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UNITED STATES BANKRUPTCY COURT  
 SOUTHERN DISTRICT OF NEW YORK

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In re:	)	Chapter 11
	)	
DELTA AIR LINES, INC., <i>et al</i> ,	)	Case No. 05-17923 (ASH)
	)	
Debtors.	)	Jointly Administered
-----X	)	

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF CLASS CLAIMANTS  
 FOR CERTIFICATION OF CLASS UNDER FEDERAL RULE OF BANKRUPTCY  
 PROCEDURE 7023 AND TO APPOINT COUNSEL**

George T. Baker, Herbert Summers, Donald F. Mairose, and Charles L. Strickland (the “Class Claimants”), by and through their undersigned counsel, hereby file this Memorandum in Support of the Motion of Class Claimants for Certification of Class Under Federal Rule of Bankruptcy Procedure 7023 and to Appoint Counsel (the “Motion”)

**I. SUMMARY OF ARGUMENTS AND RELIEF REQUESTED**

Contemporaneously herewith, Class Claimants are filing a Proof of Claim (the “Class Claim”) against Delta for a portion of their retirement benefits that have been disregarded in the calculation of their claims for damages arising from the termination of the Supplemental Annuity Plan (the “Supplemental Plan”) and the Delta Pilots Bridge Plan (the “Bridge Plan”). Delta promised a specific retirement benefit to Class Claimants and other Delta retired pilots pursuant

to a collective bargaining agreement, the Pilot Working Agreement (the “PWA”), entered into between Delta and the Air Line Pilots Association, International (“ALPA”), the Delta Pilots Retirement Plan (the “Qualified Plan”) and the related Supplemental Plan and the Bridge Plan (collectively the Supplemental Plan and Bridge Plan shall be referred to herein as the “Non-Qualified Plans”). As a result of the manner in which Delta applied certain limitations imposed by the Internal Revenue Code (“IRC”) and allocated the retirement benefit between the Qualified Plan and the Non-Qualified Plans, Class Claimants should have an additional claim under the Non-Qualified Plans.

Class Claimants file the Class Claim, not only on behalf of themselves individually, but also on behalf of that class of persons similarly situated (the “Class”), consisting of all persons who: (a) were previously employed by Delta as pilots; (b) retired from service with Delta prior to September 2, 2006; (c) qualified as participants under the Qualified Plan, a tax-qualified defined benefit plan, which originated in 1972 and was amended and restated to be effective July 1, 1996; and (d) are not being allowed a claim for their full retirement benefits under the Qualified Plan and the Non-Qualified Plans because a portion of those benefits are being disregarded by Delta through Delta’s inconsistent application of the compensation and benefit limitations specified in Internal Revenue Code (“IRC”) § 401(a)(17) (the “Compensation Cap”) and § 415(b) (the “Benefit Cap”).

## **II. STATEMENT OF THE FACTS**

As discussed more fully in the Class Claim, the PWA contractually binds Delta to pay Class Claimants and members of the Class all vested pension benefits. Specifically, Delta was obligated to provide the Class members pension benefits equal to 60% of the retired pilots final average earnings reduced proportionately for years of service less than twenty-five (25 years)

(the “Formula Benefit”). For each member of the Class the Formula Benefit is calculated without regard to the Compensation Cap or Benefit Cap. Subject to the Compensation Cap and Benefit Cap, the Formula Benefit was to be paid from the Qualified Plan. However, because the Qualified Plan can only pay benefits as restricted by the Compensation and Benefit Caps reflected in the IRC and accompanying regulations, to the extent the Formula Benefit exceeds the benefit as restricted by the IRC, such excess benefit is to be paid by Delta pursuant to the Non-Qualified Plans. PWA, Section 26.A.1.a. at 281.

In this case, contrary to the PWA, members of the Class are not being afforded a claim for all benefits owing under the Non-Qualified Plans. Specifically, in calculating benefits payable to the Class under the Qualified Plan, Delta applied Compensation and/or Benefit Caps (collectively the “IRC Limitations”) in effect in 2001 rather than the higher IRC Limitations that were prescribed by Congress and in effect on September 2, 2006, when the Qualified Plan and Non-Qualified Plans were terminated. By using the lower IRC Limitations in effect in 2001, Delta effectively limited and lowered that portion of each Class member’s Formula Benefit payable from the Qualified Plan from the 2006 level to the 2001 level. Had Delta similarly applied the same IRC Limitations in effect in 2001 to calculate the portion of the Formula Benefit payable from the Non-Qualified Plans, then Delta would have accounted for the Formula Benefit owing to each individual Class member. However, Delta applied the higher IRC Limitations in effect 2006 when calculating that portion of the Formula Benefit payable to the Class members under the Non-Qualified Plans. In other words, Delta’s inconsistent application of the IRC Limitations when allocating the Formula Benefit resulted in a reduction of the Formula Benefit payable under the PWA. The Class members have not been allowed a claim for this reduction in the Formula Benefit between the Qualified Plan and Non-Qualified Plans. (The

difference in the Non-Qualified Plan benefit payable using the 2001 IRC Limitations and the Non-Qualified Plan benefit payable in 2006 for each Claimant constitutes the “Disregarded Benefit”). Delta has breached the PWA and the Non-Qualified Plans, and each member of the Class should be afforded an unsecured claim for their Disregarded Benefit.

Though the total amount of the claims for such Disregarded Benefits is unknown at this time, Class Claimants estimate that these claims total not less than \$100,000,000.00. Because of the nature of the Class Claim, and the number of individuals holding such claims against Delta, it is appropriate that it be treated as a class action under Federal Rule of Bankruptcy Procedure 7023. With their Motion, Class Claimants hereby seek the Court’s certification of that treatment.

In the interest of brevity, the facts relevant to the Class Claim and the adjudication of the Motion are stated in the Class Claim and will not be repeated herein.

### **III. LAW AND ARGUMENT**

Since the Federal Rules of Civil Procedure were adopted in 1937, the class action rule, Fed.R.Civ.P.23 (“Rule 23”), has steadily gained in importance within the federal court system, especially in complex dispute litigation after Rule 23’s extensive amendment in 1966. Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 1751 at 17 (3d ed. 2005) (footnotes omitted). Without the class action mechanism in modern litigation, claims involving multiple parties and complex legal issues would be nearly impossible to resolve in an efficient matter. As a court dealing with an early class action certification issue noted, “Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook fair.” Crosby Steam Gage & Valve Co. v.

Manning, Maxwell & Moore, 51 F.Supp. 972, 973 (D. Mass. 1943). The class action is a tool for resolving such claims in an expeditious and efficient matter.

The Class Claim illustrates perfectly the “importance of the class action as a procedural device” with approximately a thousand retired Delta pilots asserting claims worth tens of millions of dollars. Without class treatment, this dispute will likely result in numerous proceedings, inconsistent decisions, and excessive expenses and delay for all parties involved. With it, the pension claims of the members of the Class and defenses thereto, if any, can be resolved in an efficient manner in one proceeding, once and for all.

A. The Court Should Apply Rule 23 in This Bankruptcy Case.

The standards and procedures for certification of a class in a bankruptcy case are governed by Fed.R.Bankr.P. 7023, which makes Fed.R.Civ.P. 23 applicable to bankruptcy proceedings. Therefore, the standards and procedures for class certification in a bankruptcy proceeding are the same as those in a non-bankruptcy proceeding, subject to any additional considerations discussed in the relevant case law addressing class certification in a bankruptcy context.<sup>1</sup> As detailed below, Class Claimants meet the standards set forth in Fed.R.Civ.P. 23 (and Fed.R.Bankr.P. 7023) and class certification is justified.

A class proponent must first move to extend the application of Fed.R.Bankr.P. 7023 (and Fed.R.Civ.P. 23) to the class proof of claim. In re Woodward & Lothrop Holdings, Inc., 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997). The rules in Part VII of the Federal Rules of bankruptcy Procedure apply to adversary proceedings. Where there is no adversary proceeding, however, the existence of a contested matter under Fed.R.Bankr.P. 9014 will suffice to trigger

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<sup>1</sup> As an example, in In re Woodward & Lothrop Holdings, Inc., 206 B.R. 365 (Bankr. S.D.N.Y. 1997) the Court stated that the proponent of class certification must also “show that the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy.” Woodward & Lothrop, 205 B.R. at 369.

Fed.R.Bankr.P. 7023, provided that the proponent can establish that such a contested matter exists.<sup>2</sup> Id. A contested matter is a dispute between parties, generally brought by way of a motion. Fed.R.Bankr.P. 9014(a), which incorporates and applies many of the rules in Part VII of the Bankruptcy Rules (Adversary Proceedings) to contested matters. Although Fed.R.Bankr.P. 7023 is not expressly included in the list of Part VII Rules in Fed.R.Bankr.P. 9014, Fed.R.Bankr.P. 9014(c) provides that the Bankruptcy Court “may *at any stage* in a particular matter direct that one or more of the *other rules in Part VII* shall apply.” (Emphasis added.) This omnibus provision in Fed.R.Bankr.P. 9014 is sufficient to invoke Fed.R.Bankr.P. 7023 and, therefore, Fed.R.Civ.P. 23, in a contested matter.<sup>3</sup>

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<sup>2</sup> In Woodward & Lothrop, 205 B.R. at 369-70, the bankruptcy court acknowledged a paradox (similar to the chicken and the egg) created by the Bankruptcy Rules; a creditor cannot request class certification until there is a contested matter; a contested matter does not arise until a party files a claim objection; a claim objection cannot be filed until a proof of claim is filed. Therefore, pursuant to the Bankruptcy Rules, a class proof of claim must be filed (and objected to) before a request for class certification can be made. See Fed.R.Bankr.P. 9014 and 7023. The Certified Class in the Chartered Securities Litigation v. The Charter Co. (In re The Charter Co.), 876 F.2d 866, 874 (11th Cir. 1989); Woodward & Lothrop, 205 B.R. at 370, n.5; Illes v. LTV Aerospace and Defense Co. (In re Chateaugay Corp.), 104 B.R. at 634 (because a proof of claim is deemed *prima facie* evidence of the claim, “prior to objection proofs of claim made on behalf of a class must be presumed valid and may be filed as of right”); The Charter Co., 876 F.2d at 874 (class claim is “‘deemed allowed’ until objected to”); Woodward & Lothrop, 205 B.R. at 369-70; (“[i]n the absence of an objection . . . the proof of claim is deemed allowed”), upon the filing of a claim objection, a contested matter is created as contemplated by the Bankruptcy Rules.

<sup>3</sup> Nothing in the 11 U.S.C. § 101, *et seq.* (the “Bankruptcy Code”) or the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) expressly permits a creditor to file a proof of claim on behalf of both himself and all other creditors similarly situated. Prior to 1988, many courts held that § 501 of the Bankruptcy Code provided an exclusive list of those who may file a representative claim in a bankruptcy case. In re Ephedra Products Liability Litigation, 329 B.R. 1, 5 (S.D.N.Y. 2005) (citing cases holding the same). Upon a strict reading of § 501, class proof of claims would be invalid because a class representative is not listed in § 501 as one who can file a representative claims. Id. However, the Seventh Circuit broke from this strict interpretation of § 501 in 1988, finding that class proofs of claim are not barred by that section, but may, instead, be allowed in the discretion of the court. In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988). While neither the Second Circuit nor the U.S. Supreme Court has ruled on the validity of the Seventh Circuit’s findings, the Seventh Circuit’s approach to class proofs of claim has been followed in the Southern District of New York. See, e.g., Chateaugay, 104 B.R. 626 (S.D.N.Y. 1989) (employment discrimination class claim), appeal dismissed 930 F.2d 245 (2d Cir. 1991); Woodward & Lothrop, 205 B.R. 365 (consumer class claim); In re Thomas McKinnon Securities, Inc., 141 B.R. 31 (S.D.N.Y. 1992) (class claim under state law fraud in sale of real estate partnership interests); and In re Thomson McKinnon Securities, Inc., 133 B.R. 39 (Bankr.S.D.N.Y. 1991) (securities fraud class claim). In fact, the Chateaugay court stated that the filing of a class proof of claim in a bankruptcy case was permissible and “consistent with the broad goals of the Bankruptcy Code[.]” Chateaugay, 104 B.R. at 632.

Whether a class should be certified must be determined at an “early practicable time.” See Fed.R.Bankr.P. 7023; Fed.R.Civ.P. 23(c)(1)(A); In re Sacred Heart Hospital of Norristown, 177 B.R. 16, 23 (Bankr. E.D. Pa. 1995). However, the phrase “early practicable time” is, at the very least, subjective and dependent upon the facts of each case. Indeed, neither the Bankruptcy Code nor the Bankruptcy Rules impose a time period within which a motion under Fed.R.Bankr.P. 7023 seeking class certification must be made. The Charter Co., 876 F.2d at 874 (“the Code contains no other instances where a claimant must perfect a claim prior to objection”). Furthermore, “[t]he mere failure to seek certification does not mandate denial [of a claim] in the absence of compelling circumstances.” Woodward & Lothrop, 205 B.R. at 370, citing Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 101 (S.D.N.Y. 1981); Sanders v. Faraday Lab., Inc., 82 F.R.D. 99, 102 (E.D.N.Y. 1979).

Here, the application of Rule 23 is more than warranted. The avoidance of undue delay in the administration of the bankruptcy case is a pervasive theme in cases from this District when determining whether to make Bankruptcy Rule 7023 applicable to class proofs of claims. Ephedra Products, 329 B.R. at 4. The absence of class treatment for the many claims of the individual members of the Class will likely result in numerous proceedings, inconsistent decisions, and excessive expenses and delay for all parties involved. In this case, three of the four Class Claimants have filed claims.<sup>4</sup> One of which is already subject to an objection. (Debtor’s Twentieth Omnibus Objection to Allowance of Certain Claims, Docket no. 6308, Exhibit A at 5, objection to Donald F. Mairose.) Based on the responses to the Twentieth Omnibus Objection, approximately thirty claims remain unresolved and the majority of those raise the issue of the undervalued unsecured pension claim. It seems clear, then, that this Court

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<sup>4</sup> George T. Baker filed claim no. 8029 Herbert Summers filed claim no. 8082 and Don Mairose filed claim no. 8000.

should use its discretion to make Fed.R.Bankr.P. 7023 applicable to any determination regarding the validity of the Class Claim, and apply Fed.R.Civ.P. 23 to the Class in order to consolidate all members' putative rights of action against Delta into one matter with a limited number of Class representatives.

B. The Requirements of Rule 23 Are Met.

Once the Court determines that the application of Fed.R.Bankr.P. 7023 should be made applicable to a class proof of claim, the Court must then determine whether the class satisfies the requirements of Fed.R.Civ.P. 23 for class certification. Certification is appropriate if the Court finds that the class satisfies the four elements of Fed.R.Civ.P. 23(a), and fits into at least one of the categories enumerated in Fed.R.Civ.P. 23(b). Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1759 at 117-18. The Class in this case easily meets these statutory requirements.

In addition to these statutory requirements, the class must also satisfy two further requirements not expressly stated in the rule.

First, the class must be capable of definition. Manual for Complex Litigation § 30.1-30.4 (2d ed. 1985). This Class certainly satisfies this requirement. As stated above, the Class consists of all persons who: (a) were previously employed by Delta as pilots; (b) retired from service with Delta prior to September 2, 2006; (c) qualified as participants under the Pilot Plan; and (d) are not being allowed a claim for their full retirement benefits under the Qualified Plan because a portion of those benefits are being disregarded by Delta through Delta's inconsistent application of the compensation and benefit limitations specified in the IRC. A class can rarely be so specifically definable.

Second, the class representative must be a member of the class. See General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 156 (1982). In this case, the Class Claimants are members of the Class, in that all four were employed by Delta as pilots; retired from service with Delta prior to September 2, 2006; were qualified as participants in the Pilot Plan, and are not receiving a claim for their full retirement benefits because a portion thereof is being disregarded by Delta and the PBGC.

A motion for class certification is not an occasion for examination of the merits of the case. See Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999). There is “nothing in either the language or the history of [Federal Rule of Civil Procedure] 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class actions[.]” Eisen v. Carisle & Jacquelin, 417 U.S. 156, 177 (1974). Instead, the Court must determine if the class representatives have proffered evidence to meet each of the requirements of Rule 23. No weighing of competing evidence is appropriate at this stage of the litigation. Caridad, 191 F.3d at 293.<sup>5</sup>

1. *The Elements of Rule 23(a) Are Satisfied.*

Fed.R.Civ.P. 23(a) requires that (1) the class be so numerous that joinder of all members is impracticable; (2) there exist questions of law and fact common to the class; (3) the claims or defenses of the representative parties be typical of the claims of the class as a whole; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a)(1)-(4). As described with greater specificity below, each of these elements is met.

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<sup>5</sup> The substantive allegations contained in the Class Claim should be accepted as true for purposes of the Court’s consideration of Class Claimants’ Motion. See, e.g., Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661, n. 15 (2d Cir. 1978); see also, generally, Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.29 (4th ed. 2002) (claimant need not show the probability of success of the merits when seeking class certification).

a. Joinder of All Claimant Would Be Impracticable.

Fed.R.Civ.P. 23(a) requires the class to be “so numerous that joinder of all members is impracticable.” Fed.R.Civ.P. 23(a)(1). There is no bright line rule regarding the number of class members that will satisfy the numerosity requirement of Fed.R.Civ.P. 23, but a class, as here, **numbering hundreds of individuals**, is not a close call. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1762 (citing many cases). Filing individual claims on behalf of all potential members of the Class would pose a substantial and extremely expensive administrative burden on each individual Claimant’s counsel, the Reorganized Debtors, and this Court. Although the precise number of members of the Class cannot be determined without a close examination of the Reorganized Debtors’ records, which the Reorganized Debtors have consistently refused to release citing privacy concerns, it is obvious that this claim will be far too large to make joinder of all individuals practicable. Thus, the numerosity requirement of Fed.R.Civ.P. 23(a) is clearly satisfied.

b. There Are Many Common Questions of Law and Fact Among Members of the Class.

Fed.R.Civ.P. 23(a)(2) also requires that there are “questions of law or fact common to the class.” Fed.R.Civ.P. 23(a)(2). Fed.R.Civ.P. 23(a)(2) does not require that all issues of law or fact be common to every single member of the class, and there is no specific qualitative or quantitative test to determine if the commonality requirement is met. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1763. In fact, this Court need only conclude that there is at least one common issue to be litigated between the claims of all members of the class. Id.; Newberg & Conte, Newberg on Class Actions § 3.10 at 272-74. This is easily satisfied in a case where there is a common nucleus of operative fact, regardless of whether the underlying facts fluctuate to some extent between individual claimants.

Here, such a common nucleus of operative fact can easily be shown to exist among all Class members. Each of the Claimants and members of the Class were previously employed by Delta as pilots; retired from service with Delta prior to September 2, 2006; and qualified as participants under the Qualified Plan. Each member would have received a statement of Estimated Monthly Benefits calculating their future benefits attributable to the Qualified Plan using the 2001 IRC Limitations. None of the Class members have been allowed an unsecured claim for terminated Non-Qualified Benefits calculated using the same 2001 IRC Limitations as were used in the statement of Estimated Monthly Benefits prepared by Delta in January of 2007. This common nucleus of operative fact has a direct bearing on the central issue to be determined by the Court with regard to the Class Claim: whether the retired pilots are entitled to a claim for the uncompensated loss of promised retirement benefits from the Non-Qualified Plans when the benefit payable from the Qualified Plan is reduced because of IRC Limitations. Thus, Fed.R.Civ.P. 23(a)(2) is satisfied.

c. Claimants' Claims Against Debtors Are Typical to the Claims of the Class as a Whole.

The class representative's claim must, further, be typical of the claims of the class as a whole. Fed.R.Civ.P. 23(a)(3). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." De La Fuente v. Stokley-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983) (internal citations omitted); see also, generally, Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1764. Moreover, the "commonality and typicality requirements of Rule 23(a) tend to merge, such that a finding of commonality will ordinarily satisfy the requirement of typicality as well. See Gen. Tel. Co. of Southwest v. Falcon, 457 U.S.

147, 157 n. 13 (1982). Thus, for the Class Claimants the typicality requirement is also satisfied for the reasons set forth in the discussion of commonality, above.

d. Class Claimants Will Adequately Protect the Interests of the Class.

Fed.R.Civ.P. 23(a) finally requires that the class representatives “fairly and adequately protect the interests of the class.” Fed.R.Civ.P. 23(a)(4). This requirement is satisfied where (1) the representatives’ claims are sufficiently interrelated to and not antagonistic with the class’ claims; and (2) counsel for the representatives are qualified, experienced and generally able to conduct the litigation. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1768 at 387-88, §1769.1 at 444.

In this case, the Class Claimants have no interests in conflict with those of other members of the Class. Indeed, forwarding the interests of the other members of the Class will aid in forwarding Class Claimants’ own claims against Delta, as all have experienced an uncompensated loss of retirement benefits, and are seeking, and deserve, compensation for the same. Thus, the first element of the adequate representation component of Fed.R.Civ.P. 23(a)(4) is met.

Next, Class Claimants’ counsel are competent to handle the issues presented under this proposed action, and the appointment of such counsel as counsel for the entire Class will greatly benefit the cause of judicial economy. At an early state of any complex litigation, a court should seek to eliminate duplication of effort and to avoid unnecessary expenses. Manual for Complex Litigation § 20.22 (3d ed. 2000). The appointment of Class Claimants’ counsel as counsel for the entire Class will greatly diminish the number of pleadings the Court must wade through regarding the issues presented hereunder, while, at the same time, saving each individual Claimant the expense of hiring separate counsel. Class Claimants’ counsel, Dean Booth and

Shelley D. Rucker along with other members of Miller & Martin PLLC, bring substantial experience in successfully litigating all manners of complex, multimillion dollar class action law suits, and have substantial experience representing parties in bankruptcy cases, contested matters and adversary proceedings. Both will more than fairly and adequately protect the interests of the Class. Accordingly, Class Claimants urge this Court to appoint Dean Booth and Shelley D. Rucker as counsel for the contemplated Class. With such appointment, Class Claimants assert that the second element of Fed.R.Civ.P. 23(a)(4) is met, as proposed class counsel are qualified, experienced and generally able to conduct the litigation necessary to move the Class Claim along to final adjudication.

2. *The Class Satisfies at Least One of the Categories Enumerated in Rule 23(b).*

In order for this Class to be certified by the Court, Class Claimants must also demonstrate that the Class satisfies the additional requirements of Fed.R.Civ.P. 23(b). Such requirements overlap considerably with those of Fed.R.Civ.P. 23(a) and with each other. Newberg & Conte, Newberg on Class Actions § 4.01. Thus, the discussion of these requirements can be very brief.

Under Fed.R.Civ.P. 23(b)(1)(A), certification is appropriate if the prosecution of separate actions by members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. Fed.R.Civ.P. 23(b)(1)(A). Under Fed.R.Civ.P. 23(b)(1)(B), certification is appropriate if the prosecution of separate claims by members of the class would create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class not parties to such adjudications or substantially impair or impede their ability to protect their interests. Fed.R.Civ.P. 23(b)(1)(B). Both of these requirements are satisfied here, because multiple adjudications of the Class' individual claims could result in "incompatible standards of

conduct” for Delta, if Delta’s actions towards one Claimant is allowed but prohibited towards another. Further, an unfavorable adjudication of one Claimant’s claim could result in the preclusion of all other Claimants’ claims. Such a result can be avoided here by certifying this Class as a Fed.R.Civ.P. 23(b)(1)(A) or (B) class, which is clearly justified based upon the facts surrounding this matter.

Alternatively, the proposed Class also satisfies the requirements for certification under Fed.R.Civ.P. 23(b)(3). Under Fed.R.Civ.P. 23(b)(3), class certification is appropriate wherever common issues predominate and a class action is superior to other methods available for litigating the matter. See Fed.R.Civ.P. 23(b)(3). In determining whether to afford a class Fed.R.Civ.P. 23(b)(3) treatment, a court should consider: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability of concentrating the litigation of the claims in a particular forum; and (D) the difficulties likely to be encountered in the management of the class action. Id.

The Class satisfies all considerations that need be satisfied in order to have it certified under Fed.R.Civ.P. 23(b). Except for the allocation of damages based on each individual Claimant’s amount of Disregarded Benefits, virtually all the other issues are common, as noted above, and these common issues certainly predominate in the adjudication of the Claimants’ claims against Delta. Also, class action treatment is superior to any other alternatives that exist for the fair and efficient adjudication of these claims, by permitting a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without duplication of effort and expense that numerous individual actions would engender. Class treatment would also permit the adjudication of relatively small claims by many Claimants

who could not afford to individually litigate such claims against Delta.<sup>6</sup> Finally, there are no difficulties likely to be encountered in the management of this class action that would preclude its management as such, and no superior alternative for the fair and efficient adjudication of this controversy exists. Such considerations clearly indicate that this Class can be certified as a class action under Fed.R.Civ.P. 23(b)(3).

Accordingly, Class Claimants ask this Court to certify this Class as a Fed.R.Civ.P. 23(b)(1)(A) or (B) class, or, in the alternative, to certify it as a Fed.R.Civ.P. 23(b)(2) or (3) class.

### **RELIEF SOUGHT**

Class Claimants seek the following relief on behalf of themselves and the other members of the Class, as more particularly stated in the Motion:

- 1.. That this Court enter an Order, certifying the Class and appointing counsel as provided for herein and in the Motion; and
2. That this Court grant such other and further relief as the Court deems just and proper.

### **CONCLUSION**

For all of the foregoing reasons, Class Claimants respectfully request that the Court apply Fed.R.Bankr.P 7023 to this matter and certify Class Claimants' proposed Class under Fed.R.Civ.P. 23(b)(1) and (b)(3), and appoint Dean Booth and Shelley D. Rucker of Miller & Martin, PLLC, as class counsel.

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<sup>6</sup> There is, however, no requirement that all Claimants join in this action. There is an "opt out" procedure for Rule 23(b)(3) class actions, which would allow any putative Claimants who wish to retain individual control over their own claims against Delta or who may have antagonism towards this pending action to simply opt out of the Class, thereby protecting whatever interests they may have.

Respectfully submitted this 7th day of August, 2007.

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