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

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<b>In re:</b>	:
	:
	: <b>Chapter 11 Case No.</b>
	:
<b>DELTA AIR LINES, INC., et al.,</b>	: <b>05-17923 (ASH)</b>
	:
	: <b>(Jointly Administered)</b>
	:
<b>Debtors.</b>	:
	:
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**OMNIBUS REPLY OF THE DEBTORS IN SUPPORT OF MOTION SEEKING A  
DETERMINATION THAT THE DEBTORS SATISFY THE FINANCIAL  
REQUIREMENTS FOR A DISTRESS TERMINATION OF THE DELTA PILOTS  
RETIREMENT PLAN AND APPROVAL OF SUCH TERMINATION**

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Delta Air Lines, Inc. (“Delta”) and those of its subsidiaries that are debtors-in-possession in these proceedings (collectively, the “Debtors”), for their omnibus reply in support of their motion (the “4041 Motion” or the “Motion”)<sup>1</sup> pursuant to section 4041(c) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1341(c), seeking this Court’s approval of the voluntary distress termination of the Delta Pilots Retirement Plan (the “Pilot Plan”), respectfully state as follows:

### **PRELIMINARY STATEMENT**

1. Delta’s decision that it had no choice but to file the 4041 Motion was not made lightly. Unlike other recent airline bankruptcies (such as United Airlines and U.S. Airways), where airlines sought to terminate all of their major pension plans at the same time they sought relief under section 1113 of the Bankruptcy Code, Delta waited more than nine months after seeking section 1113 relief, and almost 11 months after filing for bankruptcy protection, before seeking the distress termination of only one of its three qualified defined benefit pension plans – the severely underfunded Pilot Plan. Moreover, Delta sought the distress termination of the Pilot Plan only after the Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (the “Airline Relief Act”), which Delta supported, was enacted. By allowing Delta to amortize future minimum funding contributions over 17 years, this new legislation will allow Delta to attempt to save the Delta Retirement Plan, the defined benefit plan that covers more than 90,000 non-pilot employees and retirees. Unfortunately, however, the Airline Relief Act provides no

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<sup>1</sup> Unless otherwise defined herein, each capitalized term shall have the meaning ascribed to it in the 4041 Motion.

solution to the waves of early retirements, lump sums and statutorily required liquidity shortfall contributions that will both immediately and indefinitely face the Pilot Plan. Although Delta recognizes that the termination of the Pilot Plan is extremely painful for many current and former Delta pilots, Delta cannot emerge from bankruptcy unless it is terminated. Delta's fiduciary duties to its creditors and to all of its current employees and retirees compel that it seek distress termination of the Pilot Plan.

2. Because of the profound problems facing the Pilot Plan, there is a widespread consensus among virtually all of the key stakeholders in these bankruptcy cases that it must be terminated. Notwithstanding that creditor recoveries will be substantially diluted by the PBGC's claims that will result from the termination of the Pilot Plan, the Creditors' Committee stated unequivocally in its Response [Docket No. 3069] that it "believes that Delta has demonstrated that the termination of the Pilot Pension Plan is in the best interest of the Debtors' estates and the Debtors' creditors." Resp. by the Off. Of Unsec. Creditors in Supp. Of Debtors' Mot. ("Creditors' Comm. Resp."), at ¶20. ALPA, which represents over 6,800 Delta pilots – the majority of the Pilot Plan's Beneficiaries – has for some time acknowledged that termination of the Pilot Plan is necessary if Delta is to emerge from chapter 11, and does not oppose this motion. The PBGC, which (a) already acknowledged to this Court that Delta will face a massive wave of early retirements if the lump sum option again becomes available and (b) would be the holder of a large unsecured claim in the event the Pilot Plan is terminated, filed a Response on August 18, 2006 [Docket No. 3087] in which it also declined to oppose the termination of the Pilot Plan. See generally Resp. of PBGC to Debtors' Mot. ("PBGC Resp."). Even DP3, Inc., a Delaware not-for-profit with 2,850 retired Delta pilots as

reported members, many of whom stand to lose a part of their Pilot Plan benefit in the event of plan termination, does not disagree with the crisis facing the Pilot Plan or oppose the Motion, although in its Response [Docket No. 3074] it (incorrectly – for reasons discussed below) seeks a delay in the hearing date for this Motion. See generally Resp. of DP3, Inc. to Debtors’ Mot. (“DP3 Resp.”).

3. This consensus is unsurprising. As was extensively described in the Bastian and McDaniel Declarations, the Pilot Plan is – and has been for some time – in a dire financial crisis, driven largely by a lump sum option that can be exercised by eligible pilots at any time with no advance notice to Delta. Since 2001, the Pilot Plan has paid approximately \$2.5 billion in lump sums to approximately 3,200 pilots – over 2,000 of whom retired early with virtually no prior notice to Delta. Today, with \$4.1 billion in liabilities but only \$1.6 billion in actuarial value assets, the Pilot Plan is underfunded by about \$2.5 billion. See McDaniel Decl., at ¶18.

4. This consensus is also significant. As prior courts have recognized, the views of the unsecured creditors’ committee and of the affected unions are to be accorded considerable weight in ruling on an application under section 4041(c) of ERISA. Indeed, as the court explained in In re Wire Rope Corp. of America, 287 B.R. 771 (Bankr. W.D. Mo. 2002):

Much to their credit, the Unions and their members have made very significant and substantial concessions to enable the Debtor to reorganize and continue in business, and the Court places great weight on the fact that the Unions do not oppose the Debtor’s Motion to terminate the Retirement Plans.

Likewise, the Court places considerable weight on the fact that the Creditors’ Committee has supported the Motion, despite the impact that termination of the Plans will have on the general unsecured creditors.

Id. at 781-82 (granting the debtor’s motion for distress termination).

5. Notwithstanding this broad consensus, there have been a number of objections to the Motion. The most vociferous such objection has come from the recently formed organization “Delta Pilots Pension Termination Opposition” (“DPPTO”). See generally, Obj. by DPPTO LLC to the Mot of the Debtors (“DPPTO Obj.”) [Docket No. 3090]. DPPTO claims that it represents “in excess of 100” retired pilots. Declaration of David M. Smith, at ¶15 (compared to the 2,850 pilots represented by DP3). Ironically, among its founders and members are the very same pilots who recently retired early to secure large lump sum payments.

6. Before addressing the various misleading or patently false arguments and assertions contained in DPPTO’s objection, it is worth noting that DPPTO has neither alleged nor presented evidence contradicting the fact that, in the event of the expected number of early retirements, the Pilot Plan would have near-term funding obligations far beyond Delta’s ability to finance. In addition, DPPTO does not appear to dispute that, with the Pilot Plan extant, Delta would be unable to obtain the exit financing that it needs to emerge from chapter 11. Finally, DPPTO fails entirely to address the undisputed fact that low-cost carriers (“LCCs”) – widely known as the most aggressive competitors in the airline industry – have never had defined benefit pension plans, and that the brutal competitive business conditions in the airline industry have forced many other legacy airline carriers (such as United Airlines and U.S. Airways) to terminate all of their defined benefit pension plans in order to survive.

7. DPPTO’s objection in essence boils down to the claim that fewer than 800 to 1,000 pilots will retire in the near term if the lump sum door reopens. Not only does DPPTO ignore recent history, human psychology and basic personal finance with this

argument, it essentially asks this Court to bet the very life of Delta (and the livelihoods of its 50,000 current employees as well as retirement benefits for its non-pilot retirees) on the chance that some smaller number of pilots will take early retirement upon the reopening of the lump sum door.

8. As discussed in detail below, the evidence shows that 800 to 1,000 pilots would likely retire early if the lump sum door reopens. Moreover, even if significantly fewer than 800 to 1,000 pilots were to retire early, Delta still would not be able to emerge from bankruptcy without terminating the Pilot Plan. For instance, if Delta were forced to continue the Pilot Plan and only 600 pilots – 25% less than Delta’s lowest estimate – retired early, the resultant operational and financial disruption and Pilot Plan contributions would create an exit financing need that exceeds, by billions of dollars, what Delta could raise. Indeed, if Delta were forced to continue the Pilot Plan and only 300 pilots – the very number of retirements suggested by DPPTO – retired early in the coming months, Delta would still not be able to emerge from chapter 11. The immediate financial impact, coupled with the huge and ever-present risk of further early retirements and liquidity shortfalls, makes it clear beyond peradventure that no lender will fund Delta’s exit unless the Pilot Plan is terminated.

9. DPPTO and its declarants also offer a litany of briefly described “alternatives” to Pilot Plan termination that DPPTO believes will allow Delta to sidestep the perpetually swinging axe of massive early pilot retirements and enormous liquidity contributions caused by the Pilot Plan. None of these alternatives solves the fundamental problem, and all of them either expressly violate ERISA, violate Internal Revenue Service (“IRS”) rules or reflect a profound misunderstanding of bankruptcy law.

10. By contrast, DP3 has requested that this Court indefinitely adjourn the hearing date for this Motion so that the recently enacted Airline Relief Act can be “fully digested” and/or modified by some future legislation so that the lump sum problem can be cured. DP3 Resp., at ¶5. As explained in Section IV below, this request for an indefinite adjournment by DP3 is without merit. The Airline Relief Act was the result of over two years of prolonged and tortuous negotiations in Congress among dozens of powerful political constituencies. Its language is clear on its face in all respects relevant to the Motion. Delta cannot and should not languish indefinitely in bankruptcy court based on the wishful conjecture that Congress may someday enact another piece of legislation that might make the Pilot Plan’s lump sum problem go away. Indeed, as DP3 informed its own members bluntly in June 2006, “Delta owes billions to the plan, and with an impending lump sum and early retirement crisis, the qualified plan cannot survive. Legislation will not change that.” DP3, FAQs on the settlement between DP3, Delta and the Creditors Committee, at 6 (June 8, 2006), <http://www.dp3.org/> (attached hereto as Exhibit 1) (noting that “[e]ven if there were provisions in the final bill to prevent lump sums – which almost no one thinks there will be – it would not change the outcome for the pilots’ plan at Delta”).

11. A separate group of participants in the Pilot Plan composed of participants who were former plaintiffs in class action litigation concerning the Pilot Plan (the “Settlement Class”) has also “opposed” the Motion. See generally, Obj. to Debtors’ Mot. [Docket No. 3076].<sup>2</sup> However, their issues are not for this Court, which is asked by

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<sup>2</sup> The Settlement Class’s objection does not challenge Delta’s proof or even address the legal standard applicable to the present proceedings. Rather, the Settlement Class’s objection focuses on whether a segregated qualified settlement fund – established in the trust (the “Trust”) for the Pilot Plan in connection with the settlement of the underlying class action litigation – can be touched as a result of any

statute to make a specific factual finding. Indeed, the proposed order submitted by the Debtors will expressly state that it is without prejudice to any rights of this group to their settlement fund should the Pilot Plan be terminated. Thus, this objection will not be addressed further in the body of this Reply. Insofar as this Court is inclined to consider the Settlement Class's argument on the merits, it is addressed in the Debtors' Reply to the Objection of Robert D. Berger and Others to Debtors' Motion Seeking Approval of a Distress Termination of the Delta Pilots Retirement Plan, simultaneously filed herewith.

12. Finally, Delta has reviewed the pro se objections to the Motion that have been filed with the Court or otherwise received by the Debtors. All of these objections (many of them apparently submitted by retired pilots affiliated with DPPTO) raise arguments already contained in DPPTO's objection and will not separately be addressed.

### **ARGUMENT**

13. Under Title IV of ERISA, a debtor can terminate a defined benefit pension plan, such as the Pilot Plan, if it satisfies the standard for a voluntary distress termination set forth in 29 U.S.C. § 1341(c)(2)(B)(ii). The standard is met if:

the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

29 U.S.C. § 1341(c)(2)(B)(ii)(IV). The test for a voluntary distress termination is whether the debtor can exit from bankruptcy, and stay out of bankruptcy, without

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distress termination of the Pilot Plan. The Settlement Class's objection is not relevant to the issues before this Court. ERISA specifically limits the role of bankruptcy courts in determining whether a debtor meets the requirements for a distress termination. 29 U.S.C. § 1341(c)(2)(B)(ii)(IV). Moreover, to the extent the Settlement Class has nonforfeitable benefits rights in the qualified settlement fund that is part of the Pilot Plan and Trust, the Motion does not seek to modify, reduce or prejudice those rights.

terminating the pension plan.<sup>3</sup> None of the parties disagree that this is the standard the Court must apply in deciding this Motion. See Creditors' Comm. Resp., at ¶¶14-16; PBGC Resp., at 7-10<sup>4</sup>; DPPTO Obj., at ¶¶6-9.

14. Delta is aware of and regrets the impact of termination on active and retired pilots and their families. However, that does not make the requested relief any less critical or appropriate. As another bankruptcy court wrote when U.S. Airways sought to terminate its own pilot pension plan:

The . . . argument is that termination of the pension plan [will] result in serious financial hardship to many, and perhaps most, of the active and retired pilots and their families. From the evidence presented as well as the numerous letters the court has received, it is obvious that many individuals will indeed suffer great financial hardship. But the question always remains: what is the alternative? If the debtors are unable to reorganize

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<sup>3</sup> See In re U.S. Airways Group, Inc., 296 B.R. 734 (Bankr. E.D. Va. 2003) (granting distress termination motion where exit financing was dependent on cash flow projections that could only realistically be met through plan termination and, thus, the only realistic plan of reorganization would require such termination); In re Wire Rope Corp. of Am., 287 B.R. 771 (Bankr. W.D. Mo. 2002) (granting distress termination motion after finding a debtor could not obtain exit financing necessary to confirm a plan and would be forced to liquidate absent termination); In re Sewell Mfg. Co., 195 B.R. 180 (Bankr. N.D. Ga. 1996) (granting distress termination motion after finding the debtor would be unable to pay its debts or continue business outside chapter 11 unless its qualified plan was terminated).

<sup>4</sup> Although the PBGC has recognized that ERISA “requires [the Debtors] to prove that unless the Pilots Plan is terminated, they will be unable to pay all debts under a plan of reorganization and will be unable to continue in business outside of bankruptcy,” PBGC Resp. at 8 (citing 29 U.S.C. § 1341(c)(2)(B)(ii)(IV)), the PBGC elsewhere characterizes this standard as requiring a showing that, but for the termination of the pension plan in question, the debtors “will liquidate.” Id. (citations omitted). While evidence that a debtor will be forced to liquidate absent termination of a pension plan would satisfy the distress termination standard, section 4041(c)(2)(B)(ii)(IV) of ERISA does not require a debtor to demonstrate that a failure to terminate the pension plan in question would lead to liquidation. See, e.g., Wire Rope, 287 B.R. at 780-81 (expressing skepticism for the PBGC’s liquidation-focused characterization of the distress termination standard and explaining that the likely liquidation of a debtor is only relevant insofar as it demonstrates that the actual ERISA standard has been met – i.e., the debtor would be forced to liquidate absent pension plan termination “because it cannot both pay its debts under a plan of reorganization and continue in business outside of the reorganization process of Chapter 11”) (emphasis in original).

The PBGC’s Response further suggests to the Court certain findings that it believes should be made in order to find that the test for voluntary distress termination has been satisfied. PBGC Resp., at 11. Delta has advanced a number of factual justifications – none of them mutually exclusive – that show that it could not exit from bankruptcy, and stay out of bankruptcy, without terminating the Pilot Plan. Delta respectfully submits that, if the Court agrees with any of these justifications, the Court may find that the distress termination standard has been satisfied.

and must liquidate in chapter 7, the pension plan would be terminated anyway, and the retired pilots would be in exactly the same position, as regards their pension, as they will under the proposed distress termination. . . . Given that reality, the undoubted financial hardship that will result from a termination of the plan is an insufficient basis for this court to withhold its approval when the debtors have made a compelling showing that termination is necessary for this airline to emerge from chapter 11.

U.S. Airways, 296 B.R. at 746.

**I. DPPTO IS WRONG THAT 800 TO 1,000 IS NOT A REASONABLE ESTIMATE OF THE LIKELY NUMBER OF EARLY RETIREMENTS BUT, IN ANY EVENT, DELTA COULD NOT SURVIVE EVEN IF THE NUMBER WERE MUCH LOWER**

**A. 800 to 1,000 Is a Reasonable Estimate of the Number of Pilot Early Retirements**

15. If the Motion were denied, the lump sum option would again become available to all Delta pilots over age 50. Hundreds of Delta’s most senior pilots – 857 of whom have lump sums in excess of half a million dollars – will immediately retire early to avail themselves of what will be understood to be their last chance to receive the large lump sum retirement benefits they have earned. In response to the extensive evidence submitted by Delta, DPPTO tries to dismiss the very real and very massive upcoming wave of early retirements as “unproven and illogical.” DPPTO Obj., at ¶12. On both counts, it errs.

**1. *Historical Retirement Patterns Strongly Suggest 800 to 1,000 Early Retirements Will Occur***

16. Recent historical evidence strongly supports Delta’s contention that, upon the opening of the lump sum door, between 800 and 1,000 pilots would retire early. During the 12 months leading up to Delta’s bankruptcy filing (while Delta was not yet even in chapter 11 and there still remained a chance that neither Delta nor the Pilot Plan would need any further restructuring) approximately 1,100 pilots nonetheless retired

early, representing approximately 45% of the 2,425 pilots eligible to do so. See McDaniel Decl., at ¶28; Bastian Decl., at ¶50. As of October 1, 2006, approximately 1,820 Delta pilots will be eligible to retire early. In addition, there are 126 pilots (mostly on disability) who are above age 60 and retirement eligible. Even if only the same percentage of eligible pilots who retired early in the 12 months prior to the petition date retire early when the lump sum door reopens – notwithstanding the far greater incentives to do so now – a total of approximately 819 pilots would retire early (45% of 1,820). If only an additional 10% retired early, the number of early retirements would be 1,001. In light of all of the above, it is reasonable to estimate that 800 to 1,000 pilots will immediately retire early when the lump sum door reopens. See Bastian Decl., at ¶51.

**2. *There Is Much More Reason for Pilots to Retire Now Out of a (Correct) Fear that the Pilot Plan Will Not Survive***

17. In the year since the lump sum door closed, the pressure for pilots to retire early if the lump sum option again becomes available has increased substantially:

(1) Since the bankruptcy filing, ALPA has repeatedly stated that the Pilot Plan needs to be – and will be – terminated.<sup>5</sup> By filing the Motion, Delta has taken the same position. Since the filing of the Motion, DP3 has expressed profound public pessimism over the Pilot Plan’s future prospects.<sup>6</sup> In its Response, the PBGC has likewise not retreated from its

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<sup>5</sup> See, e.g., Evid. Hr’g on Mot. to Reject ALPA CBA Tr. 132, Nov. 16, 2005 (“Your Honor, everyone in this courtroom and . . . and the union and the company fully expects that before long Delta’s pension plan will be terminated.”); Sec. 1113 Arb. Hr’g Tr. 149, Mar. 13, 2006 (“Again, you will hear a lot of testimony in great length, but the cold simple fact is that the keystone to the Delta pilots’ retirement program is, has been, the defined benefit pension plan. And that plan is doomed. It will be terminated. It will not be saved by any conceivable outcome on Capitol Hill, it will not be saved by any conceivable outcome of direct negotiations between ALPA and Delta. We acknowledge that.”).

<sup>6</sup> In a recent public announcement to the Delta retired pilot community, the leadership of DP3 stated that, as long as the lump sum option remains available, “there does not seem to be another combination of events in the real world that would preserve the plan.” DP3, Letter from DP3 Board of Trustees to DP3 members: Where we stand (Aug. 15, 2006), <http://www.dp3.org/data/Where%20we%20Stand.pdf> (attached hereto as **Exhibit 2**).

prior statements<sup>7</sup> about the grave threat posed to Delta and the Pilot Plan merely by the opening of the lump sum door. DPPTO, which represents few, if any, active pilots, describes these facts as “seemingly irrelevant.” DPPTO Obj., at ¶15. Delta believes that any active pilot trying to ascertain the likelihood of plan termination would disagree. Active pilots will not ignore the views of ALPA – their own representative;

(2) As pilots retire early and take lump sums, assets begin to drain from the Pilot Plan. This increases the chances that the Pilot Plan will, at the least, re-enter liquidity shortfall (and the lump sum door will close again) at the time of the next quarterly calculation and, ultimately, that the Pilot Plan will need to be terminated. Thus, each successive pilot’s decision to take early retirement makes it more likely that other pilots, seeing that pilot’s departure and depletion of the Pilot Plan, will also retire early;

(3) Even to extremely sophisticated laypersons, a statutory annuity from the PBGC is an uncertain amount, see Deposition of Robert Morrison 94:12-18, Aug. 25, 2006 (attached hereto as Exhibit 15) (“Morrison Dep.”) calculated using a complex equation and paid over many years – as opposed to a very large lump sum payment of a known amount that is paid immediately (and which also offers the possibility of both future investment returns and replacement income).

18. It is also important to recognize that the situation facing Delta’s retirement-eligible pilot population is one of imperfect information analogous to a classic “bank run” or “prisoner’s dilemma” situation.<sup>8</sup> In such a situation, the likely collective outcome will be a massive wave of early Delta pilot retirements as hundreds of pilots try

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<sup>7</sup> “When the Pilots Plan comes out of liquidity shortfall and is again able to pay lump sums, it is expected that most of Delta’s pilots eligible to retire will in fact retire and elect to receive their pension benefits in the form of lump sums.” PBGC Obj. to Debtors’ Mot. Pursuant to Section 363 of the Bankruptcy Code for Authority to Enter into Amendments to Pilot Working Agreement with ALPA [Docket No. 2603], at 10.

<sup>8</sup> In his Declaration in support of DPPTO’s objection, Robert Morrison entirely misses this aspect of the situation when he suggests that “[t]he risk of the PBGC involuntarily terminating the plan is real and will undoubtedly cause any pilot considering early retirement to think twice before doing so.” Decl. of Robert Morrison (“Morrison Decl.”), at ¶11. Unfortunately for Mr. Morrison’s theory, each individual active Delta pilot has imperfect information about the behavior of other pilots and would only know that delaying or declining early retirement substantially increases the risk that his or her pension will be reduced by hundreds of thousands of dollars. In such a situation, with other employment options available and regardless of which entity initiates ultimate Pilot Plan termination, each pilot’s clear incentive would be to retire early and to do so as soon as he or she could.

to minimize their individual losses – an event that would have devastating implications for both the Pilot Plan (and current retirees) and Delta.

**3. *Individual Financial Considerations Support the Decision to Retire Early***

19. Contrary to the assertions in DPPTO's objection, the financial incentives for Delta pilots to take early retirement are even greater now than they were a year ago. As a result of LOA #46 and LOA #51, the active pilots at Delta made very substantial labor concessions, including a 32.5% pay rate cut in 2004 followed by a 14% pay rate cut in 2006. As a result, the lump sum has grown much more valuable compared to an individual pilot's estimated remaining earnings until mandatory retirement at age 60. Moreover, a lump sum payment would be based on the full amount of the pilot's accrued pension benefit, without any of the statutory caps on pension benefits imposed if the Pilot Plan is taken over by the PBGC. Further, this group is more than a year older than they were before the bankruptcy filing, so their remaining earnings until mandatory retirement at age 60 have also dropped substantially. As discussed in greater detail below, beginning as of July 1, 2008, the Airline Relief Act will increase the statutory discount rate used to calculate lump sums, causing the value of lump sums taken after 2007 to decrease. Moreover, as described in greater detail below, there is also a very real risk that the lump sum door could close for several years in 2010, which would further suggest to pilots that the time to go is now.

**B. *DPPTO's Arguments That There Will Be Many Fewer Early Retirements Are Without Merit***

20. DPPTO repeatedly asserts that the "more reasonable scenario" is that the number of retirees will be "far less" than Delta expects. DPPTO supports this position by stating that (i) various "changed circumstances" have made it far less financially

attractive for active Delta pilots to take early retirement today than it was a year ago and (ii) DPPTO's own "quantitative analysis" shows that a smaller number of active Delta pilots (perhaps 304) will actually retire. With respect to these alleged "changed circumstances," DPPTO is wrong on its facts. With respect to the "quantitative analysis" that DPPTO uses to show that fewer pilots will retire, DPPTO's analytical methods and conclusions are totally flawed and incorrect.

**1. *The Alleged "Changed Circumstances" Are Without Merit***

21. DPPTO cites six "changed circumstances" that have supposedly made it much less financially attractive for active Delta pilots to take early retirement today than a year ago. DPPTO Obj., at ¶¶18-23. All of these "changes" are either exaggerated, flatly incorrect or misleadingly articulated by DPPTO.

(a) *Interest Rates*

22. DPPTO states that pilots will not retire early due to increases in GATT rates<sup>9</sup> used to calculate lump sums. Leaving aside that DPPTO declarant Robert Morrison rather egregiously exaggerates the difference in the applicable GATT rate between the majority of Delta pilots that retired in 2005 and those pilots eligible to retire today,<sup>10</sup> DPPTO is correct that moderate GATT rate increases during the one-year period that the lump sum door has been closed have had a marginally negative effect on the

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<sup>9</sup> The statutory rates for determining lump sum benefits are commonly referred to as "GATT rates."

<sup>10</sup> Mr. Morrison suggests the difference in applicable GATT rates between current Delta pilots and pilots that retired in 2005 as an "almost 1% . . . rise." Morrison Decl., at ¶5. In fact, as Ms. McDaniel will testify, the average GATT rate applicable to pilots that retired in 2005 was approximately 4.8%, while the GATT rate applicable to pilots today is about 5.1% – a difference of a third of one percent. Mr. Morrison overstates by a factor of 3.

value of lump sums. However, DPPTO completely misses the bigger interest rate picture.

23. In a rising interest rate environment like the current one, the value of lump sums is only getting worse by the day. Moreover, current Delta pilots now face the prospect of greater mandatory statutory rate increases pursuant to sections 102 and 302 of the Airline Relief Act, which will begin to phase in a yet higher GATT rate regime beginning on July 1, 2008. As Mr. Morrison himself acknowledges, most Delta pilots pay very careful attention to fluctuations in the value of the statutory interest rates that determine the value of pilot lump sums, Morrison Decl., at ¶7, and an expectation of higher rates would “[a]bsolutely” be a reason to retire now rather than waiting for some period of time, Morrison Dep. 17:5-8. Thus, current market trends and upcoming statutory increases to GATT rates will create a powerful incentive for current Delta pilots to lock in their lump sums by retiring as early as possible.

(b) *The Money Purchase Pension Plan*

24. DPPTO next argues that the recent termination of the Money Purchase Pension Plan (the “MPPP”) will discourage active Delta pilots from taking early retirement. DPPTO Obj., at ¶19. This argument is without merit. The MPPP was a defined contribution – not a defined benefit – plan, under which Delta made contributions to the individual accounts of all active Delta pilots. It was fully funded at all times and was never at risk. Thus, before the MPPP was terminated effective June 30, 2006, active pilots had an absolute right to the money in their MPPP accounts that they could take upon retirement. After June 30, 2006, the money in pilot MPPP accounts began to be distributed to all active pilots. The termination of the MPPP has no effect on the

economics of a current active pilot's decision to retire early – it was the pilots' money one year ago and it is the pilots' money today.

(c) Non-Qualified Benefits

25. DPPTO also argues that active pilots working at Delta are less likely to retire in the future because last year's retirees purportedly believed that, even if Delta filed for chapter 11 and the Pilot Plan were terminated, they would still somehow get their "Top Hat" non-qualified pension benefits from Delta. As further described by Mr. Morrison:

Rightly or wrongly, the reality is that most Delta pilots used United Air Lines as a template and watched United closely. United filed for bankruptcy two and a half years prior to Delta, and United was still paying nonqualified funds last September. The assumption for every early retiree was that Delta would do the same. This turned out to be a false assumption.

Morrison Decl., at ¶7.

26. This assertion is not credible. It is correct that United Airlines ("UAL"), upon filing for chapter 11 in December 2002, in a totally different environment, initially sought and obtained permission from the bankruptcy court to pay, in its discretion, non-qualified pre-petition pension obligations. By February 3, 2005, however (as its financial need grew yet greater in the deteriorating competitive business environment), UAL ceased making non-qualified pilot benefit payments. Only by getting the bankruptcy court to order specific performance of its post-petition letter agreement with UAL on February 18, 2005 was ALPA able to compel the payment of those non-qualified payments for a brief additional period. The obligation to pay was only until the qualified plan was terminated – the steps for which were already well underway. In light of these and well-publicized events in other airline bankruptcies, it is not credible for DPPTO to

suggest that the hundreds of pilots who retired in the seven months after February 18, 2005 did so based on a reasonable expectation that continued payment of their non-qualified benefits would be a fait accompli were Delta to file for bankruptcy protection.

(d) Health Insurance

27. DPPTO next argues that LOA #51 has increased the post-retirement health insurance contributions owed by a retired pilot and that this change will deter active Delta pilots from taking early retirement. DPPTO Obj., at ¶21. Although it is true that LOA #51 made changes to the health insurance premium structure for retirees between ages 60 and 65, and changes to post-65 coverage, DPPTO's emphasis on these changes is misleading for a variety of reasons. First, it ignores the fact that the pre-age 60 premium percentages for pilots – the costs most relevant to a pilot's early retirement decision – have remained unchanged for over 25 years. All Delta pilots who retire early must pay 100% medical premiums until they reach age 60.<sup>11</sup> Second, it neglects to mention that a very substantial number of early retirees decline Delta's post-retirement health coverage upon their retirement. Third, it ignores the fact that health benefits for retirees over age 60 are essentially variable over the long term (since Delta and ALPA can agree to amend them at any time), and are thus presumably not a major factor in the decision of a pilot to retire early. Moreover, a federal health care tax credit available for participants in terminated defined benefit plans who are at least 55 and meet certain health coverage requirements may further reduce retirees' health insurance costs.

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<sup>11</sup> During the special early retirement program in 1996 and 1997, pilots who retired under that program had the 100% premium waived as part of the incentive to retire early.

(e) Change in Financial Situation

28. DPPTO next asserts that “a pilot considering early retirement today faces a different financial reality” from pilots who retired early in 2005. DPPTO Obj., at ¶22. DPPTO states that “individuals who retired in 2005 benefited from a 28% pay increase in the 2001 contract, which allowed them to increase their personal savings prior to early retirement.” Id. This is, of course, a non-distinction, since the pilots currently eligible for early retirement today benefited from the exact same 2001 pay increase (and the same opportunity for increased savings) as those who retired a year ago. Moreover, because LOA #51 has reduced salaries for active pilots since 2005, this would only have the effect of increasing the value of the lump sum payments relative to future earning power (as described in greater detail below). This would inevitably encourage early retirement. Further, DPPTO implies that, unlike pilots that retired in 2005, current active pilots are not eligible for a payout at retirement resulting from unused vacation and bank time. See id. This suggestion is false. Retiring pilots are eligible for the same vacation and bank time payouts as were applicable in 2005.

(f) Delta’s Future Prospects

29. Finally, DPPTO states that “today’s active pilot sees a company with a future, rather than the gloom, doom and bankruptcy that a pilot would have seen in 2005.” DPPTO Obj., at ¶23. As Delta often has stated, Delta has a very long road ahead of it, and the airline industry is brutally competitive. Moreover, since substantially all of the key stakeholders in these bankruptcy cases agree that unless the Pilot Plan is terminated, Delta could not survive, the continuation of the Pilot Plan itself would logically tend to defeat the bright expectations that DPPTO describes.

30. In addition, even if one assumed that this statement by DPPTO is true without qualification, it misses the point. The acceleration in early retirements that began in the years prior to Delta's bankruptcy filing had little to do with the continued existence of Delta, and everything to do with the prospects for the continued existence of the Pilot Plan. Despite DPPTO's argument to the contrary, the fact is that the key determinant of a Delta pilot's decision to retire is whether the pilot thinks the Pilot Plan may terminate and he or she will lose the lump sum benefit and be capped by the PBGC. The financial health and future of Delta is of minimal relevance to that decision. Indeed, during late 2004 and 2005, when there was very real hope on all sides that Delta had sufficiently restructured, there were also substantial continuing early retirements.

**2. *The Schrenker Declaration Is Fundamentally Flawed***

31. DPPTO claims that a "quantitative analysis" conducted by Mr. Marcus Schrenker shows that "far fewer" active Delta pilots will actually retire than the 800 to 1,000 that Delta estimates. DPPTO Obj., at ¶¶12, 24-27. In his analysis, Mr. Schrenker used a variety of assumptions and formulae, combined with individual payroll information and other data provided to him by 60 active pilots, to approximate the lump sums payable for all of the estimated 1,820 Delta pilots eligible for early retirement. Declaration of Marcus Schrenker ("Schrenker Decl."), at ¶2. He then compared his approximated values of the lump sums payable at early retirement with an equally approximate estimate of "how much each pilot could earn and accumulate in retirement benefits if he stayed" with Delta. *Id.* Based on this comparison, he predicted that any pilot whose "lump sum exceeded the amount that an individual would earn by remaining employed" would retire early. *Id.* Even Mr. Schrenker's flawed financial analysis predicts that at least 300 Delta pilots will retire early if the lump sum door opens. *Id.*

(a) Quantitative Flaws

32. Review of the analysis described in the Schrenker Declaration shows that it contains multiple seriously flawed assumptions that decimate its validity.

(i) Assumption That Retired Pilots Earn No Replacement Income

33. Perhaps the most obvious flaw in Mr. Schrenker's analysis is his assumption that any pilot who elects early retirement will not have any replacement income. It is widely known within the airline industry that retired pilots – and particularly those pilots who retire before age 60 – frequently earn replacement income from other occupations. As well trained professionals in a highly compensated field, airline pilots who retire early are often able to replace all or a portion of their income – sometimes for periods several years longer than the FAA's mandatory retirement age of 60 would otherwise allow.

34. Although Delta does not keep statistics on the employment patterns of its retired pilots, the most recent edition of Airline Pilot Job Monthly (Kit Darby's Air Inc., Atlanta, Ga.), Aug. 10, 2006 (attached hereto as Exhibit 3), a trade publication for airline pilots, shows that the demand for new airline pilots in the United States is estimated to translate to over 5,500 new positions per year in the air passenger and air cargo industries, see id. at 1, 14, and lists numerous positions for senior airline pilots interested in working for other major airlines, national airlines, corporate jet operators, cargo carriers and flight training academies. See id. Foreign airlines, many of which allow pilots to fly until age 65, have recently received considerable attention in the media for aggressively recruiting pilots (particularly senior pilots) with prior experience at major U.S. carriers such as Delta, with some offering captains non-taxable salaries of \$8,000 to

\$15,000 per month.<sup>12</sup> In addition, many Delta pilots who have retired early have replaced portions of their income by entering new occupations altogether. Mr. Schrenker’s blanket assumption that all Delta pilots who retire early – many while still in their early fifties – will not earn any replacement income after early retirement is totally unrealistic and likely understates the value of early retirement for active Delta pilots by hundreds of thousands of dollars.

(ii) *Assumption That Retired Pilots Earn No Investment Income On Lump Sums*

35. The next flaw in Mr. Schrenker’s analysis is his apparent assumption that any lump sum taken by a pilot upon early retirement earns no investment income in the years leading up to the pilot turning 60. This is a profound flaw in his analysis and essentially precludes any sort of meaningful “apples to apples” comparison between the “early retirement” scenario and the “retirement at age 60” scenario. As before, this assumption results in an understatement of the value of the lump sum option by potentially (an additional) hundreds of thousands of dollars. Notably, Mr. Schrenker stated in his deposition that he initially did factor in investment income earned on lump sums into his model, but then took it out “for simplicity,” even though he had already done the model. See Deposition of Marcus Schrenker 69:14-19, August 27, 2006

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<sup>12</sup> See Susan Carey, John Larkin & Bruce Stanley, Outbound Flight: With Jobs Scarce, U.S. Pilots Sign On At Foreign Airlines, Wall St. J., May 5, 2006, at A1 (describing the hiring of the most senior U.S. pilots by foreign carriers and quoting the national president of ALPA as saying “[O]ur guys are warming up to [foreign carrier work] . . . This one looks like a permanent structural shift.”); see also Jon Hilkevitch & John Schmeltzer, Great Record. Tip-Top Health. Too Old., Aug. 22, 2006, Chi. Trib., at C1 (describing the demand for senior U.S. airline pilots among foreign carriers); Corey Dade, Why Some Passenger Pilots Take Huge Pay Cuts to Fly Cargo, Wall St. J., June, 2, 2006, at A13 (describing the exodus of pilots from passenger airlines to cargo carriers and noting that “five-year cargo pilots now make an average of \$108,330 a year, while top captains are paid \$194,566”). For example, Mr. Denis Waldron of DPPTO, who retired in May 2005, is currently employed as a Captain for Asiana Airlines as a B-777 pilot, flying one of the largest commercial aircraft in the world. Smith Decl., at ¶13.

(“Schrenker Dep.”).<sup>13</sup> Mr. Schrenker’s analysis also fails to take into account the fact that a pilot taking a lump sum upon retirement may receive a further substantial benefit by rolling the money over into a tax deferred IRA or 401(k), such as the Delta Family Care Savings Plan, Delta’s 401(k) plan. Because the assets in such vehicles grow tax deferred, an investor can realize a substantial incremental appreciation in value because of the extended deferral of tax payments.

(iii) *Mr. Schrenker’s “Model” Mispredicted Last Year’s Wave By Close To 100%.*

36. The best possible proof that Mr. Schrenker’s “model” has no predictive ability is that after it was produced to Delta in discovery, Delta ran it retroactively using the financial information of those pilots that actually retired early in 2005. Of the 720 pilots who retired early in 2005, 656 were active pilots. Under Mr. Schrenker’s model, only 310 – less than half – of the actual early retirees “should” have retired. It is literally less predictive than a random coin toss. This conclusively proves that Mr. Schrenker’s model (i) is not predictive and (ii) grossly understates – by at least an order of magnitude – the likely number of early retirements.

37. As further corroboration for this conclusion, as will be explained by Delta’s actuary at the hearing, a rebuttal analysis performed in response to DPPTO’s objection will (i) show the value at age 60 of benefits that an active pilot would have if he or she does not retire early and the Pilot Plan later terminates and (ii) compare that event with the value at age 60 of retiring early as soon as the lump sum window opens. Under this analysis, on a present value basis, if a “run on the bank” occurs and the Pilot Plan

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<sup>13</sup> At the request of counsel for DPPTO, the Debtors are not filing the transcript of Mr. Schrenker’s deposition as an exhibit to this brief, but will separately provide it to the Court.

subsequently terminates, the average retirement-eligible pilot who remains on Delta's seniority list would lose hundreds of thousands of dollars in pension benefits – even more than the substantial lump sum itself. See Towers Perrin Analysis (attached hereto as Exhibit 12). Moreover, due to PBGC regulations, retirement-eligible pilots under the age of 53 would, on average, lose \$861,000 if they retire at age 60 after a “run on the bank” occurs and the Pilot Plan terminates, while pilots older than 53, on average, lose \$772,000 in such a situation. Although the most senior Delta pilots will gain the most by taking early retirement, if the Pilot Plan terminates, Delta pilots between the ages of 50 and 53 who do not take early retirement will lose the most (and also have the greatest opportunity for replacement income). DPPTO mischaracterizes Delta's position by boldly stating that only pilots over 55 are “the group Delta expects to retire.” DPPTO Obj., at ¶16. In fact, consistent with its experience prior to the petition date, Delta expects a large number of pilots from all retirement-eligible age brackets to retire. Indeed, demonstrating the fact that Mr. Schrenker's model does not come remotely close to predicting how pilots will make retirement decisions, his model suggests that the most senior pilots will retire – since they have less remaining earnings at Delta – while his survey suggests that pilots in the 50-53 age range are more likely to retire. See Schrenker Decl., at ¶6. When asked about this at his deposition, Mr. Schrenker stated that “it turned out I was really quite wrong” in thinking that “my very simple mathematical formula” would map pilots' real decisions. See Schrenker Dep. 96:18-98:20.

(b) *Omission of Psychological and Non-Quantitative Considerations*

38. Finally, Mr. Schrenker's analysis ignores the psychological value of a large lump sum. Although well proven principles of behavioral finance could be cited to express this notion in abstract and theoretical language, a real-world example amply

illustrates the point. When the lump sum door opens, a hypothetical Delta senior pilot in his fifties who is the sole income earner for his family will immediately face a choice between the following two scenarios as he looks ahead to his sixtieth birthday:

- Option 1: Retire early and receive a lump sum worth many hundreds of thousands of dollars (or possibly above \$1 million) today. This lump sum can be invested. Conservatively invested at a modest rate of return, this lump sum would be expected to appreciate significantly between now and when the pilot turns 60. During this period, the pilot can also seek other income opportunities – either in aviation or elsewhere – to replace lost income from Delta. In the event of the pilot’s death sometime during this period, the lump sum (in addition to any other death benefits for which the pilot is eligible) is a certain amount that will be available for his beneficiaries.
- Option 2: Indefinitely forebear retirement. If other Delta pilots retire in large numbers, the pilot can expect that hundreds of millions of dollars in assets will be drained from the already underfunded Pilot Plan, inevitably resulting in its termination. Assuming that Delta somehow survives the operational disruption from large numbers of pilot retirements, the pilot can expect to receive his Delta salary until the pilot reaches mandatory retirement at age 60. Upon retirement, the pilot will receive the benefits he has earned under Delta’s defined contribution plan. In addition, at best, the pilot will be entitled to an annuity payment from the PBGC that is uncertain in amount but dramatically lower than his expected pension.

DPPTO agrees that, as Mr. Morrison testified, lump sums have a significant “psychological value.” Morrison Dep. 37:12-14; see also Schrenker Dep. 97:23-25 (when asked to explain why his financial model did not correspond with his survey results, Mr. Schrenker stated that “what I discovered is that there’s incredible psychological background behind everyone’s decision”). Other aspects of Mr. Schrenker’s work for DPPTO confirm the point.

39. As Mr. Morrison of DPPTO testified at deposition, even his own retirement decision was not primarily motivated by an analytical comparison of the value of his lump sum with the value of his future earnings. Morrison Dep. 12:22-13:4. The value of his lump sum was substantially less than his expected future earnings as a Delta

pilot. Morrison Dep. 24:18-25. Mr. Morrison further testified that those pilots who retired early in 2005 probably did not conduct any serious financial analysis before deciding to retire early, and instead – just like Mr. Morrison – relied on other “personal” factors. Morrison Dep. 11:19-20, 16:4-14. When questioned, Mr. Morrison was unable to name a single pilot he knows who retired in 2005 based on a quantitative financial analysis of his situation. Morrison Dep. 26:8-10, 27:5:8. Stated differently, DPPTO’s own witness totally refuted their own “expert” and admitted that he knows of no one who uses the Schrenker methodology.

40. Delta agrees with Mr. Morrison that unquantifiable personal factors are also central. That is why Delta believes recent actual historical retirement patterns are predictive of the number of early retirements that will occur when the lump sum door opens.

**3. *The “Survey Data” and Pilot “Affidavits” Are Entirely Without Merit***

41. DPPTO has further relied on purported survey data (drawn from calls with Mr. Schrenker himself) and pilot “affidavits” (which are not in fact “affidavits,” but are unsworn forms posted to DPPTO’s website to support its cause) to attempt to contradict Delta’s estimate that approximately 800 to 1,000 pilots will likely take early retirement if the lump sum door opens. DPPTO Obj., at ¶¶26-27. Both the survey data and Mr. Schrenker’s compendium of so-called affidavits, however, are rife with problems and are of minimal, if any, use or consequence to this proceeding.

(a) **Mr. Schrenker’s “Survey” Is Fundamentally Flawed**

42. DPPTO claims that “based on a survey of over 300 retirement-eligible pilots, only 26 of them anticipated potentially taking early retirement,” and argues that applying the percentage of early retirements derived from this survey conducted by Mr.

Schrenker to the total number of retirement-eligible pilots yields fewer early retirements than the 800-1,000 estimated by Delta. DPPTO Obj., at ¶26. This “survey” is, however, (a) nothing of the sort and (b) fundamentally flawed in several key respects, rendering it completely unreliable as evidence in these proceedings.<sup>14</sup>

43. As an initial matter, the entire premise of the “survey” is entirely misplaced: answers to a non-binding “survey” cannot accurately predict what would actually happen if the lump sum door were to open and pilots understandably viewed this as their last chance to obtain lump sums after the door had been closed for a year. If one were to have conducted a similar survey a year or so before Delta’s bankruptcy, it is easy to imagine only a small percentage of eligible Delta pilots suggesting that they planned to retire early, when in fact 45% of them did. History tells us what would actually happen as the risk of losing a \$500,000 to \$1 million or more lump sum becomes real and present – pilots’ preferences for staying if they could keep their lump sums too is overwhelmed by the prospect of losing an enormous sum of money which would serve as a critical nest egg for retirement. As more pilots retire early and drain assets from the Pilot Plan, the pressure to retire early increases, because the risk to the Pilot Plan increases. A non-binding “survey” taken before pilots are actually faced with the pressure of losing their lump sums, and before the “run on the bank” actually takes hold, is divorced from reality.

44. Whereas even a survey that was professionally constructed and independently performed would therefore suffer from a critical flaw, Mr. Schrenker’s purported survey suffers from many more. By Mr. Schrenker’s own admission, his

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<sup>14</sup> For an overview of issues bearing on the adequacy of surveys offered as evidence in court proceedings, see generally Shari Seidman Diamond, Reference Guide on Survey Research, in Reference Manual on Scientific Evidence 229 (2d ed. 2000), available at [http://www.fjc.gov/library/fjc\\_catalog.nsf](http://www.fjc.gov/library/fjc_catalog.nsf).

project was not even intended to be “official” or “professional.” See Schrenker Dep. 46:2-4 (“I’ve not retained any e-mails in regards to this because this was not meant to be an official or scientific study in any way.”); id. 43:5-8 (the few scattered notes he retained concerning his conversations are “really are just for myself. I never in my wildest dreams thought anybody would be looking at this, especially in a professional light.”); id. 83:14-21 (Q: “Other than the notations in these bubbles that we’re referring to, did you take any other notes of what was said? A: “I may have, but I have no idea where they are. I just shred everything. Again, I never thought anybody was ever going to look at this.”); id. 80:20-22 (“No, this wasn’t a scientific study. It wasn’t meant to be a [G]allup poll. It was pretty much just an informal discussion.”).

45. Moreover, Mr. Schrenker conducted the survey himself, and introduced himself (to those pilots who did not already know him) as “affiliated with and working for” DPPTO. See id. 87:12-14. Many pilots already knew what DPPTO was, but for those who did not, Mr. Schrenker “would give them the website and explain it’s a group of retired pilots and – that we’re opposing the termination of the pension plan.” Id. 87:25-88:4. DPPTO, of course, has undertaken an intensive campaign to try to encourage retired pilots to join in its position, and to part ranks with DP3, Inc., by arguing that pilots will not retire early. In other words, pilots who were contacted by Mr. Schrenker were contacted on behalf of an organization of retired pilots whose position was that if active pilots retired early and the Pilot Plan were drained further, their members’ pensions would be in jeopardy. To say the least, these circumstances could hardly be characterized as anything remotely close to an objective “survey.” Pilots were effectively being asked,

by a representative of DPPTO, whether they would take their own lump sums and as a result be part of – from the perspective of DPPTO – the “problem.”

46. In addition, while Mr. Schrenker testified that he had access to Delta’s seniority list and would have been able to call eligible pilots at random, id. 79:3-7 – which he says he “initially” did, id. 77:7 – the pilots contacted by Mr. Schrenker were generally not chosen at random or by any other means that could have lent predictive credibility to Mr. Schrenker’s “sample.” Instead, as stated in his declaration, Mr. Schrenker started doing surveys “based on recommendations” from his clients, and “it escalated by word of mouth.” Schrenker Decl., at ¶3. Similarly, he stated that “active pilots have been helping [him] to gather information by contacting other pilots and asking if I could call to interview them.” Id., at ¶4. Rather than contacting pilots at random, a number of active pilots obviously inclined to help with DPPTO’s project referred particular pilots to Mr. Schrenker. Indeed, Mr. Schrenker admitted during his deposition that many pilots in the survey contacted him, rather than the other way around. See Schrenker Dep. 73:14-25.

47. Even more egregiously, Mr. Schrenker “surveyed” many pilots after they had already submitted the “affidavits” (described below) that DPPTO was soliciting from pilots in e-mails and on its website, in which DPPTO asked pilots to state that they would not retire early. See id. 79:8-25.<sup>15</sup> To state the obvious, these were the people who, in response to DPPTO’s campaign, self-identified themselves as having no intention to retire. In no sense can the word “survey” even be used to apply to this population,

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<sup>15</sup> Mr. Schrenker estimated that 70 people fit into this category, Schrenker Dep. 79:24, though this number is larger than the number of affidavits produced to Delta by DPPTO.

insofar as “survey” is, by definition, intended to mean a statistical prediction from an overall population.

48. In addition, Mr. Schrenker testified that many of the people he interviewed knew who he was. In other words, they were not only being asked to identify themselves as part of the “problem” by a representative of DPPTO, but by someone that many of them knew. Mr. Schrenker has stated that he has “consulted with over 200 potential Delta retirees in the past 3 years,” Schrenker Decl., at ¶1, and that approximately 75% of his total client base is composed of Delta pilots, Schrenker Dep. 18:2-15. He testified at his deposition that “most of these people [who he interviewed] knew who I was and they heard of our firm,” and some of them were Mr. Schrenker’s own clients. See id. 49:16-17; see also id. 88:20-21.<sup>16</sup>

49. Of course, Mr. Schrenker does not even purport to have been objective with respect to the goals of the organization on whose behalf he conducted the study. Mr. Schrenker is a founding member of DPPTO and Mr. Schrenker testified at his deposition that his company donated \$25,000 and the use of its aircraft to the organization. See id. 38:7-38:10. DPPTO does not even try to suggest that the purpose of the study was to conduct an objectively accurate and methodologically sound study. Instead, as Mr. Morrison testified, the point of doing the “survey” was to “substantiate our position” because DPPTO “had to somehow prove that [Delta’s position] was a lie.” Morrison Dep. 57:7-15.

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<sup>16</sup> Mr. Schrenker “guessed” that this was a small number, “maybe 20 at most.” Schrenker Dep. 80:21. We have requested counsel for DPPTO to provide the number, but have not received an answer as of the time of this writing.

50. Compounding the problems yet further, Mr. Schrenker did not use any pre-established, consistent set of questions or script. We have nothing to indicate precisely how questions were posed, and whether, among other things, they were unambiguous, not leading, and consistently presented. Without a record of how the questions were presented, it is impossible to determine whether Mr. Schrenker phrased or ordered his questions or otherwise behaved in a way, intentionally or unintentionally, to influence or shape the survey results. As is well known, the way in which questions are presented or phrased can radically influence the outcome of even professionally conducted surveys.

51. Worse still, we have no record of what pilots said in response to Mr. Schrenker's "survey," other than a few assorted comments from selected pilots that he has jotted in the margins of his spreadsheet. This is the case despite the fact that, while conducting the survey, Mr. Schrenker clearly knew that it was being used by DPPTO in support of its position in litigation. In short, we have no way of knowing what people were asked and how they were asked it, exactly how people responded, what assumptions they may have been operating under, or any number of other controlling factors. Even to call these conversations a "survey," in the sense in which some surveys are deemed admissible in a court of law as reasonably predictive of future behavior, is to stretch the limits of the term well past its breaking point.

(b) *DPPTO's "Affidavits" Are Inadequate to Counter Delta's Evidence*

52. DPPTO also makes much of the fact that "over 50 [retirement-]eligible pilots" have indicated to DPPTO "by affidavit" that they do not plan to retire early.

DPPTO Obj., at ¶27.<sup>17</sup> According to DPPTO, “[t]hese affidavits were obtained by posting a form on the DPPTO website as well as through discussions in airports.” Id. As with the survey, the 35 “affidavits” initially produced by DPPTO to Delta (and the 30 “affidavits” produced by DPPTO to Delta at 7 p.m. yesterday evening) (examples of which are attached hereto as Exhibit 5) are plainly insufficient to support the proposition for which DPPTO offers them.

53. First, it is plain that no effort was made in soliciting these “affidavits” to obtain a representative sample of active pilots, see DPPTO Obj., at ¶27; DPPTO Website, <http://www.dppto.com/index.html> (attached hereto as Exhibit 4), at 1 (urging pilots, via DPPTO’s website, to “fill out and and [sic] fax the retirement affidavit now!” in order to “FIGHT BACK”); see also Exhibit 4 at 3, Affidavit for Delta Pilots Pension Termination Opposition (titling each “affidavit” as “FOR” DPPTO), making it impossible to extrapolate from the 65 “affidavits” any predictions about the behavior of the 96% of the 1,820 retirement-eligible pilots who have not submitted such an “affidavit.”

54. Second, the form “affidavits” fail to offer any options beyond retirement “at the first opportunity if the lump sum [door] were opened” or (at the other extreme) at age 60, Exhibit 5 at 1-2, thereby obscuring the range of actual, nuanced and contingent choices a pilot might make in light of other factors (an apparent “run on the bank” for lump sums by other pilots, the possibility of losing the lump sum option forever, an operational or financial crisis at Delta or the real threat of such a crisis, etc.),<sup>18</sup> as some of

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<sup>17</sup> Although two days before the DPPTO Objection was filed Mr. Morrison announced on DPPTO’s website that DPPTO had received “hundreds of affidavits,” at his deposition Mr. Morrison acknowledged that the DPPTO objection refers to only fifty such “affidavits” and that he “had no reason to believe that 50 was an accurate number.” Morrison Dep. 68:6-77:2.

<sup>18</sup> Indeed, the most recent version of the “affidavit” does not even provide for a choice between these two options, but rather is simply a statement that the pilot signs that states that they do not plan to

the respondents themselves recognized, see id. at 4 (“I still don’t like the survey question/statement. IF, lump sums were available and in je[o]pardy, I’d leave in a heart beat. IF lump sums were available and not in je[o]pardy, I’d stay until age 60, longer, if the rules change.”).<sup>19</sup>

55. Finally, the “affidavits” are not, in fact, affidavits at all – they are not notarized or sworn under oath, nor are they offered as declarations under penalty of perjury pursuant to 28 U.S.C. § 1746.<sup>20</sup> They are merely a survey form filled out by 65 of DPPTO’s supporters.<sup>21</sup> See, e.g., Exhibit 5; see also Exhibit 4, “Delta Pilots Pension Termination Opposition Official Random Field Survey V2.4” at 2 (presenting the “affidavit” as the “SURVEY” and offering directions to “survey participant[s]”). They are nonbinding statements of intent from a very small percentage of eligible pilots and, like Mr. Schrenker’s “survey” responses, they cannot capture what will happen when pilots actually face the prospect of losing their lump sums and view this as possibly their last chance to secure them. In short, they are of no probative value to this proceeding or DPPTO’s objection.

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retire early, even if the lump sum were to become available. Compare Exhibit 5 at 1, with Exhibit 4 at 5 (Affidavit of David L. Mosley).

<sup>19</sup> Although this pilot indicates that he would “leave in a heartbeat” if lump sums were available and in jeopardy, Mr. Schrenker’s summary spreadsheet of survey results identifies the pilot as one who would not retire before age 60. Thus, because Mr. Schrenker’s survey draws blindly from the “affidavits” without regard to the qualified nature of the pilots’ responses, the survey results are rendered even more useless.

<sup>20</sup> The “affidavits” are also therefore inadmissible as evidence in this proceeding. See generally United States v. 143-147 E. 23rd St., 77 F.3d 648, 657-58 (2d Cir. 1996) (concluding that the factual assertions made in an “unsworn letter” “were properly disregarded by the court” on summary judgment).

<sup>21</sup> Again, until 7 p.m. yesterday evening, DPPTO had produced to Delta only 35 such “affidavits.”

#### 4. *DPPTO's Actuary's Declaration Is Fraught with Errors*

56. The Declaration of Ian Altman (the "Altman Decl."), the actuary retained by DPPTO to support the contentions of its objection, is short on "analysis," but makes many accusations without factual support.<sup>22</sup> Mr. Altman's opinions and findings should be accorded little to no weight by this Court. As he admitted at deposition, he was retained by DPPTO "approximately two weeks ago," Deposition of Ian H. Altman 6:23-25, Aug. 25, 2006 (attached hereto as Exhibit 14) ("Altman Dep."), has had "no professional experience" with the operational issues associated with major airline pensions, *id.* 10:17-24, has until now "never performed any . . . actuarial calculations for a defined pension benefit plan covering airline pilots," *id.* 11:7-18, and has no prior experience dealing with a pension plan "where it was actually determined that a liquidity shortfall situation had occurred," *id.* 12:6-8. In addition, he conceded that, other than "reading newspapers and being a frequent flier," *id.* 14:10-11, he has essentially done no background work or analysis whatsoever on the facts of this case.<sup>23</sup> Perhaps even more

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<sup>22</sup> In his declaration, Mr. Altman makes the claim under oath that, "[d]espite our repeated specific requests, Delta has failed to provide any documentation" for various calculations, including "[i] calculation of the liquidity shortfall funding projections, [ii] calculation of the required ongoing funding under the new pension law, [iii] division between liquidity shortfall and ongoing funding requirements for projection of future cashflow, and [iv] demographic detail on the 1,100 pilots who retired in the 12 months prior to Delta's chapter 11 filing." Altman Decl., at ¶4. These accusations, repeated in DPPTO's Objection, see DPPTO Obj., at ¶40, (i) were never made to Delta prior to these public filings and (ii) are totally untrue. In accordance with a written discovery agreement reached with DPPTO on August 16, 2006, Delta produced materials responsive to the first two of these categories on August 18, 2006. Counsel for DPPTO never requested materials relating to the third or fourth categories identified by Mr. Altman – indeed, as to this latter category, DPPTO's initial request for documents specifically excluded data related to "past retirement history." See DPPTO's First Document Request (attached hereto at Exhibit 6); see also E-mail from Sara Pikofsky to Marshall S. Huebner (Aug. 16, 2006 8:33 p.m.) (contained in Exhibit 7 attached hereto) (describing various categories of discovery materials to be produced by Delta – none of which encompass the third or fourth categories identified by Mr. Altman). Indeed, when Mr. Altman was shown the Bates-stamped materials that Delta provided to DPPTO's counsel, he immediately admitted that the produced documents were "precisely the type of information I was looking for and repeatedly requested." Altman Dep. 30:21-23. Based on conversations between counsel, this matter now appears resolved.

<sup>23</sup> As illustrated, for example, by the following exchange:

astonishingly, despite DPPTO’s written promise to produce to Delta “all reports, analyses and studies relied upon by the declarants,” not one piece of paper or electronic record was produced by Mr. Altman other than public filings of the Pilot Plan itself. It is difficult to imagine what analysis Mr. Altman could have performed without producing any written materials.

57. Perhaps because of his admitted limited knowledge about the extraordinarily complex facts and legal backdrop of the Pilot Plan, Mr. Altman (who is not a lawyer) proceeds in his declaration to (i) opine on ERISA law and how this Court should apply it, Altman Decl., at ¶5, (ii) offer various suggestions for how Delta could avoid paying lump sums to pilots (which would be contrary to law), id., at ¶¶13-17, and (iii) share savings calculations based on an incorrect understanding of LOA #51, id., at ¶18. With respect to Mr. Altman’s opinions about ERISA, section 4041, the distress termination standard and his “opinion” of whether Delta has satisfied the distress termination standard, id., at ¶5, Delta submits that these matters are well outside of Mr. Altman’s area of expertise. His “savings” calculations based on his flawed understanding

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- Q. Other than reading the Towers’ declaration and the actuarial report of Towers, what research have you done with respect to commercial airline pilot retirement rates?
- A. Nothing outside of reading all of the declarations that have been provided in this case . . . .
- Q. So you didn’t attempt to determine whether studies have been done regarding retirement rates for commercial airline pilots?
- A. I did not look into that, no.
- Q. Why not?
- A. There was a relatively limited time, as I described, to prepare this declaration. It’s just not a possibility.

Altman Dep. 14:2-20.

of LOA #51 and his unlawful “alternatives” for how Delta could solve the lump sum problem or the problems of the Pilot Plan are addressed in sections II-B and II-C, respectively.<sup>24</sup>

58. Most of the remainder of Mr. Altman’s declaration is devoted – again with no factual background – to questioning Delta’s actuary, Margaret McDaniel, her competence and her fidelity to professional standards. *Id.*, at ¶¶7-12. Although Delta will more than adequately address the merit of Mr. Altman’s assertions, his “calculations” and accusations in greater detail at trial,<sup>25</sup> three statements in the Altman Declaration simply cannot go unanswered in this brief. First, Mr. Altman states that the Airline Relief Act “provides significant long term pension relief to airlines” and “it is only the immediate cashflow crunch that determines the validity of Delta’s claims.” *Id.*, at ¶7. As stated elsewhere in this brief, this statement is erroneous and reveals a misunderstanding of the new legislation – which has not changed the statutory obligation of companies whose plans are in liquidity shortfall to make liquidity contribution requirements when due, *see* McDaniel Decl., at ¶¶32-33.

59. Second, Mr. Altman attacks Ms. McDaniel for not using exactly the same assumptions used by Towers Perrin in its July 1, 2005 Actuarial Report to calculate 2006 and beyond expected early retirements. Altman Decl., at ¶¶9-10, 12. Incredibly, the

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<sup>24</sup> Indeed, it is far from clear that Altman’s repeated testimony in areas well outside his actuarial expertise is appropriate. *See* Fed. R. Evid. 702; *see also* Kuhmo Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590-93 (1993); Brink v. Union Carbide Corp., 41 F.2d 402, 405-06 (S.D.N.Y. 1997).

<sup>25</sup> Among other things, Mr. Altman states that Ms. McDaniel “ma[de] no independent effort to verify the projection that 800 – 1,000 pilots will immediately retire if the plan is not terminated.” Altman Decl., at ¶8; *see also id.*, at ¶12. As Mr. Altman readily admitted during his deposition, Mr. Altman had no basis for this assertion other than conjecture based on his review of Ms. McDaniel’s declaration. Altman Dep. 55:17-57:4. This will be further addressed at trial.

Altman Declaration suggests that rote application of the July 1, 2005 assumptions<sup>26</sup> would have resulted in an appropriate estimate of future pilot retirements and future pension contributions, notwithstanding the following events, among others, that have occurred since that date:

- Delta’s September 14, 2005 bankruptcy filing;
- Delta’s cessation of contributions to the Pilot Plan;
- The occurrence, for the first time in the Pilot Plan’s history, of a liquidity shortfall and the consequent cessation of lump sum payments;
- The issuance of a notice of intent to terminate the Pilot Plan;
- ALPA’s repeated testimony that the Pilot Plan is “doomed”;
- ALPA’s acceptance of an additional, substantial cut in pay;
- The freezing of the Pilot Plan, so that no additional accruals of benefits are permitted; and
- The enactment of the Airline Relief Act, part of which provides that significantly underfunded pension plans must cease paying lump sums at a future date.

Obviously, each of these factors (let alone all of them together) have vastly increased the incentive of Delta pilots to retire early should the lump sum door open in the future (particularly if they expect that the Pilot Plan will terminate thereafter). Nevertheless, at deposition, Mr. Altman refused to express an opinion as to whether a calculation performed subsequent to July 1, 2005 should reflect any of these events, Altman Dep. 61:14-19, and he himself refused to acknowledge them in his own “broad brush calculations” that he submitted to the Court while reserving the “right to present refined calculations” in the future. Altman Decl., at ¶¶20-23. As historical retirement patterns demonstrate, Mr. Altman’s refusal to accept the real-world situation of both Delta and the

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<sup>26</sup> In his deposition, Altman admitted that he does not even know what factors Towers Perrin considered in constructing the July 1, 2005 retirement rate assumptions. Altman Dep. 70:15-19.

Pilot Plan defies logic and common sense – let alone reasonable actuarial standards – and Delta will show this at trial.<sup>27</sup>

60. Finally, in both his declaration and his deposition, Mr. Altman questioned Ms. McDaniel for not taking into account certain “demographic information” about the pilot population that was eligible for retirement in 2005 and is eligible for retirement today. Id., at ¶12; Altman Dep. 57:5-20, 81:22-82-17. Ms. McDaniel will testify at trial that, subsequent to Mr. Altman’s deposition, she performed precisely the sort of “demographic” analysis advocated by Mr. Altman, and compared Delta pilots that retired early in the year preceding bankruptcy with those eligible for early retirement today. Based on this analysis (and before considering any of the further current incentives to retire early), the expected number of lump sum retirements in the 12 months beginning October 1, 2006 would be approximately 678 – almost triple Mr. Altman’s conjectured and unsupported number. See Demographic Analysis of 2004-05 Retirements Applied to Current Eligible Population (attached hereto as Exhibit 13).

**C. Even if the Early Retirements Are Many Fewer Than the Estimated 800-1,000, Delta Would Still Not Be Able to Procure Exit Financing or Propose a Feasible Plan of Reorganization Unless the Pilot Plan Is Terminated**

61. As discussed above, Delta’s best estimate of the expected level of early retirements if the lump sum door reopens is 800 to 1,000. These early retirements will cause severe operational and financial disruptions at Delta. See Bastian Decl., at ¶55. As a result, Delta will breach its DIP financing covenants and would be exposed to the risk of liquidation. See Coleman Decl., at ¶12. If Delta somehow could survive this crisis,

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<sup>27</sup> Mr. Altman also “echo[es] Mr. Morrison’s observations that lump sum discount rates were nearly 1% lower in 2005 than they are today” and notes that, as a result, “lump sums today are significantly less attractive.” Altman Decl., at ¶12. Delta addresses the exaggerated interest rate claims by Mr. Morrison in Section I-B-1(a) above.

Delta would need exit financing in the range of \$5.2 billion to \$6.6 billion. See id., at ¶14; Bastian Decl., at ¶63. This is billions more than Delta could raise under any circumstances because, among other reasons, Delta has insufficient collateral to support such a massive level of exit financing. See Coleman Decl., at ¶¶13,16. Moreover, even if Delta could somehow obtain such huge amounts of exit financing, Delta would be so vulnerable to future waves of early retirements that it could not propose a feasible plan of reorganization. See id., at ¶17.

62. DPPTO does not attempt to rebut these facts. Instead, it simply asserts that a much lower number of pilots will actually retire. As extensively discussed above, this assertion is directly contrary to the evidence. However, even if far fewer pilots retire early, the resultant levels of required exit financing still are beyond Delta's reach if it were forced to continue the Pilot Plan. For example, as will be confirmed at the hearing, if the low end of Delta's estimate (800) is reduced by 25% to 600 early retirements, Delta would still need \$4.4 billion in exit financing. If the estimate is, arguendo, reduced by an additional 25% to 400 early retirements, Delta would need \$3.6 billion in exit financing. Even at the entirely fanciful level of 300 early retirements suggested by DPPTO, Delta would need \$3.3 billion in exit financing. See "Required Financing" prepared by Delta (attached hereto as Exhibit 8).

63. As Delta's witnesses will show at trial, Delta could never raise any of these exit financing amounts – Delta has neither the collateral base nor a business plan that will support exit financing at any of these levels, especially with the overhanging risk of future waves of early retirements. An exit financing amount of "only" \$3.3 billion still vastly exceeds what Delta could obtain, because Delta would have only \$1.20 in

collateral to offer lenders for every dollar in loans. As Mr. Coleman will testify at trial, this is an unworkable coverage ratio for exit lenders to Delta, particularly in light of the many other factors described below and that will be elaborated upon at the hearing. By contrast, in the UAL exit financing, with no remaining defined benefit plans, let alone the risk of future waves inherent in the Pilot Plan’s lump sum feature, the exit lenders had \$2.30 of collateral for every dollar lent. See Coleman Decl., at ¶16.

64. Even in the unlikely event that fewer than 800 to 1,000 pilots immediately retire early when the lump sum door opens, this would not make Delta any more able to obtain exit financing, for a very simple reason. While a lower level of initial early retirements would reduce the amount of the required exit financing, it would make Delta a greater credit risk to potential exit lenders – a lower level of early retirements today means that a larger number of pilots will or could retire early and take lump sums in later years, when Delta will not have the protection of chapter 11. As the following table shows, assuming no early retirements, the number of pilots eligible for early retirement today (1,820) almost doubles to 3,517 by 2010.

**Number of Pilots Eligible for Early Retirement**

	As of:			
	12/31/2007	12/31/2008	12/31/2009	7/1/2010
Counts at Prior Period	1,820	2,472	2,957	3,408
New early retirement eligibles	693	552	532	202
Mandatory retirements	(41)	(67)	(81)	(93)
<b>Total Early Retirement Eligible Pilots</b>	<b>2,472</b>	<b>2,957</b>	<b>3,408</b>	<b>3,517</b>

Thus, after emergence from bankruptcy, the potential number of early retirements that Delta could suffer – without prior notice – will be even larger, the potential operational

disruption will be even worse and the potential mandatory liquidity contributions will be even greater than today. Even the most cursory due diligence by an exit lender will reveal this fact.

65. Moreover, one trigger for such an (almost unimaginable) crisis is already set. Effective July 1, 2010 – well before the likely maturity of any potential exit financing facility – the Airline Relief Act will severely restrict Delta pilots from taking lump sums for several years if the Pilot Plan is (as it almost certainly will be) less than 80% funded. For Delta to avoid triggering this restriction (assuming 600 pilots retire when the lump sum door initially opens), it would need to make an additional contribution of \$515 million to the Pilot Plan in 2010. If only 400 pilots retire, Delta will need to contribute \$800 million, and if 300 retire, Delta will need to contribute \$835 million. See “Forecast of Contributions and Expense through December 31, 2010 Assuming Lump Sum Door Reopens and 300 – 1,000 Pilots Retire Early as of October 1, 2006” prepared by Towers Perrin (attached hereto as Exhibit 9). Delta’s failure to fund these amounts will almost certainly cause a “run on the bank” in 2010 – yet another massive wave of pilot retirements. No potential source of exit financing would lend money to a company that bears this risk. Added to this risk would be the billions of dollars that would leave the collateral base as a result of making of the liquidity shortfall contributions to the Pilot Plan. For example, even if only 300 pilots retire, Delta would need to contribute \$1.0 billion through 2010, excluding the impact of retirements in 2010 triggered by the onset of lump sum restrictions. This amount would increase to \$1.7 billion should the “run on the bank” occur in 2010.<sup>28</sup> See id.

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<sup>28</sup> These amounts will be even greater if the annual investment return on Pilot Plan assets through 2010 is lower than projected.

66. In addition, Delta, like the rest of the airline industry, is highly susceptible to external events such as price wars, fuel spikes, hurricanes, terrorist events and avian flu or other contagious disease epidemics.<sup>29</sup> Delta's vulnerabilities, post-emergence, will be compounded due to its relative liquidity position (even without the Pilot Plan) on two important measures: (i) the ratio of unrestricted cash to revenues and (ii) the cash reserves for annual days of operating expenses. See "Delta's Cash Position Relative to Other Airlines as of June 30, 2006" prepared by Blackstone (attached hereto as Exhibit 10).<sup>30</sup> Were Delta forced to continue the Pilot Plan, Delta would suffer from a fatally weak balance sheet. Burdened with the costs of the Pilot Plan, as well as periodic disruptions from early retirements, Delta would be unable to compete effectively with its peers and would be extremely susceptible to future shocks and events. As this Court well knows, LCCs and many legacy carriers have no defined benefit plans. Moreover, were it forced to continue the Pilot Plan, Delta's post-emergence frailty would not go unnoticed by Delta's active pilots. Since fear of loss of the lump sum option is the key driver of pilot early retirements, see Bastian Decl., at ¶45, any external shock impacting the airline industry could be a "mega" shock for Delta since it also could be a trigger for a wave of early retirements. To say that potential exit lender would not lend to a company with this degree of overhanging risk is an understatement.

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<sup>29</sup> For example, Delta incurs an extra \$25 million in costs for every one cent increase in the price of jet fuel. Delta's forecast for the price of jet fuel has increased from \$1.75/gal to \$2.25/gal since the beginning of 2006 and Delta estimates its fuel costs will be over \$900 million greater than its business plan for 2006. A shock like 9/11 could wipe out \$800 million of Delta's cash reserves, even if only 50% of the impact is assumed. A prolonged fare war driving a 5% reduction in Delta's revenues from planned levels for the year would reduce Delta's liquidity by an amount in the range of \$750 million to \$1 billion.

<sup>30</sup> As of June 30, 2006, Delta's unrestricted cash to revenue ratio was 15.9% compared to the LCC average of 29.9% and a peer group average of 20.1%. When Delta's unrestricted cash is translated to annual days of operating expenses, it had 60 days of coverage as compared to the LCC average coverage of 122 days and peer group average coverage of 93 days. See Exhibit 10.

67. For all the foregoing reasons, unless the Pilot Plan is terminated, the precise number of early retirements – 1,000, 800, 600, 400 or even 300 – is not ultimately determinative. Even at DPPTO’s unsupportable lowball early retirement estimates, Delta’s witnesses will testify at trial that, if Delta is forced to continue the Pilot Plan, it would still not be able to obtain the required exit financing and would still not be able to propose any plan of reorganization that would satisfy the feasibility test under section 1129 of the Bankruptcy Code.

**II. DPPTO’S ARGUMENTS CONCERNING “ALTERNATIVES”  
AVAILABLE TO DELTA ARE WITHOUT MERIT**

**A. Further Cost Cutting, Financial Improvements and Other Measures Are Not Available to Satisfy the Funding Needs of the Plan**

**1. *Delta’s Deep and Company-Wide Cost Cutting***

68. In spite of Mr. Bastian’s extensive testimony to the contrary, DPPTO, incredibly, claims that the “Debtors’ motion cites very little, other than vague references to labor cost cuts and cuts in aircraft costs and leases, with regard to other steps taken to improve their financial condition.” DPPTO Obj., at ¶34 (citing Motion, at ¶64). This is irresponsible and false. Over the course of no fewer than sixteen paragraphs and seven pages, the Bastian Declaration painstakingly describes extensive and company-wide cost cuts and financial improvements of up to \$5 billion per year sought during the period from 2001 to 2005. Bastian Decl., at ¶¶15, 25-32. As Mr. Bastian explains, these initiatives included:

- eliminating travel agent base commissions for tickets sold in the United States and Canada;
- reducing contract work, inventory levels, advertising expenditures, passenger service expenses and professional fees;
- transforming the passenger check-in process to utilize more self-service options;
- implementing new crew scheduling technology for flight attendants
- restructuring operations at two of Delta’s hubs;

- entering into a marketing alliance with Continental and Northwest;
- renegotiating a variety of significant work- and benefit-related terms in Delta's collective bargaining agreement with ALPA;
- implementing of operational improvements, including technology and productivity enhancements such as improvements in airport processes, maintenance and distribution efficiency;
- effectuating overhead reductions;
- implementing across-the-board pay reductions for all non-pilot employees (including executives);
- reducing vacation time;
- increasing the shared cost of healthcare coverage and eliminating a healthcare insurance subsidy for all non-pilot employees retiring after January 1, 2006; and
- eliminating thousands of non-pilot jobs.

Id., at ¶¶27-31 & n.5.

69. The Bastian Declaration further articulates the additional \$3 billion per year in improvements being implemented by the Debtors as part of their chapter 11 reorganization, Id., at ¶¶15, 38-41, bringing the total value of cost cuts and financial improvements to \$8 billion per year over 2001 levels. These additional efforts to reduce costs and generate financial improvements include:

- revenue and network improvements such as (i) fleet simplification, (ii) increased international mainline flying, serving routes with greater profit potential, (iii) domestic capacity reductions due to over-capacity, (iv) additional right-sizing and simplification of Delta's hubs;
- restructuring initiatives such as (i) debt relief, (ii) airport lease and facility savings, (iii) aircraft lease rejections and renegotiations, (iv) restructuring of vendor contracts, and (v) changes to otherwise nonamendable medical benefits for existing retirees; and
- dramatic labor cost reductions, including (i) savings from changes in wages, benefits and work rules for non-pilot employees,<sup>31</sup> and (ii) savings due to the recent renegotiation of Delta's labor contract with ALPA.

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<sup>31</sup> Delta's management has participated fully in the wage reductions and benefit changes implemented with respect to non-pilot employees during bankruptcy. As this Court found on February 22, 2006, "[i]t's not contested that this group of employees is, by far, the lowest compensated of any of the similar airlines with which Delta competes." In re Delta Air Lines, Inc., No. 05-17923 (ASH), Tr. of Omnibus Hr'g Feb. 22, 2006 50:24-51:2.

Id., at ¶39. In addition, Mr. Bastian has testified that Delta anticipates that as many as 9,000 jobs will have been eliminated system-wide between 2005 and the end of 2007.

Id., at ¶40.

70. It should be abundantly clear to DPPTO that no further cuts could be made that would allow Delta to operate as a viable airline, implement its Business Plan and fund its massive obligations to, and absorb the risks of, the Pilot Plan. Mr. Bastian has expressly testified to this in his Declaration. Id., at ¶¶38, 41, 62. Moreover, DPPTO itself fails to suggest any area of additional cost reductions that Delta has not yet made, let alone cost reductions that would allow it to afford its massive obligations under the Pilot Plan. This argument is specious.

**2. *DPPTO's Arguments Concerning the ALPA Note and the ALPA Claim Are Factually Wrong***

71. Pursuant to the terms of LOA #51, ALPA will receive an unsecured claim (the "ALPA claim") and, if the Pilot Plan terminates, a note (the "ALPA Note"). It is clear that the various assertions made by DPPTO in its objection completely misunderstand the nature and structure of both the ALPA Note and the ALPA Claim. DPPTO Obj., at § IV.

72. Both Mr. Morrison and Mr. Altman stated in their declarations to this Court that ALPA is receiving a \$650 million administrative claim, and that this \$650 million would be immediately available to fund the Pilot Plan were it not terminated. Morrison Decl., at ¶13; Altman Decl., at ¶18. This is incorrect. As this Court knows, the ALPA Note is a 15-year bullet maturity note. It is neither an administrative claim nor a cash payment. There are no required repayments of principal prior to the maturity date of

the ALPA Note, which will be in 2022 (or later). Delta's only obligation prior to the maturity date is semi-annual interest.<sup>32</sup>

73. DPPTO's assertion that Delta would "regain[] the value" of the ALPA Claim if the Pilot Plan is not terminated, DPPTO Obj., at ¶31 n.4, is likewise utterly incorrect. The ALPA Claim was granted and allowed upon approval of LOA #51. It has no connection at all to Pilot Plan termination or non-termination. It was, like the ALPA Note, in respect of massive concessions by working pilots. It is also merely an unsecured claim that will be converted to equity upon emergence. In no event could it free up any value to fund the Pilot Plan.

**B. A PRP Program Will Not Salvage the Pilot Plan**

74. DPPTO also suggests that any operational crisis caused by the simultaneous retirement of hundreds of senior pilots could be averted through the implementation of a Post Retirement Pilot ("PRP") program. *Id.*, at ¶29. Under such a hypothetical future PRP program, retired pilots would operate Delta aircraft as temporary employees for the at least 14-16 months that would be required to train and replace the pilots that retired early. For the reasons set forth below, a PRP program (which at best would address only operational disruption – one of several fatal problems of the Pilot Plan) is not feasible.

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<sup>32</sup> Contrary to DPPTO's equally misleading suggestion, DPPTO Obj., at ¶31, \$580 to \$680 million would not be sufficient to cover the Pilot Plan's funding requirements. The contribution to the Pilot Plan is not \$580 to \$680 million. As the McDaniel Declaration makes plain, \$580 to \$680 million is the amount of lump sums expected to be paid out of the Pilot Plan if lump sum payments are reinstated as of October 1, 2006, and 800 to 1,000 pilots retired. McDaniel Decl., at ¶31. The actual funding requirements for the Pilot Plan would be approximately twice that amount upon emergence from bankruptcy. *Id.*, at ¶34.

(a) *Based on Delta's Past Experience, a PRP Program Is Not Workable Under These Circumstances*

75. Assuming that retired pilots would participate in a PRP program, past experience suggests that such a program would not be effective to address the current circumstances. For example, when a PRP program was implemented in October 2004 and 2005 (the only time in history), Delta was not always successful in getting enough retired pilots to fill the staffing gaps left by early retirements. There were two primary reasons for this: First, some retired pilots preferred to stay retired rather than work at what was – from their perspective – the greatly reduced (32.5%) wage rates in place for Delta pilots. (This was even before the additional 14% cut in wage rates under LOA #50 and LOA #51, which did not go into effect until near the end of the PRP program on December 15, 2005). Second, ALPA and active pilots only accepted even a limited PRP program if, inter alia, participating retired pilots would not be permitted to retain their seniority rights for bidding on monthly flying schedules, leaving participating retired pilots to receive the least desirable monthly schedules, and in many cases fly on “reserve status.”<sup>33</sup> Because participating retired pilots were already receiving their retirement benefits, they did not have the same incentive as active pilots to fly the period that they were assigned. As a result, participants in the past PRP program could (and at times did) refuse to fly at any time with no notice, jeopardizing the reliability of Delta’s flight operations. Given these past problems, the notion that the past PRP program could be operated on the scale required by 800 to 1,000 retirements is not realistic.

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<sup>33</sup> A pilot that files on “reserve status” has fewer days off and a non-predictable flying schedule, whereas senior pilots generally have the best schedules consisting of scheduled trips for which the pilot bid.

(b) *A PRP Program Would Not Be Acceptable To Active Pilots Under These Circumstances*

76. Implementation of any sort of PRP program would require (i) a decision by ALPA to engage in negotiations on this issue; (ii) a negotiated agreement between the Delta and ALPA negotiating committee; (iii) ratification by the MEC of the tentative agreement reached between the negotiating committees; and it would most likely require: (iv) ratification by active Delta pilots. Delta does not believe that ALPA or the active pilots will agree to a new PRP program, especially one of the size and duration that would be needed to avert the coming operational crisis. The 2004-2005 PRP program was bitterly resented by most active pilots because its implementation was seen as encouraging senior active pilots to retire early and take lumps sums (draining the Pilot Plan of assets) while continuing to fly the highest paying aircraft types and routes. As a result, ALPA has advised Delta repeatedly that most active pilots are implacably opposed to PRP programs. Indeed, last year, Delta formally requested that ALPA agree to extend the small 2004-2005 PRP program by three months. The ALPA negotiators flatly refused even to entertain the idea with the MEC. During the section 1113 negotiations, Delta asked ALPA repeatedly for an extension of the 2004-2005 PRP program and was not only repeatedly rebuffed but was told that the PRP program must end by no later than the end of 2005. In light of the profound anger among active pilots at the much smaller and unprecedented prior PRP program, the notion that a PRP program could be implemented in a manner that would allow Delta to avoid the consequences of 800 to 1,000 early pilot retirements is unrealistic. Moreover, because over 500 additional pilots become eligible for early retirement every year for the next three years, a PRP program that could “solve”

the potential operational disruptions posed by recurrent waves of early retirements would effectively require a perpetual PRP program, to which active pilots would never consent.

(c) *A PRP Program Would Actually Worsen the Problems of the Pilot Plan*

77. Even assuming that retired pilots would participate in a PRP program and active pilots would very unhappily (and resentfully) consent to one, such a program would have the very obvious (and extremely negative) consequence of encouraging yet more current and future senior Delta pilots to retire early and take lump sums.

Essentially, such a hypothetical PRP program would give senior pilots the best of both worlds – they would be able to retire early and take their lump sums, while continuing to receive their salary for an extended period of time if they choose to continue flying.

These ever increasing cycles of early retirements, lump sums, drained assets and liquidity contributions would dramatically increase the financial problems of both Delta and the Pilot Plan, compromising Delta's planned exit from chapter 11 and inevitably ending in a Pilot Plan termination far more financially damaging (for both Delta and participants) than that sought today.

(d) *The IRS Would Likely Strongly Oppose the Implementation of a PRP Program of the Scale Required to Avert an Operational Disruption*

78. Finally, a PRP of the size necessary to avert the upcoming operational disruption would jeopardize the tax qualifications of the Pilot Plan. Under relevant tax regulations, qualified defined benefit plans such as the Pilot Plan are prohibited from making distributions to participants who have not reached their normal retirement date as long as they remain employed by the employer. See, e.g., Treas. Reg. § 1.401-1(b)(i). Violation of this rule could result in plan disqualification and severe adverse tax consequences for both Delta and Pilot Plan participants. Because of the obvious potential

for abuse, the IRS requires that there be an actual separation from service before qualified plan benefits can be paid. The IRS will ignore “sham” retirements and not permit qualified benefit payments that arise from them. As a result, pre-arranged returns to employment are prohibited. See Preamble to Proposed Treasury Regulations on Phased Retirement, 69 FR 65108, 65110 (Nov. 10, 2004).

79. In structuring the 2004-2005 PRP program, Delta and ALPA carefully considered both the formal views of the IRS under the regulations described above, and the informal views of the IRS communicated to Delta regarding retirement/rehire arrangements. The key IRS requirements were perceived to be the following: (i) no retiring pilot was assured of rehire by Delta; (ii) the PRP program was of an extremely limited duration; and (iii) it was tailored so as only to deal with a certain level of pilot retirements in a small number of aircraft types. Assuming a new PRP program of the size required could even be implemented, any new PRP program would – from the perspective of the IRS – lack all of these factors. As a result, Delta believes that the IRS would very likely consider any such PRP abusive under the relevant tax regulations.

**C. DPPTO’s Other “Alternatives” Either Violate the Anti-Cutback Rule or Are Otherwise Unworkable**

80. In the next spin of DPPTO’s proposed game of Russian Roulette for Delta, it throws out several other “suggestions” for saving the plan. They range from frivolous to illegal.

**1. *Waivers Will Not Salvage the Pilot Plan***

81. Contrary to DPPTO’s assertions, DPPTO Obj., at ¶42, Delta and its pilots could not agree to waive the lump sum option from the Pilot Plan without violating the

law and disqualifying the Pilot Plan under the Internal Revenue Code (the “IRC”), 26 U.S.C. §§ 1 et seq.<sup>34</sup>

82. Both the IRC and ERISA contain provisions – codified in section 411(d)(6) of the IRC and section 204(g) of ERISA and known as the “anti-cutback rule” – that preclude employers from eliminating or otherwise reducing “protected benefits,” which specifically include distribution options, such as the lump sum option, under a tax-qualified pension plan. 26 U.S.C. § 411(d)(6); 29 U.S.C. § 1054(g); see generally Cent. Laborers’ Pension Fund v. Heinz, 541 U.S. 739, 743-44 (2004) (recognizing the importance of the anti-cutback rule). As originally enacted, section 411(d)(6) of the IRC provided that “[a] plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8) . . . or section 4281 of the Employee Retirement Income Security Act of 1974.” 26 U.S.C. § 411(d)(6). In 1984, Congress amended these provisions to further clarify their scope. See Retirement Equity Act of 1984 (the “REA”), Pub. L. No. 98-397, 98 Stat. 1429 (1984). The REA amended section 204(g) of ERISA and section 411(d)(6) of the IRC to read in relevant part:

(g) Decrease of accrued benefits through amendment of plan.

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

\* \* \*

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

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<sup>34</sup> A violation of the IRC’s anti-cutback rule can result in a pension plan losing its tax-qualified status. See 26 U.S.C. §§ 401(a)(7), 411.

29 U.S.C. § 1054(g); see also 26 U.S.C. § 411(d)(6);. Thus, any plan amendment that has the effect of eliminating an optional form of benefit is treated as reducing an accrued benefit under the plan.

83. There can be no dispute that the right to receive lump sum distributions under the Pilot Plan is an optional form of benefit. The Treasury Regulations<sup>35</sup> define an “optional form of benefit” as “a distribution alternative (including the normal form of benefit) that is available under the plan with respect to an accrued benefit.” Treas. Reg. § 1.411(d)-3(g)(6)(ii)(A); see also Treas. Reg. § 1.411(d)-4, Q&A 1(b) (noting that “different optional forms of benefit exist if a distribution alternative is not payable on substantially the same terms as another distribution alternative”). The regulatory examples<sup>36</sup> further confirm that a lump sum distribution feature is an optional form of benefit for purposes of the anti-cutback rules under the IRC and ERISA:

The following examples illustrate the meaning of the term “optional form of benefit.” . . . Example 1. A plan permits each participant to receive his benefit under the plan as a single sum distribution; a level monthly

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<sup>35</sup> Under section 101(a) of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Aug. 10, 1978), and section 204(g) of ERISA, 29 U.S.C. § 1054(g), the Secretary of the Treasury has interpretive jurisdiction over the anti-cutback rules under both ERISA and the IRC. See also 29 U.S.C. § 1202(c) (“Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of [IRC] . . . shall also apply to [their counterparts in ERISA].”).

<sup>36</sup> The preamble to final regulations under section 411(d)(6) of the IRC further confirm this assertion:

The final regulations retain the rule from the proposed regulations under which a plan is permitted to be amended to eliminate an optional form of benefit . . . if, after the amendment, the plan offers a designated set of core options . . . . The core options are defined as a straight life annuity, a 75% joint and contingent survivor annuity, a 10-year term certain and life annuity, and the most valuable option for a participant with a short life expectancy.

70 Fed. Reg. 47109, 47113 (Aug. 12, 2005). The same paragraph further states that elimination of an optional form of benefit may not be effective until four years after the amendment is adopted, and “that a plan may not be amended to eliminate an optional form of benefit that includes a single-sum distribution that applies with respect to at least 25% of a participant’s accrued benefit as of the date the optional form of benefit is eliminated.” Id. (emphasis added).

distribution schedule over 15 years; a single life annuity, a joint and 50 percent survivor annuity; a joint and 75 percent survivor annuity . . . Each of these benefit distribution options is an optional form of benefit (without regard to whether the values of these options are actuarially equivalent).

Treas. Reg. § 1.411(d)-4 Q&A 1(b)(2) (emphasis added).

84. Because a lump sum distribution option is an optional form of benefit, a plan sponsor may not amend a pension plan to eliminate such a feature with respect to previously accrued benefits. Significantly, this rule applies even where the plan participants consent to the elimination. See Treas. Reg. § 1.411(d)-4, Q&A 2(a)(1); see also I.R.S. P.L.R. 9146045, 1991 WL 779685 (Nov. 15, 1991) (noting same); Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755, 762 (7th Cir. 2003) (affirming that the anti-cutback rule does not permit employees to voluntarily reduce their benefits because “[t]hey are, in short, being invited to sell their pension entitlement back to the company cheap, and that is a sale that ERISA prohibits.”).

85. Thus, there is no authority for the sort of blanket waiver of protected pension rights that DPPTO blithely proposes.<sup>37</sup> See DPPTO Obj., at ¶42. To the contrary, Treasury’s anti-cutback regulations specifically prohibit a waiver of benefits

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<sup>37</sup> The sole case cited by DPPTO in support of its waiver argument, Laniok v. Advisory Committee of Brainerd Manufacturing Co. Pension Plan, 935 F.2d 1360 (2d Cir. 1991), is wholly inapposite. Although the Second Circuit recognized in Laniok that “[a]llowing an individual to relinquish his opportunity to ‘fulfill [] whatever conditions are required’ to qualify for benefits is not inconsistent with protecting the legitimate expectations of those who are entitled to benefits,” the case concerned an employee’s ability to decline to participate in a pension plan. Laniok, 935 F.2d at 1364-65. It does not address, and most certainly does not authorize a result that would conflict directly with Treasury’s anti-cutback regulations, such as the waiver of an accrued benefit by an employee who is actually a participant in the plan. Nor does Laniok authorize a plan or plan sponsor to circumvent the anti-cutback rule by extracting (or even requesting) a participant’s promise to “postpone” receipt of an accrued benefit, as DPPTO advocates. Cf. United States v. Smith, 47 F.3d 681, 684 (4th Cir. 1995) (rebuking an attempt by the government “to do indirectly what it cannot do directly” by requiring a participant to take a pension distribution and then paying it to the government as restitution in order to avoid violating ERISA’s anti-alienation rule, 29 U.S.C. § 1056(d)(1)).

protected by the anti-cutback rule, including optional forms of benefits such as lump sum distributions. Treas. Reg. § 1.411(d)-4, Q&A 3(a)(3).

**2. *Delta and ALPA May Not Modify the Notice Requirement***

86. DPPTO also suggests that Delta and ALPA could avoid the operational impact associated with pilot retirements by unilaterally requiring a longer notice period – apparently one that provides that a pilot who retires without the requisite notice is ineligible to receive a lump sum to which he or she is otherwise entitled.<sup>38</sup> For similar reasons to those described in the prior section, such a draconian amendment would clearly violate the anti-cutback rule.<sup>39</sup> It also would do nothing to solve the Pilot Plan’s funding crisis, and virtually nothing to prevent the upcoming operational crisis.

**3. *Delta May Not Provide Additional Benefits to Induce Pilots Not to Exercise the Lump Sum Option***

87. DPPTO’s suggestion that Delta explore the possibility of adding additional forms of benefits, so as to make the lump sum “less desirable,” is also

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<sup>38</sup> Any argument that Delta and ALPA can amend the Pilot Plan to lengthen the notice period with respect to benefits already earned at the time of the amendment without violating section 411(d)(6) of the IRC under the authority of Treasury Regulations section 411(d)-4, Q&A-2(b)(ix) would be misleading. If ALPA’s agreement could be secured, at most the regulation would permit Delta to amend the Plan to modify the lump sum payment by changing the time of payment of the lump sum such that, after the amendment, it was available no more than two months after the time it was available before the amendment. However, this would not have solved the current problem – it would simply have slightly delayed the payment date of the lump sum payments to those pilots who elected to retire on the last day of a month but would not have altered the period of notice that a pilot must give before retiring and locking in his entitlement to his lump sum.

<sup>39</sup> For example, such a notice restriction would violate the test laid out by the Supreme Court in Heinz. As the Supreme Court explained, “as a matter of common sense, a participant’s benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit ‘reduces’ the benefit just as surely as a decrease in the size of the monthly payment.” Heinz, 541 U.S. at 744 (internal citations omitted). The “real question,” according to the Court, “is whether a new condition may be imposed after a benefit has accrued; may the right to receive certain money on a certain date be limited by a new condition narrowing that right?” Id. at 746. The Supreme Court’s answer to this question was no. Thus, adopting a new notice requirement that would have the effect of prohibiting a pilot from receiving a lump sum in a situation in which the payment of the lump sum would have been permitted at the time the benefit accrued, as suggested by DPPTO, is clearly prohibited.

untenable. For example, a “bonus” (as suggested by DPPTO) in exchange for a pilot’s agreement not to take a lump sum would be both illegal and self-defeating. No explanation is given where the Debtor would obtain the hundreds of millions of cash necessary for bonuses to induce such pilot behavior. Moreover, such a “bonus” is subject to legal challenge as being prohibited by section 206(d) of ERISA, which provides that, “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated,” 29 U.S.C. § 1056(d), and as an improper attempt to circumvent the anti-cutback rules discussed above. Moreover, each of the alternative incentives suggested by DPPTO provides for payment of benefits faster than a life annuity, and therefore (i) has the effect of rapidly draining Pilot Plan assets and (ii) would be a prohibited payment if the Pilot Plan is terminated in the future or is subject to liquidity shortfall, see 29 U.S.C. §§ 1056(e); 1341(c)(3)(D)(iv). Given the Pilot Plan’s funding problems, it is also not at all obvious why any of the “alternative” incentives casually suggested by DPPTO (e.g., payment of lump sums over five years) would deter pilots from taking lump sums.

88. Equally fundamentally, however, any such “alternative” form of benefit, if truly more valuable than the lump sum (and possibly even if equal in value), would make the Pilot Plan ineligible for airline funding relief under section 402(b)(3) of the Airline Relief Act, which prohibits any plan amendment increasing benefits after July 26, 2005. Without the benefits of the Airline Relief Act, the Pilot Plan’s funding requirements would increase to levels that would be even more unsustainable. DPPTO claims that the range of benefit options is “limited only by the imagination.” DPPTO Obj., at ¶41.

DPPTO is correct only if one's imagination operates with no regard for governing federal law.

**4. *Any Sale of the Pilot Plan's Illiquid Assets Would Be Reckless, Difficult and in Violation of ERISA***

89. The last passing suggestion for temporarily averting the problems of the Pilot Plan is that “[i]n order to improve its liquidity and thus more easily avoid liquidity shortfall, Delta could sell its [i.e., the Plan’s] illiquid assets.” *Id.*, at ¶44. The assets that fund the Pilot Plan (both liquid and illiquid) are held in a Master Trust for the benefit of both the Pilot Plan and the much larger non-pilot plan. The total illiquid assets held in the Master Trust have a value of approximately \$1.685 billion, and the Pilot Plan has approximately a 25% share of these illiquid assets, or roughly \$421 million. Thus, DPPTO essentially advocates a “fire sale” of the illiquid assets contained in the Master Trust – including those that fund the much larger non-pilot plan – in a desperate effort to generate funds to fill the “hole” that past lump sums have created in the Pilot Plan. Such a fire sale would not solve the funding problems of the Pilot Plan, which (as described above and in the Debtors’ Motion) are much larger than the total value of the allocable illiquid assets, nor would it prevent the funding problems associated with lump sums from continually recurring. In addition, it would almost certainly result in serious breaches of ERISA fiduciary duties to the non-pilot plan.

90. DPPTO and the Altman Declaration state (without any factual support whatsoever) that “at current market rates” the value of these illiquid assets “might” be higher than their “[over] \$400 million” estimated value. *Id.*, at ¶44; Altman Decl., at ¶17. Even allowing for the fact that these supposed “current” estimates of the value of these assets are totally without factual support, in the particular context of his proposal, they

are nothing short of wild speculation. These illiquid investments are, by definition, intended to be long-term investments that do not have a readily available market. Assuming that the crash liquidation of these assets in a reasonable time frame were possible at all, the sudden sale of scores of complex, long-term investments worth hundreds of millions of dollars in order to avert the Pilot Plan's deep (and well-publicized) liquidity problems would virtually guarantee predatory, below-market offers by potential purchasers in the investment community, and thus result in sales proceeds that are significantly below the true market value of the illiquid assets.

91. The chaos and lost value that would result from such a fire sale is almost unimaginable. Moreover, since these assets are held on behalf of all Delta pension plan participants (not just Pilot Plan participants), such a process would almost certainly expose Delta and the various fiduciaries to massive litigation for breaches of duties of prudence under section 404(a)(1)(B) of ERISA.<sup>40</sup> The fire sale that DPPTO and Mr. Altman advocate is, quite simply, the polar opposite of the care and prudence prescribed by ERISA.<sup>41</sup> More importantly, however, it does not solve the much larger near-term

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<sup>40</sup> See Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982), cert. denied, 459 U.S. 1069 (1982) (noting that ERISA's fiduciary duty is "the highest known to the law"); Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 957 (D.C. Cir. 1985) ("A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard.")

<sup>41</sup> See Department of Labor Reg. § 2550.404a-1(b) (providing that an ERISA fiduciary satisfies its duties of prudence with respect to an investment if the fiduciary "[h]as given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties"). This Regulation proceeds to explain that "appropriate consideration" shall include, but is not necessarily limited to:

- (i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and

pension contribution problems, or the deep-seated structural problems of the Pilot Plan. With the lump sum feature still in place and Delta perpetually exposed to the swinging axe of early retirements, even a sudden crash sale of assets today will not prevent the Pilot Plan's liquidity problems from continuing to reappear in the future, and exit lenders will simply be unwilling to lend into such a situation. This proposed "alternative" has no basis in reality.

### **III. RETIRED PILOTS ARE NOT BEING UNFAIRLY SINGLED OUT**

92. In yet another set of erroneous claims, based on totally incorrect facts misrepresented to this Court, DPPTO alleges that Delta has "chosen to favor the Delta Retirement Plan . . . at the expense of the Pilots Plan." DPPTO Obj., at ¶33. In support of this proposition, DPPTO claims that "it appears that the DIP financing conditions allowed Delta to make payments to the Delta Retirement Plan, even though these were larger payments, but prohibited Delta from continuing to fund the Pilots Plan." Id. Both assertions are entirely untrue.

93. First, Delta has paid nothing into the non-pilot plan since the Petition Date, and that plan is hard frozen. Rather, since the Petition Date, payments have only been made to the Pilot Plan. McDaniel Decl., at ¶22. Thus, it is blatantly untrue for DPPTO to state that Delta's "DIP financing conditions" somehow permitted Delta to

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(ii) Consideration of the following factors as they relate to such portion of the portfolio:

(A) The composition of the portfolio with regard to diversification;

(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

(C) The projected return of the portfolio relative to the funding objectives of the plan.

Id.

fund the “larger payments” to the non-pilot plan since the Petition Date and not fund the Pilot Plan.

94. Second, while other airlines recently have terminated all of their major pension plans in bankruptcy, Delta is not seeking to terminate all of its plans, but is doing the minimum necessary to make possible its survival. Although Delta could have bundled multiple plans together in its termination motion and likely could have terminated all of its pension plans, see In re Kaiser Aluminum Corp., 2006 U.S. App. LEXIS 18746, at \*3 (3d Cir. July 26, 2006), it is not seeking to terminate all of its plans because, as described below, the structure and costs of the non-pilot plan hopefully make that plan affordable under the Airline Relief Act, in contrast to the Pilot Plan, which Delta cannot afford.

95. Third, Delta has in no way “favored” the non-pilot pension plan over the Pilot Plan. As was extensively discussed in the Motion, the features of the two plans are totally different. For example, while Delta’s actuaries estimate that it would owe approximately \$25 million to the non-pilot plan at exit from bankruptcy and an additional \$70 million in the first 12 months following exit, McDaniel Decl., at ¶36, if the Pilot Plan is not terminated and the lump sum door reopens, the actuaries estimate that Delta’s obligations to the Pilot Plan for the same periods would be massive: approximately \$1.205 billion to \$1.495 billion at exit and an additional approximately \$195 million to \$220 million in the first 12 months following exit. Id., at ¶34. Moreover, while the recently passed Airline Relief Act has the effect of lowering minimum funding contributions by amortizing the amounts owed over a 17-year period for certain airline plans, see id. at ¶32 – a critical change that may well allow Delta to continue the non-

pilot plan, see Bastian Decl., at ¶42 – the Airline Relief Act has not changed the statutory obligation to make liquidity contribution requirements, see McDaniel Decl., at ¶¶32-33. These liquidity contributions, and their magnitude, are one of the key factors that distinguishes the Pilot Plan from the non-pilot plan. So is the lump sum feature – with no equivalent in the non-pilot plan. This is in addition to the crippling operational crisis that would be caused (and could be caused at any time) if the Pilot Plan were not terminated – something that is not even possible in the case of the non-pilot plan.

96. This assertion really boils down to nothing more than a complaint that Delta is somehow acting unfairly or improperly toward retired pilots. While there is no “fair and equitable” test under section 4041(c)(2)(B)(ii)(IV) of ERISA, this contention is factually baseless and should be dismissed by the Court. The average annual pension for current non-pilot retirees is \$16,600, whereas the average annual pension for current pilot retirees – assuming plan termination – will still be nearly five times higher at \$75,200. Even assuming that retired pilots had no claims and no corresponding recoveries in connection with their non-qualified pension benefits, current pilot retirees will retain, on average, approximately 75% to 80% of their total qualified and non-qualified pension benefits (including the lump sums previously paid) in the event of Pilot Plan termination. McDaniel Decl., at ¶12, n.4.

97. When this recovery is contrasted with the heavy sacrifices already made by Delta’s non-pilot employees, active pilots, and other stakeholders, the lack of merit of DPPTO’s complaint of unfair treatment becomes even more apparent:

#### Non-Pilot Employees

- Effective January 1, 2005, Delta’s non-pilot employees’ wages were slashed 10% across the board, followed by a further pay reduction (averaging 9%), effective November 1, 2005. These cuts were particularly

painful because from 2002 through 2004, with a handful of exceptions, Delta's non-pilot wages were effectively frozen. Moreover, beginning in 2002, Delta increased employee cost-sharing for medical insurance and made several other cost reductions in employee benefits. In addition, in 2005, Delta operated 5% less mainline capacity than it operated in 2001, but had reduced its non-pilot active employee headcount by over 25,000 – approximately 38% – during the same time period. The net result of all of these changes is that Delta's non-pilot employees – those that were not among the 25,000 that lost their jobs – are working harder for significantly less pay and benefits and not accruing any pension benefits.

- In March 2003, Delta's officers took an 8% pay cut, and further changes reduced their total compensation by 25% to 45% from 2003 to 2004. Officers and directors then participated in the across-the-board 10% pay cut effective January 1, 2005. Effective November 1, 2005, officers were subjected to a further pay cut of 15% and directors were subjected to a 9% pay cut – even though this reduction brought these managers even further below market, by an increasingly serious degree, and led to unwanted attrition.<sup>42</sup>

#### Active Pilots

- In the recently concluded LOA #51, ALPA agreed to a 14% reduction in wage rates, which was in addition to the 32.5% wage rate reduction agreed to in the fall of 2004, bringing active pilots' wage reductions to well over 40%.

#### Delta's Other Stakeholders

- Delta's shareholders stand to lose everything in this chapter 11 proceeding and based upon current trading values of Delta unsecured claims, the market is suggesting that Delta's unsecured creditors may only recover 30% or less of the billions of dollars owed to them.

In the face of so much shared sacrifice, DPPTO's claim that retired pilots – many of whom retired early to secure million dollar lump sums<sup>43</sup> – are being treated unfairly is misplaced, particularly when current pilot retirees will recover, on average,

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<sup>42</sup> As discussed in footnote 31, *supra*, management has made "enormous sacrifices" in this bankruptcy proceeding. *In re Delta Air Lines, Inc.*, No. 05-17923 (ASH), Tr. of Omnibus Hr'g Feb. 22, 2006 50:24.

<sup>43</sup> To add insult to insult, Mr. Morrison recently authored an article on DPPTO's Web site complaining that a million dollar lump sum is grossly inadequate to fund a comfortable retirement. [See The Fallacy of the Million Dollar Lump Sum](#) (attached hereto as Exhibit 11).

approximately 75% to 80% of their total pension benefits, which translates to a recovery that is five times larger than the average non-pilot pension.

#### **IV. DP3'S REQUEST FOR A DELAY IS WITHOUT MERIT**

98. DP3 has not objected to the Debtors' Motion on the merits. Rather, DP3 has requested that the hearing on the Motion "be delayed to allow for a full examination of the recently passed Pension Protection Act of 2006 . . . and the exploration of a legislative solution to the problems caused by an accelerated benefits option (the 'Lump Sum Option') . . . ." DP3 Resp., at ¶1. As set forth below, however, the only provisions in the Airline Relief Act relating to lump sum distributions are narrow in scope, clear and require little time for study, and the request for more time to study the Airline Relief Act in its entirety or to allow for the possible passage of new legislation by Congress is wholly without merit.

##### **A. DP3 Has Demonstrated No Need for Extra Time to Study the Airline Relief Act**

99. DP3 argues that it needs more time to review the entire text of the Airline Relief Act. *Id.*, at ¶¶4-6. This request is meritless in light of the fact that the legislation was passed by Congress on August 3, 2006, some two weeks before DP3's response was filed (and a day before the Motion was even filed). In light of DP3's history of involvement in lobbying efforts with respect to pension legislative reform, see Exhibit 1 at 6, the well-publicized nature of the pension legislative reform efforts, the obvious importance of pension reform to DP3 and the abundant time available for DP3 to study the Airline Relief Act in its entirety, DP3's request for indefinite time to study the Airline Relief Act still further should not be entertained.

100. Moreover, the Airline Relief Act provisions that address restrictions on lump sum payments are unambiguous, narrow in scope and require little time to study. These two discrete provisions of the Airline Relief Act – sections 103 (amending section 206 of ERISA) and 113 (adding a parallel provision to the IRC) – restrict a single-employer defined benefit pension plan from making lump sum distributions when the plan fails to meet certain funding requirements or the sponsor of the plan is a debtor reorganizing under chapter 11 of the Bankruptcy Code. See Airline Relief Act §§ 103, 113. Importantly, sections 103(c) and 113(b) of the Airline Relief Act provide that with respect to a plan maintained pursuant to a collective bargaining agreement, these sections will:

not apply to plan years beginning before the earlier of: (A) the later of: (i) the date on which the last collective bargaining agreement relating to the plan terminates (determined without regard to any extension thereof agreed to after the date of the enactment of the [Airline Relief Act],[<sup>44</sup>] or (ii) the first day of the plan year to which the amendments made by this subsection would (but for this subparagraph) apply, or (B) January 1, 2010.

Airline Relief Act §§ 103(c)(2), 113(b)(2).

101. LOA #51 was entered into prior to the date of enactment of the Airline Relief Act, and remains in effect, by its terms, through December 31, 2009. Accordingly, pursuant to the unambiguous provisions of sections 103(c) and 113(b) of the Airline Relief Act, the lump sum provisions of the Airline Relief Act (sections 103 and 113) will not apply to the Pilot Plan until the plan year that begins after December 31, 2009, which is the plan year beginning July 1, 2010. Thus, these lump sum provisions will be of no

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<sup>44</sup> But, for this purpose, “any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by this section shall not be treated as a termination of such collective bargaining agreement[.]” Airline Relief Act §§ 103(c), 113(b).

help when the Pilot Plan comes out of liquidity shortfall on October 1, 2006, and resumes paying lump sums as required by law.

**B. DP3's Request for Time to Seek a New "Legislative Solution" Should Be Denied**

102. DP3's request to delay this Court's consideration of the Motion on the grounds that DP3 should be given time to seek a "legislative solution to the problems caused by an accelerated benefits option," DP3 Resp., at ¶1, should be denied because there is no basis whatsoever to believe that Congress will enact additional pension-related legislation in calendar 2006 or any foreseeable time thereafter. Indeed, Congress just finished addressing this very issue only one month ago. Based upon the nearly two years it took Congress to enact the Airline Relief Act (through an uncommonly fractious process), DP3's suggestion that a legislative solution to the lump sum situation could emerge in the near future is completely untenable. It is all but impossible to conceive of any additional pension legislation or other technical correction passing during 2006 and, accordingly, this proceeding should not be delayed.<sup>45</sup> Cf. In re Armstrong World Indus., Inc., Bankr. Case No. 00-04471, Oct. 31, 2003, Tr., Docket No. 5985 pp. 26-38 (Bankr. D. Del. 2003) (denying a claimant's request to delay confirmation in the hope that Congress would adopt asbestos reform legislation).<sup>46</sup>

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<sup>45</sup> As noted above, it is virtually unthinkable that Congress would consider re-opening Pandora's Box and altering the carefully calibrated legislative enactment in order to pass a "technical correction" that dealt with the lump sum issue. See DP3 Resp., at ¶6. Moreover, such efforts would likely fail, since technical corrections turn on determinations of congressional intent, see Joint Committee on Taxation, Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation, at 34 (JCX-1-05) (Feb. 2, 2005) available at <http://www.house.gov/jct/x-1-05.pdf>, and DP3 would be hard-pressed to demonstrate that Congress' intent was to limit lump sum distributions as early as October 1, 2006.

<sup>46</sup> Indeed, DP3 advised its own members, as recently as June 8, 2006, that they should not pin their hopes to the vagaries of future congressional actions with respect to pension issues. See Exhibit 1 at 6 ("If Congress was to be the white horse upon which our pension hopes rode, that horse is still a very great distance away, obscured in dust, losing strength by the day and uncertain of its destination").

**Notice**

103. Consistent with the procedures described in the Court's Case Management Order, the Debtors have served notice of this Reply on (i) the Core Parties (as that term is defined in the Case Management Order), (ii) the PBGC, (iii) Fiduciary Counselors, Inc., the independent fiduciary for the Pilot Plan, (iv) ALPA, (v) DPPTO, (vi) DP3, and (vii) the Settlement Class. The Debtors have also posted this Reply on their Case Information Website, located at [www.deltadocket.com](http://www.deltadocket.com).

WHEREFORE, the Debtors respectfully request the Court grant the Motion and grant such other and further relief as this Court may deem just and proper.

Dated: New York, New York  
August 30, 2006

By: /s/ Marshall S. Huebner  
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