

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

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

**MEMORANDUM IN SUPPORT OF REORGANIZED DEBTORS’
OBJECTION TO (i) DP3 CLASS PROOF OF CLAIM AND
(ii) DP3 MOTION FOR CLASS CERTIFICATION**

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Delta Air Lines, Inc. (“Delta”) and those of its subsidiaries that are reorganized debtors (the “Reorganized Debtors”) in the above-captioned jointly administered chapter 11 cases (the “Bankruptcy Cases”), file this Memorandum in support of their Objection to (i) the proofs of claim dated August 7, 2007 (Claim Nos. 8601 & 8604), purportedly filed in the names of George T. Baker, Herbert Summers, Charles L. Strickland and Donald F. Mairose (the “DP3 Claimants”), and purportedly on behalf of a class of additional unnamed pilot retirees (collectively, the “DP3 Class Proof of Claim”)¹ and (ii) the Motion dated August 7, 2007 of Class Claimants for Certification of Class Under Federal Rule of Civil Procedure 7023 and to Appoint Counsel (Docket No. 6575) (the “DP3 Certification Motion”), filed by the DP3 Claimants by and through their attorneys, Dean Booth, Esq., and Shelley D. Rucker, Esq., of Miller and Martin PLLC (“Miller & Martin”):

I.
PRELIMINARY STATEMENT

Delta and DP3, Inc. (“DP3”) spent months negotiating a comprehensive settlement of all claims arising out of or relating to Delta’s non-qualified pension plans. As part of these negotiations, DP3 and its advisors were provided with detailed calculations for each and every individual claim under the settlement. In a series of hearings, this Court approved every aspect of the comprehensive settlement (including the calculation methodologies specified therein) after DP3, by and through its attorneys at Miller & Martin, expressed their unequivocal support for its terms. Now, unhappy with the expected calculation of *qualified* pension benefits by the Pension Benefit Guaranty

¹ Proofs of Claim 8601 and 8604 appear to be duplicates of each other and will be discussed as a single claim in this Memorandum.

Corporation (the “PBGC”), DP3 has violated the express terms of the Court-approved settlement by seeking additional *non-qualified* pension claims from Delta.

At best, the DP3 Class Proof of Claim and the DP3 Certification Motion represent a wholly improper and untimely attempt—by the very entity (DP3) and the very law firm (Miller & Martin) that negotiated the comprehensive Court-approved non-qualified pension settlement—to re-trade that settlement, in the hopes of extracting another nine-figure claim from these estates. At worst, they are the fruits of a calculated effort by DP3 to deceive Delta into a “comprehensive” settlement that was highly beneficial to DP3’s constituents and its counsel, all the while *knowing* that DP3 would later seek to collaterally attack that very settlement and use it as “floor” for a yet larger recovery. In either case, DP3 must not now be permitted to interject chaos into the comprehensive and substantially completed claims process it helped construct.

As set forth below, the untimely claims that DP3 seeks to bring appear to be based upon a deliberate misreading of the applicable statutes and a deliberate misstatement of the applicable facts. In sum, DP3 seeks to recover from Delta for a *possible* loss of benefits that it fears that certain of its members *may* suffer on account of the PBGC’s application of ERISA’s “look-back” rules for *qualified* pension benefits. There is simply no legal principle or contractual provision, however, that could support a *non-qualified* pension claim against Delta to offset a possible loss of PBGC-paid *qualified* pension benefits. In fact, the PBGC would have grounds to contend that any such “top up” claim would be illegal under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

The Court need not, however, reach the merits in order to deny class certification and expunge these claims. As set forth below, class certification must be denied because (i) the DP3 Class Proof of Claim is barred by virtue of being filed in direct violation of two stipulations (both executed by Miller & Martin on behalf of DP3) and the related final and non-appealable Orders that approved them; (ii) the DP3 Class Proof of Claim is untimely, having been filed after the expiration of all possible deadlines (deadlines of which DP3 and the DP3 Claimants were exceedingly well aware); (iii) the DP3 Certification Motion is untimely; indeed, no bankruptcy court has ever approved class certification where, as here, the request for certification was not made until after the effective date of a confirmed chapter 11 plan and well after the expiration of the applicable bar dates for the members of the putative class; and (iv) DP3 and the DP3 Claimants cannot possibly meet the rigorous standards for certification under Rule 23 of the Federal Rules of Civil Procedure (the “Civil Rules”), nor can Miller & Martin be appointed to represent any class whose purpose is to collaterally attack settlements negotiated by that firm. Notably, each of these reasons is independently fatal to class certification. Astonishingly, most of these issues are nowhere even mentioned in the DP3 Class Proof of Claim or the DP3 Certification Motion.

The DP3 Class Proof of Claim is Barred by Res Judicata. Although not obvious from the face of these documents, the DP3 Class Proof of Claim and DP3 Certification Motion were filed by DP3. All four of the DP3 Claimants are members of the DP3 “Honor Roll” and one is a member of the DP3 board of trustees. On DP3’s web site and in reports disseminated to its members, DP3 has repeatedly claimed the DP3 Certification Motion as its own, referring to it as the “DP3 Motion.” Indeed, according to the Court’s

own electronic case filing (“ECF”) system, the DP3 Certification Motion was in fact filed on DP3’s behalf by Miller & Martin, the very same law firm that represented DP3 throughout these chapter 11 cases.

Despite all this, the putative DP3 Claimants never admit to any affiliation with DP3 in the pleadings. This is, of course, because the DP3 Certification Motion violates and breaches comprehensive settlements *negotiated by DP3 and signed by the very same attorneys who signed the DP3 Certification Motion*. Those comprehensive settlements, enshrined in two written stipulations approved by final Orders of this Court, specifically provide that neither DP3 nor any Covered Pilots (i.e., the retirees “covered” by those settlements) shall file any additional claims in respect of the non-qualified pension plans. The DP3 Class Proof of Claim and the DP3 Certification Motion were unquestionably filed in direct violation of those stipulations and Orders.

The DP3 Proof of Claim Is Inexcusably Late. Impropriety aside, the DP3 Class Proof of Claim is also untimely—flagrantly so—having been filed *five months* after the deadline for retirees to file proofs of claim, and more than three months after the Plan’s effective date. Indeed, the possibility of filing the DP3 Class Proof of Claim was not even raised by DP3 to Delta until April 23, 2007, literally on the eve of the April 25, 2007 confirmation hearing, and more than one month after the applicable bar date. This delay (which is not even addressed by the DP3 Certification Motion) is particularly inexcusable in light of Miller & Martin’s own time records, which demonstrate that DP3 was actively considering this claim nearly one year ago. Consider the following two time entries from November 27, 2006—**literally the very day that Miller & Martin, on behalf of DP3, executed a stipulation with Delta that provided for an agreed claims**

methodology and specifically prohibited DP3 (and all Covered Pilots) from filing any additional claims against Delta in respect of the non-qualified pension plans:

Conference with Jim Gray, review notices, check out example, **questions regarding Supplemental Plan Claim and Lookback/PBGC** interface explanation for email, web and other communication. (7.5 hours) (GDB, Nov. 27, 2006) (emphasis added).

Telephone conference w/ S. Rucker, C. Walsh and R. Kurtz re: status report on DP3 settlement of SAP claims as well as **new research issues involving potential claim for difference between benefits as calculated with reduction for 3-yr lookback and the amount that would otherwise be eligible [sic] w/o the look back reduction**; legal research re: same; Revise white paper on PBGC litigation issues. (6.5 hours) (CCP, Nov. 27, 2006) (emphasis added).

(Ex. A, Miller & Martin Fee App., Invoice of Dec. 29, 2006 at 12.) Consider also that:

- DP3 (as well as all affected pilot retirees) were aware of the alleged factual basis of the DP3 Class Proof of Claim no later than January 2007—approximately two months before the bar date—when all affected retirees were sent a letter from Delta that provided estimates of PBGC benefits for the termination of the *qualified* pilot pension plan.
- DP3 was well aware of the March 12, 2007 bar date and even posted a notice of the deadline on its web site. In fact, the notice specifically stated that some individual retired pilots intended to file proofs of claim for the precise relief sought in the DP3 Class Proof of Claim, and several retirees did in fact do so. DP3 did not even heed its own notice and file the DP3 Class Proof of Claim on time.
- The alleged legal basis for the DP3 Class Proof of Claim is that the provisions of ERISA, which mandate how the PBGC calculates qualified benefits, will cause certain *qualified* benefits to receive a lower payment priority, and that Delta is somehow obligated to pay more *non-qualified* claims as a consequence. These provisions have been a part of ERISA since its enactment in 1974 and should have come as no surprise to anyone, let alone well-compensated and experienced counsel. As their time records reflect, it was no surprise to Miller & Martin at all.

The Certification Motion Should Not Be Approved at This Late Hour. Separate and apart from the proof of claim being time-barred, the DP3 Certification Motion is itself untimely (again, without any explanation). As set forth below, class actions are strongly discouraged in bankruptcy cases, particularly in this district. Courts in the Southern District of New York (including the courts in the *TwinLab*, *Musicland* and *Northwest* chapter 11 cases) routinely deny class certification where the putative class representative waits to seek certification until either the expiration of the applicable bar date or plan solicitation. Here, the putative class claimants inexplicably waited to seek certification until *several months after both the effective date of the Plan and the expiration of the applicable bar dates*. Even where the underlying proofs of claim are timely, no court has ever permitted such an untimely class certification, especially when it is so clear that the putative class representatives have been aware for months of the alleged bases for the class proof of claim.

Civil Rule 23 Cannot Be Satisfied Here. The putative class here is hopelessly conflicted and should not be certified. Using DP3's own estimate of the size of the class, approximately 99% of the members of the putative class have never filed any proof of claim for the alleged "loss" that DP3 seeks to recover here, and Delta's own review of its claims database only located 11 retirees who filed such claims (including the three claims filed by the DP3 Claimants in their individual capacities).² The DP3 Claimants are among the tiny handful of retirees who arguably have timely preserved this issue (an

² The 11 include Christopher N. Waggener and David T. McHenry, who each filed responses to the DP3 Certification Motion stating that they do not oppose the DP3 Certification Motion so long as it does not impair their own ability to recover from Delta. It should be noted that the individual claims filed by these 11 retirees are also improper because, among other things, such claims were filed in violation of the Court-approved stipulations with DP3.

issue that, as set forth below, is utterly without merit). Moreover, the DP3 Claimants (who, according to DP3, are acting on DP3's behalf) cannot effectively represent a putative class whose theory of recovery is predicated upon an attack on the settlement negotiated by DP3. For these reasons, the DP3 Claimants are not representative members of the putative class, and, therefore, the class cannot be certified. Finally, as required by Civil Rule 23(g), a class cannot be certified without the simultaneous appointment of counsel. Because of, *inter alia*, its role in negotiating the very settlements that the DP3 Class Proof of Claim violates and its conduct, Miller & Martin cannot be appointed class counsel.

For these reasons and for those set forth more fully below, Delta respectfully requests that the Court not exercise its discretion to certify a class action here, that the DP3 Class Proof of Claim be expunged and that the DP3 Certification Motion be denied.

II. THE DP3 CERTIFICATION MOTION AND DP3 CLASS PROOF OF CLAIM

The DP3 Certification Motion and DP3 Class Proof of Claim tell a very misleading story. Indeed, the DP3 Claimants have utterly omitted from those pleadings each of the following material facts:

- Two stipulations signed by DP3 and approved by this Court prohibit both DP3 and any Covered Pilot (i.e., any retired pilot covered by those stipulations) from filing *any* new claims in respect of Delta's non-qualified pension plans. (Ex. B, First Stip. ¶ 4; Ex. C, Second Stip. ¶ 4.)
- According to the Court's ECF system, the DP3 Certification Motion and DP3 Class Proof of Claim were filed on behalf of DP3. (No. 05-17923, Docket Entry No. 6575 (Aug. 7, 2007).)
- DP3 has repeatedly represented *itself*—not the four putative DP3 Claimants—as the plaintiff. A set of “Frequently Asked Questions” posted to DP3's web site characterizes the DP3 Certification Motion as a

“DP3 motion” and states that “DP3 has now filed this class action motion to help the class claimants and all similarly affected retired pilots to assert a claim for the ‘disregarded benefit.’” (Ex. D, DP3, Inc., Disregarded NQ Benefit Class Action Q&A at 2, www.dp3.org (last visited Oct. 30, 2007).) Indeed, DP3 is even soliciting donations to fund this litigation and “other possible legal challenges.” (*Id.* at 3.)

- One of the DP3 Claimants is a member of the DP3 Board of Trustees and each of the DP3 Claimants is a member of the DP3 “Honor Roll,” meaning that each has paid dues and assessments to DP3. (Ex. E, DP3, Inc., Welcome, www.dp3.org (last visited Oct. 30, 2007); Ex. F, DP3, Inc., DP3 Honor Roll (Sept. 30, 2007), www.dp3.org (last visited Oct. 30, 2007).)
- If they wished to challenge the calculation of their scheduled claims, Covered Pilots were required to file proofs of claim for non-qualified pension benefits by March 12, 2007. (Ex. G, DP3, Inc., Important: Final Notice of Deadline at 1, www.dp3.org (last visited Oct. 30, 2007).) The DP3 Class Proof of Claim, however, was not even mentioned to Delta until April 23, 2007, and was not actually filed until August 7, 2007.

But DP3 and its counsel inform the Court of none of those facts, and compound these glaring omissions with inaccuracies in what little they do say. For example, DP3 claims that the legal basis for the DP3 Class Proof of Claim is that Delta somehow misapplied caps established under the Internal Revenue Code (“IRC”) and that the previously negotiated and scheduled non-qualified pension claims are consequently miscalculated. (DP3 Class Proof of Claim ¶ 2.) While a hearing on class certification may not be the appropriate time for a substantive ruling on the underlying merits, this is so patently false that it cannot be ignored.

First, the relevant statutory rules are found in ERISA, not the IRC. As more fully described below, ERISA has two “look-back” rules that affect the way the PBGC must calculate and pay qualified benefits after the termination of a *qualified pension plan*. See ERISA § 4044(a)(3). These statutory rules requires the PBGC, in calculating benefits to

be paid after the date of plan termination, to give priority to benefits based on (i) the retiree's pay, service and age three years prior to plan termination and (ii) the terms of the plan in effect five years prior to plan termination. *Id.* The net effect of these "look-back" rules is that some amount of a retiree's PBGC-determined plan benefit may be assigned a lower position in the priority waterfall. *Id.* It is this lower priority benefit that DP3 asserts that Delta has somehow "disregarded." (DP3 Class Proof of Claim ¶ 17.)

In truth, Delta has not "disregarded" anything, because qualified benefit calculations are the sole province of the PBGC, not Delta, as this Court noted on the last occasion that retired pilots sought relief from ERISA's look-back rules. At a December 20, 2006 hearing, an attorney for one retired pilot urged the Court not to approve Delta's settlement with the PBGC "until PBGC goes back and talks to debtors and makes sure that there are provisions in [the PBGC settlement agreement] as to how there will be administration, for instance, with the five-year look-back rule." (Ex. H, Dec. 20, 2006 Hr'g Tr. 77:14–18). However, this Court properly noted that:

[T]he papers indicate to me that this is a question of either federal regulation or federal law. And in any event, it has to do with what the PBGC does in administering the assets which are committed to it. I don't have any jurisdiction, so I am told, with regard to what PBGC does and I don't know how I would have any jurisdiction. So I don't know what I can do for you on that.

(*Id.* at 77:4–10.) This Court then overruled the retired pilot's objection, and in addressing the "look-back" argument, reasoned that:

Another basis for Captain Buergey's objection to [the PBGC settlement] is the proposition that the Court should reject the settlement on the grounds or with the instruction that the PBGC and the company should go back and negotiate further elements to the settlement, specifically

relating to such matters as the two-hundred-thousand-dollar-a-year regulation with regard to the calculation of benefits, the three or five-year look-back requirement, matters which are I am told without contradiction [are] matters of federal law and federal regulation, matters which in any event have to do with the PBGC's administration of the plan, matters with respect to which this Court does not have jurisdiction and matters with respect to which, if the retired pilots have a position on the PBGC's administration of the plan, they have whatever rights are accorded to them by petitioning the PBGC and availing themselves of the Federal Procedures Act, or whatever it's called, whereby they can litigate any adverse determination by the PBGC.

(Ex. H, Dec. 20, 2006 Hr'g Tr. 90:2–18.) Notably, attorneys for DP3 were present at the December 20, 2006 hearing and, in fact, spoke in favor of the settlement with the PBGC.

(Ex. H, Dec. 20, 2006 Hr'g Tr. 35:8–36:10.) If DP3 had any reservations about the aforementioned statements by the Court, they chose not to share them, even though, according to their time records, DP3's attorneys were already researching the “supplemental” claims asserted here and based on the very same look-back rules that this Court stated were the province of the PBGC.

DP3 and the DP3 Claimants cannot be permitted to circumvent ERISA and invent new *non-qualified pension* claims against Delta when they are apparently disappointed with their estimated PBGC benefits for the termination of a *qualified pension*. As the Court has already noted, there are other avenues through which those concerns may be addressed (i.e., with the PBGC), and the DP3 Claimants are free to pursue them.

Furthermore, there are many factors that determine each pilot retiree's qualified plan benefit from the PBGC. These factors include, for example, (i) the amount of assets in the qualified plan, including the ultimate value of the consideration paid by Delta under the PBGC Settlement Agreement (defined below), (ii) the level of guaranteed

benefits, (iii) the level of nonforfeitable benefits and (iv) ERISA’s look-back rules. *See* ERISA § 4044. The sole gravamen of the DP3 Certification Motion, however, is that *one* of those factors—the look-back rules—should give rise to substantial new *non-qualified* pension claims against Delta. (DP3 Class Proof of Claim ¶ 18.) DP3 simply cannot cherry-pick one *qualified* pension factor out of many and credibly complain that that factor, and only that factor, is the cause of an allegedly compensable *non-qualified* pension loss.

Similarly, the DP3 Class Proof of Claim incorrectly states that “Delta contracted with members of the Class to provide any benefits not paid by the Qualified Plan, from either the Delta Pilots Bridge Plan . . . the Supplemental Annuity Plan . . . or some other non-qualified plan. Delta has failed to provide Class Claimants and the other members of the Class with general, unsecured claims for all benefits owing under the Non-Qualified Plans.” (DP3 Class Proof of Claim ¶ 3.) To the contrary, Delta has provided retired pilots with all of the non-qualified pension claims to which they are entitled pursuant to the various Court-approved settlements, and none of these settlements made Delta a surety for PBGC benefits under the qualified pension plan. Nor could they: the PBGC would likely assert that such a mechanism is illegal under ERISA. *See* Section IV.C.4 *infra*.

The DP3 Claimants’ insinuation that Delta miscalculated the non-qualified claims under the settlement with DP3 by using actual 2006 benefit figures is equally absurd. Delta calculated the non-qualified pension claims exactly as exhaustively negotiated with DP3 and contemplated by the First and Second Stipulations (as defined below). DP3 does not dispute this fact; it just ignores the governing settlement agreements altogether

in the DP3 Certification Motion, an approach that borders on misrepresentation to this Court. For DP3 to contend now, after all the undisputed claims and its substantial legal fees have already been paid, that the exhaustively-vetted use of the 2006 benefits was erroneous is beyond the pale, and should not be condoned by this Court.

III. STATEMENT OF THE CASE

A. Background of the Bankruptcy Cases and Jurisdiction Over This Proceeding

On September 14, 2005 (the “Petition Date”), each Reorganized Debtor commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). On April 25, 2007, the Court confirmed the Reorganized Debtors’ Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the “Plan”). The Plan became effective on April 30, 2007. On September 26, 2007, the Court issued final decrees closing each of the Reorganized Debtors’ cases except for the cases of Delta and Comair, Inc.

The Court has subject matter jurisdiction over this Objection pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and may be determined by the Court. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. The Qualified Pension Plan and Its Termination

Prior to its termination, the Delta Pilots Retirement Plan (the “Qualified Plan”) was maintained by Delta pursuant to its Pilot Working Agreement with the Air Lines Pilots Association, International (“ALPA”). The Qualified Plan was a “defined benefit plan” subject to the funding requirements of the IRC and ERISA.

On August 4, 2006, after much deliberation and careful consideration of the interests of the various constituencies, Delta filed a motion (the “4041 Motion”) seeking (i) a determination by this Court that, unless the Qualified Plan were terminated, Delta would be unable to pay its debts pursuant to a plan of reorganization and would be unable to continue in business outside of chapter 11 and (ii) approval of the voluntary distress termination of the Qualified Plan pursuant to section 4041(c) of ERISA, with a proposed termination date of September 2, 2006.

On September 5, 2006, the Court, based upon an extensive factual record, granted the 4041 Motion and made the factual findings that were a prerequisite to the distress termination of the Qualified Plan. None of the PBGC, DP3 or ALPA objected.

On December 20, 2006, with the support of DP3, among others, the Court approved a settlement agreement between Delta and the PBGC (the “PBGC Settlement Agreement”), pursuant to which the PBGC approved the Qualified Plan termination as of September 2, 2006, and the PBGC assumed trusteeship as of December 31, 2006 (although Delta had operated the Plan since the termination date solely in accordance with PBGC rules). Consistent with the provisions of ERISA providing that the PBGC is entitled to the claim with respect to the termination of a qualified pension plan for the amount of benefits that cannot be paid from the plan because of its funded level (including benefits reduced pursuant to the look-back rule), the PBGC Settlement Agreement provided the PBGC with a \$2.2 billion general unsecured claim and \$225 million in cash.

After the termination of the Qualified Plan, Delta had no further role in the calculation of benefits payable by the PBGC to beneficiaries of the Qualified Plan, except

to perform the initial benefit reductions required by PBGC rules and to provide the PBGC with information from Delta's employee database that the PBGC uses to perform its own benefit calculations.³ Pursuant to ERISA, the PBGC is now exclusively responsible for calculating and paying benefits under the Qualified Plan.

C. The Non-Qualified Plans and Their Termination

As of the Petition Date, Delta sponsored two non-qualified defined benefit pension plans for its pilots, the Delta Pilots Bridge Plan and the Delta Pilots Supplemental Annuity Plan (together, the "Non-Qualified Plans"), which provided retirement benefits to pilots that would have been paid by the Qualified Plan but for limitations imposed on qualified plans by the IRC. On the Petition Date, Delta ceased making non-qualified benefit payments allocable to pre-petition service. Pursuant to Court Order, on December 31, 2006, the Non-Qualified Plans were terminated effective as of September 2, 2006.

D. Delta Negotiates a Comprehensive Settlement with DP3 Regarding Claim Calculations in Respect of the Termination of the Non-Qualified Plans

DP3 is a Delaware not-for-profit corporation that was incorporated in October 2003 with the stated intent of seeking to preserve pensions, health insurance and other benefits of the retired Delta pilots and their dependents and survivors. (Ex. A, Miller & Martin Fee App. ¶ 1.) Consistent with that stated intent, DP3 negotiated with

³ As an accommodation to both the PBGC and the affected retirees, however, Delta did send a letter dated January 12, 2007 to each retired pilot that included an individualized estimate of the benefits each pilot would receive from the PBGC, but noted that the final benefit level would be determined by the PBGC. (*See, e.g.*, Ex. I(iii), Herbert Summers, Proof of Claim 8082 (Mar. 12, 2007) (attaching copy of Jan. 12, 2007 letter from Delta Air Lines, Inc.)) This letter explicitly stated that "PC3 Benefits" (third priority benefits) were calculated using plan terms from five years ago (as required by the "look-back" provisions of ERISA). (*Id.*)

Delta two comprehensive and Court-approved stipulations with respect to the termination of the Non-Qualified Plans.

1. The First Stipulation and the Pre-Termination Claims

On June 2, 2006, after extensive, intense negotiations among Delta, the Official Committee of Unsecured Creditors (the “Creditors’ Committee”) and DP3 to resolve certain pending motions, objections and appeals filed by DP3 in connection with, among other things, the termination of the Non-Qualified Plans, the Court approved the Stipulation and Consent Order Between the Debtors, the Creditors’ Committee and DP3 (Docket No. 2656) (the “First Stipulation”).

The First Stipulation grants certain allowed claims to pilots who retired prior to the termination date of the Non-Qualified Plans (the “NQ Termination Date”) and who had accrued and unpaid benefits arising thereunder for the period commencing on the Petition Date and ending on the NQ Termination Date (collectively, the “Pre-Termination Covered Pilots”). (Ex. B, First Stip. ¶ 4.) The Pre-Termination Covered Pilots collectively received an allowed administrative claim in the aggregate amount of \$9 million (the “NQ Admin Claim”) and an allowed general non-priority unsecured claim for the balance of Non-Qualified Plan benefits accrued and unpaid from the Petition Date to the NQ Termination Date in the aggregate amount of approximately \$71.4 million (the “Balance Claim”) in full and complete satisfaction of all rights of Pre-Termination Covered Pilots arising under the Non-Qualified Plans prior to the NQ Termination Date. (Ex. B, First Stip. ¶ 4.) DP3 and all Pre-Termination Covered Pilots specifically agreed that they would not assert any other claim or cause of action against Delta in respect of the Non-Qualified Plans arising prior to termination.

The NQ Admin Claim and the Balance Claim shall be in full and complete satisfaction of all rights of all Covered Pilots arising under the Non-Qualified Plans prior to the NQ Termination Date, and, except as expressly set forth in paragraph 6 below (i) neither DP3 nor any Covered Pilot shall have or assert any other claim or cause of action against any Debtor . . . relating to any Non-Qualified Plan.

(Ex. B, First Stip. ¶ 4.)⁴

2. The Second Stipulation and the Post-Termination Claims

The First Stipulation explicitly left open the issue of the existence and amount of any claims for the period on and after the NQ Termination Date. (Ex. B, First Stip. ¶ 6.) As such, Delta, DP3 and the Creditors' Committee engaged in additional extensive, intense negotiations on that subject. These negotiations culminated in the Stipulation Regarding Allowed Claims in Respect of Post-Termination Non-Qualified Pension Benefits of Retired Delta Pilots dated November 27, 2006 (the "Second Stipulation" and, together with the First Stipulation and the related Orders of the Court, the "DP3 Settlement"), which was approved without objection by Order of the Court dated December 15, 2006 (Docket No. 3871).

The Second Stipulation grants substantial allowed claims to pilots who retired prior to the NQ Termination Date and who, absent termination of the Non-Qualified Plans, would otherwise have been entitled to receive benefits under the Non-Qualified Plans as of the NQ Termination Date based on the non-qualified benefits that would have

⁴ On August 28, 2006, the Court entered the Further Order Concerning the Stipulation and Consent Order Between the Debtors, the Creditors' Committee and DP3, which binds all pilots who retired prior to the NQ Termination Date and who had accrued and unpaid benefits arising under the Non-Qualified Plans to the terms of the First Stipulation except for 13 objecting retired pilots addressed therein. All of the originally objecting retired pilots have since agreed to be bound by the terms of the First Stipulation.

otherwise been payable as of the NQ Termination Date (the “Post-Termination Covered Pilots” and, together with the Pre-Termination Pilots, the “Covered Pilots”).⁵ (Ex. C, Second Stip. ¶¶ 1–2.) Pursuant to the Second Stipulation, the Post-Termination Covered Pilots received additional allowed general non-priority unsecured claims in the aggregate amount of approximately \$728 million (the “Post-Termination Claims”) in full and complete satisfaction of all rights of Post-Termination Covered Pilots arising under the Non-Qualified Plans. (Ex. C, Second Stip. ¶¶ 1–4.) DP3 and all Post-Terminated Covered Pilots specifically agreed that they would not assert any other claim or cause of action against Delta in respect of the Non-Qualified Plans.

The Post-Termination Claim shall be in full and complete satisfaction of all rights of all Post-Termination Covered Pilots arising in connection with Non-Qualified Plans on and after the NQ Termination Date, and neither DP3 nor any Post-Termination Covered Pilot shall have or assert any other claim or cause of action against any Debtor . . . relating to such rights and claims.

(Ex. C, Second Stip. ¶ 4.)

Significantly, the Second Stipulation establishes specific, comprehensive and mandatory methodologies for determining the claims of individual Covered Pilots.

[T]he methodology set forth in the [Second Stipulation] shall be employed by the Debtors to calculate all claims arising in connection with the Non-Qualified Plans for the period on and after the NQ Termination Date for all pilots who retired prior to the NQ Termination Date and who, absent termination of the Non-Qualified Plans, would otherwise have been entitled to receive benefits under the Non-Qualified Plans as of the NQ Termination Date.

⁵ The Covered Pilots also include others whose rights to benefits under the Non-Qualified Plans are derivative of the rights of the retired pilots described above, including alternate payees, survivors and contingent beneficiaries.

(Ex. C, Dec. 15, 2007 Or. 2.) This methodology, together with the methodology established by the First Stipulation for pre-termination claims (collectively, the “NQ Pension Benefits Methodologies”), was heavily negotiated by Delta, the Creditors’ Committee and DP3, with each retaining its own advisors (including actuaries) to perform extensive diligence on the NQ Pension Benefits Methodologies. (Ex. C, Second Stip. 2–3; Ex. A, Miller & Martin Fee App. 10.) Indeed, the Second Stipulation, signed by Shelley D. Rucker, Esq., of Miller & Martin on behalf of DP3, stated that “[t]he Signatories to this Stipulation represent that they have been represented by experienced counsel and are duly authorized by their clients to execute this Stipulation.” (Ex. C, Second Stip. ¶ 8.)

According to its fee application and associated time records, Miller & Martin, attorneys for DP3, spent considerable time negotiating the DP3 Settlement and reviewing the methodology for computing individual claims. (Ex. A, Miller & Martin Fee App. 9–11.) For its services as attorneys to DP3, including its role in negotiating the DP3 Settlement, Miller & Martin received an allowed administrative claim of \$900,000 and an allowed general unsecured claim of \$5,711,937, each funded by a pro rata reduction in the allowed claims of Covered Pilots. (Ex. J, Mar. 22, 2007 Or. 3.)

E. The Methodology for Calculating Non-Qualified Claims, and the Deadline for Retirees to File Proofs of Claim, Were Well Publicized

Pursuant to the DP3 Settlement, the Covered Pilots were notified that they would receive a Post-Termination Claim calculated according to the value of the non-qualified benefits a particular Covered Pilot was receiving “on or after October 1, 2006,” which

was the first date during the post-termination period on which non-qualified benefits were scheduled to have been paid. (Ex. K, Nov. 27, 2006 Mot. Ex. B.)

This method of calculating each Covered Pilot's Post-Termination Claim was extensively negotiated by DP3 and DP3's attorneys, Miller & Martin. (Ex. A, Miller & Martin Fee App. 9–11.) DP3 conducted its own actuarial analysis of the claims calculations with the full cooperation and support of Delta's professionals. (*See* Ex. A, Miller & Martin Fee App. 10.) In September 2006, Margaret M. McDaniel of Towers Perrin (a firm that provides actuarial consulting services) sent a letter to Dean Booth, Esq. of Miller & Martin that explained the present value of post-termination, non-qualified retirement plan benefits for pilots. (McDaniel Decl. ¶ 5.) The letter explained the methodology used for making these calculations and specifically noted that those calculations would be performed using "post-termination benefits assumed to be payable on or after September 2, 2006." (McDaniel Decl. Ex. A.) Thereafter, Ms. McDaniel spoke with Mr. Booth to review the proposed calculation methodology in detail, and in November 2006, Ms. McDaniel (along with D. Michael Keen, Esq., a senior member of Delta's in-house legal staff) made an in-person presentation to members of the DP3 board of trustees that set forth the proposed calculation methodology. (McDaniel Decl. ¶¶ 6–7.) Delta also prepared spreadsheets that set forth each and every Covered Pilot's claim in respect of the termination of the Non-Qualified Plans, all calculated using 2006 figures. (McDaniel Decl. ¶ 8.) The parties were in complete agreement.

Delta and DP3 independently went to great lengths to educate Covered Pilots about the claims calculation methodology, including the use of post-September 2, 2006 benefits as the basis for calculating the Post-Termination Claims. Each Covered Pilot

was served with a copy of the Second Stipulation, an explanatory letter from Delta and an illustrative example of a sample claim calculation. (Ex. K, Nov. 27, 2006 Mot. ¶ 26.) Significantly, not a single objection to the Second Stipulation or the claims calculation methodology described therein (including the use of 2006 figures) was filed. (Ex. L, Dec. 14, 2006 Decl. of No Objs.)

On or about January 24, 2007, Delta amended its Schedules of Assets and Liabilities (the “NQ Benefits Schedule Amendment”) to list the amount of each Covered Pilot’s claim calculated pursuant to the NQ Pension Benefits Methodologies, and sent to Covered Pilots (among other things): (i) a letter setting forth the amount of the NQ Admin Claim, the Balance Claim and the Post-Termination Claim; (ii) a written explanation of how such NQ Admin Claim, the Balance Claim and Post-Termination Claim was calculated; and (iii) a bar date notice, explaining that the deadline to object to any of the NQ Admin Claim, the Balance Claim and the Post-Termination Claim was March 12, 2007 (the “Covered Pilot Bar Date”).⁶

DP3 and its professionals, including its attorneys at Miller & Martin, received and presumably reviewed the NQ Benefits Schedule Amendment before it was filed and were well aware of the Covered Pilot Bar Date. DP3 posted a notice of the Covered Pilot Bar

⁶ The Covered Pilot Bar Date was set pursuant to the Court’s Order dated June 5, 2006 Establishing Deadline for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof (the “Bar Date Order”). The Bar Date Order stated that current and former employees of the Reorganized Debtors were not required to file proofs of claim at that time, but further stated that:

if the Debtors provide written notice to any current or former employee stating that the Debtors do not intend to exercise their authority to pay [claims for non-qualified pension benefits], such current or former employee shall have until the later of (i) the Bar Date [August 21, 2006] and (ii) 45 days from the date of service of such written notice, to file a proof of claim.

(Ex. M, Bar Date Or. 4.)

Date to its web site, which stated that persons who believed that they were entitled to additional claims against Delta arising out of the Non-Qualified Plans were required to file proofs of claim by March 12, 2007. (Ex. G, DP3, Inc., Important: Final Notice of Deadline at 1, www.dp3.org (last visited Oct. 30, 2007).) Miller & Martin also referenced the Covered Pilot Bar Date in its fee application.

As of the Covered Pilot Bar Date, only 11 out of approximately 3,000 Covered Pilots had filed individual proofs of claim for the type of relief sought by the DP3 Class Proof of Claim, which includes the three claims individually filed by the DP3 Claimants.⁷ Nor was any class claim filed by the Covered Pilot Bar Date.

F. The Untimely Filing of the DP3 Class Proof of Claim and the DP3 Certification Motion

Despite (i) the expiration of the Covered Pilot Bar Date and (ii) the explicit terms of the First and Second Stipulations (each executed by Miller & Martin on behalf of DP3) and the final and non-appealable Orders approving them, which provide, *inter alia*, that neither DP3 nor any Covered Pilot shall assert *any* additional claims against any of the Debtors on account of the Non-Qualified Plans (Ex. B, First Stip. ¶ 4; Ex. C, Second Stip. ¶ 4), on April 23, 2007, a mere *two days before the confirmation hearing*, Miller & Martin first informed Delta of its intention to file a class proof of claim on the following day (i.e., one day before the confirmation hearing) for additional non-qualified benefits.

⁷ This estimate is derived from a review of Delta's claims database to identify those claims that remain unresolved and that appear to seek a claim from Delta in connection with ERISA's look-back rules.

It was not until August 7, 2007⁸ that DP3 did in fact file the DP3 Class Proof of Claim, purportedly on behalf of certain named individuals and other retired pilots who they believe are entitled to additional non-qualified claims because they are unhappy with the calculation of qualified benefits by the PBGC under the Qualified Plan. (*See* DP3 Class Proof of Claim ¶¶ 16–17.) No motion seeking the Court’s permission to file a late proof of claim was filed by DP3, nor has DP3 moved to set aside the final Court orders that specifically prohibit the filing of any additional claims by DP3 or Covered Pilots.

IV. ARGUMENT

The DP3 Class Certification Motion is both procedurally barred and substantively groundless. The relief that the DP3 Claimants seek is precluded by stipulations and Orders approved by this Court and binding on the DP3 Claimants that are res judicata of the claims now asserted. Moreover, the DP3 Class Proof of Claim was filed after the applicable bar date. Each of these facts precludes consideration of the DP3 Class Certification Motion.

Even if the DP3 Claimants are able to surmount those obstacles, they still must persuade the Court that it is appropriate to apply class certification rules to this proceeding. Pursuant to Bankruptcy Rule 9014, class certification rules apply to contested matters only if the Court, in its discretion, decides to apply them. The Court

⁸ The DP3 Claimants agreed to refrain from filing a class proof of claim on the day before the confirmation hearing. In return, Delta agreed not to rely on Section 9.5 of the Plan (which provides that “On or after the Confirmation Date, the holder of a Claim . . . must obtain prior authorization from the Bankruptcy Court or the Debtors to file or amend a Claim”) as grounds for objecting to a DP3 class proof of claim. However, Delta reserved its rights to object to the class proof of claim and any motion for class certification on any other grounds, including on the grounds that any class proof of claim (even if it had been filed on April 24, 2007) was already untimely and also barred by the DP3 Settlement.

should not exercise that discretion for many reasons. Doing so would revive the time-barred claims of hundreds of creditors who did not file by the applicable bar date, reward claimants who waited for months before seeking class certification (despite being all-too-well aware of the “claims”), overturn prior orders of this Court that have been final and non-appealable for months, and violate ERISA.

Finally, if, by dint of heroic efforts in advocacy, the DP3 Claimants are able to establish that their claims are not barred by res judicata, are not time barred, and that class certification rules should be applied, all would be for naught because the DP3 Claimants cannot satisfy the class certification prerequisites of Civil Rule 23 (including the requirement of identification and appointment of unconflicted class counsel).

A. DP3, the DP3 Claimants and Miller & Martin Are Barred from Collaterally Attacking Their Settlement with Delta

The DP3 Class Proof of Claim is barred by the DP3 Settlement, which is res judicata of all claims and causes of action arising in connection with the Non-Qualified Plans. “Generally, res judicata (claim preclusion) operates to prevent the parties or their privies to a prior action from litigating any matter that was or could have been decided in a previous suit.” *Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992) (citing *Murphy v. Gallagher*, 761 F.2d 878, 879 (2d Cir. 1985)). Under the doctrine of res judicata, “a final judgment on the merits bars further claims by the parties or their privies based on the same cause of action.” *Montana v. United States*, 440 U.S. 147, 153 (1979) (citations omitted). Res judicata will bar later litigation if a prior decision “was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action.” *EDP*

Medical Computer Sys., Inc. v. United States, 480 F.3d 621, 624 (2d Cir. 2007) (quoting *In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985)).

There is no question that the first two requirements are met. A consent decree entered by a bankruptcy court is considered a final judgment on the merits for res judicata purposes. *See Amal. Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 639 (2d Cir. 1987) (“The general rule is that a final consent decree is entitled to res judicata effect . . . because the entry of a consent judgment is an exercise of judicial power.”); *EDP Medical Computer Sys., Inc. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007) (“This rule applies with full force to matters decided by the bankruptcy courts.”).

With respect to the third requirement, the Second Circuit has repeatedly held that “one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, even though the first party was not formally a party to the litigation.” *Alpert’s Newspaper Delivery Inc. v. N.Y. Times Co.*, 876 F.2d 266, 270–71 (2d Cir. 1989) (holding that suit by independent newspaper deliverers was barred by res judicata because a single trade group was the “admitted mastermind and financier” of both suits, even though trade group was never a named party and named plaintiffs were different in each action). The Second Circuit relied on a series of its decisions holding that res judicata prevents an organization from orchestrating a series of litigations against the same defendant:

Such was the result in *Ellentuck v. Klein*, 570 F.2d 414 (2d Cir. 1978), in which we held that a group of property owners were precluded from relitigating issues raised in a prior litigation brought by another group of property owners, when both suits were funded by a property owners’ association. Although several of the plaintiffs were identical in the two proceedings at issue in *Ellentuck*, we

did not rely on that fact in reaching the conclusion that the property owners' association's involvement made res judicata appropriate. Similarly, in *Ruiz v. Commissioner of Department of Transportation of the City of New York*, 858 F.2d 898 (2d Cir. 1988), we found identity of parties when two groups of truck drivers filed two suits, one in state court and one in federal court, challenging a New York vehicle weight regulation. We reasoned that, since the two groups were using the same attorneys in the two actions, the allegations were identical, and there were indications of an industry-wide strategy coordinated by counsel for the Industry Advancement Fund, sufficient identity of parties existed to bar relitigation of previously raised claims.

Id. at 270–71; *see also Meagher v. Board of Trustees*, 921 F. Supp. 161, 165–66 (S.D.N.Y. 1995), *aff'd*, 79 F.3d 256 (2d Cir. 1996) (plaintiff who brought action as representative of pension plan barred by res judicata of prior action brought by same plaintiff in his individual capacity as beneficiary under such plan). The Second Circuit has also noted that the presence of the same attorneys in multiple related actions strongly suggests that res judicata should apply. *Conte v. Justice*, 996 F.2d 1398, 1402–03 (2d Cir. 1993) (“Clearly, the appearance of the same attorney in both actions creates the impression that the interests represented are identical”; applying New York law and collecting authorities).

Here, perhaps to avoid the clear res judicata effect of the DP3 Settlement, the DP3 Certification Motion purports to be brought by four individual pilot retirees with no declared connection to DP3. But, of course, (1) the four putative class representative are all members of the DP3 “Honor Roll” and one is also a member of the DP3 Board of Trustees; (2) the very same law firm (indeed, the very same lawyers) that represents the

putative class representatives has also represented DP3 throughout;⁹ and (3) DP3 has repeatedly claimed the DP3 Certification Motion as its own in its own web site, public announcements, press releases and even on the Court's ECF filing system. (Ex. F, DP3, Inc., DP3 Honor Roll (Sept. 30, 2007), www.dp3.org (last visited Oct. 30, 2007); Ex. E, DP3, Inc., Welcome, www.dp3.org (last visited Oct. 30, 2007); Ex. A, Miller & Martin Fee App. 1; Ex. D, DP3, Inc., Disregarded NQ Benefit Class Action Q&A, www.dp3.org (last visited Oct. 30, 2007).) Incredibly, the DP3 Certification Motion says not one single word about any of this or about the more than \$800 million comprehensive settlement that DP3 and Miller & Martin negotiated with Delta. DP3 cannot avoid res judicata by this transparent maneuver.

Finally, with respect to the fourth requirement for barring later litigation under the doctrine of res judicata, there is no question that the DP3 Class Proof of Claim involves the same claims and causes of action that were specifically settled by the DP3 Settlement, which resolved *all* potential claims and causes of action against Delta arising out of the Non-Qualified Plans. *See Federated Dep't Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981) (res judicata precludes the relitigation of issues "that were or could have been raised in [a prior] action."). The claims distributed to Covered Pilots pursuant to the DP3 Stipulation were "*in full and complete satisfaction of all rights of all Post-Termination Covered Pilots arising in connection with the Non-Qualified Plans on and after the NQ Termination Date, and neither DP3 nor any Post-Termination Covered Pilot shall have*

⁹ Delta is not aware of any statement filed by Miller & Martin or by DP3 pursuant to Bankruptcy Rule 2019. It should be noted that the failure of a party to comply with the disclosure requirements of Bankruptcy Rule 2019 may be grounds for refusing to permit that party from being heard in a case. *See* Bankruptcy Rule 2019(b); *cf. In re Northwest Airlines Corp.*, 363 B.R. 701, 704 (Bankr. S.D.N.Y. 2007) ("The Rule is long-standing, and there is no basis for failure to apply it as written.").

or assert any other claim or cause of action against any Debtor. . . relating to such rights and claims.” (Ex. C, Second Stip. ¶ 4 (emphasis added); see also Ex. B, First Stip. ¶ 4 (with respect to pre-termination claims).)¹⁰

Indeed, this global settlement of non-qualified pension claims against Delta was the very heart of the DP3 Settlement and the distribution of cash and hundreds of millions of dollars worth of Reorganized Delta shares to Covered Pilots and to Miller & Martin. Delta never would or could have made those distributions without the assurance that it had reached a final, comprehensive settlement with DP3 and the Covered Pilots. Having reaped the multi-hundred million dollar benefits of the DP3 Settlement, DP3, the DP3 Claimants and Miller & Martin cannot now be permitted to re-trade it and seek to extract what they estimate to be another \$100 million in claims from these estates. See *Lazard v. Texaco, Inc. (In re Texaco, Inc.)*, 81 B.R. 820, 825 (Bankr. S.D.N.Y. 1988) (“Where a party to a consent decree has obtained the benefits of a consent, in addition to the termination of litigation, such party cannot be permitted to ignore the obligations imposed upon the party by the decree.”) (citing *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)).

B. The DP3 Class Proof of Claim was Filed After the Applicable Bar Date for Filing Claims for Non-Qualified Pension Benefits

As discussed at length in Section IV.C *infra*, class actions in bankruptcy are disfavored even where the putative class representatives file the class proof of claim on time and promptly seek class certification. Class actions are even less favored when the

¹⁰ As set forth in footnote 4 above, a mere 13 retirees out of more than 6,000 pilot retirees initially objected to being bound by the First Stipulation, but each objector subsequently asked to be bound. No one objected to the Second Stipulation, which established the methodology for calculating post-termination claims. (Ex. L, Dec. 14, 2006 Decl. of No Objs.)

claim is timely filed but the putative class representatives wait until plan solicitation or later before seeking class certification. Here, the DP3 Claimants seek to do something seemingly unprecedented in the history of chapter 11: to obtain class certification by motion filed months after the effective date of the Plan with respect to a class proof claim that itself is untimely (indeed, filed more than three months after the Plan's effective date). As will be discussed in Section IV.C.2 *infra*, the DP3 Claimants' delay in seeking class certification is fatal. However, the DP3 Class Proof of Claim fails for the separate and independent reason that it was filed after the Covered Pilot Bar Date.

Pursuant to the Bar Date Order and as a result of the scheduling of claims on January 24, 2007, the Covered Pilot Bar Date was March 12, 2007. (Ex. M, Bar Date Or. 4; Ex. G, DP3, Inc., Important: Final Notice of Deadline at 1, www.dp3.org (last visited Oct. 30, 2007).) DP3 and Miller & Martin (as well as all Covered Pilots) received written notice of the Covered Pilot Bar Date, and DP3 and Miller & Martin participated in the negotiation and drafting of the calculation methodology and the claims notices (each of which noted March 12, 2007 as the Covered Pilot Bar Date), and have referenced the Covered Pilot Bar Date in other pleadings filed with this Court. Indeed, DP3 posted information concerning the Covered Pilot Bar Date on its web site, and in that very same notice stated that a group of pilots believed that the DP3 Settlement did not adequately account for the look-back rules and were filing individual claims on that basis. (Ex. G, DP3, Inc., Important: Final Notice of Deadline at 2, www.dp3.org (last visited Oct. 30, 2007).) That DP3 was aware of and bound by the Covered Pilot Bar Date is beyond peradventure.

Nevertheless, the DP3 Claimants did not file the DP3 Class Proof of Claim until August 7, 2007. Indeed, Miller & Martin did not even raise to Delta the possibility of a class proof of claim until April 23, 2007, two days prior to the confirmation hearing and more than one month after the Covered Pilot Bar Date. The DP3 Class Proof of Claim is therefore untimely and barred by the Bar Date Order.

It is no defense for the DP3 Claimants to assert that some of their members are not “Covered Pilots” and so are not bound by the Covered Pilot Bar Date. At least one of the DP3 Claimants (Donald F. Mairose) is clearly a Covered Pilot, and, in any case, the DP3 Class Proof of Claim is brought on behalf of hundreds of Covered Pilots, each of whom is subject to the Covered Pilot Bar Date. DP3 may not sweep hundreds of untimely claims past the Covered Pilot Bar Date by cleverly selecting as its class representatives three non-Covered Pilots.¹¹

Incredibly, DP3 fails even to mention the lateness of the DP3 Class Proof of Claim in the DP3 Certification Motion, much less seek an order of the Court excusing the untimely filing. However, were they (at this late hour) to seek relief from the Covered Pilot Bar Date, the DP3 Claimants would need to show that their delay was the result of “excusable neglect” under Bankruptcy Rule 9006(b)(1). The four-factor test for determining excusable neglect is: (i) the danger of prejudice to the debtor; (ii) the length

¹¹ On the evening of April 23, 2007, Delta agreed with DP3 that it would not rely, in objecting to the DP3 Class Proof of Claim, on the provisions of its now-confirmed chapter 11 plan of reorganization that established an absolute prohibition, without either Delta or Court permission, on the filing of any new claims (or even the amendment of existing claims) after the entry of an Order confirming the Plan. The Court entered the Order less than 48 hours after this agreement was reached. As such, it is inconceivable that any non-Covered Pilot forbore from filing a proof of claim on account of this last-minute agreement, and yet the DP3 Class Proof of Claim would have the effect of granting claims to potentially hundreds of otherwise time-barred claimants, none of whom have demonstrated any desire to pursue such a claim.

of the delay and its potential impact on judicial proceedings; (iii) the reason for the delay, including whether it was within the reasonable control of the claimant; and (iv) whether the claimant acted in good faith. *Pioneer Invest. Servs. Co. v. Brunswick Assoc. LP*, 507 U.S. 380, 395 (1993).

None of the factors support the claim here, especially because the DP3 Claimants have not even begun to meet their burden of demonstrating excusable neglect. *See In re Agway, Inc.*, 313 B.R. 22, 27 (Bankr. N.D.N.Y. 2003) (burden of proof is on claimant). The test is stringently applied, and the Court of Appeals for the Second Circuit has taken what it characterizes as a “hard line” against allowing late claims. *See Midland Cogeneration Venture Ltd. v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115, 122–23 (2d Cir. 2005). The critical factor for the “excusable neglect” test is the reason given by the claimant for the delay, *id.* at 123, which must be considered in light of the “essential function” of bar date orders in bankruptcy as mechanisms for ensuring the sound administration of the bankruptcy estate. *Id.* at 127–28 (quoting *In re Hooker Invs., Inc.*, 937 F.2d 833, 840 (2d Cir. 1991)).

Applying the *Pioneer* factors in light of the Second Circuit’s decision in *Enron*, it is clear that the DP3 Claimants are not entitled to an order from the Court allowing them to file the DP3 Class Proof of Claim after the applicable bar date.

Prejudice to the Debtor. In *Enron*, the Second Circuit found that permitting a late-filed \$12.5 million claim in a case with nearly \$1 trillion in filed claims would be prejudicial to the debtor because doing so would subvert the bar date order and open the floodgates to new claims. *Id.* at 131–32. Here, the DP3 Class Proof of Claim is for at least \$100 million, and in a far smaller claims pool. Moreover, the DP3 Class Proof of

Claim is, in effect, a tardy objection to and collateral attack on the DP3 Settlement that was approved by the Court almost a full year ago. If the DP3 Settlement is called into question and the bar date is not enforced, then thousands of retirees and other claimants might feel justified in filing *new* claims of all types against the Reorganized Debtors. Allowing the DP3 Class Proof of Claim would very severely prejudice Delta and its creditors.

Length of the Delay and Impact on Judicial Proceedings. On April 23, 2007, the DP3 Claimants first notified the Reorganized Debtors of their intention to file the DP3 Class Proof of Claim on the following day. This was more than a month after the Covered Pilot Bar Date and only two days before the confirmation hearing on April 25, 2007. The DP3 Class Proof of Claim was not filed until August 7, 2007, more than three months after the Plan’s effective date and the distribution of millions of Delta shares to the Covered Pilots. The DP3 Class Proof of Claim will, if permitted to move forward, divert the resources of the Reorganized Debtors from the reconciliation of legitimate claims *timely* filed by other claimants and may encourage many others to file late claims. *Cf. In re Kmart Corp.*, 381 F.3d 709, 714–15 (7th Cir. 2004) (court rejected proof of claim filed one day after bar date because allowing all claims filed late could result in a “mountain of such claims”), *cert. denied sub nom. Simmons v. Kmart Corp.*, 543 U.S. 1056 (2005). Even a short delay will not be excused if the reason for the delay is weak. *Enron*, 419 F.3d at 129. Here, the DP3 Claimants unquestionably knew of the Covered Pilot Bar Date and of these claims months earlier, and have offered absolutely no justification for the inexcusable delay. By contrast to the facts in *Kmart* and *Enron*

(where the reason for the delay in each case was given as simple inadvertence or accident), here the cause of the delay appears to have been tactical, at best.

Good Faith of the Claimant and Reason for the Delay. DP3's and its counsel's good faith in this matter is open to very serious question. The very individuals who negotiated the DP3 Settlement now seek to evade its terms, change the methodology used to calculate claims thereunder, and deprive Delta and its estates of the only consideration they received under the DP3 Settlement—finality. To accomplish this purpose, they have filed with the Court a motion that fails to mention even the most elementary facts about this proceeding, including the fact that the claims they seek are barred by a settlement that they themselves negotiated and approved. They have also repeatedly told everyone else that the motion is DP3's—only in the pleadings do they omit to mention DP3's involvement. Indeed, DP3 is asking pilots to send money to DP3 because “this type of litigation is extremely expensive to pursue, and we urge all non-members of DP3 to join in order to share in the burden of this and other possible legal challenges.” (Ex. D, DP3, Inc., Disregarded NQ Benefit Class Action Q&A at 3, www.dp3.org (last visited Oct. 30, 2007).)

Nor may the DP3 Claimants credibly plead ignorance or some other explicable reason for their failure to comply with the Covered Pilot Bar Date. The DP3 Claimants were manifestly aware of the look-back rules before the Covered Pilot Bar Date because three of the four claimants filed *individual* proofs of claim for the same liability. (Ex. I(i), Donald F. Mairose, Proof of Claim 8000 (Mar. 9, 2007); Ex. I(ii), George T. Baker, Proof of Claim 8029 (Mar. 12, 2007); Ex. I(iii), Herbert Summers, Proof of Claim 8082 (Mar. 12, 2007).) Their attorneys were similarly familiar with the Covered Pilot Bar

Date and the existence of the alleged liability. The following time entries from the Miller & Martin Fee Application—each from the period when the DP3 Settlement was being negotiated, executed by the parties thereto and approved by the Court (months before the Covered Pilot Bar Date and the untimely filing of the DP3 Class Proof of Claim)—prove this conclusively.

Conference with Jim Gray, review notices, check out example, **questions regarding Supplemental Plan Claim and Lookback/PBGC** interface explanation for email, web and other communication. (7.5 hours) (GDB, Nov. 27, 2006) (emphasis added).

Telephone conference w/ S. Rucker, C. Walsh and R. Kurtz re: status report on DP3 settlement of SAP claims as well as **new research issues involving potential claim for difference between benefits as calculated with reduction for 3-yr look back and the amount that would otherwise be eligible [sic] w/o the lookback reduction**; legal research re: same; Revise white paper on PBGC litigation issues. (6.5 hours) (CCP, Nov. 27, 2006) (emphasis added).

Review Buerger's latest filing, DPW responses to earlier filings; PBGC response and other pleadings—conference with Wilson, conference with Gray regarding scope of engagement and engagement letter, **review questions regarding 5 year look back**, review issues regarding 1972 plan and effect on computations. (9.8 hours) (GDB, Dec. 18, 2006) (emphasis added).

Work on analysis of issues with respect to compensation limit gap between Supplemental Plan and Pilots Plan under PBGC rules. (1.8 hours) (CAC, Dec. 27, 2006).

Review latest court filings. **Work on Pilots Plan versus Supplemental Plan gap issue.** (1.6 hours) (CAC, Jan. 2, 2007) (emphasis added).

Work on analysis of gap issue and allocation of PBGC recovery among pilots' benefits. Continue review of and revisions to PBGC white paper. (1.3 hours) (CAC, Jan. 10, 2007) (emphasis added).

(Ex. A, Miller & Martin Fee App., Invoice of Dec. 29, 2006 at 12, Invoice of Jan. 31, 2007 at 6, 8–10.) These entries strongly suggest that DP3 and its counsel were, even as they were signing the comprehensive settlements, planning to subvert them, and that the late filing of the DP3 Class Proof of Claim was caused by expediency rather than any recognized justification for ignoring bar dates.

C. The Court Should Not Exercise Its Discretion Pursuant to Bankruptcy Rule 9014 to Apply Bankruptcy Rule 7023 to This Contested Matter

Even were the DP3 Class Proof of Claim not barred by res judicata and the DP3 Settlement, and even were the DP3 Class Proof of Claim not already time-barred and precluded by the Bar Date Order, the DP3 Certification Motion must also fail because it is utterly bereft of any allegation (let alone proof) that this Court should exercise its discretion to consider class certification. Amazingly, the DP3 Certification Motion utterly fails to address this point, despite the recent precedents in this district that have uniformly rejected requests to apply class certification rules under facts far more compelling than those presented here.

As an initial matter, nothing within the Bankruptcy Code gives creditors the right to file a class proof of claim. *In re Thompson McKinnon Securities Inc.*, 133 B.R. 39, 40 (Bankr. S.D.N.Y. 1991), *aff'd*, 141 B.R. 31 (1992). Indeed, for many years, courts within the Second Circuit concluded that class proofs of claim were impermissible in bankruptcy. *See, e.g., Pan Am. World Airways v. Shulman Trans. Enterprises, Inc. (In re Shulman Trans. Enterprises, Inc.)*, 21 B.R. 548, 551 (Bankr. S.D.N.Y. 1982) (“in most instances class action principles are antithetical to those of bankruptcy”), *aff'd*, 33 B.R. 383 (S.D.N.Y. 1983), *aff'd*, 744 F.2d 293 (2d Cir. 1984); *Lazard v. Texaco, Inc. (In re*

Texaco, Inc.), 81 B.R. 820, 826 (Bankr. S.D.N.Y. 1988) (“The requirement for individual filing of a proof of claim is not extinguished when a larger number of similar claims are involved. A class action claim cannot be used to evade that requirement.”).

Today, although class proofs of claim are permitted under certain limited circumstances, they remain disfavored. See *In re Ephedra Prods. Liability Lit.*, 329 B.R. 1, 5, 9 (S.D.N.Y. 2005) (“bankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action and . . . class certification may be ‘less desirable in bankruptcy than in ordinary civil litigation’” and “Since superiority of the class actions is lost in bankruptcy, only compelling reasons for allowing a particular opt-out class claim can justify applying Rule 23.”) (quoting *In re Am. Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988)). The virtue of class certification, and the traditional justification for empowering a class representative to represent the interests of class members, is the efficient adjudication of thousands of claims. However, the Bankruptcy Code already provides for the efficient and consistent adjudication of multiple claims through the claims reconciliation process, which is why the added expense and complexity of a class action proceeding pursuant to Civil Rule 23 is disfavored. See *In re Thomson McKinnon Securities Inc.*, 133 B.R. 39, 41 (Bankr. S.D.N.Y. 1991) (“the bankruptcy forum permits the filing of many claims in one case without the need for a series of suits which could otherwise be resolved in a class action.”); *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 376 (Bankr. S.D.N.Y. 1997) (“A bankruptcy proceeding offers the same procedural advantages as the class action because it concentrates all the disputes in one forum.”); *In re Northwest*

Airlines Corp., No. 05-17930, 2007 WL 2815917, at *3 (Bankr. S.D.N.Y. Sept. 26, 2007) (not for publication) (“Class action status is sparingly used in a bankruptcy case.”).

This is particularly true here, where the Reorganized Debtors have successfully addressed thousands of claims (either through objection, negotiation or reconciliation to their books and records). Indeed, since the effective date of the Plan, the Reorganized Debtors have made distributions on over 39,000 scheduled, administrative, priority, secured and unsecured claims with a face value of almost \$11.5 billion. Unsecured creditors have already received two distributions: one in May 2007 (involving the distribution of approximately 233.2 million shares of new Delta common stock on unsecured claims in the face amount of approximately \$10.4 billion) and one in the summer of 2007 (involving the distribution of an additional 20.8 million shares of stock on account of unsecured claims allowed as of and subsequent to the effective date of the Plan in the face amount of approximately \$996 million). A third distribution is scheduled to occur in November 2007.

Pursuant to Bankruptcy Rule 9014, the Court may choose (in its absolute discretion) to permit Civil Rule 23 to apply to the DP3 Class Proof of Claim. If the Court decides to apply Civil Rule 23, and further decides that the DP3 Class Proof of Claim satisfies each of the requirements of Civil Rule 23, then and only then will the lengthy class action process begin. *See In re Ephedra Prods. Liability Litig.*, 329 B.R. 1, 4 (S.D.N.Y. 2005) (“the bankruptcy court first decides under Rule 9014 whether or not to apply Rule 23, Fed.R.Civ.P., to a ‘contested matter,’ i.e., the purported class claim; if and only if the court decides to apply Rule 23, does it then determine whether the requirements of Rule 23 are satisfied.”); *In re Musicland Holding Corp.*, 362 B.R. 644,

655 n.11 (Bankr. S.D.N.Y. 2007) (“Some decisions erroneously conflate the satisfaction of the Rule 23 criteria with the separate question, unique to bankruptcy, whether an otherwise certified (or certifiable) class should be permitted to file a class proof of claim.”).¹² The inquiry therefore proceeds in two stages: the Court is only required to examine the elements of Civil Rule 23 if the Court first determines in its discretion that it is appropriate to apply Civil Rule 23.

The Court should not exercise that discretion here. Courts have routinely declined to exercise their discretion to extend the application of Civil Rule 23 to a proof of claim under analogous circumstances, including (1) cases where members of the putative class received notice of the bar date but did not timely file individual claims, (2) cases where no class was certified pre-petition (and thus, creditors were not under any misapprehension that someone else would file a claim on their behalf), and (3) cases where class certification would adversely affect the administration of the case. *See In re Musicland Holding Corp.*, 362 B.R. 644, 654 (Bankr. S.D.N.Y. 2007) (collecting cases). All these circumstances are present here and justify denying the application of Civil Rule 23 and, consequently, class certification.

¹² The DP3 Claimants may not evade this discretionary exercise of the Court’s authority by recharacterizing the action as an adversary proceeding. *See Ephedra*, 329 B.R. at 7 (“The filing of an adversary proceeding with a class action complaint does not alter the right of both the debtor and creditors who are not parties to the adversary proceeding to interpose an objection to the class proof of claim and have it determined as ‘contested matter’ subject to the Court’s discretion to expunge the claim by declining to apply Rule 23.”).

1. The Court Should Decline to Exercise its Discretion to Certify the DP3 Class Action Because the Vast Majority of Putative Class Members Did Not File Individual Claims by the March 12, 2007 Bar Date, and Allowing the DP3 Class Proof of Claim Would Effectively Revive Those Claims to the Detriment of Other Creditors

The putative class members had a well-publicized opportunity to file individual claims on this basis prior to the Covered Pilot Bar Date, but only 11 out of the many thousands of retired pilots did so. Class certification under such circumstances should not be countenanced. “[P]utative members of an uncertified class who received actual notice of the bar date but did not file timely claims are the least favored candidates for class action treatment.” *In re Musicland Holding Corp.*, 362 B.R. 644, 655 (Bankr. S.D.N.Y. 2007). By granting class certification, a court is “effectively extending the bar date for the benefit of those who sat on their rights, and also paying class counsel, at the expense of the vigilant creditors who observed the bar date.” *Id.*; *see also Bailey v. Jamesway Corp. (In re Jamesway Corp.)*, No. 95-44821, 1997 WL 327105, at *10 (Bankr. S.D.N.Y. June 12, 1997).

That is among the reasons why class certification was denied in *In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16, 23–24 (Bankr. E.D. Pa. 1995). The court denied the class certification motion, despite its being filed *before* the bar date had expired, because:

[I]t is manifestly clear that it would be unwarranted, unfair, and possibly violate the due process rights of other creditors of the Debtor to effectively extend the bar date to benefit (1) the members of the putative class who failed to exercise vigilance; and (2) the pocketbook of the putative class’s counsel, who obviously will seek a contingency fee from all unnamed class members who fail to opt out of the putative class.

Id at 24. Courts in this district routinely strike class proofs of claim that would effectively revive hundreds of time-barred claims. In *Musicland*, the court refused to certify a class proof of claim where the purported class members received notice of the bar date and were on notice that they were required to file proofs of claim to preserve their rights. 362 B.R. at 656. Similarly, in *Jamesway*, the court denied a motion for class certification where only 243 out of 840 potential class members—more than 20 times the number of claimants here, and on a smaller denominator—filed individual proofs of claim by the bar date:

Known claimants of all kinds who have received actual notice of the bar date must proceed through the claims process on a level playing field. Tinkering with an established bar date may raise due process claims of parties who have timely filed claims by originally-established bar dates, since it gives late filers a second bite at an apple which is likely to be less than fully satisfying, and thus effect unfair diminution of the timely filer's share of a distribution.

Jamesway, No. 95-44821, 1997 WL 327105, at *4–5 (Bankr. S.D.N.Y. June 12, 1997) (quoting *Sacred Heart*, 177 B.R. at 22–23). Certification of a class action is even less appropriate in cases where no pre-petition class action exists to give class members the false impression that a class representative would be filing claims on their behalf. *See Musicland*, 362 B.R. at 656.

Here, Covered Pilots received actual, individual notice of the bar date for disputing their scheduled non-qualified claims and for filing new claims. Even if some had not, it is inconceivable that any pilot retiree was unaware that Delta commenced a chapter 11 case in September 2005 and terminated all pilot pension plans effective September 2006. Each Covered Pilot received an individualized package explaining the

methodology for calculating his or her own claim, and warning them that if they wished to dispute the claim or seek additional compensation, they were required to file their own proof of claim by March 12, 2007. All pilot retirees entitled to any claim (pension or otherwise) received a *paper* copy of the Plan (most other claimants received only electronic versions), which clearly included the bar date established by Section 9.5 thereof. (*See* No. 05-17923, Docket No. 4464, Feb. 7, 2007 Or. 7.) Moreover, DP3 posted information on its web site specifically highlighting the bar date and encouraging retirees to file proofs of claim on account of the five-year look-back rule. (Ex. G, DP3, Inc., Important: Final Notice of Deadline at 2, www.dp3.org (last visited Oct. 30, 2007).) Indeed, DP3 even prepared draft “templates” for retirees to use to describe the basis of their proof of claim. (Ex. G, DP3, Inc., Important: Final Notice of Deadline at 2, www.dp3.org (last visited Oct. 30, 2007).) Individual pilots were perfectly well aware of their obligation to file a proof of claim if they wished to dispute the amounts scheduled for them pursuant to the DP3 Settlement. Nevertheless, of the several thousand pilots who received those notices, only 11, or well under 1%, filed a proof of claim for the liabilities asserted in the DP3 Class Proof of Claim. *Compare Jamesway*, 1997 WL 327105, at *4–5 n.3 (rejecting class certification even where 28% of possible claimants filed individual claims). The DP3 Class Proof of Claim would, in effect, allow hundreds and hundreds of untimely claims by creditors who chose not to file them by the applicable bar date. This cannot be permitted: the law on this point is consistent and clear.

2. The Court Should Decline to Exercise its Discretion to Certify the DP3 Class Action Because the Claimants Did Not Seek Class Certification Within A Reasonable Time, and Class Certification Now Would Interfere With the Administration of the Estate

A second essential prerequisite to class certification is that the claimants seek class certification promptly. Class certification is not appropriate in the period immediately preceding plan confirmation, and is certainly not appropriate after distributions have commenced. For example, the district court in *In re Ephedra Products Liability Litigation* affirmed an order of the bankruptcy court expunging class proofs of claim because class certification was not sought until after the debtors' plan of reorganization had been submitted to creditors for voting. 329 B.R. 1, 5–7 (S.D.N.Y. 2005). Although the claimants tendered various excuses for the tardy application for class certification in that case, the district court held that “regardless of how and why no application for the Court to apply Rule 23 was brought *sub judice* until after the plan had already been submitted to creditors, applying Rule 23 now would, as indicated, greatly and unduly delay distribution of the estate.” *Id.* at 6. Consequently, it was “simply too late in the administration of this Chapter 11 case to ask the Court to apply Rule 23 to the class proofs of claim.” *Id.* at 5.

Similarly, in *In re Woodward & Lothrop Holdings, Inc.*, the court expunged a class proof of claim because the claimant waited until after plan confirmation before bringing a motion for class certification. 205 B.R. 365, 370–71 (Bankr. S.D.N.Y. 1997). The claimant had a “duty to certify the class expeditiously” and if a “claimant waits until a post-confirmation claim objection to first bring the issue to a head, serious prejudice may result to the other creditors and the estate.” *Id.* For this reason, the court entered an

order expunging the claimant's class proof of claim—even though it was timely filed before the claims' bar date—because of the delay in seeking certification. *Id*; *see also In re Northwest Airlines Corp.*, No. 05-17930, 2007 WL 2815917, at *3–5 (Bankr. S.D.N.Y. Sept. 26, 2007) (not for publication) (expunging class proof of claim and denying class certification because it was not sought until after confirmation).

Here, Delta was not even initially contacted until weeks after the voting deadline on the Plan, and only approximately 48 hours before the start of the confirmation hearing. And the claim itself was not ultimately filed until months after that. Granting class certification now would interfere with the orderly resolution of the remaining claims against the Reorganized Debtors by grafting unnecessary class action procedures onto an ordinary claims dispute and blowing wide open a bar date applicable to many thousands of parties. The limited resources of the Reorganized Debtors would be diverted from the reconciliation of other (in most cases, timely filed) claims against the estate, and those claimants who, unlike the hundreds of putative DP3 class members, filed timely claims should not be unjustly penalized by the tardy prosecution of the DP3 Class Proof of Claim. Moreover, allowing the \$100 million DP3 Class Proof of Claim to move forward will dilute the recovery of all other creditors and could potentially delay the final distribution to creditors. As the court in *Woodward* noted, “a bankruptcy case can proceed no faster than its slowest matter . . . and a class-action may ‘gum up the works’ because until complete, the bankruptcy court cannot determine the entitlement of the other creditors.” 205 B.R. at 376 (citations omitted). The calculation, scheduling and reconciling of retiree claims has already taken more than a year and literally hundreds of hours of work by Delta and its professionals. These estates should not be compelled to

endure and finance this process a second time. The court in *Northwest*, for similar reasons, recently refused to grant a motion for class certification made after the confirmation date. *In re Northwest Airlines Corp.*, No. 05-17930, 2007 WL 2815917 (Bankr. S.D.N.Y. Sept. 26, 2007) (not for publication).

3. The Court Should Decline to Exercise its Discretion to Certify the DP3 Class Action Because the Asserted Claims Are Collateral Attacks on Prior Settlements Approved by This Court and Negotiated by the Very Individuals (and Their Attorneys) Who Now Seek an Additional Recovery

As set forth at length in Section IV.A *supra*, the DP3 Certification Motion and the DP3 Class Proof of Claim grossly violate the non-qualified claims settlement agreed to by DP3 and approved by the Court. While it is true that class certification proceedings are not the time for litigating the merits of the putative class action, Bankruptcy Rule 9014 allows the Court to decide whether to begin certification proceedings at all. Pursuant to Bankruptcy Rule 9014, whether to apply Bankruptcy Rule 7023 (and therefore Civil Rule 23) to a particular matter is entirely within the discretion of the Court, and the Court is not obliged to ignore the fact that the DP3 Class Proof of Claim is patently barred by previous orders of the Court. *See In re Ephedra Prods. Liability Lit.*, 329 B.R. 1, 10 (S.D.N.Y. 2005) (“The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.”). Apart from the meritorious defenses that the Reorganized Debtors have to the DP3 Class Proof of Claim, equitable considerations suggest that the very people who negotiated a settlement should not be allowed, by exploiting the class action device, to subvert it.

4. The Court Should Decline to Exercise its Discretion to Certify the DP3 Class Action Because the Asserted Class Claim is a Thinly-Disguised Effort to Evade Title IV of ERISA by Recovering for the Termination of a Qualified Defined Benefits Plan

And then there is ERISA. The basis for the DP3 Class Proof of Claim is what the DP3 Claimants incorrectly categorize as a shortfall or “gap” between the benefits paid by the PBGC and the claims they received pursuant to the DP3 Settlement. But the DP3 Class Proof of Claim is based upon a *qualified* pension plan issue. This effort to prosecute a *non-qualified* claim against Delta for a possible diminution of *qualified* plan benefits at the hands of the PBGC violates ERISA by usurping the PBGC’s exclusive prerogative to administer claims against employers on account of the termination of qualified defined benefit plans.

As the DP3 Claimants must admit, the reason that they are seeking more *non-qualified* claims against Delta is because of their fear that ERISA’s look-back rules will result in lower *qualified* benefit recoveries from the PBGC. (*See* DP3 Class Proof of Claim ¶¶ 17–18.) Specifically, they believe that the PBGC will assign certain benefits a lower priority based upon application of ERISA’s three- and five-year look-back rules, which, as explained in Section II *supra*, require the PBGC to determine the benefit that would have been payable to a retiree based on (i) his or her age, pay and service three years prior to plan termination and (ii) the plan terms five years prior to plan termination, and compare that amount to the amount actually being paid to the retiree at plan termination, giving a lower payment priority to the difference between the two.

The DP3 Claimants (evidently assuming that there will ultimately be insufficient assets to pay such lower priority qualified benefits in full) seek to convert their claims for

qualified benefits from the PBGC into allowed claims against Delta, allegedly arising from the termination of the Non-Qualified Plans. The amount of the claim sought pursuant to the DP3 Class Proof of Claim is the difference between the qualified benefit that was payable immediately prior to plan termination and the benefits that will be given third-priority status by the PBGC using ERISA's look-back rules. This claim, of course, violates the terms of the DP3 Settlement, which contemplates that 2006 benefit figures would be used for calculating the non-qualified claims of all Covered Pilots (and calculated each pilot's claim to the penny, with those calculations reviewed and approved by DP3). (Ex. K, Nov. 27, 2006 Mot. ¶ 20; Ex. K, Nov. 27, 2006 Mot. Ex. B.) It also violates ERISA because the DP3 Class Proof of Claim is an attempt to recover from Delta a shortfall in *qualified* pension benefits.

Pursuant to ERISA, the Reorganized Debtors were liable to the PBGC for the "total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan." 29 U.S.C. § 1362. After the termination of a qualified defined benefit pension plan (as this Court knows all too well from prior litigation in this matter), the PBGC is the only entity entitled to recover from an employer on account of unfunded benefit liabilities under such plan. *United Steelworkers of Am. v. United Engineering, Inc.*, 52 F.3d 1386, 1389–90 (6th Cir. 1995). Individual plan participants and beneficiaries are not entitled to bring claims against an employer for any reduction in benefits paid by the PBGC after it assumes trusteeship of the terminated plan. *Id.* at 1394 ("To allow a private right of action against the employer would contravene Congress's intent to disburse guaranteed benefits before nonguaranteed

benefits. Allowing plan participants to bring suit directly against the plan sponsor also raises the possibility of double recovery.”).

The PBGC also has a long-standing policy against so-called abusive “follow-on plans,” which it has defined as new benefit arrangements “designed to wrap around the insurance benefits provided by the PBGC in such a way as to provide both retirees and active participants substantially the same benefits as they would have received had no termination occurred.” *PBGC v. LTV Corp.*, 496 U.S. 633, 642 (1990). Abusive follow-on plans are discouraged because, among other things, they give employees an incentive not to oppose terminations, thus increasing the likelihood of plan terminations and further burdening of the PBGC. *Id.* at 651.

The DP3 Claimants seek relief that the PBGC would likely argue violates ERISA by providing a supplemental claim against the Reorganized Debtors for qualified defined pension benefits that the PBGC is statutorily required to subordinate to other benefits. The DP3 Claimants are unhappy that some portion of their qualified pension benefit is being subordinated by the PBGC, acting pursuant to ERISA. Rather than challenge the PBGC (which they clearly can do under the PBGC rules), however, the DP3 Claimants are seeking a larger *non-qualified* claim from Delta on account of what they expect will be unpaid *qualified* benefits. This they may not do. As this Court recognized at the hearing to approve the PBGC Settlement Agreement, the calculation of qualified benefits is performed by and under the statutory jurisdiction of the PBGC. (Ex. H, Dec. 20, 2006 Hr’g Tr. 90:2–18.) The PBGC is the only entity that may lawfully recover from an employer for qualified benefits, and any attempt to circumvent this restriction is prohibited. Delta should not be required to bear the risk of a future PBGC action (or any

other adverse consequences) because a handful of retirees desires a greater recovery than is lawful or was bargained for.

D. Even if Bankruptcy Rule 7023 is Applied, Class Certification is Not Permissible Under the Applicable Statutory Requirements

As noted above, if the Court determines, in the exercise of its discretion pursuant to Bankruptcy Rule 9014, not to apply Bankruptcy Rule 7023 to this proceeding, then the inquiry ends and the DP3 Class Proof of Claim will be disallowed and expunged.

However, even if the Court decides to apply Bankruptcy Rule 7023 (which would make Civil Rule 23 applicable to this proceeding), the Court should still deny the DP3 Claimants' motion for class certification because the prerequisites to certification in Civil Rule 23 are not satisfied and the class action is not maintainable thereunder.

1. The DP3 Claimants Have Not Satisfied the Prerequisites to Class Certification Pursuant to Civil Rule 23(a)

Pursuant to Civil Rule 23(a):

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The DP3 Class Proof of Claim fails to meet prongs one, three and four of Civil Rule 23(a), all of which must be met before a class action may be certified.

The putative class is not “so numerous that joinder of all members is impracticable.” As discussed in Section IV.C.1 *supra*, granting class certification to the DP3 Claimants would allow approximately 1,000 purported class members to avoid the

applicable bar date, to the detriment of other creditors who timely filed claims. The only conceivably legitimate members of a class are those who filed individual proofs of claim, but those appear to be only 11 retirees, three of whom are the DP3 Claimants, and even these 11 claims have been filed in violation of the First and Second Stipulations.¹³ This very small number of claims can be easily handled through the ordinary claims reconciliation process established by the Court, especially since Delta believes they are all barred, including as a matter of law. There is no reason to certify a class for such a small group of potential claimants.

Moreover, the claims and defenses of the DP3 Claimants are not “typical of the claims and defenses of the putative class” and the DP3 Claimants cannot “fairly and adequately protect the interests of the class” (typically requiring that “each class member makes similar legal arguments”). *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). The DP3 Claimants are not representative of the class they seek to represent. Three of the four DP3 Claimants have filed individual proofs of claim on the same basis as the DP3 Class Proof of Claim, but more than 99.6% of Covered Pilots and more than 99.8% of all pilot retirees have not. This fact creates an insurmountable conflict within the alleged class because the vast majority of the putative class members will be required to defend their failure to file individual proofs of claim. Moreover, the DP3 Claimants appear to be acting on behalf of DP3 as an organization; DP3 has repeatedly admitted as much on its web site. However, DP3 negotiated the

¹³ Indeed, those few who did file individual claims may have done so only at DP3’s prompting after DP3 informed pilots of this new potential claim. (*See Ex. G, DP3, Inc., Important: Final Notice of Deadline*, www.dp3.org (last visited Oct. 30, 2007).)

settlement that bars the alleged claims, and will not be able to represent the interests of the putative class. *See Gen'l Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (the adequacy-of-representation requirement “raises concerns about the competency of class counsel and conflicts of interest”).

2. The Class Action is Not Maintainable Pursuant to Federal Rule of Civil Procedure 23(b)

To be certified as a class under Civil Rule 23, the DP3 Claimants must further prove that the class is maintainable pursuant to one of the three tests of Civil Rule 23(b). Here, none are satisfied: (i) class certification is not required to ameliorate a risk of inconsistent results for class members; (ii) injunctive or declaratory relief is not an appropriate (or even requested) remedy for the alleged harm; and (iii) class action is not a superior method for resolving the claims.

(a) The Claims Reconciliation Procedures Established by This Court Preclude Any Risk That Separate Actions Will Be Maintained Absent Class Certification

Pursuant to Civil Rule 23(b)(1), a class action may be maintainable if class certification is necessary to avoid “inconsistent or varying adjudications with respect to individual members of the class” or “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members.” Here, only 11 retirees appear to have filed individual proofs of claim on account of the look-back rules (which includes three DP3 Claimants), and the Reorganized Debtors will stipulate that any objections to those individual claims filed by the Reorganized Debtors will be heard (with the Court’s permission) at a single hearing.

Also, this Court’s legal rulings will, of course, apply to the 11 claimants who filed individual claims. As such, there is absolutely no risk of inconsistent adjudications.

(b) Injunctive or Declaratory Relief is Not An Appropriate (or Even Requested) Remedy for the Alleged Claims

Pursuant to Civil Rule 23(b)(2), a class action may be maintainable if “final injunctive relief or corresponding declaratory relief with respect to the class as a whole” is an appropriate remedy for a party’s action or refusal to act. Certification is appropriate under Civil Rule 23(b)(2) where “declaratory or injunctive relief is an important aspect of the overall relief sought.” *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 516 (S.D.N.Y. 1996). Here, of course, nothing of the sort is being sought. The DP3 Claimants seek to have a claim allowed against these estates, which does not require declaratory or injunctive relief.

(c) A Class Action is An Inferior Mechanism for Fair and Efficient Adjudication of the Present Controversy

Pursuant to Civil Rule 23(b)(3), a class action may be maintainable if the Court finds that a class action is “superior to other available methods for the fair and efficient adjudication of the controversy.” As discussed in Section IV.C.2 *supra*, overlaying class action procedures onto the present claims dispute will not aid in the efficient adjudication of this matter. The claims reconciliation procedures established by the Court and the Bankruptcy Code are more than sufficient to resolve this matter, and the only apparent beneficiaries of class certification would be the putative attorneys for the class. *Compare In re Ephedra Prods. Liability Lit.*, 329 B.R. 1, 10 (S.D.N.Y. 2005) (“The only real beneficiaries of applying Rule 23 would be the lawyers representing the class.”).

3. Miller & Martin Should Not be Appointed as Class Counsel Because of Their Role in Negotiating the Settlement That They Are Now Collaterally Attacking

Even if the Court believes that the claim is valid, timely and not barred or unlawful, and that class certification is otherwise appropriate, the Court should not appoint Miller & Martin as class counsel. Pursuant to Civil Rule 23(c)(1)(B), an order certifying a class action “must appoint class counsel under Rule 23(g).” When appointing class counsel, the Court may consider any “matter pertinent to counsel’s ability to fairly and adequately represent the interest of the class.” Civil Rule 23(g)(1)(C)(ii). This includes actual and potential conflicts of interest. “Obviously, an attorney who should be disqualified because of a conflict of interest will not meet this requirement.” *Smith, Cohen, Ringel, Kohler & Martin v. Arnall, Golden & Gregory (In re N. Am. Acceptance Corp. Securities Cases)*, 593 F.2d 642, 644 (5th Cir. 1979).

Here, Miller & Martin actively participated in the negotiation of the DP3 Settlement that the DP3 Claimants now seek to collaterally attack—and nowhere do they even mention this fact in their pleadings. As class counsel, Miller & Martin would be in the untenable position of representing class members who seek claims that are specifically precluded by the express terms of the DP3 Settlement, which was negotiated and signed by Miller & Martin. This irreconcilable conflict of interest, along with the other very serious issues raised by their time records and recent pleadings, prevents Miller & Martin from serving as class counsel pursuant to Civil Rule 23(g), and, unless alternate class counsel is engaged, no class action certification order can therefore be issued pursuant to Civil Rule 23(c)(1)(B).

**V.
CONCLUSION**

For the reasons set forth above, Delta respectfully requests that the Court enter an order denying with prejudice the DP3 Certification Motion, disallowing and expunging the DP3 Class Proof of Claim and granting such other and further relief as may be just and proper.

Dated: New York, New York
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