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

Attorneys for Debtors and
Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re: :
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DELTA AIR LINES, INC., et al., : **Chapter 11 Case No.**
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Debtors. : **05-17923 (PCB)**
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**OBJECTION AND MEMORANDUM OF LAW OF THE
DEBTORS TO MOTION OF DP3, INC. 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

Delta Air Lines, Inc. and those of its subsidiaries that are debtors and
debtors in possession in these proceedings (collectively, “**Delta**” or the “**Debtors**”),¹ as
and for their objection to the motion (the “**Motion**”) of DP3, Inc. d/b/a Delta Pilots’

¹ The Debtors are the following entities: ASA Holdings, Inc.; Comair Holdings, LLC; Comair, Inc.; Comair Services, Inc.; Crown Rooms, Inc.; DAL Aircraft Trading, Inc.; DAL Global Services, LLC; DAL Moscow, Inc.; Delta AirElite Business Jets, Inc.; Delta Air Lines, Inc.; Delta Benefits Management, Inc.; Delta Connection Academy, Inc.; Delta Corporate Identity, Inc.; Delta Loyalty Management Services, LLC; Delta Technology, LLC; Delta Ventures III, LLC; Epsilon Trading, Inc.; Kappa Capital Management, Inc.; and Song, LLC.

Preservation Organization (“**DP3**”) to compel the continued payment of certain payments in connection with collectively bargained-for pension benefits to the retired pilots, and the responses in support thereof of Fiduciary Counselors Inc. (“**FCI**”) and the Pension Benefit Guaranty Corp. (the “**PBGC**”),² respectfully state as follows:

Introduction

DP3’s Motion and FCI’s Response ask this Court to ignore Second Circuit law that is directly on point, and to afford Pre-Petition Pension Obligations (as defined herein) superpriority administrative status under § 1113(f) of the title 11 of the U.S. Code (the “**Bankruptcy Code**” or the “**Code**”). In connection with the bankruptcy of another legacy airline, the Second Circuit expressly rejected this position. It ruled that § 1113(f) does not speak to claim priority and that claims arising under a collective bargaining agreement (“**CBA**”) are “accorded first priority status as administrative expenses only to the extent . . . attributable to post-petition” work. Air Line Pilots Ass’n, Int’l v. Shugrue (In re Ionosphere Clubs, Inc.) (“**Ionosphere II**”), 22 F.3d 403, 408 (2d Cir. 1994). The vast majority of reported decisions both within and without this Circuit have followed Ionosphere II, and have declined to transform Pre-Petition Pension Obligations into superpriority obligations by judicial fiat. Moreover, it has long been the law in this circuit and virtually everywhere else that, like all other claims against a debtor, pension claims must be split into their various priority components under § 507 of the Bankruptcy

² Response, Memorandum of Law and Request for Determination of Priority of Fiduciary Counselors Inc. to Motion and Memorandum of Law of DP3 to Compel the Continued Payment of Collectively Bargained For Pension Benefits to the Retired Pilots (“**FCI Br.**”); Pension Benefit Guaranty Corporation’s Limited Response to Motion of DP3, Inc. to Compel the Continued Payment of Collectively Bargained For Pension Benefits to Retired Pilots (“**PBGC Br.**”).

Code. Pre- is pre- and post- is post-. No case within this circuit (and virtually none outside it) has held to the contrary.

Confronted with this clear and controlling precedent, DP3 and FCI are left to argue, without the benefit of any case law or legal authority, that Ionosphere II should be severely limited – actually overruled – by this Court. As detailed below, these attempts have no basis in law or logic and must fail.

Shockingly, in the very first sentence of its “Introduction,” DP3 attempts to glean support for its position by representing to this Court that:

In every other major airline bankruptcy, including the one filed by Northwest Airlines in this court on the same day as Delta, the debtor continued paying pension benefits – qualified and non-qualified, pre-petition and post-petition – as they became due in the ordinary course of business. Only Delta has taken the unprecedented aggressive and extreme position on the first day of its bankruptcy filing not to pay them.³

This condemnatory factual assertion is either fantasy or perfidy. In fact, every one of the major legacy carriers in chapter 11 (United Airlines (“**UAL**”), U.S. Airways and Northwest Airlines) has, under well-established law, halted payment of some or all of the very pre-petition pension obligations that DP3 and FCI wrongfully seek to compel Delta to pay. None of their courts has disagreed. Moreover, DP3 misleadingly suggests to this Court that, unlike in all the other cases, qualified pension payments will cease to be made to retirees. This is, of course, untrue, as monthly qualified payments are and will continue to be made directly from the Qualified Plan to retirees even if Delta does not make pre-petition contributions to the Plan.

³ Notice of Motion and Memorandum of Law of DP3, Inc. to Compel the Continued Payment of Collectively Bargained for Pension Benefits to the Retired Pilots (“**DP3 Br.**”) at 1.

On September 12, 2004, the petition date of “USAir II,” U.S. Airways filed a “Wages and Employee Benefits” motion. Just like the equivalent first-day motion filed by Delta, neither contributions to defined benefit pension plans nor non-qualified pension benefits were among the payments U.S. Airways sought discretionary authority to continue. On the following day, U.S. Airways filed a motion expressly requesting permission to pay only those obligations to its qualified and nonqualified benefit plans that arose from post-petition accruals. (Ex. A at 12-13.) U.S. Airways did not in fact pay any pre-petition funding obligations to its qualified plans for the pendency of its bankruptcy, and, because the plans were ultimately terminated, the court apparently never ruled on whether U.S. Airways should have been required to make any such payments.

UAL, upon filing under chapter 11 in December 2002, initially sought and obtained permission from the bankruptcy court to pay, in its discretion, qualified and nonqualified pre-petition pension obligations. It too, like Delta (and U.S. Airways and Northwest Airlines), took the position that these were pre-petition claims not otherwise payable. On July 15, 2004 (as its financial need grew yet greater in the deteriorating operating environment), UAL ceased making all further qualified pension plan contributions. This nonpayment of pre-petition pension obligations provided in a CBA – the precise issue at bar – was squarely addressed and validated by Chief Judge Wedoff several months later. See infra pp. 33–34. The UAL court observed that “most of the reported decisions have held that a claim for breach of a collective bargaining agreement gives rise to an administrative expense only if the claim meets the requirements for administrative expense treatment under Sections 503 and 507.” Transcript of March 18, 2005 Omnibus Hearing at 63, In re UAL Corp., No. 02 B 48191 (Bankr. N.D. Ill.)

[hereinafter “UAL Oral Decision Tr.”]. Relying on Second Circuit and Third Circuit precedent, the UAL Court ruled that “[a] debtor-in-possession or trustee does not, quote, ‘modify,’ close quote, an executory contract by failing to make payment during bankruptcy of amounts that are due under the contract on account of pre-petition services.” UAL Oral Decision Tr. at 59–60 (citing, *inter alia*, Ionosphere II, 22 F.3d at 408).

Finally, Northwest Airlines, which also filed for chapter 11 reorganization on September 14, 2005 in the Southern District, did not make the approximately \$65 million qualified pension plan contribution due the very next day. Indeed, news reports have suggested that Northwest filed when it did precisely to avoid making this pre-petition pension contribution. *See, e.g.*, Mary Williams Walsh, Northwest’s Timing Made U.S. an Unsecured Creditor, N.Y. Times, Sept. 15, 2005, at C4 (attached as Ex. B).

DP3’s opening factual representation to this Court, that Delta’s approach is “unprecedented aggressive and extreme” and at odds with what has happened in “every other major airline bankruptcy” (DP3 Br. at 1), is patently false. All of the major airlines in chapter 11 have shared Delta’s understanding, and have acted upon that understanding of the well-established law. And none of their respective bankruptcy courts has disagreed.

Similarly, as detailed below, FCI’s primary legal assertion – that courts have adopted the “nearly unanimous view” that pre-petition pension obligations give rise to an exception to the Second Circuit’s definitive ruling that § 1113(f) does not elevate pre-petition obligations to superpriority status (FCI Br. at 3) – has no basis in law whatsoever. Not one case cited by FCI actually supports their contention that Ionosphere

II does not apply to pensions. Not one. Rather, FCI mostly cites to cases in the one circuit that has disagreed with Ionosphere II and made all CBA claims superpriority. The caselaw in the Second Circuit is clear and consistent. Like all other claims, pension payments coming due after the Petition Date must be examined, and split into their appropriate priority categories under § 507.

Finally, it is not surprising that the PBGC’s “Limited Response” is limited, and devoid of any case law and analysis. Courts have uniformly rejected the PBGC’s view that ERISA and the Internal Revenue Code bootstrap pension payments into superpriority payments and trump the priority scheme set forth in the Bankruptcy Code.

Relevant Facts

The Delta Pilots Retirement Plan, Amended and Restated As of July 1, 1996 (the “**Qualified Plan**”) (excerpts attached as Ex. C), is a tax-qualified defined benefit pension plan governed by the Employee Retirement Income Security Act of 1974 (“**ERISA**”). The Qualified Plan document sets forth formulae for calculating the pension benefits due to a Delta pilot on retirement (the “**Formula Benefit**”) on the basis of factors including age, salary, and years of service. See Qualified Plan §§ 5, 8.02(B), 8.03(G). As part of its obligation under the Pilot Working Agreement (“**PWA**”) ⁴ to “pay the entire cost of providing retirement benefits for Pilots derived from the [applicable] formulas,” PWA § 26 A.1 (attached as Ex. D), Delta makes “contributions [to the Qualified Plan] at reasonable periodic intervals, taking into consideration the

⁴ The PWA is Delta’s collective bargaining agreement with its pilots.

recommendation contained in the latest actuarial valuation” addressing the Plan’s short-term and long-term financial needs. Qualified Plan § 10.02.

The Internal Revenue Code of 1986 (the “**IRC**”) imposes limits on both the size of the payments that can be made under a qualified plan and the level of annual salary that can be taken into account under the plan’s benefit formula. See 26 U.S.C. § 415(b)(1)(A) (limiting annual benefits paid under a qualified plan to \$160,000); id. § 401(a)(17) (limiting the annual salary that can be taken into account to \$200,000).

Of Delta’s approximately 23,500 non-pilot retirees and survivors, fewer than 75 former senior executives are owed benefits that exceed these federal limits. Among Delta’s approximately 5,500 pilot retirees and survivors, approximately 3,775 are owed a Formula Benefit in excess of these ceilings. Because payment of the full Formula Benefit for these pilot retirees under the Qualified Plan would violate federal law, the PWA provides that the difference between the full Formula Benefit and the maximum that can be legally paid by a Qualified Plan will be paid by non-qualified plans (the “**Non-Qualified Plans**”). See PWA § 26 A.1. Unlike qualified pension benefits, which are paid by a separate juridical entity (namely, the trust required to be maintained for a qualified plan), benefits provided by the Non-Qualified Plans are paid to retirees by Delta itself, and any right to receive payments under these plans is “no greater than that of an unsecured general creditor of the company.”⁵

The Debtors’ obligations to make payments to retirees under the Non-Qualified Plan are of course 100% pre-petition in nature; retirees no longer work for the

⁵ Delta Pilots Bridge Plan, as amended and restated effective July 1, 1996 § 8; Delta Pilots Supplemental Annuity Plan, effective July 1, 1996 § 8.

company. In November 2004, Delta agreed with its pilots' union to severely reduce and in some cases eliminate further benefit accruals under the Qualified and Non-Qualified Plans effective December 31, 2004.⁶ Instead, the pilots negotiated for and got a substantially enhanced percentage of their salary put away for them each pay period as their pension benefit. Commencing on January 1, 2005, Delta has been providing pilots with an (average) 8% pay-as-they-work pension benefit.⁷ The Debtors' obligation to make contributions under the Qualified Plan is thus almost exclusively attributable to the pre-petition work of Delta pilots (or retired pilots) and correspondingly gives rise to pre-petition claims.

On September 14, 2005, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court. On the same day, Delta filed a first-day wages and benefits motion (the "**Wages and Benefits Motion**"). The Wages and Benefits Motion sought authority to pay contributions under the Qualified Plan and make payments under the Non-Qualified Plans only to the extent those contributions and payments were attributable to the post-petition services of Delta's employees. The Wages and Benefits Motion did not seek authority to pay Qualified Plan contributions and make Non-Qualified Plan payments to the extent attributable to pre-petition services (the "**Pre-Petition Pension Obligations**"), but stated that the Debtors would pay these

⁶ During these bankruptcy proceedings, some very small contributions to the Qualified Plan may come due, as post-petition salary increases of current pilots concomitantly raise their benefit levels. Delta agrees that these contribution amounts are administrative in nature.

⁷ See Letter of Agreement No. 46 between Delta Air Lines, Inc. and the Air Lines Pilots in the service of Delta Air Lines Inc. as represented by the Air Line Pilots Association, International, dated Nov. 11, 2004 (excerpts attached as Ex. E). Delta has honored every dollar of these promised pension benefits and will continue to do so unless and until the CBA is modified under § 1113.

obligations in a manner consistent with the priority scheme established by the Bankruptcy Code.

On September 23, 2005, DP3 filed the Motion seeking to compel Delta (i) to pay non-qualified to pre-petition retirees from Delta's own funds and (ii) to make funding contributions to the Qualified Plan exclusively attributable to pre-petition labor and benefits.⁸ On September 30, 2005, FCI, the independent fiduciary for the Qualified Plan, filed a response to the Motion, in which it supported DP3's position with respect to Qualified Plan contributions. On the same day, the PBGC filed its limited response to the Motion, also supporting the Motion.⁹

Argument

DP3 argues that Delta must pay the Pre-Petition Pension Obligations in cash in full when due because (i) § 1113(f) somehow trumps the priority scheme of § 507 and requires that all pre-petition claims arising from a CBA be accorded superpriority, and because (ii) provisions of ERISA and the IRC require that these payments be made. FCI, by contrast, argues that all pension-related obligations are entitled to administrative expense priority because (iii) pension obligations are somehow different than other

⁸ As the Wages and Benefits Motion made clear, Delta will of course honor all post-petition administrative claims arising under those Plans.

⁹ In their responses to DP3's Motion, both the PBGC and FCI assert that they are reserving their rights to supplement their pleadings or otherwise file subsequent pleadings seeking unspecified relief at a later date with regard to some or all of the issues raised in the instant motion. (See PBGC Br. ¶¶ 6-7 (arguing that the "timing and outcome of DP3's Motion should not preclude PBGC or other parties from seeking to compel Delta to make post-petition pension contributions under any other legal theory" and ostensibly reserving the right "to supplement this Response or file subsequent pleadings seeking further appropriate relief with respect to Delta's obligations to fund its Plans postpetition"); FCI Br. at 2 & n.3 (purporting to reserve the right "to supplement this Response or bring its own motion to determine the priority of pension plan funding obligations, compel payments, determine the amount due to the Pilot's Plan or to file any other appropriate pleading with this bankruptcy court concerning the Pilot's Plan").) The Debtors are aware of no authority – nor has the PBGC or FCI cited any – permitting a party to litigate an issue, lose, and then return for a second bite of the proverbial apple at a later date.

claims for pre-petition employee benefits, and are entitled to administrative expense status so long as the actual payment obligation happens to come due post-petition, regardless of when the underlying entitlement was earned or accrued.

Each of these arguments is meritless, and has been repeatedly rejected by many courts. First, the Second Circuit has definitively held that the prioritizing of benefit claims as set forth in § 507 (with only true post-petition claims receiving priority, post-petition payment) does not violate – indeed does not even implicate – § 1113(f)'s prohibition against unilateral termination or alteration of any provisions of a CBA. The Code's prioritizing of claims is not a debtor's “unilateral modification” of a contract. Second, while the provisions of ERISA and the IRC may determine the extent of the Debtors' substantive liability, it has been near universally held that the Bankruptcy Code alone determines the priority of those claims in bankruptcy. Finally, the special rule that FCI purports to identify that would exclude collectively bargained pension-related obligations from the scope of Ionosphere II simply does not exist, as courts have repeatedly recognized that pension obligations are subject to the priority scheme of § 507.

I. Section 1113 of the Bankruptcy Code

To better understand why § 1113 does not accord superpriority to Pre-Petition Pension Obligations as DP3 and FCI claim, it is important to understand what § 1113 in fact accomplishes. Section 1113 of the Bankruptcy Code was enacted by Congress in response to the Supreme Court's decision in NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), and “the events that took place in Bildisco are representative of the ill that Congress sought to cure in enacting § 1113.” Shugrue v. Air Line Pilots Ass'n, Int'l (“Ionosphere I”), 922 F.2d 984, 990 (2d Cir. 1990). The Bildisco opinion was

comprised of two parts: In the first part, a unanimous Court recognized that “[t]he traditional business judgment standard governs the rejection of ordinary executory contracts,” but devised a “more stringent” equitable standard for rejection of a collective bargaining agreement. Century Brass Prods., Inc. v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (In re Century Brass Prods., Inc.), 795 F.2d 265, 271–72 (2d Cir. 1986).

Section 1113 of the Code was enacted with the aim of “revers[ing] the second part of Bildisco,” Century Brass, 795 F.2d at 272, in which a sharply divided Court “held that a debtor in bankruptcy, prior to obtaining judicial approval to reject the collective bargaining agreement, may unilaterally terminate or modify provisions of the agreement without committing an unfair labor practice under either § 8(a)(5) or § 8(d) of the NLRA.” Id. (citing Bildisco, 465 U.S. at 534). Neither the majority nor the dissent ever even suggested that pre-petition claims arising from an unassumed CBA should be accorded administrative expense priority. Rather, the controversy in Bildisco concerned whether claims arising from employees’ post-petition services should accrue on the basis of the reasonable value of those services (as the majority held), or on the basis provided in the CBA (as the dissent contended). Compare Bildisco, 465 U.S. at 532 (holding that, once a bankruptcy petition has been filed, “the collective-bargaining agreement is not an enforceable contract”), with id. at 545–46 (Brennan, J., concurring in part and dissenting in part) (“[A]ny compensation earned by and payable to the employee under the contract after the petition is filed is a first priority administrative expense.” (emphasis added and internal quotation marks omitted)).

Section 1113 affects the treatment of CBAs in two important ways. First, § 1113 makes it harder to reject a CBA than it is to reject other types of contracts, where a liberal “business judgment” standard usually governs. It imposes procedural and substantive requirements on the parties akin to “an expedited form of collective bargaining with several safeguards,” and permits a debtor to apply for rejection of a CBA only if expedited bargaining fails, at which point “a modified version of the unanimously decided first part of Bildisco applies.” Century Brass, 795 F.2d at 272.

Second, in the period from the petition date until the actual assumption or rejection of a CBA by court order, § 1113(f) alters the status of a CBA as compared to many other types of executory contracts. Ordinarily, “[i]f 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 [only] the reasonable value of those services,” not the rates set forth in the contract for the post-petition services provided. Mason v. Official Comm. of Unsecured Creditors (In re FBI Distribution Corp.), 330 F.3d 36, 43 (1st Cir. 2003) (emphasis added) (quoting Bildisco, 465 U.S. at 531).

Section 1113(f) (just like §§ 1110(a)(2) and 365(d)) varies this general rule, and mandates that the debtor pay what the contract actually requires – not “reasonable value” – for post-petition services actually provided under a CBA. As the Bankruptcy Court for the Central District of Illinois recently elaborated:

[T]o the extent the union employees provide post-petition services to the debtor-in-possession, whatever compensation for those services that accrues under the CBA is entitled to administrative priority, without being subject to reduction. In other words, to the extent the union members establish a valid claim to administrative priority status, the amount of the

priority claim is equivalent to the entire compensation package provided for by the terms of the CBA, to the extent earned on account of the postpetition services, without regard to reasonableness. The debtor-in-possession or trustee does not have the option, for example, of paying a reduced wage rate or of excising extra items of compensation such as holiday pay or vacation pay, that are above and beyond the minimalist formula of a day's wage for a day's work.

In re Fleming Packaging Corp., No. 03-82408, 2004 Bankr. LEXIS 1384, at *11–12 (Bankr. C.D. Ill. Aug. 31, 2004) (citations omitted and emphasis supplied); see also In re Colorado Springs Symphony Orchestra Ass'n, 308 B.R. 508, 517 (Bankr. D. Colo. 2004) (“Where the consideration called for in the collective bargaining agreement is provided to the debtor-in-possession, post-petition, then the compensation called for in the collective bargaining agreement, and related to those post-petition services, is given administrative expense treatment. In that way, the courts respect the language of § 1113(f) that binds a debtor-in-possession to the terms of its collective bargaining agreement and also faithfully adhere to the payment priorities set out in §§ 503 and 507.”).

Should the terms on which post-petition claims accrue under the CBA prove unduly onerous, § 1113(e) authorizes the modification of the terms on an interim basis if “essential to the continuation of the debtor’s business, or [necessary] to avoid irreparable harm to the estate.” Indeed, every one of the cases cited by DP3 on page 9 of its memorandum of law involved interim modifications to the terms on which post-petition claims would accrue.¹⁰ Not one addressed pension rights earned pre-petition. Accordingly, none of these cases has any bearing on the issue sub judice.

¹⁰ See, e.g., In re United Press Int’l, Inc., 134 B.R. 507, 510, 514 (Bankr. S.D.N.Y. 1991) (elimination of administrative severance pay to employees laid off post-petition); In re Horsehead Indus., Inc., 300 B.R. 573, 580 (Bankr. S.D.N.Y. 2003) (reduction in hourly wages, revised profit sharing plan that reduced or eliminated the debtors’ contribution, and elimination of retiree medical benefits accorded administrative expense priority by § 1114(e)(2)); In re Hoffman Bros. Packing Co., Inc., 173 B.R. 177, 185 (9th Cir. B.A.P. 1994) (health insurance and pension obligations attributable to employees’ post-petition

II. Ionosphere II Directly Holds that § 1113(f) Does Not Displace the Priority Scheme of § 507(a)

In Ionosphere II, the Second Circuit, consistent with the analysis above, held that vacation pay accrued pre-petition by employees under an unassumed CBA was not entitled to administrative expense priority on account of § 1113(f). See Ionosphere II, 22 F.3d at 407–08. Indeed, the Second Circuit framed the question on appeal almost verbatim to the request of the movants here: “On appeal, the Unions contend that section 1113(f) of the Code supersedes the priority scheme of section 507” Id. at 405. The Ionosphere II court held (and explained itself at length) that claims for collectively bargained benefits must only be accorded the priority they would otherwise be due under § 507 of the Bankruptcy Code: Benefit claims arising under a CBA are to be “**accorded first-priority status as administrative expenses only to the extent . . . attributable to postpetition work.**” Id. at 408 (emphasis added). Claims for services rendered pre-petition, however, are not entitled to administrative priority. See id. at 405.

None of the pension claims at issue here do – or could – relate to “post-petition work” – our circuit’s express and absolute prerequisite for administrative status.

There is, it bears mention, a case that interprets § 1113(f) exactly as DP3 and FCI do. In United Steelworkers of Am. v. Unimet Corp. (In re Unimet Corp.), 842 F.2d 879 (6th Cir. 1988), the Sixth Circuit endorsed the position that DP3 and FCI now advance – that § 1113(f) overrides § 507 and grants superpriority to pre-petition claims

labor); Beckley Coal Min. Co. v. United Mine Workers of America, 98 B.R. 690, 691 (D. Del. 1988) (administrative severance benefits paid to employees laid off post-petition); In re Salt Creek Freightways, 46 B.R. 347, 351 (Bankr. D. Wyo. 1985) (employer granted interim relief to eliminate all payments to pension fund and health and welfare fund – including payments attributable to post-petition labor); In re Evans Products Co., 55 B.R. 231, 233–34 (Bankr. S.D. Fla. 1985) (authorizing reduction in average hourly cost per union employee).

for collectively bargained benefits. Our circuit, however, considered and expressly rejected Unimet's erroneous interpretation of § 1113(f). See Ionosphere II, 22 F.3d at 408 (“To the extent that Unimet can be read in this manner, it is inconsistent with our analysis in Ionosphere I and we reject it.”).

Moreover, the vast majority of courts have embraced Ionosphere II, and rejected Unimet – ruling that § 1113(f) simply has no bearing on pre-petition claims such as those at issue and assuredly does not compel their payment. See, e.g., Jordan v. Rayman, Martin & Fader, Inc. (In re Rayman, Martin & Fader, Inc.), 170 B.R. 286, 291 (D. Md. 1994); In re Chateaugay Corp., 130 B.R. 690, 700 n.13 (S.D.N.Y. 1991), opinion withdrawn and vacated as moot, No. 90 Civ. 6048 (KTD) (S.D.N.Y. Jun 16, 1993); Fleming, 2004 Bankr. LEXIS 1384, at *11–12; In re Certified Air Techs., 300 B.R. 355, 369 (Bankr. C.D. Cal. 2003); Int’l Bhd. of Teamsters v. Kitty Hawk Int’l, Inc. (In re Kitty Hawk, Inc.), 255 B.R. 428, 436 (Bankr. N.D. Tex. 2000); In re Family Snacks, Inc., 249 B.R. 915, 922 (Bankr. W.D. Mo. 2000); Barto Tech. Serv. v. Persons Listed on Exhibit A-I of the Objection (In re Wean, Inc.), 171 B.R. 528, 531 (Bankr. W.D. Mo. 1993); In re Moline Corp., 144 B.R. 75, 79 (Bankr. N.D. Ill. 1992); In re Armstrong Store Fixtures Corp., 135 B.R. 18, 22 (Bankr. W.D. Pa. 1992); Shipwrights, Joiners & Caulkers Local 2071 v. Uniflite, Inc. (In re Murray Indus., Inc.), 110 B.R. 585, 589 (Bankr. M.D. Fla. 1990), vacated as moot, 140 B.R. 298 (M.D. Fla. 1992).

Indeed, even within the Sixth Circuit, where Unimet remains binding precedent, courts have subjected the decision to stinging criticism and followed it only as a matter of unavoidable judicial obligation. See, e.g., In re Typocraft Co., 229 B.R. 685, 690–91 (Bankr. E.D. Mich. 1999) (criticizing the conclusion “that § 1113(f) creates its

own priority as to covered CBA obligations, whether pre- or post-petition” as a result based on “questionable logic” that is “not necessarily called for by the statute and rules in question,” but nonetheless adhering to this conclusion because “the language of Unimet dictates” that result).

The Second Circuit based its thoroughly-reasoned and widely-followed decision on multiple grounds, including (i) “the axiom of statutory interpretation that, ‘when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective,’” Ionosphere II, 22 F.3d at 407; (ii) the Bankruptcy Code’s theme of equality of distribution, id. at 408; and (iii) the related presumption that “[w]hen Congress . . . intend[s] to alter the general priority scheme, it . . . do[es] so explicitly,” id.

A. The Duty of Courts to Regard Statutes Capable of Co-Existence As Effective

In concluding that § 1113(f) does not override the detailed priority scheme of § 507, the Second Circuit invoked the “axiom of statutory interpretation that, ‘when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.’” Id. at 407 (quoting Ionosphere I, 922 F.2d at 991 (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976))). The Second Circuit determined that §§ 507 and 1113 were easily capable of co-existence: Section 1113(f) obligates debtors-in-possession to pay what is contractually mandated for post-petition services; it purports neither to specify the priority for the various types of claims arising under a CBA nor to dictate when such claims should be paid. See id. at 407. Conversely, while § 507 establishes the priority of claims, “it does not affect the underlying obligation.” Id. at 407. In the court’s own words:

Judicial ordering of benefit claims pursuant to § 507 is not equivalent to employer avoidance of obligations under a collective bargaining agreement. The collective bargaining agreement is respected, but the financial obligations issuing from it are accorded priority consistent with the Bankruptcy Code. Moreover, application of the priority scheme does not conflict with the purpose of section 1113.

Id. at 407 (internal quotation marks and citation omitted and emphasis supplied).

B. Equality of Distribution

The Second Circuit also relied on the Bankruptcy Code’s “theme of . . . equality of distribution.” Id. at 408 (quoting Nathanson v. NLRB, 344 U.S. 25, 29 (1952)). The statutory theme of equality of distribution finds its most prominent expression in § 507, which embodies a “careful balancing of competing policies.” Id. at 408. Section 507(a) of the Code, the court explained, “is intended to be the exclusive list of priorities in bankruptcy” and courts should be “loath to create a class of claims with superpriority status absent express statutory authority.” Id. (emphasis added).

Indeed, § 507(a) of the Code creates a finely reticulated priority scheme for expenses and claims, specifically including employee wage and benefit claims. As recently amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08, 119 Stat. 23, § 507(a) defines ten different classes of claims, each class delineated with considerable specificity. The new § 507(a)(4) creates a fourth priority for wages, salaries or commissions, including vacation, severance, and sick leave pay, up to \$10,000 per individual, provided that the amounts are earned within 180 days before the earlier of the filing of the petition or the date of the cessation of the debtor’s business. The new § 507(a)(5), a companion provision to § 507(a)(4), creates a fifth priority for contributions to an employee benefit plan, up to \$10,000 per individual, to the

extent the contributions arise from services rendered within 180 days before the earlier of the filing date of the petition or the date of the cessation of the debtor's business.

The comprehensive character of the priority scheme created by § 507(a), and the specificity with which that section delimits each class of claims entitled to priority, supports the well-established requirement that exceptions to this scheme be explicit. Section 1113, which only proscribes unilateral termination or modification of a CBA's provisions, can hardly qualify in this respect. The Second Circuit and almost every other court to have addressed the issue have therefore held that had Congress sought to create a special superpriority for all claims, pre- or post-, arising under a CBA, it would have expressed this intent very differently and with ever so much more clarity than § 1113(f). This, of course, comports perfectly with decades-old blackletter law. As the Supreme Court held in Nathanson v. NLRB, 344 U.S. 25 (1952), "if one claimant is to be preferred over others, the purpose should be clear from the statute." Id. at 29.

The implausibility of § 1113(f) somehow creating a superpriority for all pre-petition benefits provided in a CBA is only compounded by the overlap between the employee benefits for which § 507(a) long ago created discrete and limited priority tiers, and the employee benefits that are invariably the subject of collective bargaining. It is simply unthinkable that Congress would have intended to create, sub silentio, an unlimited first superpriority for collectively bargained pension benefits, in light of its express decision to create only fifth priority (of exactly \$10,000) for the very same thing – contributions to employee benefit plans. See 11 U.S.C. § 507(a)(5) (as amended). Indeed, Congress's focus earlier this year on § 507(a)(5), increasing the priority amount for employee benefit contributions from \$4,925 to \$10,000 per covered employee (and

having the change be one of the very few that was immediately effective), further crystallizes that Congress could not and did not somehow intend to simultaneously grant unlimited superpriority for such claims under § 1113(f).¹¹

C. When Congress Has Sought to Alter the General Priority Scheme of § 507, It Has Done So Explicitly

DP3's argument is further built on the proposition, contained in the very first sentence of its "Argument and Citation of Authority," that "Section 1113, as construed by the Second Circuit, requires protections for pension benefits provided to retirees pursuant to a collective bargaining agreement similar to the protections provided for other retiree benefits by § 1114." (DP3 Br. at 5 (emphasis added).)

DP3's statement of law to this Court is remarkable in that it is literally the diametric opposite of the Second Circuit's actual, direct statement on the subject. In Ionosphere II, the Second Circuit held that "Section 1113 does not address the priority to be accorded claims arising from a debtor's obligations under a CBA," observing that "[w]hen Congress has intended to alter the general priority scheme [of § 507] it has done so explicitly." Id. at 408. The very example cited by the Second Circuit to illustrate why § 1113 could not reasonably be construed to accord administrative priority was "section 1114(e)(2)[, which unlike § 1113] expressly confers upon retiree benefits owed by the debtor the status of an allowed administrative expense." Id.

Exactly as noted by the Second Circuit (and by the Third Circuit in In re Roth American, Inc., 975 F.2d 949 (3d Cir. 1992), and many other courts), juxtaposing

¹¹ See Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

§ 1113 with § 1114 supplies irrefutable evidence that § 1113 was not intended to elevate pre-petition collectively bargained obligations to administrative or superpriority expenses. Section 1113 says absolutely nothing about when CBA claims are to be paid or what priority they are to be afforded. In stark contrast, § 1114 (governing contractually promised retiree health and medical benefits, not pension claims) expressly addresses matters of timing and priority. Section 1114(e)(1), just like § 1113(f), provides that “[n]otwithstanding any other provision of this title, the debtor in possession . . . shall not modify any retiree benefits.” 11 U.S.C. § 1114(e)(1) (emphasis added). Critically, however, and very differently from § 1113(f), the text of § 1114(e) continues, with additional rules not found, or even hinted at, in § 1113. Section 1114 goes on to say that debtors in possession “shall timely pay” all such benefits and that “[a]ny payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.” 11 U.S.C. § 1114(e) (emphasis added). There is, of course, no analog to these provisions in § 1113. Thus, § 1114 removes any possible doubt that when Congress intends to grant administrative expense status to benefit claims, it does so with specificity and precision.

Many courts have joined the Second Circuit in ruling that the clarity of § 1114(e) with respect to the administrative priority status conferred on health and medical benefits imbues great meaning to the deafening silence of § 1113 with respect to CBA claims, and further buttresses the Second Circuit’s observation that “[w]hen Congress has intended to alter the general priority scheme, it has done so explicitly.” Ionosphere II, 22 F.3d at 408; In re Roth American, Inc., 975 F.2d at 956 (making the

same observation). As many courts have noted, had Congress intended for § 1113 to create a similar superpriority for all pre-petition wage and benefit claims arising under a CBA, it would have either incorporated language similar to that of § 1114(e) into § 1113 or else amended § 507 to reflect this intent. See In re Certified Air, 300 B.R. at 369; see also id. at 367 n.23 (“The explicit language and the legislative history of § 1114 stand in stark contrast to the absence of any such language in § 1113. The fact that Congress failed to include similar language in § 1113, which would have created an exemption for immediate payment of any wages or benefits due under a collective bargaining agreement, is evidence that Congress did not intend § 1113 to be exempt from the operation of other sections of the Code, including the priorities set forth in § 507(a).” (internal quotation marks omitted)); UAL Oral Decision Tr. at 64 (noting that § 1114(e)(2), which contains language expressly mandating the payment of pre-petition claims, “contrasts pointedly” with § 1113, which is devoid of such language, and concluding on this basis that Congress could not have intended § 1113 to disrupt the Bankruptcy Code’s general priority scheme).¹²

III. The Efforts of DP3 and FCI to Skirt Ionosphere II Must Fail

Confronted with directly controlling precedent that definitively forecloses any argument that § 1113(f) accords superpriority status to Pre-Petition Pension Obligations, DP3 and FCI respond with a number of “creative” efforts to distinguish Ionosphere II and its many progeny:

¹² Section 1110 provides yet another example of the fact that when Congress chose to override the priority scheme of § 507 and require the full payment of pre-petition claims during the period prior to assumption or rejection, it did so with care and specificity. Like § 1113, § 1110 imposes additional requirements on debtors deciding to assume or reject a specific type of (statutorily favored) contract. Unlike § 1113, however, § 1110 expressly mandates the payment of all pre-petition claims as the price of preserving the assumption/rejection option. See 11 U.S.C. § 1110(a)(2)(B)(1).

- DP3 contends (in a theory never-before aired by court or commentator) that the holding of Ionosphere II is inapplicable outside the rare context of a liquidating chapter 11 case. (See DP3 Br. at 12–14.)
- DP3 also argues that (although Delta has neither sought to assume the Pilots Working Agreement nor sought this Court’s approval for any such assumption) Delta should be deemed to have constructively assumed the CBA, making all possible claims thereunder administrative. (See DP3 Br. at 15–18.)
- FCI, by contrast, concedes that Ionosphere II is generally applicable to claims arising from a CBA, but contends that claims for collectively bargained pension benefits are specially exempt from Ionosphere II’s otherwise broadly applicable holding. (See FCI Br. at 8.)

All of these arguments must fail. As discussed below,

- Ionosphere II applies with equal force to reorganizing and liquidating chapter 11 cases and no court has ever held to the contrary.
- A debtor could not, and does not, “constructively assume” a CBA. In fact, constructive assumption does not exist in this jurisdiction.
- Ionosphere II draws no distinction between pension and non-pension benefits, and no court in any judicial circuit has ever so distinguished it. The cases FCI cites purporting to constitute a “nearly unanimous” rule that pension contributions due post-petition must be accorded administrative expense priority (FCI Br. at 3) are cases that have followed Unimet (and which are not good law in the Second Circuit) or are blatantly mischaracterized and have no relevance to the issue sub judice.

A. Ionosphere II Applies with Equal Force to Liquidating and Reorganizing Chapter 11 Cases

The Second Circuit in Ionosphere II nowhere suggested that its holding was limited to liquidating chapter 11 cases, or that the distinction between a liquidating and reorganizing case had any relevance whatsoever to its decision. Indeed, none of the rationales on which the Second Circuit rested its decision is applicable only in the context of a liquidating case: The duty of courts to reconcile statutes capable of coexistence; the Bankruptcy Code’s theme of equality of distribution; and the presumption that when Congress intends to alter the general priority scheme, it does so explicitly, all apply with

equal force in both liquidating and reorganizing chapter 11 cases. Moreover, DP3 fails to cite any judicial precedent or other authority – not one case, not even one article – that has ever endorsed its radical “reinterpretation” of Ionosphere II.

Lacking support for its reorganizing/liquidating distinction, DP3 culls two scraps of dictum from the opinion of the district court – not the Second Circuit – in Ionosphere II, strips them of their context, and creates a misleading impression that the district court somehow intended to limit its holding to liquidating cases. (See DP3 Br. at 13.) DP3’s proposal to limit a precedent of the Second Circuit based on dictum extracted from the opinion of the district court it affirmed is a “novel” hermeneutic approach, highly questionable in and of itself.

This unorthodox interpretive technique is particularly inappropriate here, as DP3 mischaracterizes the import of the passages it cites. Even the cited scraps of dicta, when read in context, militate against granting DP3 the relief it seeks. The district court, in stating that “an important distinction [exists] between reorganizing and liquidating bankruptcies,” In re Ionosphere Clubs, Inc., 154 B.R. 623, 629–30 (S.D.N.Y. 1993), sought only to emphasize that § 1113 is principally concerned with the prospective alteration of the provisions of a CBA (which can only occur in a reorganizing context), not with the priorities assigned to employment-related obligations. As the district court explained in the very same paragraph, “§ 1113 governs only the conditions under which a Debtor-in-Possession may modify or reject a collective bargaining agreement, but . . . the payment of employment-related prepetition obligations is governed exclusively by § 507.” Id. at 630 (emphasis added and internal quotation marks omitted) (quoting Shipwrights, Joiners & Caulkers Local 2071 v. Uniflite, Inc. (In re Murray Indus., Inc.),

110 B.R. 585, 588 (Bankr. M.D. Fla. 1990), vacated as moot, 140 B.R. 298 (M.D. Fla. 1992)).

DP3 also cites the district court's remark that it was not faced "with the concern . . . about an operating debtor offloading continuing financial obligations to former employees as part of a reorganization." Id. at 630. The district court explained, however, that that concern is material only where a debtor "d[oes] not want to pay [its obligations to former employees] at all, in any order of priority." Id. at 629. The district court concluded that no such concern is present where a debtor – like the Debtors in this case – "will pay [its obligations], but under the priority scheme set out by the Code." Id.

Finally, and perhaps most importantly, no case law supports the distinction DP3 attempts to draw between liquidating and reorganizing cases. Not one court has ever opined that Ionosphere II is limited, or should be, to liquidations. To the contrary. Numerous courts, including the bankruptcy court presiding over the UAL bankruptcy case, have applied the principles of Ionosphere II in cases involving reorganizing chapter 11 debtors. See, e.g., Jordan v. Rayman, Martin & Fader, Inc. (In re Rayman, Martin & Fader, Inc.), 170 B.R. 286, 291 (D. Md. 1994); In re Moline Corp., 144 B.R. 75, 79 (Bankr. N.D. Ill. 1992) (holding that, as a debtor-in-possession that "fail[s] to make payments when due . . . has neither altered nor terminated the collective bargaining agreement," § 1113(f) should not operate to compel the debtor's immediate payment of benefits provided for therein), appeal denied, 1992 U.S. Dist. LEXIS 14202 (N.D. Ill. 1992); In re Chateaugay, 130 B.R. at 700 n.13.

B. Ionosphere II Applies to Pre-Petition Pension Obligations

FCI, for its part, also argues that Ionosphere II is inapplicable here, albeit for different reasons. Whereas DP3 insists that the Second Circuit, in deciding Ionosphere II, sub silentio intended to limit the scope of its decision to liquidating chapter 11 cases, FCI insists that claims for pension obligations are specially exempt from the holding of Ionosphere II. (FCI Br. at 10 (purporting to draw a “distinction between pension obligations due under a collective bargaining agreement and other benefits due under a collective bargaining agreement”).) Indeed, FCI even purports to have discerned a “nearly unanimous view” among courts “that pension obligations under a collective bargaining agreement will, until section 1113 rejection or modification, be treated as consideration for current labor and will therefore receive administrative expense priority.” (FCI Br. at 3–4.)

This “nearly unanimous view” is a pure fiction. The case law FCI collects as support for this “unanimous view” comprises a motley assortment of precedents from jurisdictions following Unimet (which has been rejected by the Second Circuit) and grossly mischaracterized cases from other jurisdictions. Indeed, simply reading each of the precedents FCI cites demonstrates that no court in any judicial circuit has ever even articulated the supposedly “unanimous view” that pension obligations are specially exempt from the otherwise applicable holding of Ionosphere II. FCI not only fails to marshal any precedents supporting its “nearly unanimous view,” but also fails to demonstrate how that “view” would even comport with basic logic. Ultimately, FCI’s failure on both scores requires this Court to reject FCI’s view that § 1113 (silently) accords claims for collectively bargained pre-petition pension obligations – but no other

claims for pre-petition collectively bargained benefits – administrative or superpriority status.

As a threshold matter, it is well-established in this judicial circuit and in others that “[a] debt is not entitled to priority simply because the right to payment arises after the debtor-in-possession has begun managing the estate.” Trustees of Amalgamated Ins. Fund v. McFarlin’s, Inc., 789 F.2d 98, 101 (2d Cir. 1986). Rather, “an expense is administrative only if it arises out of a transaction between the creditor and the bankrupt’s trustee or debtor in possession, and ‘only to the extent that the consideration supporting the claimant’s right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.’” Id. at 101 (citations omitted) (quoting In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976)).

Retirees, of course, do not, and could not, provide current consideration to the estates beneficial to the “operation of the business.” Thus, the non-qualified benefits are 100% pre-petition in nature, the funding contributions to the Qualified Plan nearly so. Under the standards articulated in Amalgamated and Mammoth Mart – that an expense must both arise post-petition and be on account of a benefit supplied to the debtor post-petition – Delta’s pre-petition funding obligations cannot be deemed administrative expenses.

Both DP3 and FCI insist, however, that the rules that generally govern the extent to which an expense is administrative are somehow inapplicable to claims for minimum funding contributions to qualified defined benefit pension plans. In their view, pension funding obligations attributable to pre-petition services should nonetheless be treated as administrative expenses because (i) the IRC and ERISA require that these

payments be made; (ii) courts have regarded pension funding obligations as constituting an exception to the Second Circuit’s Amalgamated standard; and (iii) even if claims for missed funding obligations would ordinarily be entitled to administrative priority only to the extent they were attributable to post-petition services, courts have expressed a “nearly unanimous view” that funding obligations arising under a CBA are entitled to administrative priority. Each of these assertions is patently wrong.

1. The Bankruptcy Code, Not the IRC or ERISA, Determines the Priority of Pension Funding Obligations

DP3 and the PBGC briefly suggest (with no citation to case law) that the IRC and ERISA require this Court to grant superpriority to all claims for minimum funding contributions, and that, in light of ERISA and the IRC, the Debtors should be forced to pay all of these pre-petition claims when “due.” (See DP3 Br. at 10; see also PBGC Br. ¶ 6.) DP3 states that “neither the Internal Revenue Code nor ERISA permit an employer to segregate charges to the pension funding standard account that accrue during the plan year for purposes of determining its liability to a pension plan” and that “[u]nder the controlling substantive law, the obligation to contribute encompasses the full amount necessary to maintain the plan, regardless of when the employees performed the service to earn their benefits.” (DP3 Br. at 10.)

The inability of DP3 or the PBGC to muster even a single citation in support of this assertion is unsurprising when the actual contours of the “controlling substantive law” are examined. In fact, it is well-settled law that the Bankruptcy Code – not the IRC or ERISA – determines the priority of minimum funding contribution claims in bankruptcy. See PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman), 126 F.3d 811, 818 (6th Cir. 1997) (“It is well established that the Bankruptcy Code, not ERISA,

determines the priority of claims against a bankruptcy estate. Thus, regardless of the substantive law on which the claim is based, the proper standard for determining that claim's administrative priority looks to when the acts giving rise to a liability took place, not when they accrued."); see also PBGC v. CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators of Utah, Inc.), 150 F.3d 1293, 1298 (10th Cir. 1998) (same); UAL Oral Decision Tr. at 60 (rejecting the argument that "the obligation to make [minimum funding] contributions is a unitary one that cannot be divided between benefits earned pre-petition and those earned post-petition"). There simply is no authority for the proposition that ERISA or the tax code somehow elevate pre-petition unsecured claims to superpriority, immediate cash pay status. There are, however, scores of cases to the contrary.

2. Pension Obligations Are Not an Exception to the Amalgamated Standard that Determines Whether Expenses Are Administrative

FCI next proposes that claims for pension funding contributions are entitled to treatment as administrative expenses even if those claims are wholly attributable to pre-petition services. In particular, FCI argues that pension contributions payable post-petition "are earned by post-petition work, unlike vacation pay and similar benefits earned pre-petition." (FCI Br. at 9.) This is simply untrue.

As an initial matter, as discussed above, the pension plans at issue here were all-but frozen almost nine months ago. Accordingly, almost no new benefits could ever even accrue for work performed post-petition. Rather, since January 1, 2005, active pilots have been receiving a percentage of their pay each pay period as their new accruing pension benefit for their current services, which Delta has been and is continuing to pay.

In addition, aside from an unpublished district court opinion (discussed infra pp. 39–43), FCI cites two cases as “authority” for the proposition that pension funding obligations are somehow treated differently than all other claims for employee benefits and afforded special priority status. (FCI Br. at 13.) The first case is entirely irrelevant and the second case has been rejected as incompatible with Second Circuit precedent.

FCI first “cites” Alabama Power Co. v. Davis, 431 U.S. 581 (1977), a case construing the Military Selective Service Act that has absolutely nothing to do with bankruptcy or the priority of pension claims. The second case, Columbia Packing Co. v. PBGC, 81 B.R. 205 (D. Mass. 1988), does hold that minimum funding obligations are entitled to administrative status in their entirety. It may be the only case ever to have done so. However, as Judge Lifland recognized long ago, “the Columbia Packing decision cannot be reconciled with the Second Circuit’s holding in Trustees of Amalgamated Ins. Fund v. McFarlin’s, Inc., . . . which . . . established that the resolution of the administrative priority issue essentially turns on when the debtor’s employees provided labor in consideration for receiving pension benefits from the debtor.” LTV Corp. v. PBGC (In re Chateaugay Corp.), 115 B.R. 760, 777 (Bankr. S.D.N.Y. 1990), aff’d, 130 B.R. 690 (S.D.N.Y. 1991), opinion withdrawn and vacated as moot, No. 90 Civ. 6048 (KTD) (S.D.N.Y. Jun 16, 1993).

FCI’s inability to provide any other authority is unsurprising, as bankruptcy courts in this district and virtually all courts outside it 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.” In re Finley, Kumble, Wagner, Heine, Underberg,

Manley, Myerson & Casey, 160 B.R. 882, 890 (Bankr. S.D.N.Y. 1993) (holding that to the extent “the obligation to pay minimum funding requirements relates to prepetition labor by Debtor’s employees” it “is a prepetition debt not entitled to priority”); see also In re Sunarhauserman, 126 F.3d at 820; In re CF&I Fabricators, 179 B.R. at 708 (holding that minimum funding claims are pre-petition in character except for the small fraction that relate to actual post-petition work of post-petition employees); In re Kent Plastics Corp., 183 B.R. 841, 847 (Bankr. S.D. Ind. 1995) (same); Chateaugay, 115 B.R. at 776–78 (emphasizing that “the resolution of the administrative priority issue essentially turns on when the debtor’s employees provided labor in consideration for receiving pension benefits from the debtor”).

Ultimately, FCI appears to concede that claims for pension contributions are entitled to administrative expense status only to the extent they are attributable to post-petition services. (FCI Br. at 15–16 (apparently conceding that Chateaugay, 130 B.R. 690 (S.D.N.Y. 1991), Sunarhauserman, 126 F.3d 811 (6th Cir. 1997), CF&I Fabricators, 150 F.3d 1293 (10th Cir. 1998) and Amalgamated, 789 F.2d 98 (2d Cir. 1986) were each correctly decided, but distinguishing each on the basis that it did not involve claims arising from a CBA).)

3. Collectively Bargained Pension Funding Obligations Are Not Exempt from the Priority Scheme of § 507

In an effort to salvage its untenable position, FCI attempts to suspend the rules of law and logic and alchemistically argue that $0 + 0 = 2$. As noted above, FCI concedes (as it must) that pension contributions are entitled to administrative expense status only to the extent actually attributable to post-petition work. (Zero number one.) FCI also concedes that, in this circuit, § 1113(f) of the Code does not entitle all

obligations arising from a collective bargaining agreement administrative priority or superpriority. Instead, as Ionosphere II makes clear, obligations arising from a CBA are entitled to administrative priority only to the extent they are attributable to post-petition services. (See FCI Br. at 11–12 & n.9 (citing numerous cases that have held that § 1113(f) does not displace the priority scheme established by § 507).) (Zero number two.)

Adding zero and zero together, it would seem to follow that § 1113(f) could not possibly accord pre-petition pension-related claims administrative priority or superpriority. FCI, however, insists this is not so, although it never supplies any cogent explanation to the Court as to why collectively bargained pension obligations should be accorded treatment that is unquestionably denied to (i) pension obligations, and (ii) obligations for collectively bargained benefits generally. Instead, FCI posits that this is the “nearly unanimous view.”

All of the cases that FCI cites in support of its “nearly unanimous view” that pension benefits have been found to be a special exception to the rule of law articulated in Ionosphere II and Roth American are cases from other circuits that embrace the Sixth Circuit’s decision in Unimet and, therefore, reject our circuit’s decision in Ionosphere II in toto. Not one of them stands for the cited proposition of a special pension exception to Ionosphere II’s dictates. See In re Acorn Bldg. Components, Inc., 170 B.R. 317, 318, 321 (E.D. Mich. 1994) (following Unimet and compelling debtor to pay pre-petition wages and benefits (including vacation pay and holiday pay)); In re WCI Steel, Inc., 313 B.R. 414, 418 (Bankr. N.D. Ohio 2004) (holding that Unimet requires compliance “with all provisions of a collective bargaining agreement . . . requiring the

debtor to make payments on account of pre-petition obligations” (emphasis added)); In re Arlene’s Sportswear, Inc., 140 B.R. 25, 28 (Bankr. D. Mass. 1992) (requiring debtor to make payments into a holiday trust fund and holding that “claims arising out of a collective bargaining agreement may be granted priority status regardless of whether they meet the requirements of 11 U.S.C. § 503(b) and 507(a)”), disapproved, Ionosphere II, 22 F.3d at 407; see also Eagle, Inc. v. Local No. 537 of United Ass’n of Journeymen, 198 B.R. 637, 639 (D. Mass. 1996) (relying on Unimet and holding that § 1113 ““creates a super-priority for all pre-petition as well as post-petition payments due under a collective bargaining agreement which, in effect, trumps 11 U.S.C. § 507”” (quoting Arlene’s, 140 B.R. at 26). Although FCI characterizes these precedents as recognizing a narrow pension-related exception to Ionosphere II, in fact each of these cases wholly embraces Unimet, holds that Ionosphere II would not only be inapplicable to pension benefits, but to all benefits, and therefore cannot be deemed good law in the Second Circuit.

The few cases FCI cites that do not rely on Unimet are a hodgepodge of grossly mischaracterized precedents that offer no support whatsoever to FCI’s assertions that pension-related claims are somehow excluded from the scope of Ionosphere II: Two of the cases cited simply hold that, to the extent union members provide post-petition services to the debtor’s estate, their administrative claim will accrue according to the terms set by the CBA. See Teamsters Indus. Sec. Fund v. World Sales, Inc. (In re World Sales, Inc.), 183 B.R. 872, 876 (B.A.P. 9th Cir. 1995) (workers who worked 18 days post-petition were entitled to the full amount of the debtor’s monthly contribution to an employee health plan where the CBA provided that the full monthly contribution would be paid for any employee who worked at least one day in a month); In re Colorado

Springs Symphony Orchestra, 308 B.R. 508, 520 (D. Colo. 2004) (musicians who did not perform or rehearse post-petition remained entitled to an administrative claim for unpaid wages earned post-petition where the musicians had been willing, ready, and able to engage in activities scheduled by the debtor and CBA provided they would be compensated for their post-petition activity so long as they remained so prepared). One holds that a bankruptcy court cannot grant § 1113(e) relief nunc pro tunc, thereby retroactively validating the debtor's post-petition unilateral changes in benefits. See In re Hoffman Bros. Packing Co., Inc., 173 B.R. 177 (9th Cir. BAP 1994). And in a fourth, the debtors were found to have effected “a unilateral alteration of the agreements, for purposes of § 1113(f), when they failed to abide by the provisions” of a CBA by concededly “fail[ing] to pay wages and various benefits due and owing to their employees and [without] petition[ing] the court for permission to terminate or alter the agreement pursuant to § 1113.” In re Armstrong Fixtures Corp., 135 B.R. at 21.

In short, virtually none of these cases addresses pension benefits, and to the extent any does, it certainly does not hold that special rules apply to pension-related obligations that exclude them from the scope of Ionosphere II.

C. **Ionosphere II Was Recently Applied to Claims for Missed Pension Minimum Funding Contribution in the UAL Reorganizing Chapter 11 Case**

As noted above, the issue sub judice was squarely addressed less than a year ago in the UAL bankruptcy case, another reorganizing chapter 11 case of a major airline in which the priority of pension funding obligations was addressed. In UAL, Independent Fiduciary Services, Inc. (“IFS”), an independent fiduciary appointed for UAL's defined benefit plans, filed a motion to allow as administrative expenses all

claims for pre-petition minimum funding contributions not paid by the Debtors. Just like DP3 and FCI, IFS argued, inter alia, that claims for missed minimum funding contributions, whether attributable to pre-petition or post-petition labor, were entitled to administrative status both by § 1113 of the Bankruptcy Code and by the provisions of ERISA and the IRC that govern contributions to qualified plans.

UAL objected, and argued that, under both § 1113 and the well-established law governing the priority of pension contributions, claims for missed contributions would only be entitled to treatment as administrative expenses to the extent they could be attributed to post-petition labor.

At a March 18, 2005 hearing, Chief Judge Wedoff agreed with UAL, and, reading a lengthy and thorough opinion into the record, denied IFS's request to convert pre-petition pension obligations to superpriority administrative claims merely because they arose in connection with a CBA. See UAL Oral Decision Tr. at 58–59. The bankruptcy court rejected IFS's (and DP3's and FCI's) contention that Pre-Petition Pension Obligations are entitled to treatment as superpriority administrative expenses by § 1113(f) of the Bankruptcy Code. The bankruptcy court, surveying relevant precedents, found that “most of the reported decisions have held that a claim for breach of a collective bargaining agreement gives rise to an administrative expense only if the claim meets the requirements for administrative expense treatment under Sections 503 and 507.” UAL Oral Decision Tr. at 62–63. The court found these decisions, notably Ionosphere II, “entirely persuasive.” UAL Oral Decision Tr. at 63.

In electing to adopt the analysis of the Second Circuit in Ionosphere II and the Third Circuit in Roth American and to reject Unimet, the bankruptcy court also

reasoned that a debtor's failure to pay pre-petition pension obligations does not constitute an impermissible "alteration" of a collective bargaining agreement under § 1113(f).

Moreover, the court observed that, in pointed contrast to § 1114(e)(2) of the Bankruptcy Code, which also addresses employee benefits, § 1113 is notably devoid of language expressly according priority to obligations arising pre-petition. See UAL Oral Decision Tr. at 64.

The District Court for the Northern District of Illinois subsequently granted IFS leave to appeal. While FCI misleadingly tells this Court that the district court allowed an interlocutory appeal of the UAL oral ruling in light of an intra-district conflict (FCI Br. at 14), this is entirely made up out of whole cloth and is nowhere to be found in the court's order. Rather, the district court's opinion unequivocally states the conflict it perceived was inter-circuit (i.e., Ionosphere II and Roth American versus Unimet), not intra-district. The opinion of the district court identified the "central question of law" as "the effect of Section 1113 on the priority of claims arising under the CBA in bankruptcy cases" and noted that "[o]ther courts ha[d] split on the issue." United Air Lines, Inc. v. Indep. Fiduciary Servs. (In re UAL Corp.), No. 05 C 2139, slip op. at 4 (N.D. Ill. June 29, 2005). While Unimet and its progeny "ha[d] found that Section 1113 preempts the priority scheme set forth in the code," noted the Illinois District Court, "the majority of courts," including the Second Circuit in Ionosphere II, "consistent with UAL's argument and the bankruptcy court's ruling, have found that Section 1113 does not preempt the priority scheme set forth in the bankruptcy code." Id. As the Seventh Circuit had not yet addressed the issue, the district court agreed that "there is a central question of law which is not settled by controlling authority of the sitting court." Id. at 5.

Here, just as in UAL, the central issue is without question “the effect of Section 1113 on the priority of claims arising under the CBA in bankruptcy cases.” Unlike in the Seventh Circuit, however, in the Second Circuit this “central question of law” is “settled by controlling authority,” namely Ionosphere II.

In yet another attempt to spin proverbial straw into gold, FCI ignores the unambiguous language of the actual district court order granting the UAL appeal and instead simply fantasizes that the appeal was granted because of an alleged conflict between the UAL decision and Journeyman Plasterers Protective & Benevolent Society Local No. 5 v. Energy Insulation, Inc. (In re Energy Insulation, Inc.), 143 B.R. 490 (N.D. Ill. 1992). Energy Insulation is nowhere even cited by the district court in its ruling. Nor is there any conflict whatsoever between UAL and Energy Insulation. In Energy Insulation, the debtor, following its petition date, reneged on its collectively bargained obligation to make post-petition contributions to multiemployer pension and welfare funds. The union “filed a motion to compel the debtor to pay its post-petition employee benefits” when due under 1113(f). Id. at 492. Even though the bankruptcy court had “categorized the payments as administrative expenses” – a finding not challenged and not on appeal – it declined to compel the debtor to pay them currently. Id. The sole issue on appeal was whether these admittedly post-petition benefit obligations had to be paid when actually due under the CBA, or could be satisfied at the very end of the bankruptcy case, just like “regular” administrative claims. The union lost. The district court affirmed, reasoning that § 1113(f) did not require the debtor to timely pay even admitted administrative expenses arising under a CBA. Id. at 496. How or why FCI believes that

Energy Insulation is inconsistent with, or even relevant to, Chief Judge Wedoff's ruling in UAL remains a mystery.

D. Delta Has Not Constructively Assumed the PWA

Relying on a yet another discredited case from yet another jurisdiction, DP3 next attempts to argue that the Debtors should be deemed to have assumed the PWA by operation of law and that therefore all claims thereunder have become administrative in nature. (See DP3 Br. at 15–16.) To even make this assertion, DP3 relies on one part of the Fourth Circuit's decision in Adventure Resources, Inc. v. Holland, 137 F.3d 786 (4th Cir. 1998). This aspect of the Adventure Resources opinion, however, is inconsistent with Ionosphere II as well as other Second Circuit law and, as noted below, has been roundly criticized by many courts in other circuits. Although the Fourth Circuit explicitly agreed with the Second Circuit that § 1113 does not displace the priority scheme of § 507, it seemingly disagreed with the Second Circuit (and most other courts) concerning the treatment of claims for pre-petition collectively bargained benefits where a debtor has not yet rejected a CBA. In particular, the Fourth Circuit (i) held that a debtor's failure to reject a CBA in accordance with § 1113 is deemed to have resulted in the debtor's assumption of the CBA in bankruptcy, see Adventure Res., 137 F.3d at 798, and (ii) concluded that, as a result, claims arising from a debtor's failure to cure pre-petition defaults of a CBA are entitled to first priority as administrative expenses of the bankruptcy estate, id. at 793.

This approach is wholly inconsistent with the approach adopted by the Second Circuit. The Second Circuit in Ionosphere II recognized that the debtor had not rejected the CBAs at issue, 22 F.3d at 405, but nonetheless affirmed the order of the

bankruptcy court, which had classified pre-petition vacation pay claims as unsecured claims eligible for third-priority status only to the extent vacation pay was earned for work performed within the 90-day period before the filing date, and as general unsecured claims otherwise, see id. at 404. Had the Second Circuit subscribed to the analysis the Fourth Circuit undertook in Adventure Resources, it would of course have arrived at the opposite result: As the debtor had not rejected the contracts at issue, the court would have deemed them assumed, and the claims at issue – arising from a debtor’s failure to cure pre-petition defaults of the CBA – would have been entitled to first priority as an administrative expense of the bankruptcy estate. Thus, Adventure Resources cannot be reconciled with the result reached in Ionosphere II.

Unsurprisingly, courts in other circuits have criticized the Fourth Circuit’s notion of implied, accidental assumption of an executory contract as being contrary to hornbook bankruptcy law. For instance, the Eighth Circuit Bankruptcy Appellate Panel opined:

[W]e think the concept of implied assumption of an executory contract is fatally flawed. . . . Indeed, Section 365(d) presumes nonassumption by inaction, except in certain specified cases, such as nonresidential real property leases. See 11 U.S.C. § 365(d)(4) (1994). We find the Adventure Resources decision inconsistent with the explicit requirement under § 365 that a debtor may assume an executory contract only upon a motion.

United Food & Commercial Workers Union, Local 211 v. Family Snacks, Inc. (In re Family Snacks, Inc.), 257 B.R. 884, 904 (B.A.P. 8th Cir. 2001); see also In re Greater S.E. Cmty. Hosp. Found., Inc., 267 B.R. 7, 25–26 (Bankr. D.D.C. 2001) (“[T]he analysis in Adventure Resources ignores § 365(a) of the Bankruptcy Code which provides that ‘the trustee, subject to the court’s approval, may assume or reject any executory contract

or unexpired lease of the debtor.’ Assuming that the Pension Plan constitutes an executory contract, it has not been assumed because there was no order approving assumption of the contract in this case.”); In re Typocraft Co., 229 B.R. 685, 689 (Bankr. E.D. Mich. 1999) (“[O]ne cannot derive from the specific language of § 1113, the conclusion that a CBA that is not ‘rejected’ pursuant to the procedure set out in that section is in effect deemed to have been ‘assumed.’”).

Equally importantly, the doctrine of implied or accidental assumption is most assuredly not the law in this Circuit. See generally South Street Seaport Ltd. P’ship v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 763 (2d Cir. 1996) (holding that assumption, under § 365, “must be done, as suggested by the Bankruptcy Rules, through a formal motion to the court”); 10 Collier on Bankruptcy ¶ 6006.01[3], at 6006-5 (15th ed. 1998) (stating that “the majority, and better reasoned view is that, except for assumption or rejection as part of a plan, the trustee can manifest the intention to assume or reject an executory contract or unexpired lease only by formal motion filed in accordance with the requirements of Rules 6006(a), 9014 and 9013, or in a confirmed plan.”).

E. 1655 Broadway Has No Relevance to the Case Sub Judice

Both DP3 and FCI characterize In re 1655 Broadway Restaurant Corp., No. 96 Civ. 9116 (RPP), 1997 U.S. Dist. LEXIS 2479 (S.D.N.Y. March 7, 1997), an unreported one-and-a-half page district court decision, as a landmark case that limits or even overrules Ionosphere II. FCI goes so far as to repeatedly characterize the unpublished case as “the controlling decision in this District” that constitutes “settled law.” (FCI Br. at 3, 4, 8.) As a threshold matter, 1655 Broadway is not even binding on

this or any court.¹³ Moreover, its power as persuasive authority on any major topic is questionable at best, given that the decision, which involved a small amount of money owed by a defunct Beefsteak Charlies, is characterized by its extreme brevity, lack of in-depth legal analysis and a total of four citations to precedent.

It is highly improbable that 1655 Broadway is or was intended by anyone, much less its author, to be the landmark decision that both DP3 and FCI characterize it as being. If the decision was intended by Judge Patterson to represent a significant departure or limitation on existing Second Circuit precedent, it is likely that the decision would have been designated for publication. Moreover, not one word of the opinion suggests that Judge Patterson thought that he was announcing a new rule or distinguishing existing law. Moreover, jurisprudential history speaks for itself: In the eight-and-a-half years that have elapsed since 1655 Broadway was decided, it has never been relied on by any other court. Never.

Contrary to FCI's intimations about the ruling, the district court did not purport to distinguish Ionosphere II or to announce a new rule of any kind. Rather, 1655 Broadway was a straightforward action to compel the debtor "to pay post-petition accrued and unpaid pension and welfare fund contributions." 1997 U.S. Dist. LEXIS

¹³ A bankruptcy court is not bound by the decision of a single district court judge in a multi-judge district. See Barnett v. Jamesway Corp., 235 B.R. 329, 336 n.1 (Bankr. S.D.N.Y. 1999) (Garrity, J.) ("We find that where the bankruptcy court sits in a multi-judge district, it is not bound by principles of stare decisis by the decision of a district judge in that district."); In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson, & Casey, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993) (Conrad, J.) ("A bankruptcy judge, like a district court judge, is free to reexamine an issue despite the existence of a prior decision of another judge in the same district unless, by chance or otherwise, all judges in his or her district have ruled consistently on the same issue, or the Circuit or Supreme Court has so held."); In re Stockbridge Funding Corp., 145 B.R. 797, 810 n.29 (Conrad, J.) (Bankr. S.D.N.Y. 1992) (same), vacated in part on other grounds 158 B.R. 914 (S.D.N.Y. 1993); In re Argo Communications Corp., 134 B.R. 776, 786 n.9 (Conrad, J.) (Bankr. S.D.N.Y. 1991) (same).

2479, at *1 (emphasis added). As the district court stressed, following the debtor's chapter 11 filing, "workers were continuing to perform services and receive as compensation and benefits less than the agreed upon price under the Collective Bargaining Agreement." Id. at *6. Indeed, the brief opinion states no fewer than five times that it was addressing debtor obligations that accrued post-petition. Nowhere does it even offer a glimmer of a hint that it was addressing obligations that one might have thought were pre-petition in nature, let alone issuing a ruling elevating pre-petition claims to superpriority administrative status through a trailblazing interpretation of 1113(f) and Ionosphere II. Rather, the case was about unpaid post-petition benefits that were compensation for post-petition work.

Yet further evidence that the debtor contributions at issue in 1655 Broadway were post-petition (in case the court saying it five times on one page is not enough) is supplied by the fact that multi-employer plans were involved. Such plans (just like all the defined contribution benefits that Delta is honoring in cash in full) are typically funded on a "pay-as-you-go" basis, and any claims for contributions payable post-petition would have been wholly attributable to post-petition labor. See Pension Benefit Guaranty Corp., Introduction to Multiemployer Plans, <http://www.pbgc.gov/practitioners/multiemployer-plans/content/page13645.html> (last visited Sept. 29, 2005) ("In multiemployer plans, the amount of the employer's contribution is set by a collective bargaining agreement that specifies a contribution formula (such as \$3 per hour worked by each employee covered by the agreement) and further provides that contributions must be paid to the plan on a monthly basis."); see, e.g., N.Y. State Teamsters Conference Pension & Retirement Fund v. UPS, 382 F.3d 272,

276 (2d Cir. 2004) (multiemployer plan contributions made periodically based on the hours worked per day by each plan participant); Amalgamated Ins., 789 F.2d at 102 (“[E]mployers contribute[] to multiemployer plans at rates specified in their collective bargaining agreements with their employees’ unions. The contributions [a]re based on hours worked by employees, units of production . . . or a percentage of compensation.” (quoting H. Rep. No. 869, Apr. 5, 1980, 96h Cong., 2d Sess., reprinted in 1980 U.S.C.C.A.N. 1928, 2922)); Peick v. Pension Ben. Guaranty Corp., 724 F.2d 1247, 1255 (7th Cir. 1983) (explaining that multiemployer plans are “funded by employer contributions which are made at a rate established by the terms of the collective bargaining contract. This rate is usually expressed as an amount per time worked or product produced, e.g., \$.75 per hour or \$1.50 per widget”). Thus, the benefits at issue were post-petition in nature.

Finally, and perhaps most importantly, FCI’s central argument – that pension claims are radically different and therefore outside the scope of Ionosphere II, and that 1655 Broadway means that “[t]he District Court for the Southern District of New York has squarely held that pension contributions owed under an unmodified and rejected collective bargaining agreement are entitled to administrative expense priority” (FCI Br. at 3) – borders on farce when one realizes the principal legal issue addressed by 1655 Broadway did not involve pension claims at all. The principal legal dispute concerned health insurance premiums. In 1655 Broadway, a struggling debtor tried to save money by paying its employees’ actual medical bills as medical expenses came up, instead of – as expressly required by the CBA – contributing to the fund that bought them health insurance. As the district court noted in summarizing the decision on appeal:

The Bankruptcy Court, after a hearing on September 5, 1996, denied the motion and ordered that 1) an administrative claim be granted to the Funds against the estate of the Debtor in the amount of \$194,363.00 without prejudice to Debtor's right to object to the amount; 2) the Debtor pay directly to its employees any health benefits not paid by the Funds due to the Debtor's delinquency; and that 3) such payments for health benefits have priority over all administrative expenses and priority claims of any kind specified un 11 U.S.C §§ 503(b) & 507(a).

1997 U.S. Dist. LEXIS 2479, at *3-4 (emphases added).

Conclusion

Delta well understands its obligations under the law. It will, of course, comply with the CBA and with § 1113 and pay its valued unionized employees their wages and their benefits for post-petition services as provided for in the CBA, unless and until the CBA is modified by this Court pursuant to the dictates of § 1113. This, of course, is what the Second Circuit and almost all other courts and commentators say the law (and specifically § 1113(f)) requires of a debtor. It is for that reason, for example, that Delta has paid every single penny of defined contribution benefits actually earned post-petition by its pilots.

DP3 and FCI, in their misguided quest to extract the payment of pure pre-petition claims owed to retired pilots, and for contributions on account of benefits earned months, years and even decades ago by current and retired pilots under the Qualified and Non-Qualified Plans, have twisted the actual governing law well past the breaking point. Like so many other courts that have addressed the issue, the Ionosphere II court did not embrace Unimet – it decisively rejected it. Its holding is as clear as it is governing:

Implying a superpriority for claims arising under CBAs also would disrupt the careful balancing of competing policies embodied in section 507. . . . Section 1113 does not address the priority to be accorded claims arising from a debtor's obligations under a CBA. We must therefore assume that Congress intended that the priorities set forth in section 507 should apply

to these claims. When Congress has intended to alter the general priority scheme, it has done so explicitly.

22 F.3d at 408. The requested relief should be denied.

New York, New York

Dated: October 3, 2005

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