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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

DELTA AIR LINES, INC., et al.

Debtors.

Chapter 11 Case No.

05-17923 (PCB)

(Jointly Administered)

**SECTION 1114 COMMITTEE'S MOTION TO
ENFORCE DEBTOR'S SECTION 1114 OBLIGATIONS**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Delta Air Lines has improperly taken over \$30 million from the separate Disability and Survivorship Trust to pay an unauthorized and unrelated company expense—employee severance benefits. Those withdrawals have contributed to a growing funding deficit in the Trust of now over \$212 million. The Disability and Survivorship Trust (the “Trust”) is undeniably a “fund or program” maintained or established by Delta “for the purpose of providing . . . payments for retired employees and their spouses and dependents for . . . benefits in the event of . . . accident, disability, or death.” As such, it is specifically protected by Section 1114. But Delta continues these unauthorized withdrawals, along with improper payments for short-term disability, at the rate of over \$1.5 million every two weeks, according to the latest figures Delta has provided.

Delta’s improper use of funds from the Trust must stop immediately, to protect the Trust and those disabled, widowed, and orphaned (literally) who look to the Trust for security of payment despite Delta’s current bankruptcy and future business challenges. The Section 1114 Committee therefore seeks an order under Section 1114:

1. Prohibiting further diversion of funds out of the Trust during the Bankruptcy without compliance with Section 1114;
2. Authorizing the Committee, on behalf of the Trust, to recover funds Delta improperly diverted from the Trust.

II. DELTA’S RAIDING OF THE DISABILITY AND SURVIVORSHIP TRUST.

A. DELTA’S MISSTATEMENTS TO THE COURT ABOUT THE TRUST AND SEVERANCE.

In its First Day Motion, before any creditors’ committee or 1114 committee was appointed, Delta sought and obtained authority to continue payments of “Health and Welfare Plan Obligations,” noting that those annual expenses were approximately \$600 million and that

over \$156 million “was paid directly from *fully funded trusts* during the 2004 plan year to meet obligations under two Health and Welfare Plans that provide disability and survivorship benefits to pilots and nonpilot employees.” (Emphasis added.) First Day Motion, Docket #21, p. 8, n. 4, Declaration of Dean M. Gloster (hereafter “Gloster Decl.”), filed concurrently, at Ex. A. That was a clear misstatement. By June 30, 2004, by Delta’s own documents, the Trust was nowhere close to being “fully funded.” Rather, it was under funded by \$212 million, due in large part to the combination of illegal prior withdrawals for severance and the Debtor’s projected future withdrawals for severance and short-term disability. FAS 112 Report for Plan Year Ending June, 2004, Declaration of Mitchell I. Serota (hereafter “Serota Decl.”), filed concurrently, ¶ 4, Ex. C.¹

The Debtors’ First Day Motion also asserted that employees were receiving severance benefits out of a “Supplemental Unemployment Program” which was funded “primarily” through the Delta Family-Care Disability and Survivorship Trust. Gloster Decl., Docket #21, p.15, ¶ 21, Ex. A. The Debtor acknowledged the assets in the Trust were not “property of the Debtors’ estates and can only be used to pay qualifying benefits,” but slipped in another misstatement: “(such as severance payments under the Supplemental Unemployment Program).” This add-on ignores two inconvenient facts: First, there is no authorization *anywhere* in the Trust to pay any obligation of the Supplemental Unemployment Program, and it is not in the list of plans the Trust does fund. Gloster Decl., First Amendment to Trust, Ex. B. Second, the Trust specifically *prohibits* payment of severance obligations arising after March 1, 2002 (a date apparently before the adoption of the Supplemental Unemployment Program and certainly before separation from employment of any of those drawing severance payments under it). Id.

¹ Despite earlier requests, the Debtor did not provide that report to the Committee until December 1, 2005. Gloster Decl. at ¶ 9.

B. ESTABLISHMENT OF THE DISABILITY AND SURVIVORSHIP PLAN.

Delta created the Delta Family Care Disability and Survivorship Plan (“Plan”) as an employee welfare benefit plan as defined in ERISA. Gloster Decl., Ex. C.² The Plan generally provides benefits for employees and retirees who become disabled, survivor benefits for the eligible family members of retirees and employees,³ and life insurance benefits for retirees. Id., Plan at § 1.24. The Plan contemplates funding a trust fund administered by the Plan’s trustees for the benefit of the Plan’s beneficiaries from a “Benefit Fund.” Id., Plan at § 1.07 and § 11.03. Significantly, Section 11.04 of the Plan restricts that fund to payment of benefits and states “[n]o person, including the Employing Companies, shall have any financial interest in or right to the benefit Fund or part thereof, except as expressly provided for in the Plan and the Trust.” Id. (emphasis added).

According to the originally restated and amended (as of July 1, 2001) Trust, it was established to fund only “the Delta Family-Care Disability and Survivorship Plan,” and was restricted to “provide life insurance, medical, and/or other benefits” that may be provided by a section 501(c)(9) voluntary employee benefit association. Gloster Decl., Ex. D, at Recital A. It recognized that the Administrative Committee of Delta would conduct the general operation and administration of the Trust (id., Recital B) and that the Benefit Funds Investment Committee of the Delta Board of Directors (“BFIC”) would be the named fiduciary for investment of Plan assets in the Trust. (Id., Recital C.)

Section 3.1(a) of the Trust required the trustee to make disbursements as directed by the

² The Plan was restated and amended as of January 1, 1994, and was subsequently amended 12 separate times. It was restated and amended again as of January 1, 2004 and subsequently amended. None of those amendments provided for severance benefits.

³ As discussed below, the Committee believes that deceased former employees of Delta have effectively retired for purposes of Section 1114.

instructions of the BFIC or Administrative Committee or their designees. Section 3.1(b) provided that the BFIC and Administrative Committee “shall be responsible for insuring that any payment directed . . . conforms to the provisions of the Plan, this [Trust] Agreement, and the provisions of ERISA.” Id. at 3.1(a).

C. SEVERANCE BENEFITS AND THE TRUST.

The Plan does not provide for any severance benefits.⁴ The Trust also originally did not provide for the payment of severance. But in November, 2001, the First Amendment to the Trust was added, “effective as of September 11, 2001” which expanded Recital A’s definition of the Plan to also include: “the Delta Air Lines, Inc. Recovery Plan Voluntary Severance Program, the Delta Air Lines Recovery Plan Published Pay Scale Employees Reduction in Force Program, and the Delta Air Lines, Inc. Recovery Plan Supervisory/Administrative Employees and Corporate Administrative Support Employees Involuntary Severance Program.” First Amendment to Trust, Gloster Decl., Ex. B. That same amendment, however, also restricted payment of severance benefits by adding a new subsection (c) to section 3.1 of the trust agreement:

There shall be no disbursements from the Trust on account of benefits from the Delta Air Lines, Inc. Recovery Plan Voluntary Severance Program, the Delta Air Lines Recovery Plan Published Pay Scale Employees Reduction in Force Program, and the Delta Air Lines, Inc. Recovery Plan Supervisory/Administrative Employees and Corporate Administrative Support Employees Involuntary Severance Program unless the obligation to pay benefits arose between the dates of September 11, 2001 and March 1, 2002.

Id. (emphasis added).

Despite the disclosure requirements of ERISA for material modifications to funding for

⁴ It included disability benefits (Section 4), basic life insurance benefits (Section 5), monthly income survivor benefits (Section 6), as well as general provisions regarding the calculation of the amount of the various income benefits (Section 7), procedures for claim denial (Section 8), and administration (Section 12). Gloster Decl., Ex. C.

ERISA plans, Delta did not provide notice of this change in the funding Trust to any of the Plan beneficiaries at the time or to the beneficiaries then receiving Trust payments. Delta only notified those receiving severance that they would be getting payment from the Trust. Serota Decl., Ex. D, at 13. Before this brief window of severance payments was authorized, the Trust may have been over funded, at least according to Delta's aggressive actuarial assumptions of a 10% compounded long-term return on assets.⁵ At the end of 2000, Delta's FAS 112 Report stated that with that assumption, that the Trust was overfunded to the tune of \$99 million. That did not last.

D. DELTA STRIPPED OVER \$30 MILLION FROM THE TRUST FUND SINCE 2002 TO PAY SEVERANCE BENEFITS IN VIOLATION OF THE TERMS OF THE TRUST.

Since March 1, 2002 when the authorization for the limited (and undisclosed) severance programs ended, Delta has been improperly paying millions of dollars annually out of the Disability and Survivorship Trust in employee severance claims, and in lieu of salary to furloughed employees, under a completely different program, the Supplemental Unemployment Program, which has been in effect for "the past three and a half years." Debtor's First Day Motion, p.14, ¶ 21. Starting with \$6 million in FYE June 30, 2002, Delta continued to pay \$13.2 million in severance in FYE 2003, and \$2.8 million in FYE 2004, all from the Trust. Delta's Nov. 27, 2005 Response To Committee's Request, Serota Decl., Ex. D. And in a December 1, 2005 conference call among Delta and the Committee's respective counsel, Delta reported that it paid almost \$14 million in severance out of the Trust in FYE June 30, 2005. Gloster Decl., ¶ 10.

In addition, by an amendment dated September 12, 2005, just two days before Delta filed Chapter 11, Delta purported to amended the Plan to add "short-term disability." Plan, Amended

⁵ At the end of 2000, Delta's FAS 112 Report stated that with that assumption, the Trust was overfunded to the tune of \$99 million. Serota Decl., ¶ 3.

Effective 1/1/04, Gloster Decl., Ex. E at § 2.01, Short-Term Disability. By this amendment Delta retroactively justified having used \$22.6 million of Trust funds to pay YE 2004 short term disability payments, effectively having Trust assets inure to its own benefit in violation of Section 11.04 of the Plan. The Trust will run out of money before the end of plan year 2010, if one projects out the impact of \$14 million in severance every year going forward (the 2005 amount), plus \$22 million in short term disability payments, plus the previously estimated disability and survivor payments. Serota Decl., ¶ 10. At the latest annual rate just of unauthorized severance and improperly authorized retroactive short term disability, the Trust is losing over \$36 million a year, or \$1.5 million every two week pay period.

III. DELTA’S IMPROPER SEVERANCE AND FURLOUGH PAYMENTS FROM THE TRUST ARE IMPROPER IN BANKRUPTCY UNDER SECTION 1114, A VIOLATION OF ERISA, AND ALSO A BREACH OF FIDUCIARY DUTY.

A. DELTA’S ONGOING DISBURSEMENTS OF SEVERANCE PAYMENTS FROM THE TRUST BREACH THE PROTECTIONS OF SECTION 1114. THIS MISUSE OF THE TRUST MUST STOP.

Section 1114(a) of the Bankruptcy Code protects “payments . . . in the event of . . . disability, or death,” and applies to payments, “under any plan, fund or program (through the purchase of insurance or otherwise).” 11 U.S.C. § 1114(a). The Trust unmistakably provides those disability and death benefits for retirees. The Plan and Trust did not provide for payment of severance payments past March 2002. Worse, Delta has admitted its intention to continue to pay severance benefits that are not authorized under the terms of the Trust (Debtor’s First Day Motion at pp. 14-15, ¶ 21), at an annual rate of \$14 million during 2005, and that substantial severance benefits are expected in 2006 as well. Gloster Decl. at ¶ 10. At the Debtor’s present rate of Trust raiding, the Trust will be gone in 60 months. See Serota Decl., ¶ 10.

Delta must stop this behavior and either negotiate with the Committee or move before the Court and meet the fairness showing of Section 1114 to continue to make severance payments

from the Trust.

1. Delta's First Day Orders Breach The Protections Of Section 1114.

The Debtor's First Day Motion improperly claimed that employees were receiving severance benefits out of a "Supplemental Unemployment Program" which was funded "primarily" through the Delta Family-Care Disability and Survivorship Trust. Gloster Decl., Docket #21, p.15, ¶ 21, Ex. A. The Debtor acknowledged the assets in the Trust were not the "property of the Debtors' estate and can only be used to pay qualifying benefits," but represented that these qualifying benefits included "severance payments under the Supplemental Unemployment Program." That is not the case, as there is nothing in the Plan or Trust authorizing such disbursements. Accordingly, Delta's First Day Motion and subsequent order continued the improper practice of these unauthorized payments, in square disregard for the provisions of Section 1114.

2. Delta's Violation Of Section 1114 In Paying Severance Without Authorization Is More Than A "Paperwork" Error.

Delta's failure to get authorization for severance payments in the Trust absolutely bars its payment of severance under the terms of the operative documents. The Trust specifically prohibits severance arising after March 1, 2002 and Section 11.04 of the Plan prohibits Delta's payment or access to funds "except as specifically authorized by the Plan and Trust."

Further, Delta's failure to amend the Plan in 2002 to permit continuing future raids on the Trust to pay severance was not an inadvertent mistake. During that same time in early 2002, Delta's Board of Directors authorized pricey Supplemental Executive Retirement Plans ("SERPs") for Delta's Chairman Leo Mullin and 32 other senior Delta executives. Delta's March 25, 2003 SEC Filing, Schedule 14A, Gloster Decl., Ex. F at 26. That diversion of \$25 million from operating cash to SERPs was understandably controversial to Delta's active

employees and retirees alike. In justifying the action, Delta's then CFO (and recipient of the second largest SERP) Michele Burns claimed that the SERPs were established simply "to provide security for the payment of retirement benefits already earned." M. Burns Memo to all Delta employees in April 2003, Gloster Decl., Ex. G. It would have been enormously difficult for Delta's self-dealing executives in 2002-2003 to have simultaneously announced that they were also changing the rules about spending the Trust funds specifically to reduce "the security of payment" for the widowed, orphaned and disabled.

Finally, the severance limitations in the Disability and Survivor Trust should be respected because the essential purpose of that Trust was to protect the funds in it, for the benefit of the disabled and the survivors, regardless of Delta's future success or difficulties.

3. Section 1114 Requires The Debtor To Replenish The Trust For The Unauthorized Severance And Retroactive Disbursements.

Delta's improper payments out of the Trust since 2002 to the present have contributed to its present-day underfunded status. See Serota Decl., ¶ 4. At the same time, that asset diversion has unjustly enriched Delta by improving its cash position by over \$30 million, and continues to do so post-petition. This behavior alone justifies the Court's intervention under Section 1114 to authorize this Committee to bring an adversary proceeding seeking restitution, a constructive trust and a resulting trust of the more than \$30 million in severance payments wrongly taken from the Trust.

B. DELTA'S ATTEMPTED RETROACTIVE AMENDMENT OF THE PLAN TO DRAIN THE TRUST WITHOUT COMPLYING WITH SECTION 1114 IS INVALID.

It does not matter if Delta argues that it properly signed a Plan amendment for the retroactive change to short-term disability benefits. Section 1114 still controls. First, the policy underlying Section 1114 is to protect retirees and their benefits, and as such courts should presume that debtors make retroactive changes to benefit programs for the purpose of

circumventing Section 1114's protections. See In re General Datacomm Industries, Inc., 407 F.2d 616 (3d Cir. 2005) (even if by statute the Debtor could terminate a retiree benefit program as an executory contract effective immediately prior to the bankruptcy filing under § 365(g)(1), that retroactive termination would still not be given effect to defeat the protections of Section 1114).

Second, Delta's retroactive amendment is inconsistent with the express provision of the Plan itself. See Plan Section 11.04, Gloster Decl., Ex. C. Specifically, either Delta improperly paid \$22 million in 2004 (and an unknown amount in 2005) out of the Trust without then having authority, and tried to cure the problem (at the earliest) two days before the bankruptcy filing, or Delta paid the short-term disability benefits in 2004-2005 itself, and on the eve of bankruptcy actually got authority, in its purported retroactive amendment, to reimburse itself directly out of the coffers of the Trust. Either result would seem to be a clear violation of Plan Section 11.04's command barring the employer from "any right to the Benefit Fund or part thereof."

Third, Delta had a duty of candor to inform the Court about its 21-month retroactive invasion of the Trust on the eve of bankruptcy. This is particularly true given Delta's simultaneous agenda of modifying retiree medical benefits, its representation to the Court at the time that it was "premature" to permit appointment of a Section 1114 committee, and its misstatements about the funding of its severance program in the First Day Motion. Under the circumstances, Section 1114 requires at the least the presumption that such retroactive removal of retiree assets be analyzed in the 1114 context.

C. IRRESPECTIVE OF WHETHER DELTA VIEWS THE TRUST AS AN AMENDABLE BENEFIT, ITS BENEFITS ARE PROTECTED BY SECTION 1114.

The Debtor's cavalier treatment of the Trust's assets, its 11th hour short-term disability amendment and the First Day orders regarding the Trust, and its equally cavalier response to the

Committee’s urgent requests for further information about improper Trust payments, suggest that the Debtor views the Trust as a welfare benefit freely amended outside of the structure of Section 1114. Aside from our arguments above that Delta was restricted from amending the Trust and could not retroactively amend the Plan, Delta’s position is also legally incorrect.

1. The Language Of Section 1114 Clearly Encompasses Any Theoretically Proper Amendments to the Trust.

When interpreting whether Section 1114 encompasses “amendable” benefits, the analysis must begin with the plain words of the statute. When the language of a statute is clear, it is deemed conclusive and must be applied according to its ordinary meaning.⁶ Section 1114(e)(1) provides that notwithstanding any other provision of Title 11, a debtor, “shall timely pay and shall not modify *any* retiree benefits” except when the court, after notice and hearing, orders such modification or the debtor and authorized representative agree to the modification of benefits. 11 U.S.C. § 1114(e)(1) (emphasis added). Further, under Section 1114, the retiree benefits subject to its protection are those payments made “under any plan, fund, or program . . . maintained or established . . . by the debtor prior to filing a petition commencing a case under this title” for the purpose of providing retired employees non-pension benefits. 11 U.S.C. § 1114(a).

The plain language of Section 1114 clearly encompasses the entire category of retiree benefits, including “amendable” benefits. “[T]he language of the statute makes it quite clear that – absent the occurrence of two statutory conditions – the debtor in possession is required to continue the payment of retirement benefits at pre-petition levels *The statute contains no*

⁶ See, e.g., *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (“It is well established that ‘when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.’”); see also *In re Century Brass Products, Inc.*, 795 F.2d 265, 273 (2d Cir. 1986) (“Our construction of the statute follows from its plain language”).

other basis for debtors to modify or cease the payment of retiree benefits.” In re Speco Corp., 195 B.R. 674, 678 (S.D. Ohio 1996) (emphasis added).

Nowhere does the statute purport to recognize, much less carve out, an exception for “amendable” benefits. On the contrary, “[t]he definition makes no distinctions whatsoever about the basis on which retiree benefits are paid” – including “whether the employer has the power to modify such agreement or plan outside of bankruptcy” – “but rather, includes ‘any plan, fund, or program’ maintained or established by the debtor prior to filing.” Susan J. Stabile, Protecting Retiree Medical Benefits In Bankruptcy: The Scope Of Section 1114 Of The Bankruptcy Code, 14 Cardozo L. Rev. 1911, 1932 (1993); In re Farmland Indus., Inc., 294 B.R. 903, 917 (Bankr. W.D. Mo. 2003) (“There is nothing in the language of the statute to suggest that Congress intended to allow the termination of retiree benefits in those instances where the debtor has the right to unilaterally terminate those benefits under the language of the plan or program at issue.”) Application of the plain meaning rule leads to the inarguable result that Section 1114 reaches “any retiree benefit,” amendable or not.

2. The Case Law Supports Application Of Section 1114 To The Disability And Survivorship Trust.

Even if the Court looks beyond the straightforward language of the statute, the weight of the case law requires no different result here.⁷ While there is a split of authority on the application of Section 1114, those decisions in which the issue of the amendability of the benefits was expressly considered – as opposed to merely noted in *dicta* – have held that Section 1114 applies irrespective of whether the debtor has the right to unilaterally terminate those benefits under the language of the plan or program at issue. In In re Farmland Industries, for

⁷ Given the clarity of Section 1114’s language, no further construction of the statute by resort to external sources is required. See INS v. Cardoza-Fonseca, 480 U.S. 421, 445 n.29 (1987) (if the statutory language is plain, no further construction of the statute is required, for there is nothing to construe.)

example, the Chapter 11 debtors sought authorization to terminate certain life insurance benefits provided to the debtor's retired employees under a group term life insurance policy. The court held the debtors were required to comply with Section 1114 because the benefits at issue met the definition of "retiree benefits" under that section and the debtors sought to modify the benefits through termination:

In this Court's view, § 1114 prohibits a debtor from terminating or modifying *any* retiree benefits (as defined in that section) during a Chapter 11 case unless the debtor complies with the procedures and requirements of § 1114, *regardless of whether the debtor has a right to unilaterally terminate the benefits.*

In re Farmland Industries, Inc., 294 B.R. at 914 (emphasis added). At bar, of course, the Debtor does not have a right to unilaterally use the Trust assets for severance payments since there has been no amendment permitting such a modification. But even were the Plan and Trust to be amended, that would not remove the Trust from the purview of Section 1114 under the teaching of Farmland. See also In re Ames Dep't Stores, Inc., 1992 WL 373492 at*1 (S.D.N.Y. Nov. 30, 1992), rev'd on other grounds, 76 F.3d 66 (2d Cir. 1996) (finding "the Debtor's cavalier attempt to unilaterally terminate the Retired Employees' insurance benefits produces a drastic and most undeserving result" and, notwithstanding that "the Plan contains unambiguous language reserving the right to unilaterally terminate the Retired Employees' insurance benefits," ordering the Debtor to follow the requirements of Section 1114).

3. Delta's Proffered Case Law Is Either Inapplicable Or Wrong.

Delta previously presented this Court with a veritable laundry list of cases that Delta claimed "endorse[] our Court of Appeals' ruling that 1114 addresses only those benefits the debtor is obligated to pay – and is not free to alter – under applicable non-bankruptcy law." Delta's October 24, 2005 Opposition to the Motion For Committee Appointment at 19. The vast majority of those cases, however, are inapplicable because they either did not apply 1114 (In re

Raytech Corp., 242 B.R. 222, 225 n.3 (Bankr. D. Conn. 1999) (decided under ERISA, after the court concluded that “Section 1114 . . . is not implicated here.”)), dealt with employee benefits under a collective bargaining agreement that had expired prior to the Chapter 11 filing (LTV Corp. v. United Mine Workers (In re Chateaugay Corp.), 945 F.2d 1205 (2d Cir. 1991), In re Doscocil Cos., 130 B.R. 870, 876 (Bankr. D. Kan. 1991)), addressed union employees who had no collective bargaining agreement (In re CF&I Fabricators of Utah, Inc., 163 B.R. 858 (Bankr. D. Utah 1994), or the debtor was ceasing operations entirely so Section 1114 served no purpose (In re North American Royalties, Inc., 276 B.R. 860 (Bankr. E.D. Tenn. 2002).

Finally, In re Penn Traffic Co., 2005 Bankr. LEXIS 785 (Bankr. S.D.N.Y. Mar. 11, 2005) is, perhaps understandably, wrongly decided. Buried within 51 paragraphs of findings, only one of which even mentioned Section 1114, the Penn Traffic Court stated with absolutely no analysis or supporting authority that “although the Debtors maintain a program of providing retired non-union employees . . . with life insurance policies of \$5,000, this program, by its terms, is terminable by the Debtors at their discretion, and therefore, section 1114 is inapplicable to this program.” Id. at *21-22.

Other courts have picked up on the distinction Delta refuses to acknowledge, the difference between a right that naturally expires by its own terms (as in the expired CBA in Chateaugay), and a right which a debtor affirmatively seeks to terminate upon entering bankruptcy. See In re Federated Dep’t Stores, Inc., 132 B.R. 572, 574 (Bankr. S.D. Ohio 1991) (concluding that “[t]he cases of In re Doscocil Co. and In re Chateaugay Corp. stand simply for the proposition that expiration of old contract rights involving retiree benefits may operate to short-circuit the modification process [of Section 1129(a)(13) and 1114]”).

Delta has previously attempted to draw yet another meaningless distinction by claiming

that so-called “contractual rights” cannot be amendable benefits. Under that novel theory, according to Delta, neither In re Speco, 195 B.R. 674 (S.D. Ohio 1996) nor In re New York Trap Rock, 126 B.R. 19 (S.D.N.Y. 1991) support a conclusion that Section 1114 applies to amendable benefits, because both of those cases allegedly dealt with benefits that were “contractual rights.” This is irrelevant where the Delta benefits at issue are also “contractual rights” under the broad language of Section 1114(a).

In addition, Collier’s bankruptcy treatise disagrees with Delta and treats both cases as applying Section 1114 protection to amendable benefits, even those that are supposedly “contractual benefits” in Delta’s parlance. Collier notes: “[b]ankruptcy courts have been split on the issue whether a debtor must comply with the procedures and requirements of section 1114 even if the debtor has a legal right under a prebankruptcy retirement plan to unilaterally terminate retiree benefits.” 7 Collier on Bankruptcy, § 1114.03[1] at 1114-16 (15th ed. rev. 2005). Notwithstanding this split of authority, Collier cites Speco, supra, and New York Trap Rock, supra, as well as Ames and Farmland, for the proposition that “[s]ome courts have held that regardless of a unilateral termination right in the contract, the plain language of section 1114 prohibits modification of retiree benefits unless the court approves such modification under sections 1114(g) and (h).” 7 Collier on Bankruptcy, § 1114.03[1], n.6a (emphasis added). In any event, neither Speco nor New York Trap Rock turned on the amendability of the benefits in concluding that Section 1114 applied to the attempted modifications and required compliance with the section’s procedures.⁸

⁸ Even had Speco or New York Trap Rock considered the amendability of the benefits in issue, those decisions are not controlling law here. In re 400 Madison Avenue Ltd. Partnership, 213 B.R. 888, 890 n.2 (S.D.N.Y. 1997) (a decision issued by a single bankruptcy judge in a multi-judge bankruptcy court is not binding on the other bankruptcy judges).

D. THE BFIC'S AND ADMINISTRATIVE COMMITTEE'S PAYMENT OF SEVERANCE PAYMENTS VIOLATED THE PLAN AND THE TRUST, AND BREACHED THEIR FIDUCIARY OBLIGATIONS UNDER ERISA; THIS COURT SHOULD IMPOSE A CONSTRUCTIVE TRUST ON ALL IMPROPERLY MISAPPROPRIATED TRUST FUNDS.

Fiduciaries of an ERISA-regulated trust, as here, must act prudently and diligently solely in the interests of the beneficiaries, and in accordance with the governing documents. 29 U.S.C. § 1104(a)(1). The BFIC and the Administrative Committee⁹ breached those duties by paying severance benefits in violation of the express provisions of the Plan and the Trust. Except for a brief modification of the Trust to permit severance benefits for claims arising between September 11, 2001 and March 1, 2002, the Trust did not permit Trust funds to be used to pay severance benefits, and to the contrary, specifically prohibited use of Trust funds for payment of severance benefits for claims arising after March 1, 2002. First Amendment to the Trust, Gloster Decl., Ex. B. The Plan provides:

Exclusive Benefit Rule. At no time shall any part of the corpus or income of the Benefit Fund be used for or diverted to any purpose other than for the exclusive benefit of the Participants and their Beneficiaries and defraying reasonable expenses of administering the Plan.

Plan, §11.04, Gloster Decl., Ex. C. Thus, the BFIC's and the Administrative Committee's actions breached their express fiduciary duty under ERISA that requires fiduciaries to discharge their duties in accordance with the documents and instruments governing the plan. 28 U.S.C. § 1104(a)(1)(D).

In addition, their disregard of controlling documents was clearly neither prudent nor diligent, was in violation of 29 U.S.C. § 1104(a)(1)(B), and they are therefore responsible for any resulting losses or lost opportunity for profits. See 29 U.S.C. § 1109(a), § 1132(a)(3); cf.

⁹ The BFIC is the designated fiduciary of the Trust (Trust Agreement, Recital C, Gloster Decl., Ex. D), and the Administrative Committee is the designated fiduciary of the Plan. Plan, § 12.01, Gloster Decl., Ex. C.

Donovan v. Bierwirth, 754 F.2d 1049, 1057-58 (2d Cir. 1985) (breach of fiduciary duty for improperly purchased stock on behalf of plan); Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1240-42 (2d Cir. 1989) (failing to follow investment guidelines). These losses total over \$30 million and deprived the Trust of the opportunity to earn an investment return on these funds.

Under these circumstances, the Court should impose a constructive trust on at least \$52 million (\$30 million for severance and \$22 for short-term disability payments) of Delta's assets for reimbursement of Trust funds improperly used for Delta's expense operations. See Waller v. Blue Cross of California, 32 F.3d 1337, 1342-44 (constructive trust appropriate where defendant breached fiduciary duty by imprudently choosing annuity provider to cover plan liabilities). While the Trust had the fiduciary relationship with the retirees, Delta has, all along, exercised control of the Trust through the BFIC and the Administrative Committee and caused the Trust to pay severance, effectively supplanting Delta operating expenses with prohibited payments from the Trust funds. By so directing the BFIC and the Administrative Committee, Delta has directly benefited from the breach by avoiding payment of millions of dollars in severance of what would have otherwise been operating expenses. Thus, a constructive trust is wholly appropriate.

E. THE PLAN'S TRUSTEES HAVE THREATENED TO CONTINUE TO VIOLATE THEIR FIDUCIARY DUTIES UNDER NEW YORK STATE LAW, IN VIOLATION OF SECTION 28 U.S.C. § 959(b), WHICH PROVIDES AN ADDITIONAL BASIS FOR ENJOINING SUCH FUTURE CONDUCT.

Section 28 U.S.C. § 959(b) establishes that a debtor in possession must manage the property in their possession in accordance with state laws, including the duties of a fiduciary.

The statute provides, in relevant part, that:

a trustee . . . appointed in any cause pending in any court of the United States, *including a debtor in possession*, shall manage and operate the property in his possession as such trustee . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 959(b) (emphasis added).

The BFIC and Administrative Committee’s conduct to date demonstrates the need for this Court’s intervention to stop their actions which undercut the beneficiaries’ interests.¹⁰ By definition, they breached their fiduciary duty when they made severance payments not for the beneficiaries’ benefit and in contradiction of the Trust:¹¹

No portion of the principal or the income of the Trust Fund shall revert to or be recoverable by the Company or any Employer or ever be used for or diverted to any purpose other than for the expenses of administering the Plan or the Trust Fund or for the exclusive benefit of Participants in the Plan

Trust at § 2.6, Gloster Decl., Ex. D.

Here, the Debtor has breached its fiduciary duties under both ERISA and applicable New York law,¹² and the Court should move promptly to stop the wrongful payment of severance and any other unauthorized expenses.

IV. RELIEF SOUGHT.

In response to Delta’s breach of its fiduciary duties, clear violation of Section 1114, and unclean hands in connection with its first day orders and retroactive siphoning of some \$22 million 2 days before the bankruptcy filing, the Committee respectfully requests the following relief:

A. SECTION 1114 APPLIES TO THE TRUST.

The Court should order that Section 1114(a) applies to the Plan and Trust as a “plan, fund

¹⁰ “Restatement [Second] of Trusts § 170[1]: ‘The trustee is under a duty to administer the trust solely in the interest of the beneficiaries.’ It is this duty that prohibits a fiduciary . . . from giving trust property away to the detriment of a beneficiary (Scott, Trusts § 190.10 [4th ed. 1987].” In re Gallet, 765 N.Y.S. 2d 157, 159 (2003).

¹¹ Disbursements from the Trust are made only on the “Instructions of the BFIC, the Administrative Committee, or their designees.” Trust, § 3.1(a), Gloster Decl., Ex. D. Either the Plan Administration Committee or the BFIC apparently instructed the trustee (Chase Manhattan Bank) to make severance and furlough payments for active employees from assets held in trust for the benefit of survivors and disabled employees.

¹² The Trust is governed by the law of New York. Trust, Gloster Decl., Ex. D, at Section 13.1.

or program” maintained or established in whole or in part by Delta prior to the bankruptcy filing for the purposes of providing payments or reimbursements for “retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death,” including the Trust. Pursuant to Section 1114, the Court should also find that the Debtor is precluded from amending the Trust or the Plan without first complying with the requirements of Section 1114 if such amendment would in any way impact the payment or prospect for payment of any “benefits in the event of sickness, accident, disability, or death,” and thus the Debtor’s changes are invalid for failure to comply with Section 1114.

B. THE DEBTOR MUST IMMEDIATELY HALT THE UNAUTHORIZED DISBURSEMENTS FROM THE TRUST AND REPAY THE WRONGLY DIVERTED FUNDS TO THE TRUST WITH INTEREST.

With respect to the unauthorized disbursements going forward, the Committee requests that the Debtor immediately cease payment from the Trust of any obligations for severance, furloughs, or any other unauthorized amounts, and immediately repay the Trust any unauthorized amounts disbursed from the Trust since September 13, 2005, together with 8% annual simple interest on the diverted funds, based on a 365 day year and the actual days elapsed.¹³

To the extent Delta does not immediately repay to the Trust all unauthorized payments, the Committee should be authorized to assert a constructive trust or resulting trust, for the benefit of the Trust and in the amount equal to the total disbursements from the Trust for severance claims which arose or first became payable at any time after March 1, 2002, and all other unauthorized payments, together with quarterly compounding interest at a reasonable rate to be set by this Court in light of Delta’s cost of borrowing funds, Delta’s projected long term return

¹³ To the extent not already authorized by the First Day Orders, the Debtor should be authorized to make severance, furlough, and any other otherwise unauthorized Trust disbursement, from the Debtor’s own assets.

