

Hearing Date: October 6, 2005 @ 1:30 p.m.

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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., *et al.*,) Case No. 05-17923-pcb
)
Debtors.) Jointly Administered
-----X

**REPLY BRIEF IN SUPPORT OF THE RETIRED PILOTS' MOTION TO
COMPEL THE CONTINUED PAYMENT OF COLLECTIVELY BARGAINED
FOR PENSION BENEFITS TO THE RETIRED PILOTS**

TO THE HONORABLE PRUDENCE CARTER BEATTY
UNITED STATES BANKRUPTCY JUDGE

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Delta's aggregate pension obligations, exclusive of its retiree benefits obligations, is the single biggest claim in this case - it dwarfs that of the next largest claim scheduled by the debtor. Therefore, the significance of this motion cannot be overstated both in human and economic terms. The decision of this Court will have broad ramifications for retirees who provided years of service to build Delta and even to the country as a whole if the termination of Delta's pension plan contributes to a taxpayer bailout of the Pension Benefit Guaranty Corporation ("PBGC"). At stake is the welfare of thousands of individuals who relied on Delta's promise to provide them with ongoing pension benefits during their retirement years. The issue is not an abstract one, but a real one.

So long as Delta is reorganizing in Chapter 11 and its pilots continue flying pursuant to their unmodified collective bargaining agreement, 11 U.S.C. § 1113 requires Delta to continue making all ongoing pension benefit payments to its retired pilots, including both mandatory minimum funding contributions to the qualified defined benefit plan and pension payments directly to the retired pilots pursuant to the non-qualified portion of the defined benefit plan, unless and until Delta meets its burden under § 1113. Delta predictably argued in response to DP3's motion to compel that the Second Circuit's Ionosphere II decision established a *per se* rule that the priority scheme of § 507 always trumps § 1113 and that this Court has no choice but to allow Delta to unilaterally terminate all pension benefit payments and contributions coming due post-petition pursuant to a collective bargaining agreement.

Delta's ongoing minimum pension obligations pursuant to the current collective bargaining agreement are not Ionosphere II obligations to liquidate pre-petition debts, but are rather ongoing contractual requirements to pay pension benefits and contributions as required 11 U.S.C. 1113(f). Delta's circular argument that its "breach" of the collective bargaining agreement is not a "rejection" prohibited by § 1113 is a *non sequitur* that begs the § 1113 question.¹ Delta cannot pick and choose which parts of the collective bargaining agreement ought to be enforceable by this Court.

A. This Court is bound by Century Brass, Ionosphere I, and Ionosphere II and these three Second Circuit decisions can and must be reconciled to give effect to the holding and concerns of each.

1. Delta's broad reading of Ionosphere II cannot be reconciled with the Second Circuit's Century Brass holding that a debtor cannot terminate pension benefits without first engaging in the § 1113 process with the retirees' authorized representative.

Delta does not attempt to reconcile its broad reading of Ionosphere II with the only Second Circuit decision to specifically address § 1113's relationship to retirees and retiree benefits, including pension benefits, In re Century Brass Prod., Inc., 795 F.2d 265

¹ It is black letter law that in a contract for the payment of money, non-payment constitutes a breach of the contract. REST. 2d CONTRACTS § 235(2) (1981) ("When performance of a duty under a contract is due any non-performance is a breach. Thus, the failure to perform at the time stated in the contract establishes an immediate breach.") (citing Franconia Assoc. v. U.S., 536 U.S. 129, 122 S. Ct. 1993 (2002)); 17A AM. JUR. 2d Contracts § 690 (2004) ("As a general proposition, the failure of one party to an entire contract to pay an installment when due is such a breach as will absolve the other party from all obligations to perform while the default continues."); 17B C.J.S. Contracts § 501 (1999) ("[P]arties to the contract are bound to perform it according to its terms, particularly when it has been executed by the other party. The failure to perform the obligations so undertaken, such as failure to pay money when due . . . constitute[s] a breach of contract."). The Bankruptcy Code expressly uses the terms "breach" and "rejection" as synonyms: "[T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . ." 11 U.S.C. § 365(g)(1).

(2d Cir. 1986). The Second Circuit held in Century Brass that “retirees should properly be characterized as ‘employees’ for purposes of applying § 1113.” Id. at 275. The Second Circuit specifically held “that vested retiree insurance benefits are a proper subject of [the] bargaining” required by § 1113 and further required the bankruptcy judge to appoint an “authorized representative” to negotiate on behalf of the retirees since the union had a conflict of interest as a matter of law. Id. at 267. “[I]f retirees benefits are subjects of bargaining between the union and the employer, and no modification can occur absent the retirees’ consent, those retirees must be represented in the negotiations.” Id. at 274. The Second Circuit’s holding that a debtor is prohibited from modifying “retiree benefits” without first bargaining in good faith with the retirees’ authorized representative specifically included the debtor’s proposed “termination of the existing pension plan and institution of a new plan.” Id. at 269. Therefore, at least in the Second Circuit, union retirees enjoy all of the protections afforded union employees by § 1113, including the right for a separate authorized representative of the union retirees to bargain in good faith with the debtor over whether the proposed modification or elimination of their pension benefits is necessary to the reorganization (something Delta has the burden of proving). Century Brass was not overruled by Ionosphere II. In re Ionosphere Clubs, Inc., 22 F.3d 403 (2d Cir. 1994) (“Ionosphere II”).

Delta admits that § 1113(f) provides administrative priority status to collectively bargained benefits accruing based upon post-petition labor (Delta Br. at p. 9 n. 8, pp. 11-13, p. 43), but claims that it does not have to make mandatory minimum funding contributions to the retirees’ pension plan because they provided services to Delta pre-petition. There is no indication in the Second Circuit’s Century Brass opinion that the

retirees there were providing post-petition services. If Delta's position is correct, the Century Brass court would not have reversed the district court's approval of the debtor's proposed "termination of the existing pension plan and institution of a new plan" and remanded the case with instructions that the bankruptcy court appoint a representative for the retired employees of the debtor and then hold such further proceedings under § 1113 as appropriate. 795 F.2d at 269, 276.

2. **Delta's broad reading of Ionosphere II cannot be reconciled with the Second Circuit's Ionosphere I holding that the preemptive effect of § 1113(f) on other sections of the Bankruptcy Code requires a "circumstance specific rather than section specific . . . particularized determination."**

Delta chose not to address the merits of the argument that the Second Circuit's Ionosphere II decision found that the "circumstance specific" application of § 507's priority scheme to vacation pay claims did not run afoul of the policies enshrined in § 1113 because Eastern was out of business and liquidating and had no collective bargaining agreement continuing in effect. Delta sarcastically dismisses DP3's argument as "creative" and "novel".² If Eastern had still been reorganizing, the Second Circuit

² In fact, this distinction has previously been recognized: "The conflict between the [Sixth, Third, and Second] circuits [in Unimet, Roth, and Ionosphere II] can be explained, in large part, by the different scenarios each court addressed. All three circuit courts faced one factual similarity: a company that had closed operations. . . . The Second and Third Circuits, however, faced [a] situation[] where the company was proceeding to liquidate. These circuits viewed liquidation as a distinguishing factor." Steven Kropp, A Case of Misplaced Priorities: A Proposed Solution to Resolve the Apparent Conflict Between Sections 507 and 1113 of the Bankruptcy Code, 18 Cardozo L. Rev. 1459, 1482 (Jan. 1997); see also In re Family Snacks, Inc., 257 B.R. 884 (8th Cir. BAP 2001) (applying analysis of Ionosphere II and Roth (both liquidating in Chapter 11) to pre-petition claims against liquidating Chapter 11 debtor and distinguishing Adventure Resources because it involved a reorganizing debtor, but claiming not to reach the issue of priority treatment of claims under § 1113(f) because it was not raised by the union); In re Ionosphere Clubs, Inc., 154 B.R. 623, 30 (S.D.N.Y. 1993) (holding, affirmed by Ionosphere II, that "it is not necessary for § 1113 to supersede § 507 in order for any

could not have reached the decision it did in Ionosphere II without expressly overruling Ionosphere I. The Ionosphere II court was attempting to follow its precedent in Ionosphere I – not abrogate or overrule it. In fact, Judge Miner issued an opinion concurring in part and dissenting in part in Ionosphere I because the majority did not go far enough in requiring that the procedures of § 1113 be followed, and stated:

By obtaining its relief in the Bankruptcy Court in the context of an action to enforce an automatic stay, Eastern is able to avoid compliance with a carefully-drawn statute enacted by Congress to govern labor-management relations in a bankruptcy reorganization. As noted by my colleagues, the statute was designed to overcome the Supreme Court's decision in National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513, 528-29, 104 S. Ct. 1188, 1197-98, 79 L.Ed.2d 482 (1984), which allowed a debtor unilaterally to terminate or alter a collective bargaining agreement prior to seeking bankruptcy court approval under § 365(a) for rejection of an executory contract. The statute specifically forbids termination in the manner permitted by Bildisco and promotes the long-established national labor policy of encouraging collective bargaining. . . . Eastern took this one-sided action without bothering with the preliminaries. We should not countenance this conduct, for it precludes resolution of the wet leasing dispute through the preferred process of collective bargaining.

In re Ionosphere Clubs, Inc., 922 F.2d 984, 997-98 (2d Cir. 1990) ("Ionosphere I") (Miner, J., dissenting) (internal citation omitted).

Judge Miner also authored the Second Circuit panel's unanimous opinion in Ionosphere II and held that payment of the terminated employees' claims for lump sum vacation pay earned pre-petition were governed by the specific priority provision of § 507(a)(3) and that "[a]pplying the analytical framework we established in Ionosphere I to the facts of this case, we hold that application of the priority scheme of section 507

feature essential to preserving the collective bargaining process to be respected here, particularly when we are dealing with a liquidating Chapter 11 and the collective bargaining process has ended"). In fact, Ionosphere II's rejection of Unimet is understandable in light of the Second Circuit's circumstance specific § 507 analysis given that the Sixth Circuit had allowed § 1113 to trump § 507 even in the absence of a reorganizing debtor.

will not allow Eastern unilaterally to modify or terminate its obligations under the collective bargaining agreements.” 22 F.3d at 407 (emphasis added).³ Ionosphere I requires rejection of any *per se* rule because “§ 1113(f) presumes a particularized determination in any circumstance as to whether the application of another provision of the Bankruptcy Code will permit a debtor unilaterally to terminate or alter a collective bargaining agreement” since § 1113(f) “was meant to prohibit 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 collective bargaining agreement without meeting the requirements of § 1113.” 922 F.2d at 990-91.

Delta’s obligation to continue ongoing minimum funding contributions to the defined benefit plan and to continue paying pension benefits to its retired pilots pursuant to the current collective bargaining agreement now in effect is not an Ionosphere II obligation to liquidate a pre-petition debt created by the termination of all union employees,⁴ but rather is an ongoing contractual requirement to pay pension benefits during the term of the collective bargaining agreement required to be honored by 11

³ In re Roth Am., Inc., 975 F.2d 949, 954-58 (3d Cir. 1992), decided by the Third Circuit between the two Ionosphere cases and relied upon by the Second Circuit in Ionosphere II, also involved the priority status of proofs of claim for pre-petition vacation pay claims of terminated union workers against a debtor liquidating in Chapter 11 that had “ceased all manufacturing activity and laid off all its employees.” Id. at 957. In distinguishing the Sixth Circuit’s Unimet decision and holding that § 1113 did not preempt § 507 to create a “superpriority”, the Roth court noted that “Unimet itself is of questionable application in this situation because it did not involve either a Chapter 11 liquidation or the question of priority.” Id.

⁴ Presumably if Eastern had continued operations, its union employees would have continued working and would have taken their vacations or been paid their vacation pay in the ordinary course. Because a collective bargaining agreement typically requires the company to pay all earned but unused vacation pay in a lump sum upon the employee’s termination, Eastern was faced with an enormous aggregate vacation pay claim caused by the fact of its decision to liquidate rather than stay in business.

U.S.C. 1113(f). Delta faults DP3 for attempting to limit Ionosphere II to its operative facts despite being directed to do so by the opinion itself and Ionosphere I. Delta incorrectly asserts that this expressly factually limited holding of Ionosphere II should be expanded to a *per se* rule applying to all monetary obligations owed pursuant to collective bargaining agreement because the Second Circuit's rationale for its decision purportedly applies with equal force in both liquidating and reorganizing Chapter 11 cases.

Delta argues that it is the duty of courts to reconcile statutes that are capable of co-existence so as to regard each as effective and that Ionosphere II found § 507 and § 1113 to be "capable of co-existence" in all circumstances *and* that no other provision of the Bankruptcy Code (*e.g.*, § 365) should be considered "capable of co-existence" with § 507 and § 1113 in differing circumstances (*e.g.*, in a reorganizing Chapter 11). However, Ionosphere II's holding that "[j]udicial ordering of benefit claims pursuant to § 507 is not equivalent to employer avoidance of obligations under a collective bargaining agreement" only makes sense in connection with "the facts of this case" involving a liquidating debtor that had already terminated all of its union employees previously governed by a collective bargaining agreement and the question of the payment of previously contingent vacation pay claims that would not have been liquidated but for Eastern going out of business. Once all union workers are terminated and the doors closed, the collective bargaining requirements of § 1113(b)-(c) have no relevance or meaning. There was no collective bargaining agreement "continuing in effect" to be assumed, modified, or rejected – only claims arising therefrom to be administered through the liquidation process.

In these circumstances, strictly applying § 507 to payments owed pursuant to a *de facto* terminated collective bargaining agreement may not conflict with § 1113(f)'s command that “[n]o provision of [Title 11] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.” The “provisions of this section” refer to the necessity of the debtor to bargain in good faith and, if an agreement cannot be reached, for the Court to approve only those modifications to the collective bargaining agreement that are “necessary” to the reorganization. Without a reorganization, there is no need to prove that rejection of the collective bargaining agreement is necessary or to bargain for needed modifications. Without employees, there is no collective bargaining agreement – only claims arising from their termination.

If the debtor is reorganizing under Chapter 11 and continuing to employ union labor, § 1113(f), when read in connection with § 365 so that both are “capable of co-existence” and given effect, requires the debtor to pay *all* ongoing obligations, including retirees’ pension benefits, owed pursuant to its collective bargaining agreement unless and until modified or rejected. This result is required by the plain language of § 1113. Because Century Brass requires Delta to negotiate with the authorized representative of the retired pilots prior to terminating their pension benefits, § 1113 must be read as follows:

- 1) “The debtor in possession . . . may *assume or reject* **[the retired pilots’ pension plan provided pursuant to the current]** collective bargaining agreement only in accordance with the provisions of this section.” 11 U.S.C. § 1113(a).
- 2) “Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section “trustee” shall include a debtor in possession), shall--(A) make a proposal to the

authorized representative of the **[retired pilots]** covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections **[such as the pilots' pension benefits]** that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and (B) provide . . . the representative of the **[retired pilots]** with such relevant information as is necessary to evaluate the proposal.” 11 U.S.C. § 1113(b)(1).

- 3) “During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative **[of the retired pilots]** to confer in good faith in attempting to reach mutually satisfactory modifications of **[the retired pilots' pension plan provided pursuant to the current collective bargaining agreement.]**” 11 U.S.C. § 1113(b)(2).
- 4) “The court shall approve an application for rejection of **[the retired pilots' pension plan provided pursuant to the current]** collective bargaining agreement only if the court finds that-- (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1); (2) the authorized representative of the **[retired pilots]** has refused to accept such proposal without good cause; and (3) the balance of the equities clearly favors rejection of such agreement.” 11 U.S.C. § 1113(c).
- 5) “No provision of **[Title 11]** shall be construed to permit a trustee to unilaterally terminate or alter any provisions of **[the retired pilots' pension plan provided pursuant to the current]** collective bargaining agreement prior to compliance with the provisions of this section.” 11 U.S.C. § 1113(f).

If Delta is allowed to unilaterally terminate pension payments to retirees, it will upset the dynamic established by § 1113 which requires debtors to comply with collective bargaining agreements until they are modified or terminated by the court or agreement, *not by the debtor*. The statute deliberately places a financial burden on the debtor by requiring it to continue making all payments pursuant to the collective bargaining agreement. If the debtor wants to extract itself from the obligations of the

collective bargaining agreement, then it must comply with the procedures of § § 1113 – otherwise the debtor has no incentive to bargain. In this case, Delta has circumvented those procedures by unilaterally terminating benefits and thus there is nothing about which the retirees’ authorized representative might “confer in good faith in attempting to reach mutually satisfactory modifications.” Nor would retirees be able to “refuse[] to accept such proposal with[] good cause” because Delta’s unilateral termination of pension benefit payments has rendered the retired pilots’ “acceptance” – or lack thereof – irrelevant.

According to Delta, the mere filing of its Chapter 11 petition immediately converted the retired pilots’ pension benefits into general unsecured claims as a matter of law. It wants to accept the benefits of the integrated collective bargaining agreement, but disavow the obligations to retirees. “The Debtor here wants both the benefits of rejection (the ability to impair the pre-petition arrears) and the benefits of assumption (labor peace) at the same time. It may not have its cake and eat it too.” In re Manor Oak Skilled Nursing Facilities, Inc., 201 B.R. 348, 350 (Bankr. W.D.N.Y. 1996) (holding that “all defaults under a collective bargaining agreement that has not been formally rejected are entitled to administrative expense status just as if the collective bargaining agreement had been ‘assumed.’ To treat them otherwise is precisely the kind of unilateral modification that is prohibited under 11 U.S.C. § 1113(f).”).

B. This Court should follow the Fourth Circuit’s well-reasoned decision in Adventure Resources which follows Ionosphere II, but also gives § 1113 its intended effect in reorganizing bankruptcies – to force the debtor to bargain in good faith and prove that its proposed modifications are necessary to the reorganization before unilaterally terminating *any* collectively bargained for benefits.

The Fourth Circuit is the only circuit court to address the interplay between § 1113, § 507 and § 365 in the context of a reorganizing debtor’s obligation to continue payments required by a collectively bargained for pension plan. Adventure Resources, Inc. v. Holland, 137 F.3d 786, 797 (4th Cir. 1998) (citing Ionosphere II with approval). The Fourth Circuit held that by continuing to operate in bankruptcy and employ workers pursuant to a collective bargaining agreement without moving to modify or reject the collective bargaining agreement pursuant to § 1113, the debtor necessarily assumed the collective bargaining agreement by operation of § 1113(f) and all of the ongoing obligations – arising pre-petition or post-petition – that went along with it pursuant to § 365. Id. at 799. “Thus, § 365 continues to apply to collective bargaining agreements, except where such an application would create an irreconcilable conflict with § 1113.” Id. at 798. Just as § 507’s priority scheme continues to apply to the extent not inconsistent with § 1113, so also does § 365 along with its priority scheme to the extent not inconsistent with § 1113: “That the obligations of an executory contract be accepted along with its benefits is made plain by the Bankruptcy Code’s requirement that, as conditions of the contract’s assumption, the debtor cure any existing default and compensate all non-debtor parties for actual pecuniary losses that have resulted therefrom. See § 365(b)(1).” Id.

Delta incorrectly argues that the Fourth Circuit’s decision rests upon the doctrine of “constructive”, “implied”, or “accidental” assumption which is contrary to the Second

Circuit's decision in In re Burger Boys, Inc., 94 F.3d 755, 763 (2d Cir. 1996). To the contrary, bankruptcy courts within the Fourth Circuit have also rejected the doctrine of implied assumption both before and after the Adventure Resources opinion. See In re A.H. Robins Co., Inc., 68 B.R. 705, 709 (Bankr. E.D. Va. 1986) ("An executory contract may not be assumed without court approval."); In re Ducane Gas Grills, Inc., 320 B.R. 341, 351 (Bankr. D.S.C. 2004) (holding that "§ 365(a) specifically requires court approval of any assumption of an executory contract"). The Adventure Resources court instead held that if a collective bargaining agreement is not rejected by the debtor pursuant to § 1113, then it is assumed by the debtor's failure to reject and remains in full force and effect: "The collective bargaining agreement between the [union] and [debtor] was assumed in bankruptcy as the result of the latter's failure to reject it in accordance with § 1113." Adventure Resources, 137 F.3d at 798. A debtor cannot accept the benefits of an integrated collective bargaining agreement and then selectively accept the burdens.

This holding is supported by the plain language of § 1113(a) which provides that § 1113 is the exclusive provision regarding the assumption or rejection of collective bargaining agreements and § 1113(f)'s command that no other provision of Title 11 (including § 365 or § 507) shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with § 1113. The doctrine of implied assumption has been rejected by most courts because § 365(a) provides that "the trustee, *subject to the court's approval*, may assume or reject any executory contract . . . of the debtor." However, this necessity of court approval, after notice and hearing, before an executory contract may be assumed by the debtor does

not apply to collective bargaining agreements after the enactment of § 1113. Section § 1113 sets forth detailed procedures and criteria for the rejection of a collective bargaining agreement, but is otherwise silent as to the process for assuming a collective bargaining agreement other than to say no other section of the Bankruptcy Code governs assumption of collective bargaining agreements which can no longer be unilaterally modified or rejected by the debtor prior to obtaining court approval *of the proposed modification*. No grounds are provided or permitted by the statute upon which a court may deny the assumption of a collective bargaining agreement. Accordingly, Delta's insistence that a formal motion for court approval to assume the collective bargaining agreement is required by § 365(a) is a red herring.

Section 1113's preemption of the assumption of collective bargaining agreements and § 1113's incorporation of § 365's administrative priority provision can best be understood in the context of § 1113's enactment in reaction to the Supreme Court's decision in Bildisco. No Congressional action was required to compel debtors to comply with the requirements later codified in § 1113(b)-(c) before approving the rejection of a collective bargaining agreement because this was taken care of by the Supreme Court's first holding in Bildisco:

Before acting on a petition to modify or reject a collective-bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. Not only is the debtor-in-possession under a duty to bargain with the union under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), see post, at 18-19, but the national labor policies of avoiding labor strife and encouraging collective bargaining, *id.*, § 1, 29 U.S.C. § 151, generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. The Bankruptcy Court need step into this process only if the parties' inability to reach an agreement threatens to

impede the success of the debtor's reorganization. If the parties are unable to agree, a decision on the rejection of the collective-bargaining agreement may become necessary to the reorganization process. At such a point, action by the Bankruptcy Court is required, while the policies of the Labor Act have been adequately served since reasonable efforts to reach agreement have been made.

N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 526, 104 S. Ct. 1188, 1196 (1984) (internal citations omitted). Compare 11 U.S.C. § 1113(b)-(c). This first holding of Bildisco, that collective bargaining agreements were executory contracts subject to § 365's rejection procedures with a more stringent rejection standard, was not controversial and was substantially codified by § 1113(b)-(c).

The second holding of the Bildisco Court, that a Chapter 11 debtor-in-possession "is not guilty of an unfair labor practice by unilaterally breaching a collective-bargaining agreement before formal Bankruptcy Court action," is what led to the enactment of § 1113 to specifically overturn this portion of the Bildisco opinion. 465 U.S. at 534, 104 S. Ct. at 1200; see Century Brass, 795 F.2d at 266-267 ("Section 1113 reversed the second part of Bildisco"). Accordingly, the issue was not whether a collective bargaining agreement could be rejected in bankruptcy, but rather expressly concerned the status of the collective bargaining agreement between the filing of the bankruptcy petition and a formal rejection approved by the bankruptcy court after meeting the heightened rejection standard. In reaching its controversial holding, the Supreme Court first provided a primer on the Bankruptcy Code's claim administration process as it applies to executory contracts pursuant to § 365:

Damages on the contract that result from the rejection of an executory contract, as noted, must be administered through bankruptcy and receive the priority provided general unsecured creditors. See 11 U.S.C. §§ 502(g), 507. If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to

pay for the reasonable value of those services, which, depending on the circumstances of a particular contract, may be what is specified in the contract[.] Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract *cum onere*, and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate, 11 U.S.C. § 503(b)(1)(A).

Bildisco, 465 U.S. at 531-532, 104 S. Ct. at 1199 (internal citations omitted).

Immediately after explaining the priority consequences of its decision, the Court held:

[T]he practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again. . . . We conclude that from the filing of a petition in bankruptcy until formal acceptance, *the collective-bargaining agreement is not an enforceable contract* within the meaning of NLRA § 8(d).

Id. (citation omitted) (emphasis added). It is this very holding that collective bargaining agreements are not enforceable contracts until formal acceptance, and the debtor's unilateral breach thereof prior to formal rejection could not be enjoined as an unfair labor practice, that Congress swiftly overturned with the passage of § 1113.

Specifically, § 1113(a) provides that “[t]he debtor in possession . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section” and § 1113(f) commands that “[n]o provision of [Title 11] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.” 11 U.S.C. § 1113(a), (f). These provisions have to be read against the backdrop of the Supreme Court's recently provided primer on the Bankruptcy Code's claim administration process as it applies to executory contracts pursuant to § 365 and Congress' desire to make collective bargaining agreements fully enforceable between the petition date and formal rejection by preventing a debtor's unilateral termination, modification, or rejection of a

collective bargaining agreement prior to consensual modification or court-approved rejection.

By specifically setting out to overturn this holding of the Bildisco court, Congress sought to give collective bargaining agreements the status of an assumed executory contract under § 365 unless and until the substantive and procedural requirements of § 1113 for rejection have been met. There is no other logical way to apply 11 U.S.C. § 1113(a) & (f) in a reorganizing Chapter 11 bankruptcy where the collective bargaining requirements of § 1113(b)-(c) still have relevance and meaning. This analysis is further compelled by the Second Circuit's holding in Ionosphere I:

In discerning Congress' intent in enacting § 1113, we look first to the language of the statute. United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20, 21 (2d Cir. 1989). Subsection 1113(a) provides that a debtor "may assume or reject a collective bargaining agreement only in accordance with the provisions of [section 1113]." Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code are inoperable to the extent that they allow a debtor to bypass the requirements of § 1113. The language of the statute indicates that Congress intended § 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement and that application of other provisions of the Bankruptcy Code that allow a debtor to bypass the requirements of § 1113 are prohibited.

Ionosphere I, 922 F.2d at 989 –990.

Delta also attempts to summarily dispense with the Adventure Resources analysis by cavalierly claiming that it is "yet another discredited case from yet another jurisdiction" and relies primarily upon the Eighth Circuit BAP's dicta in In re Family Snacks, Inc., 257 B.R. 884 (8th Cir. BAP 2001). Family Snacks, decided by the Eighth Circuit BAP after both Ionosphere II and Adventure Resources, involved the post-asset sale claims of the union in a liquidating Chapter 11. While the Eighth Circuit BAP found "the Adventure Resources decision inconsistent with the explicit requirement under § 365

that a debtor may assume an executory contract only upon a motion[,]" it nonetheless based its following of Ionosphere II and application of § 507's priority scheme to the union's claims upon the "circumstance specific" difference between the reorganizing debtor in Adventure Resources and the liquidating debtor in Family Snacks:

Unlike the debtors in Adventure Resources, the Debtor here did not "continue to reap the benefits of its bargain without concern that the nondebtor party will be made whole for the debtor's unfulfilled prepetition obligations." Adventure Resources, 137 F.3d at 790. Instead, recognizing its dire financial situation, Debtor actively sought a purchaser and moved quickly to liquidate its assets. It never indicated that it had any intention of remaining in business at the expense of its employees. It initiated the rejection process almost immediately after the asset sale took place and arranged for the purchaser to assume or pay, or itself assumed and paid, the Debtor's post-petition obligations under the CBA. Almost all of the Debtor's employees, both union and non-union, were rehired by the purchaser under terms and conditions nearly as favorable as those under the CBA. Thus, to the extent Adventure Resources stands for the proposition that there is a concept of assumption by inaction under § 365, the facts in that case are so disparate as to make it inapplicable to this case.

Id. at 904-05.⁵ Moreover, the Eighth Circuit BAP expressly did not "reach this issue of priority treatment of the union employees' unpaid medical and dental expenses because the union has specifically disclaimed resting its argument on § 1113(f)." Id. at 903.

Accordingly, this Court should follow the Fourth Circuit's well-reasoned decision in Adventure Resources which follows Ionosphere II, but also gives § 1113 its intended effect in reorganizing bankruptcies – to force the debtor to bargain in good faith and prove that its proposed modifications are necessary to the reorganization before unilaterally terminating *any* collectively bargained for benefits.

⁵ It should be noted that Family Snacks is the only circuit-level decision following both Ionosphere II and Adventure Resources and it implicitly acknowledged in dicta the difference in § 1113's effect on claim administration depending upon whether the debtor was reorganizing or liquidating.

C. Delta continues to miss the point.

Delta mischaracterizes DP3's brief discussion of the other major pending airline bankruptcies as a deliberate fabrication intended to deceive the Court. (Delta Br. at p. 3). To the contrary, DP3 acknowledges that the pilots' pension plans were ultimately terminated in the UAL and US Air bankruptcies *after meeting the procedural requirements of § 1113 and ERISA* (although UAL achieved an "involuntary" termination of the pilots' pension plan approximately six months earlier than agreed to by ALPA in an agreed modification to the collective bargaining agreement). For example, US Airways filed its first Chapter 11 petition on August 11, 2002 and filed its conditional application pursuant to Section 1113(c) for relief from its collective bargaining agreements eleven days later on August 22, 2002. US Airways ultimately reached a consensual agreement with ALPA through the § 1113 process that ultimately led to the termination of the pilots' pension plan.

In the UAL bankruptcy, it is true that UAL initially sought and was granted discretionary permission to pay pension benefits to retirees and in fact did pay approximately \$204 million over the course of two years without any objections from creditors. However, when UAL sought to unilaterally terminate its "discretionary" payment of non-qualified pension benefits to its retired pilots in February 2005, the bankruptcy court granted ALPA's emergency motion pursuant to § 1113(f) to compel continued payment of non-qualified pension benefits under the pilots' collective bargaining agreement. (Order dated February 18, 2005 attached hereto as Exhibit A). Moreover, UAL filed an emergency motion this past Friday, September 30, 2005, this time seeking permission to cease payment of non-qualified pension benefits based upon

the court's oral ruling allowing the pilots' pension plan to be terminated. (UAL September 30, 2005 Motion attached hereto as Exhibit B). According to the website of the United Retired Pilots Benefit Protection Association, Judge Wedoff denied UAL's motion at a hearing held Monday, October 3, 2005. ("Website Update" from <http://ualpilotpension.com> attached hereto as Exhibit C). Accordingly, UAL is *still* required to continue making non-qualified pension benefit payments directly to its retired pilots until the final order approving the termination of the pilots' pension plan is entered by the bankruptcy court.⁶

Delta does not provide a coherent argument against the above synthesis of the Bankruptcy Code with Second Circuit precedent, but instead relies upon pension cases not involving § 1113 or non-binding lower court decisions from other jurisdictions incorrectly deriving a *per se* rule from Ionosphere II. Moreover, none of the five cases cited by Delta for its assertion that "virtually all courts . . . have repeatedly affirmed that claims for missed post-petition minimum funding contributions merit priority treatment only '[t]o the extent [they] arose postpetition from the postpetition labor of the Debtors' . . . employees'" involved the application of § 1113. (Delta Br. at pp. 29-30 (quoting In re Finley Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882 (S.D.N.Y. 1993))). Additionally, in four of the five cited cases, the pension plans had already been terminated. In Finley Kumble, supra, it was clear that the termination of the

⁶ Northwest, although it apparently failed to make its minimum funding contribution to its defined benefit plan, at least sought and obtained permission to pay pre-petition employee obligations and "to continue at this time their practices, programs, and policies with respect to the Employees and Retired Employees." (First Day Order re Wages and Benefits, attached hereto as Exhibit D). Although the issue has not yet been presented to the Northwest court, DP3 does not agree that § 1113(f) allows such payments to be made in only the discretion of the debtor.

pension plan was imminent since notice had been given by the pension plan trustee that he would terminate the pension plan, a liquidation trustee had already been appointed, and the PBGC had already filed proofs of claim on behalf of the pension plan. Id.

Delta spends the last three and a half pages of its brief arguing that the one and a half page decision of the District Court for the Southern District of New York in In re 1655 Broadway Restaurant Corp., 1997 WL 104961 (S.D.N.Y. 1997) did not overrule Ionosphere II. (Delta Br. at pp. 39-42). Delta misses the point. This case is constructive because it required immediate payment of ongoing pension benefits and implicitly treated the collective bargaining agreement as assumed unless and until rejected pursuant to § 1113: “Having not moved to reject or modify the collective bargaining agreement, the Debtor is bound by the terms of the collective bargaining agreement, which require the Debtor to make timely payments to the [pension funds].” Id. at * 2 (vacating denial of motion to compel payments to pension funds pursuant to collective bargaining agreement). This common sense understanding that § 1113(f) requires debtors to treat their collective bargaining agreements as assumed unless and until rejected. See also In re Manor Oak Skilled Nursing Facilities, Inc., 201 B.R. 348, 350 (Bankr. W.D.N.Y. 1996) (holding that “all aspects of a collective bargaining agreement remain in effect and binding until rejection occurs, including the duty to cure pre-petition arrears or suffer the consequences.”).

DP3 notes that Delta did not deny or contest anywhere in its forty-four page response brief DP3’s assertion that Delta would not be able to meet the substantive standards of § 1113 by its own admissions or that its early unilateral termination of payments to the qualified defined benefit plan required by ERISA was strategically

designed to increased the risk of an “involuntary” termination of the qualified plans by the PBGC. Nor did Delta rebut DP3’s assertion that Delta contractually bound itself in by virtue of the Bankruptcy Protection Letter to a heightened standard more stringent than § 1113 and § 1114 in regards to retiree benefits and pensions in the event of a bankruptcy filing and acknowledged that pension benefit payments were subject to the requirements of § 1113. By terminating all payments to the retired pilots under the non-qualified defined benefit plan and announcing its refusal to make the minimum funding contributions required by ERISA to the qualified defined benefit plan at the outset of this bankruptcy proceeding, Delta’s bypass of § 1113 is a fait accompli.

Section 1113, along with basic fundamental principles of fairness and justice, forbid Delta’s unilateral termination of pension benefit payments and contributions without negotiating in good faith with the retirees’ authorized representative and meeting *its burden* of showing that the procedural and substantive requirements of § 1113 have been satisfied. Delta must first satisfy the requirement of § 1113(b)(a)(A) that any changes to collectively bargained for benefits be “necessary to permit the reorganization of the debtor” before any permanent cessation of pension payments can be sanctioned by this Court and must satisfy the more stringent requirement of § 1113(e) that interim changes to collectively bargained for benefits be “essential to the continuation of the debtor’s business, or . . . to avoid irreparable damage to the estate” before these changes may be made on an interim basis.

Accordingly, DP3’s motion to compel Delta to make all pension benefit payments and contributions required by its collective bargaining agreement should be granted.

Dated: October 5, 2005.

SCHREEDER, WHEELER & FLINT, LLP

By: /s/ Dean Booth

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Delta Pilots' Pension Preservation Organization

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:

UAL CORPORATION, ET AL.,

Debtors.

Chapter 11

Case No. 02 B 48191
(Jointly Administered)

**ORDER GRANTING THE EMERGENCY MOTION OF AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL PURSUANT TO 11 U.S.C. SECTION 1113(f) TO
COMPEL CONTINUED PAYMENT OF NON-QUALIFIED PENSION BENEFITS
UNDER THE PILOTS' COLLECTIVE BARGAINING AGREEMENT**

The Emergency Motion of Air Line Pilots Association, International pursuant to 11 U.S.C. Section 1113(f) to Compel Continued Payment of Non-Qualified Pension Benefits under the Pilots' Collective Bargaining Agreement came before the Court on February 18, 2005. Upon consideration of the undisputed facts, the arguments of the parties and the applicable law, and for the reasons set forth on the record in open court,

IT IS HEREBY ORDERED that:

1. The motion is GRANTED.
2. Debtors shall continue payment of non-qualified benefits (as described in the motion) until the A Plan is terminated pursuant to applicable law or the parties agree otherwise.
3. Notwithstanding the possible applicability of Bankruptcy Rule 7062 or any other rule that would provide for a stay, the terms of this Order shall be immediately effective and enforceable upon its entry.

Dated: February 18, 2005



Eugene R. Wedoff
United States Bankruptcy Judge



PLEASE TAKE FURTHER NOTICE that you may obtain further information concerning these Chapter 11 cases:

At the United States Bankruptcy Court, Northern District of Illinois at either www.ilnb.uscourts.gov (home page); or

At the Debtors' private website at www.pd-ual.com.

Date: September 30, 2005

Respectfully submitted,

UAL CORPORATION, et al.

/s/ David R. Seligman

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:

UNITED AIR LINES, INC., et al.,

Debtors.

)
)
)
)
)
) **Chapter 11**

**PENSION BENEFIT GUARANTY
CORPORATION,**

Plaintiff,

vs.

**UNITED AIR LINES, INC., as Plan Administrator
for the United Airlines Pilot Defined Benefit Pension
Plan,**

Defendant,

and

**AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, UNITED RETIRED PILOTS
BENEFIT PROTECTION ASSOCIATION,
ROGER D. HALL, DENNIS D. DILLON, GERARD
TERSTIEGE, EUGENE M. CUMMINGS,
RAYMOND P. FINK, JAMES M. KRASNO and
WILLIAM L. RUTHERFORD,**

Intervenors.

) **Case No. 02-B-48191**
) **(Jointly Administered)**

) **Adversary Proc. No. 05-481**

) **Honorable Eugene R. Wedoff**

) **Hrg. Date: 9:30 a.m. CST**
) **Oct. 3, 2005**

**EMERGENCY MOTION FOR AUTHORITY TO ENTER INTO TRUSTEESHIP
AGREEMENT WITH PBGC TO TERMINATE PILOT PLAN**

1. As this Court is aware, in 1991 United and ALPA entered into a side letter to the ALPA CBA (Letter Agreement 91-12) to provide a mechanism for United's retired pilots to receive pension benefits that are not qualified for coverage under PBGC's pension insurance regime set forth in Title IV of ERISA because they exceed the salary limitations in Internal

Revenue Code § 401(a)(17). These benefits are referred to as "Non-Qualified Benefits." Under Letter Agreement 91-12, United has an obligation to pay eligible pilots the difference between: (a) contractually agreed defined benefits under the Pilot Plan and (b) the maximum amount of defined benefits that could legally be paid from the Pilot Plan as a result of IRC limitations. Unlike the Pilot Plan qualified benefits, there is no segregated trust from which to pay Non-Qualified Benefits. United's pilots are the only unionized employees that receive non-qualified pension benefits; other unionized employees simply do not earn enough to exceed the salary limitation imposed by IRC § 401(a)(17).

2. Since filing for bankruptcy, United has paid retired pilots approximately \$6 million per month in Non-Qualified Benefits directly from estate assets, totaling approximately \$204 million. United also has paid on average approximately \$3.3 million per month in partial lump sum pension payments to retiring pilots, representing approximately \$3 million of qualified lump sum payments paid directly from the Pilots Plan's assets, and approximately \$300,000 of non-qualified lump sum payments paid directly from United's own estate funds.

3. On February 18, 2005, this Court ruled that United had an obligation to continue paying the Non-Qualified Benefits until termination of the Pilots Plan. United had argued that it should be able to temporarily suspend Non-Qualified Benefits pending resolution of the PBGC's involuntary termination litigation, because if the Pilot Plan was terminated with a retroactive termination date, then United would have paid Non-Qualified Benefits that otherwise did not have to be paid and that were unrecoverable as a practical matter. United further argued that once a termination date was set, it could then make Non-Qualified Benefit payments for the period from March 1, 2005 until the termination date. The Court disagreed, stating that:

You have an argument, I think it's a good argument, that once the qualified plan is terminated, the obligation to make nonqualified

payments under the collective bargaining agreement will necessarily terminate because there is a computation that has to take place based on the qualified plan to calculate the nonqualified benefits. But until that termination occurs, there is an ongoing contractual obligation to make the nonqualified payments. There is nothing that erases that obligation because of a potential for an event taking place in the future.

See Feb. 18 Trans. 92:20 to 93:6.

The CBA includes provisions requiring the payment of the nonqualified benefits with no exception for periods during which a notice of termination is pending but not yet effective. With the termination of the qualified benefits, the derivative obligation to pay nonqualified benefits would likewise terminate. But until that termination actually occurs, irrespective of any retroactive effective date, the obligation to make payment of nonqualified benefits is present under the CBA. A denial of that obligation by United would be a modification of the CBA prohibited under Section 1113.

See Feb. 18, 2005 Trans. 148:13-25. Since the Court's February 18 ruling, United has paid approximately \$42 million in additional Non-Qualified Benefits.

4. On May 11, 2005, this Court approved a comprehensive settlement resolving virtually all pension-related issues between United and PBGC (the "PBGC Settlement"). In its ruling, this Court (and subsequently other courts) held that, under Section 4042 of ERISA, United as plan sponsor can enter into a trusteeship agreement, thereby consenting to PBGC's termination of the Pilot Plan, notwithstanding any contractual obligation to its union to the contrary. See Association of Flight Attendants v. United Air Lines, Inc., slip op. attached hereto as Exhibit A (Case No. 05-C-3172) (July 21, 2005) (Der-Yeghiayan, J.) (affirming this Court's approval of PBGC settlement and rejecting AFA's argument that United's entry into PBGC settlement violated Section 1113); see also Jones and Laughlin Hourly Pension Plan v. LTV Corp. (In re LTV), 824 F.2d 197, 201-02 (2d Cir. 1987) (finding that plan sponsor could consent to PBGC's termination of pension plan over union's objection); Ass'n of Flight Attendants v.

Pension Benefits Guaranty Corp., slip opinion attached hereto as Exhibit B (Case No. 05-1036 (ESH)) (D.D.C. June 8, 2005) (Huvelle, J.) (finding no likelihood of success regarding AFA's argument that United's entry into PBGC settlement violated Section 1113); 29 U.S.C. § 1367.

5. The PBGC Settlement also sets forth the conditions under which United will enter into a trusteeship agreement to terminate the Pilots Plan:

As soon as practical after the [date the PBGC Settlement is approved], PBGC and United shall execute termination and trusteeship agreements with respect to the Pilot Plan, with a termination date that is either mutually agreed by the Parties or judicially determined (but in neither event any later than the latest termination date for any of the other Pension Plans).

See § 4(c) of the PBGC Settlement. Moreover, to satisfy certain concerns raised by ALPA prior to the hearing on the PBGC Settlement, United clarified for ALPA's benefit that it would not execute a trusteeship agreement for the Pilot Plan until the conclusion of the pending involuntary termination litigation resulting in plan termination. See Order Approving PBGC Settlement, Additional Terms and Conditions, Paragraph 12. In essence, United was willing to allow pilots their "day in court" to challenge PBGC's termination of the Pilots Plan.

6. On September 27 -- after conducting a day-long trial the prior week -- this Court ruled that PBGC had met its burden to prove the need for the issuance of a judicial decree terminating the Pilot Plan pursuant to Section 4041(c) of ERISA. The Court stated, however, that because the evidentiary standard for an involuntary termination was an issue of first impression, it was appropriate for the Court to issue a written opinion stating the reasons for the Court's ruling. And under ERISA, once the Court enters its order, the Pilots Plan will be terminated, and United will transfer all plan assets to PBGC, who will become statutory trustee of the Plan. See 29 U.S.C. § 1442(c), (d). And as this Court previously has held, once the Pilot Plan is terminated, United's obligation to pay approximately \$6 million per month in Non-

Qualified Benefits to retired pilots likewise ceases. After the Court announced its ruling, United informed the Court that there was another Non-Qualified Benefit payment scheduled to be paid for the month of October, but that given the Court's ruling, United would cease paying any further Non-Qualified Benefits to retired pilots. The Court stated that the matter was not before it.

7. If this Court does not issue its order terminating the Pilots Plan before the October Non-Qualified payment would normally be paid, but instead, for example, the Court issues an order together with a memorandum opinion at the October 21 omnibus hearing, United suspects that the retired pilots will argue that United is required to make the October Non-Qualified Benefit payment merely because the Court determined that it was appropriate to take the time necessary to draft a written opinion to support its already-stated ruling to elaborate on an issue of first impression. The retired pilots' position, if accepted by the Court at this point, would surely be an inequitable windfall in favor of one group of unsecured creditors, at the expense of the entire unsecured creditor body, who under United's proposed plan of reorganization will become the owners of reorganized United. Simply put, the Non-Qualified Benefits should no longer be elevated over other pre-petition, general unsecured claims merely because of the passage of time between this Court's ruling and the Court's issuance of a written opinion to guide the parties, appellate courts, and other courts on an issue of first impression.

8. United, as a debtor in possession of its assets, owes a fiduciary duty to all of its creditors to husband its resources for the benefit of all such creditors, and to treat creditors the same as all other similar-situated creditors, with no preferential treatment. United already has paid approximately \$54 million in non-qualified benefits since December 30, 2004 -- the date adopted by this Court as the termination date for the Pilot Plan. Although United believes that

the retired pilots' position -- if accepted -- would be inequitable, United in its fiduciary capacity believes that in light of present circumstances, it is only fair and equitable for it to enter into a trusteeship agreement with PBGC to terminate the Pilot Plan pursuant to Section 4042(c) of ERISA, as United has with respect to its other pension plans. Execution of a trusteeship agreement will result in the automatic termination of the Pilot Plan, as well as the concomitant obligation to continue making non-qualified payments.

9. In an abundance of caution, United seeks authority to execute a trusteeship agreement, similar in form to the trusteeship agreements executed between United and PBGC for United's other pension plans. As previously mentioned, this Court has held that under Section 4042, a plan sponsor can execute a trusteeship agreement notwithstanding any collective bargaining obligation otherwise. Moreover, now that the Court has announced its ruling finding that PBGC has met its burden to prove that grounds exist for termination of the Pilots Plan, the litigation has concluded, resulting in termination of the Pilots Plan, in accordance with United's clarifications to ALPA under the PBGC Settlement.

10. In the alternative, United respectfully requests that this Court immediately enter an order terminating the Pilot Plan, with an opinion to be issued later. United does not believe that any parties wishing to appeal will be prejudiced by having to commence the appellate process without an immediate written opinion. The Court already articulated in detail the basis for its decision. Moreover, under the Federal Rules of Bankruptcy Procedure, a notice of appeal will not be due for 10 days, and a statement of issues on appeal will not be due until at least 10 days thereafter. Once the appeal is docketed in the District Court, even the Federal Bankruptcy Rules do not require appellate briefs for an additional 15 days, and all District Court judges hearing appeals in this case have established their own appellate briefing schedules giving the

WHEREFORE the Debtors respectfully request that this Court enter an order: (1) authorizing their entry into a trusteeship agreement and (2) granting such other relief as the Court deems just and proper.

UAL CORPORATION, et al.

/s/ David R. Seligman
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United Retired Pilots Benefit Protection Association

Last Updated October 3, 2005 9:30 pm mdt (Update)

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WEBSITE UPDATE 10-03-05

After the close of business on Friday, September 30, 2005, United Airlines filed an emergency motion in Judge Wedoff's Court seeking an order approving United's decision to not make the October 1 non-qualified pension payments and approval for authority to enter into a trusteeship agreement with the Pension Benefit Guaranty Corporation (PBGC) terminating the United Airline Pilots' Defined Benefit Pension Plan. The basis of United motion was Judge Wedoff's preliminary ruling last Tuesday on the PGBGC's lawsuit to terminate the pilot's pension plan. [United's Friday motion](#) can be found in the documents section this website.

At the hearing this morning, Judge Wedoff denied United's motion. The United Retired Pilots Benefit Protection Association (URPBPA) and the Air Line Pilots Association argued in Court today that the pilots' plan had not been terminated as of October 1. In February 2005, United attempted to unilaterally stop payment of the non-qualified benefits. Responding to URPBPA's objections at that time, Judge Wedoff ordered United to continue making the non-qualified payments until there was an order terminating the pilot pension plan.

On September 27, 2005, United had requested in Court that Judge Wedoff approve the cessation of non-qualified pension payments based on his preliminary ruling. Judge Wedoff declined to rule on that request.

URPBPA will file an emergency motion to compel United to make the October 1, 2005 non-qualified pension payment. URPBPA attorneys expect Judge Wedoff will hear this motion before the end of this week.

WEBSITE UPDATE 10-01-05



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

NORTHWEST AIRLINES CORPORATION, et al.,

Debtors.

: Chapter 11 Case No.
:
:

: Jointly Administered
:
:

ORDER PURSUANT TO SECTIONS 363(b) AND 105(a)
OF THE BANKRUPTCY CODE AUTHORIZING, BUT NOT DIRECTING,
THE DEBTORS TO (I) PAY CERTAIN PRE-PETITION WAGES, COMPENSATION
AND EMPLOYEE BENEFITS; (II) CONTINUE PAYMENT OF WAGES,
COMPENSATION AND EMPLOYEE BENEFITS IN THE ORDINARY COURSE OF
BUSINESS; AND (III) AUTHORIZING AND DIRECTING APPLICABLE BANKS AND
OTHER FINANCIAL INSTITUTIONS TO PROCESS, AND PAY ALL CHECKS
PRESENTED FOR PAYMENT AND TO HONOR ALL FUNDS TRANSFER
REQUESTS MADE BY THE DEBTORS RELATING TO THE FOREGOING

Upon consideration of the motion (the "Motion")¹ of Northwest Airlines Corporation ("NWA Corp."), and certain of its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"),² seeking entry of an order pursuant to sections 363(b) and 105(a) of title 11, United States Code (the "Bankruptcy Code") (i) authorizing, but not directing, the Debtors to pay certain pre-petition wages, compensation and employee benefits; (ii) authorizing, but not directing, the Debtors to continue payment of wages, compensation and certain employee benefit programs in the ordinary course of business;

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

² Specifically, in addition to NWA Corp., the Debtors consist of: NWA Fuel Services Corporation ("NFS"), Northwest Airlines Holdings Corporation ("Holdings"), NWA Inc. ("NWA Inc."), Northwest Aerospace Training Corp. ("NATCO"), Northwest Airlines, Inc. ("Northwest Airlines"), MLT Inc. ("MLT"), Northwest Airlines Cargo, Inc. ("Cargo"), NWA Retail Sales Inc. ("NWA Retail"), Montana Enterprises, Inc. ("Montana"), NW Red Baron LLC ("Red Baron"), Aircraft Foreign Sales, Inc. ("Foreign Sales") and NWA Worldclub, Inc. ("WorldClub").



and (iii) authorizing and directing applicable banks and other financial institutions to process and pay all checks presented for payment and to honor all funds transfer requests made by the Debtors relating to the foregoing, all as described more fully in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and due notice of the Motion having been provided to (i) the Debtors' twenty largest unsecured creditors, (ii) the Debtors' five largest pre-petition secured lenders or any agent therefor, (iii) the United States Trustee for this District, and (iv) the Securities and Exchange Commission; and it appearing that no other or further notice of the Motion need be provided; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtors, their estates and all parties in interest; and upon the Motion, the Declaration of Douglas M. Steenland, dated as of the Petition Date, and the Declaration of Neal S. Cohen Pursuant to Local Bankruptcy Rule 1007-2 and in Support of the Debtors' Chapter 11 Petitions and First Day Orders, dated as of the Petition Date; and all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Motion is granted /s/ ALG ~~and approved in all respects;~~ /s/ ALG and it is further

ORDERED that the Debtors are hereby authorized, but not directed, to pay, in their sole discretion, the Pre-petition Employee Obligations; and it is further

ORDERED that the Debtors are hereby authorized, but not directed, (i) to pay the Employee Obligations that become due and owing during the pendency of these cases and (ii) to continue at this time their practices, programs, and policies with respect to the Employees and Retired Employees, as such practices, programs and policies were in effect as of the Petition Date; and it is further

ORDERED that all applicable Disbursement Banks and other financial institutions are authorized and directed, when requested by the Debtors and in the Debtors' sole discretion, to receive, process, honor, and pay any and all checks drawn on the Debtors' accounts to the Employees and Retired Employees, whether those checks were presented prior to or after the Petition Date, and make other transfers provided that sufficient funds are available in the applicable accounts to make the payments; and it is further

ORDERED that authorization to pay all amounts on account of Pre-petition Employee Obligations shall not affect the Debtors' right to contest the amount of validity of any Pre-Petition Employee Obligations, including without limitation, the Payroll Tax Obligations that may be due to any taxing authority; and it is further

ORDERED that nothing contained in this Order or the Motion shall constitute a rejection or assumption by the Debtors, as debtors in possession, of any executory contract or unexpired lease by virtue of reference of any such contract or lease in the Motion; and it is further

ORDERED that this Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation of this Order; and it is further

ORDERED that service of the Motion as provided therein shall be deemed good and sufficient notice of such Motion; and it is further

ORDERED that the requirement under Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York for the filing of a memorandum of law is waived.

Dated: New York, New York
15 September, 2005

/s/ ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of Reply Brief in Support of the Retired Pilots' Motion to Compel the Continued Payment of Collectively Bargained for Pension Benefits to the Retired Pilots was served via first class United States mail in properly addressed envelopes with sufficient postage affixed thereon to insure delivery upon the following:

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Marshall S. Huebner
Davis Polk & Wardwell
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Debtor's Counsel

All Parties Listed on Attached Exhibit "A"

This 5th day of October, 2005.

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