

purported March 12, 2007 bar date. As discussed, Delta has not concluded its claims review, objection and reconciliation process. Delta has filed twenty-six (26) omnibus objections to proofs of claim as well as numerous objections to individual claims. Many of these objections remain pending and unresolved, including at least two omnibus objections wherein Delta disputes the allowance of claims made by individual retirees for the Disregarded Benefit. This Court, granting Delta's Extension Motion, afforded Delta through April 24, 2008 to complete the review and reconciliation of filed claims and to file additional objections to claims. Similarly granting the putative Class an extension of the bar date so that the Class Claim for the Disregarded Benefit may be resolved using the class device would not delay the conclusion of the claims reconsideration process in any meaningful way. In fact, given the admitted complexity of calculating and administering pension claims, use of the class device is an efficient and equitable tool to facilitate the claims reconciliation process.

iii. **The Retired Pilots Have Acted in Good Faith.**

The Class Claimants and, indeed, members of the putative Class, through DP3, have acted in good faith. In its January 24, 2007 Letter, (see Ex. H, Ex. I, and Ex. J), wherein it purportedly notified members of the putative Class of the March 12, 2007 bar date, Delta unambiguously stated that it intended to pay benefits attributable to the termination of the Non-Qualified Plans pursuant to the NQ Benefits Orders. Delta informed some, but not all, retired pilots that there was no need to file formal proofs of claim unless the personal data accompanying the letter was incorrect or the retired pilot disagreed with the application by Delta of the methodologies prescribed in the NQ Benefits Orders. The January 24, 2007 Letter did not disclose Delta's decision not to include all "actual economic loss" suffered by retired pilots as

per the Stipulation. Accordingly, rather than intentionally choosing to ignore the purported March 12, 2007 bar date, it is probable that most members of the putative Class were left unaware that they held a claim.

Further, given the complexity associated with properly calculating and allocating the Formula Benefit and applying the IRC Limitations, it is unreasonable to expect individual retired pilots to glean the disparate application of the IRC Limitations from the January 24, 2007 Letter, much less to calculate the Disregarded Benefit and to file an individual proof of claim for the Disregarded Benefit. Delta engaged in “extensive research and calculations by both Delta personnel and outside actuaries to determine the [purportedly] correct claim amounts based on the negotiated terms with the committees representing the various retiree groups.” (Ex. K ¶ 11.) Certainly such “extensive research and calculations” came at great expense to these estates. The members of the putative Class should have been able to confidently rely on such “extensive research and calculation” without having to individually engage professionals and actuaries. During their tenure as active pilots and following their retirement, the members of the putative Class relied on Delta and its pension professionals to properly calculate and pay salaries and benefits, as applicable, and comply with all applicable laws and regulations. Simply put, there was no realistic way for the members of the putative Class to determine that Delta was not allowing them a claim for the Disregarded Benefit. Members of the putative Class, one can assume, relied exclusively on Delta to properly calculate the “actual economic loss” suffered following the termination of the Non-Qualified Plans as agreed to in the Stipulation and the NQ Benefits Orders.

iv. **Any Delay in Filing the Claim is Attributable to Delta.**

With respect to the most crucial Pioneer factor, the Class has a very sound reason for its failure to timely file formal proofs of claim. With the entry of the December 15, 2006 Order approving the Stipulation, Delta agreed to allow all retired pilots a claim for the “actual economic loss” resulting from the termination of the Non-Qualified Plans. (Ex. F, Stipulation ¶ 1.) They also agreed to the methodology for the liquidation of such claim for each retired pilot. Because of Delta’s monopoly of the data needed to validate the claim, pursuant to the December 15, 2006 Order, the calculation of the exact amount of each Class member’s claim was left exclusively with Delta. (Ex. E at 2.) Although certainly aware that the December 15, 2006 Order obligated it to liquidate each retiree claim equal to the present value of all post-termination benefits payable to retired pilots under the Non-Qualified Plans, Delta failed to disclose the disparate application of the IRC Limitations to individual retired pilots. Under these circumstances, the failure by any individual member of the putative Class to file a formal proof of claim by March 12, 2007 can most closely be attributable to Delta. To refuse to extend the bar date and allow retired pilots a claim for the Disregarded Benefit would be inequitable and would lead to a windfall to other unsecured creditors.

6. **The Class Claimants Have Satisfied the Requirements for Certification Under Rule 23.**

In the Class Claim, the Motion and the accompanying Memorandum of Law in Support of the Motion, the Class Claimants discuss at length the four prerequisites for certification of the Class reflected in Rule 23(a), namely the so-called (i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy requirements. The Class Claimants also establish the applicability of the additional prerequisites to certification prescribed by Rule 23(b). Accordingly, except to

address the specific contentions raised by Delta in its Objection, the Class Claimants will not in this Reply reargue the applicability of Rule 23 to the present putative Class.

a. **The Four Prerequisites for Certification Under Rule 23(a) Are Satisfied.**

Of the four prerequisites for certification contained in Rule 23(a), Delta contends that three are not present in this case and the Motion should, therefore, be denied. Specifically, Delta contends that the Class Claimants fail to meet the requirements for (i) numerosity, (ii) typicality and (iii) adequacy.

As to the numerosity requirement, Delta maintains that the putative Class is not so numerous as to render joinder of all individual members impractical because allowance of the claims of the individual members of the Class, excepting for presumably only eleven retired pilots<sup>3</sup> that filed formal proofs of claim by March 12, 2006, is precluded by application of the purported bar date. Of course, as discussed previously, this argument goes to the merits of the Class Claim and its consideration at a certification hearing is not permissible. Further, as also discussed in this Reply, because of the inadequacy of the notice given by Delta of the bar date and the fact that, by virtue of the various pleading filed by DP3 and the NQ Benefits Order, the Class timely filed an informal proof of claim, the claim for the Disregarded Benefit held by each member of the Class was timely filed.

In a Joint Statement of Stipulated Facts filed with this Court on October 12, 2005 (Docket No. 711), Delta, DP3 and ALPA acknowledged that, under the PWA and the Non-Qualified Plans, “approximately 3,485 retired pilots receive monthly Non-Qualified Pension Benefits from Delta.” (Ex. L ¶ 15.) While the Class Claimants and DP3 are not, because of Delta’s carefully guarded monopoly on individual data related to pension benefits, privy to the exact number of

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<sup>3</sup> Based on their review of filed proofs of claim, Class Claimants contend that at least forty-two retired pilots filed formal proofs of claim asserting a claim for the Disregarded Benefit.

retired pilots who have suffered an economic loss resulting from the disparate application of the IRC Limitations following the termination of the Non-Qualified Plans, at least these 3,485 retirees have presumably suffered a loss of the Disregarded Benefit. This number of potential members of the Class certainly satisfies the numerosity requirement of Rule 23(a). In fact, it is telling that Delta does not deny the disparate application of the IRC Limitations and its impact on numerous retirees. Delta instead argues that numerosity may be lacking only if this Court finds that the claims of all retirees that did not file formal proofs of claim for the Disregarded Benefit are time barred. As discussed in this Reply, such a finding is legally and factually unjustified and would have a devastating impact on retired pilots.

Delta contends that the typicality requirement is likewise absent because three of the four Class Claimants have filed timely formal proofs of claim that are not time barred. Delta continues by arguing that these three claimants may not adequately represent the Class because they, unlike other members of the Class, do not have to face the purported bar date defense. Again, because of the inadequacy of the notice afforded by Delta and the fact that ALL members of the putative Class assert that the claim for the Disregarded Benefit is allowed by virtue of the NQ Benefits Orders, those Class Claimants filing formal proofs of claim suffer under no conflict of interest. Further, even if Delta's argument is accepted, the fourth Class Claimant, Charles Strickland, did not file a formal proof of claim prior to the purported March 12, 2007 bar date. Nor, as stated previously in this Reply, did he receive any notice of the purported March 12, 2007 bar date to file a claim for pension benefits. Presumably he could competently represent the interests of similarly situated retired pilots who have suffered an economic loss because of Delta's failure to account for the Disregarded Benefit when liquidating the claims of retirees for non-qualified pension benefits as required by the NQ Benefits Orders and Stipulation.

Similarly, Delta argues that the Class Claimants and Miller & Martin may not competently or adequately represent the Class because they are acting under the auspices of DP3 and the Class Claim is tantamount to a collateral attack on the NQ Benefits Orders negotiated by DP3 and signed by Miller & Martin. Of course, as stated previously, the Class Claimants are not seeking to attack, set aside or renegotiate the NQ Benefits Orders. Instead, the Class Claim asserts an unsecured claim for the “actual economic loss” specifically allowed by the NQ Benefits Orders and the Stipulation. Accordingly, even assuming Delta’s argument is otherwise correct, neither the Class Claimants nor Miller & Martin have a conflict of interest that could arguably impair their ability to adequately represent the Class.

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

Finally, Delta maintains that none of the three tests enumerated in Rule 23(b) are satisfied. Delta first contends that a class action is not maintainable under Rule 23(b)(1) because certification is not necessary to “avoid inconsistent or varying adjudications with respect to individual members of the class.” In support of this conclusion, Delta again incorrectly asserts that only eleven retired pilots have filed formal proofs of claim for the Disregarded Benefit prior to the expiration of the purported bar date and that resolution of such eleven claims presents no risk of varying adjudications. Again, with this argument Delta is inviting this Court to impermissibly delve into the substantive merits of the Class Claim and the affirmative defenses thereto at a certification hearing. The argument also again ignores the fact that, because of the inadequacy of the notice provided by Delta of the purported bar date and the timely filing of an informal claim prior to the expiration of the purported bar date, the claim for the Disregarded Benefit held by each member of the Class is not untimely and, indeed, pursuant to the NQ Benefits Orders, should be allowed. Refusing to certify the Class and relegating individual

members of the Class to independently pursue a claim for the Disregarded Benefit presents a substantial risk of inconsistent or varying adjudications.

Delta also contends that Rule 23(b)(2) has no application because injunctive or declaratory relief is not a remedy sought in the Class Claim. However, the Class Claimants essentially seek to require Delta to again apply the methodologies prescribed by the NQ Benefits Orders in order to fully account for all lost non-qualified benefits. Such a remedy smacks of injunctive or declaratory relief, rendering Rule 23(b)(2) applicable.

Finally, Delta maintains that Rule 23(b)(3) has no application because the class vehicle is not “superior to other available methods for the fair and efficient adjudication of the controversy.” However, as discussed previously, utilizing the class action mechanism to promptly deal with the Class Claim and Delta’s affirmative defenses thereto will be both more fair and more efficient than adjudication of the individual claims of individual claimants. If not certified, members of the Class will be relegated to filing individual proofs of claim. Delta will, of course, file objections to such claims. Such objections will presumably include the substantive defenses asserted to the pending Motion. The individual retirees will then, in order to pursue the matter, have to retain individual counsel to respond to any objection filed by Delta. Those claimants responding will have to attend a formal hearing before this Court at great individual expense. Alternatively, certification of the Class will facilitate the prompt resolution of the substantive legal issues, binding on all members of the Class in one proceeding. Thus, certification of the Class will effectively afford all retirees an economical means to assert their claim and, simultaneously, consolidate all such claims in one contested matter.

## CONCLUSION

For the foregoing reasons, Class Claimants respectfully request that the Court apply Federal Rule of Bankruptcy Procedure 7023 to this matter and certify Class Claimants' proposed Class under Federal Rule of Civil Procedure 23(b)(1) and (b)(3), and appoint Dean Booth, Shelley D. Rucker and Nicholas W. Whittenburg of Miller & Martin PLLC, as class counsel.

Respectfully submitted this 7th day of November, 2007.

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