankr. S.D. Ill. 1991)).⁸

⁷ DP3 also cites *In re Horsehead Industries, Inc.*, 300 B.R. 573, 587 (Bankr. S.D.N.Y. 2003), and *In re Manor Oak Skilled Nursing Facilities, Inc.*, 201 B.R. 348, 350 (Bankr. W.D.N.Y. 1996). (DP3 at 26-27.) Both cases are irrelevant. The *Horsehead* decision involved wage claims for post-petition work, while *Manor Oak* held merely that debtor was required to make a decision whether to assume or reject the collective bargaining agreement prior to confirmation. The language quoted by DP3 derives from *In re Golden Distributors Ltd.*, 134 B.R. 760 (Bankr. S.D.N.Y. 1991), a case expressly rejected by *Ionosphere II*, 22 F.3d at 407.

⁸ *See also In re Enron Corp.*, 300 B.R. 201, 213 (Bankr. S.D.N.Y. 2003) (debtor cannot assume a contract by implication, because notice to creditors and court approval are specifically required before contract may be assumed and its burdens can be imposed on estate); *In re Child World, Inc.*, 147 B.R. 847, 852 (Bankr. S.D.N.Y. 1992) (assumption of a contract cannot be implied because it requires specific court approval pursuant to a motion in accordance with Fed.

33. Further, under section 365, as discussed above, a debtor may generally assume or reject its executory contracts at any time before confirmation of a plan of reorganization. § 365(d)(2). A non-debtor party to an executory contract who continues to provide services to the debtor under its contract does not alter its position as a general unsecured creditor simply because it holds a pre-petition claim. See *In re Whitcomb & Keller Mortg. Co.*, 715 F.2d 375, 379 (7th Cir. 1983) (a creditor that continued to provide post-petition services in accordance with an executory contract “did not alter [its] position as a general unsecured creditor on its *pre-petition* claim”); *In re U.S. Fin., Inc.*, 594 F.2d 1275, 1279-80 (9th Cir. 1979) (a telephone company’s continuation of services post-petition did not give it the right to collect unsecured pre-petition debt); *In re Globe Metallurgical, Inc.*, 312 B.R. 34 (Bankr. S.D.N.Y. 2004) ; *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 687 (Bankr. S.D.N.Y. 1992) ; see also *In re Greater S.E. Cmty. Hosp. Found., Inc.*, 267 B.R. 7, 25-26 (Bankr. D.D.C. 2001) (“the analysis in *Adventure Resources* ignores § 365(a) . . . which provides that ‘the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.’”).

34. In accordance with the foregoing, *Ionosphere II* held that claims for vacation pay arising pre-petition under an un-rejected CBA were subject to the statutory provisions of section 507; *i.e.*, they were treated as unsecured claims under section 365, and not as obligations under an “implicitly” assumed contract. 22 F.3d at 407.

R. Bankr. P. 6006); *In re Whitcomb & Keller Mortg. Co.*, 715 F.2d 375, 380 (7th Cir. 1983) (assumption or adoption of the contract can only be effected through an express order of the bankruptcy court); *In re Family Snacks, Inc.*, 257 B.R. 884, 904 (8th Cir. B.A.P. 2001) (a debtor “cannot assume an executory contract by inaction.”); *In re Gateway Apparel, Inc.*, 238 B.R. 162, 164 (Bankr. E.D. Mo. 1999) (“the intention to assume must be clearly declared by the Debtor in Possession or Operating Trustee; and notice of this intention must be given to the necessary parties.”).

35. In sum, DP3's argument that this Court should adopt the Fourth Circuit's rule that a CBA is assumed by implication in bankruptcy pending modification or rejection under section 1113 must be rejected because it is contrary to the law of this Circuit.

2. Neither *Century Brass* nor *In re 1655 Broadway* displaces controlling precedent established by *Ionosphere II*.

36. DP3 argues that *In re Century Brass Prods., Inc.*, 795 F.2d 265, 267 (2d Cir. 1986) requires Debtors to continue making pension contributions as they come due under the PWA. (DP3 at 10.) But *Century Brass* held merely that an employer cannot modify a CBA under section 1113(e) without negotiating with all of the workers affected by the proposed modifications. 795 F.2d at 275-76. Because the proposed modifications affected retirees as well as current employees, and because these two groups had conflicting interests, the *Century Brass* court held that negotiation with the union (who represented only the employees) was insufficient. *Id.* The Court did not address the relevant issue here – namely, the interplay of sections 1113 and 507 when an employer declines to meet obligations that are earned pre-petition but come due post-petition. This issue is addressed and resolved by *Ionosphere II*, as discussed above.

37. All three Appellants relied heavily below on *In re 1655 Broadway Rest. Corp.*, No. 96CIV9116, 1997 WL 104961 (S.D.N.Y. March 7, 1997), a one-and-a-half page unpublished decision, for the proposition that Debtors are obliged to make any pension contributions under the PWA that come due post-petition, regardless whether they relate to pre-petition labor. On appeal, they have given the case a minor role – but even passing mention is more than it merits.

38. First, an unpublished district court opinion cannot possibly supersede the Second Circuit's opinion in *Ionosphere II*, as Appellants suggest. (E.g., ALPA at 7-8.) Further, the case appears to deal with pension and welfare fund contributions that accrued post-petition, not

contributions that accrued pre-petition and then came due post-petition. *Broadway*, 1997 WL 104961, at *2 (holding that “the Debtor is ordered . . . immediately to pay post-petition accrued and unpaid contributions to the Pension Fund . . .”).⁹

3. Appellants’ efforts to distinguish *Ionosphere II* are unavailing.

a. Section 1113 applies to all chapter 11 cases, whether they involve reorganization or liquidation.

39. ALPA and DP3 argue that *Ionosphere II* applies only to chapter 11 debtors who have ceased operations and are liquidating their estates (ALPA at 9-10, DP3 at 19-23), even though the opinion itself contains no discussion of liquidation versus reorganization and even though section 1113 itself expressly applies to both forms of chapter 11 proceedings. DP3 concedes that “§ 1113 does technically apply in a liquidating Chapter 11,” but asserts that “it serves no real purpose” in such cases because a liquidating debtor has “de facto terminated” its CBA. *Id.* at 22. That argument not only renders meaningless Congress’s enactment of 1113 as a provision applicable to all forms of chapter 11 proceedings, *see TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”), it also begs the question why the Second Circuit in *Ionosphere II* deemed it necessary to apply section 1113 in a liquidation case and to harmonize it with section 507, which comes into play precisely when a CBA is rejected.

⁹ *Broadway* concerned multi-employer pension plans, which employers typically fund on a pay-as-you go basis, so as a matter of course the contributions under the plan accrued and came due post-petition.

40. Neither DP3 nor ALPA cite to any precedent supporting the distinction they draw, except for dicta in *Rufener Constr., Inc.*, 53 F.3d 1064, 1067 (9th Cir. 1995). (DP3 at 22.) By contrast, a number of courts have applied *Ionosphere II* to chapter 11 reorganization cases. *E.g.*, *In re Rayman, Martin & Fader, Inc.*, 170 B.R. 286; *In re Moline*, 144 B.R. at 79; *In re UAL Corp.*, No. 02-48191 (Bankr. N.D. Ill.), Transcript of March 18, 2005 Omnibus Hearing. See also *Family Snacks*, 257 B.R. at 893 (observing that, while it might seem odd to do so, courts “have applied § 1113 in a liquidation scenario” and “held or assumed that § 1113 applies in a case where the debtor will not be engaged in business because it is selling its assets.”).

41. This Court should reject this proposed “distinction” between liquidation and reorganization.

b. Pension obligations have no special status distinguishing them from other benefits claims.

42. FC argues that *Ionosphere II* is distinguishable because it involved claims for vacation pay, not pension obligations, which FC maintains should be treated differently. (FC at 15-22.) Indeed, FC contends that “virtually all courts” agree that pension plan obligations under a CBA will, until section 1113 rejection or modification, be treated as consideration for current labor and will therefore receive administrative expense priority. (FC at 15.)

43. This is nonsense. In the first place, most of the cases relied on by FC follow cases that were expressly disavowed by the Second Circuit in *Ionosphere II*. As noted above, the Second Circuit rejected the Sixth Circuit’s opinion in *Unimet* (which FC cites at 18). *Ionosphere II*, 22 F.3d at 408. The following cases cited by FC are simply lower court opinions following *Unimet*: *In re WCI Steel, Inc.*, 313 B.R. 414, 418 (Bankr. N.D. Ohio 2004); *Eagle, Inc. v. Local*

No. 537 of United Ass'n of Journeymen, 198 B.R. 637 (D. Mass. 1996); *In re Acorn Bldg. Components, Inc.*, 170 B.R. 317 (E.D. Mich. 1994) (cited by FC at 18).

44. Two more cases – *In re Arlene's Sportswear, Inc.*, 140 B.R. 25, 28 (Bankr. D. Mass. 1992) and *In re Energy Insulation, Inc.*, 143 B.R. 490, 492 (N.D. Ill. 1992) (cited by FC at 18) – follow *another* case expressly rejected by *Ionosphere II*, 22 F.3d at 407 (rejecting *In re Golden Distributions, Ltd.*, 152 B.R. 35, 37 (S.D.N.Y. 1992) (stating that all claims arising under a CBA should be treated as administrative expenses)).

45. Yet another case cited by FC, *Columbia Packing Co. v. Pension Benefit Guar. Corp.*, 81 B.R. 205 (D. Mass. 1988), is squarely at odds with the Second Circuit's opinion in *McFarlin's*, which held that “an expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession, and ‘only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.’” 789 F.2d at 101 (citations omitted); *see In re Chateaugay Corp.*, 115 B.R. 760, 777 (Bankr. S.D.N.Y. 1990) (observing that *Columbia Packing* “cannot be reconciled with [*McFarlin's*] which . . . established that the resolution of the administrative priority issue essentially turns on when the debtor's employees provided labor in consideration for receiving pension benefits from the debtor.”), *withdrawn and vacated as moot*, 1993 WL 388809 (S.D.N.Y. June 16, 1993).

46. The remaining cases cited by FC are simply inapposite. FC claims that in *In re Hoffman Bros. Packing Co.*, 173 B.R. 177 (9th Cir. BAP 1994), the Ninth Circuit BAP “squarely held that pension funding claims coming due in the period between the petition date and the date of interim modification under 1113(e) were entitled to priority status.” (FC at 18.) Not so. In *Hoffman*, the court held that interim modifications to a CBA under section 1113(e) could not be

imposed retroactively pending a debtor's motion to reject the contract. *Hoffman*, 173 B.R. at 189. Although the debtor had defaulted in contributions prior to bankruptcy, the issue of whether any pre-petition wage and benefit claims were entitled to treatment as administrative expenses under § 1113(f) was not before the court. *See Hoffman*, 173 B.R. at 180.

47. The Ninth Circuit BAP's decision in *In re World Sales, Inc.*, 183 B.R. 872 (9th Cir. BAP 1995) (cited at 20) does not help FC either. There, the court held that a claim based on payments due under an unrejected CBA for *post-petition work* is entitled to treatment as an administrative expense. 183 B.R. at 877. The court distinguished *Roth* to the extent that case involved wages earned before the filing of the petition. *Id.* *See Certified Air Techs.*, 300 B.R. at 365 (rejecting union's argument that *World Sales* follows the reasoning in *Unimet*: "*World Sales* does not embrace *Unimet*. On the contrary, the discussion in *World Sales* concurs with *Roth* and its progeny.").

48. Nor does *In re Colorado Springs Symphony Orchestra Ass'n*, 308 B.R. 508 (Bankr. D. Colo. 2004), support FC's argument. (FC at 20.) There, the court held that symphony musicians were entitled to post-petition wages even though they had not performed post-petition due to symphony cancellations. Unlike most employees, the musicians were doing their employer a service simply by being "ready, willing and able to perform" -- indeed, their contract provided for them to be paid "whether or not management schedules actual rehearsals or performances" *Id.* at 520.¹⁰

¹⁰ ALPA's arguments based on *World Sales* and *Colorado Springs* (ALPA at 10) fail for the same reason FC's do.

49. Finally, FC's argument that the court in *In re 1655 Broadway* distinguished pension funds from vacation pay is a non-starter. (FC 17-18.) There is simply no basis for concluding that the result reached by the court in that unpublished (and non-precedential) opinion had anything to do with the supposed difference between pension funds and other types of compensation.

50. This Court should reject FC's argument, which is entirely unsupported by any controlling law, that pension funds, unlike other types of wages, are exempt from the rules established in *McFarlin's* and *Ionosphere II*, i.e., that "[a] debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate," *McFarlin's*, 789 F.2d at 101, even when the debt arises from a CBA as opposed to any other kind of executory contract, *Ionosphere II*, 22 F.3d at 407-08.

4. FC's remaining arguments are meritless.

51. FC argues that denial of administrative expense status to the pension claims at issue increases the likelihood that the Qualified Plan will be terminated. (FC at 7, 11-13.) This argument makes no sense. To the contrary, the Qualified Plan is more likely to be terminated if the claims are deemed administrative claims. If that happens, they will have to be paid in full instead of on a percentage basis with other unsecured claims. Because Debtors would be unable to make such payments (which are estimated at nearly \$400 million just for 2006), they might well be forced to seek authorization to terminate the Qualified Plan.

52. FC also argues that "regulatory schemes assign administrative priority to assure that the debtors' post-petition conduct is in compliance with a statutory scheme," citing cases granting administrative priority to costs required to address environmental risks and health hazards arising from post-petition conduct. (FC at 23 and n.57.) No such risks are at issue here,

nor do any of the cases cited by FC involve the underfunding of pension plans under ERISA, which, as discussed above in section C, do not give rise to an administrative expense priority.

53. Finally, FC briefly notes that the IRS has taken the position that excise taxes imposed for failure to make minimum funding contributions should be granted administrative priority. (FC at 23 and n.58.) Of course, the IRS's position has no bearing on this case. It is well-settled that the Bankruptcy Code – not the IRC – determines the priority of minimum funding contribution claims in bankruptcy. *E.g., In re Bayly*, 163 F.3d at 1206; *In re Sunarhauserman*, 126 F.3d at 818.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's order should be affirmed.

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Respectfully submitted,

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