

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

Docket No. 05-CV-10600 (LBS)

In re: Delta Air Lines, Inc., et al.

FIDUCIARY COUNSELORS INC.,

Appellant,

v.

DELTA AIR LINES, INC., et al.,

Debtors/Appellees.

**APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

**BRIEF OF APPELLANT
FIDUCIARY COUNSELORS INC.**

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This appeal arises from the bankruptcy proceedings of Delta Air Lines, Inc. ("Delta"). Appellant Fiduciary Counselors Inc. ("Fiduciary Counselors") is the fiduciary for the Delta Pilots Retirement Plan ("the Pilot Plan"). Delta is contractually obligated to make periodic contributions to the Pilot Plan pursuant to its collective bargaining agreement ("CBA") with its pilots and, statutorily obligated to do so under federal law. Shortly after Delta's filing of its bankruptcy petition, Fiduciary Counselors requested that the Bankruptcy Court find that, under 11 U.S.C. § 503(a), if Delta failed to make any contributions due to the Pilot Plan during the time that Delta continued to accept services under the CBA, the Pilot Plan would have a claim for such unpaid contributions with administrative expense priority. While Delta's obligation to make such administrative expense priority payments arose under 11 U.S.C. § 1113(f), Fiduciary Counselors did not bring a motion under that provision. Delta and its Official Unsecured Creditors' Committee opposed Fiduciary Counselors' request, but likewise did not treat their opposition as one seeking relief under Section 1113. Curiously, U.S. Bankruptcy Judge Prudence Beatty nonetheless denied Fiduciary Counselors' request on the ground that Fiduciary Counselors could not seek relief under Section 1113, something Fiduciary Counselors was not doing.

The Bankruptcy Court clearly erred. Reasonable people may differ as to whether the Pilot Plan's claim is a post-petition claim entitled to administrative expense priority. Fiduciary Counselors believes that the Pilot Plan's claim is indeed such a post-petition claim; but it anticipates that others will advance a reasoned opposing view. No one, however, can seriously adopt the Bankruptcy Court's reasoning: it is simply black letter law that one who provides services post-petition is entitled to seek administrative expense priority if he or she is not paid for those services.

Denial of Fiduciary Counselors' request exposes Delta's pilots to great financial risk. With every required contribution that Delta fails to make -- without any certainty that such required contributions in the full required amount will receive administrative expense priority -- the Pilot Plan's failure to meet the minimum funding standards becomes worse and it becomes more likely that the Pilot Plan's current underfunding will increase, prompting the responsible government agency to terminate the Pilot Plan. Termination will dramatically reduce the current pilots' pension benefits which Delta is required to provide under the CBA. This Court should reverse the Bankruptcy Court's order and enter the substantive judgment sought by Fiduciary Counselors on behalf of the Pilot Plan. If, however, the court finds that it is not prepared to rule that the Pilot Plan is entitled to administrative expense priority, it should reverse the Bankruptcy Court's procedural ruling and remand the case for further proceedings below.

I. STATEMENT OF JURISDICTIONAL BASIS OF APPEAL

The Bankruptcy Court's oral determination in open court on October 17, 2005 and written order entered on October 31, 2005 held that Fiduciary Counselors was unable, for procedural reasons, to obtain a determination of administrative expense priority. This holding is an insurmountable hurdle between Fiduciary Counselors and the relief it seeks to obtain on behalf of the Pilot Plan. Because the Court's orders left nothing further to be determined in the Bankruptcy Court, they are final and this Court has appellate jurisdiction under 28 U.S.C. § 158(a)(1).

Section 158(a)(1) grants this Court jurisdiction over "final judgments, orders, and decrees" of the Bankruptcy Court. "Because bankruptcy proceedings often continue for long periods of time, and discrete claims within those proceedings are frequently resolved prior to the conclusion of the entire bankruptcy, the concept of finality in bankruptcy matters is more flexible

than in ordinary civil litigation.”¹ Then-Judge Breyer, writing for the First Circuit in a leading case on finality in bankruptcy appeals, held that District Courts have jurisdiction to review Bankruptcy Court orders “that conclusively determine [] a separable dispute over a creditor’s claim *or priority*.”² The Second Circuit has agreed, holding, “Orders in bankruptcy cases may be immediately appealed if they resolve discrete disputes within the larger case.”³

This Court has held that denial of administrative expense priority in similar circumstances was a final order over which it had appellate jurisdiction under Section 158(a)(1). *In re 1655 Broadway Restaurant Corp.*, No. 96 CIV 9116, 1997 WL 104961, at *2 (S.D.N.Y. Mar. 7, 1997) (“The Order’s denial of the Funds’ Motion to Compel is a final order for the purposes of § 158(a) because it ‘dispose[s] of discrete disputes within the larger case.’”).⁴ Other Courts have reached the same conclusion, holding a priority determination that left nothing else to be decided was final and appealable as of right.⁵

¹ *In re Ionosphere Clubs, Inc.*, 139 B.R. 772, 777 (S.D.N.Y. 1992).

² *In re Saco Local Development Corp.*, 711 F.2d 441, 445-46 (1st Cir. 1983) (emphasis added). The First Circuit’s decision applied Section 1293, the immediate predecessor to Section 158. Precedent applying Section 1293 governs the application of Section 158. *E.g.*, *In re Johns-Manville Corp.*, 824 F.2d 176, 179 n.1 (2d Cir. 1987).

³ *In re Chateaugay Corp.*, 922 F.2d 86, 90 (2d Cir. 1990). “[A] ‘dispute,’ for appealability purposes in the bankruptcy context, means at least an entire claim on which relief may be granted.” *In re Fugazy Express, Inc.*, 982 F.2d 769, 775-76 (2d Cir. 1992).

⁴ See also *In re Golden Distributors, Ltd.*, 152 B.R. 35 (S.D.N.Y. 1992) (exercising jurisdiction to review Bankruptcy Court order granting administrative expense priority); *In re Ionosphere Clubs, Inc.*, 154 B.R. 623 (S.D.N.Y. 1993) (exercising jurisdiction to review Bankruptcy Court order denying administrative expense priority), *aff’d*, 22 F.3d 403 (2d Cir. 1994).

⁵ *In re Acorn Bldg. Components, Inc.*, 170 B.R. 317 (E.D. Mich. 1994) (reviewing Bankruptcy Court order denying administrative expense priority to claims for wages and benefits under a collective bargaining agreement); see also *In re Hillsborough Holdings Corp.*, 116 F.3d 1391, 1393 (11th Cir. 1997) (Bankruptcy Court order that pre-petition unpaid taxes would not receive administrative expense priority was final because “it concludes the controversy between

If this Court were to find that the Bankruptcy Court's order was somehow not "final," it may and should treat the Notice of Appeal as a motion for leave to take interlocutory appeal under 28 U.S.C. § 158(a)(3). Fed. R. Bankr. P. 8003(c). In deciding whether to permit interlocutory appeal, District Courts apply the standards found in 28 U.S.C. § 1292(b), granting interlocutory review where there is a controlling question of law, as to which there is substantial ground for a difference of opinion, the prompt resolution of which would materially advance the ultimate termination of the litigation. *In re Quigley Co., Inc.*, 323 B.R. 70, 77 (S.D.N.Y. 2005). As all parties agree, the issue on appeal is a purely legal one as to which, as will become clear, there is significant reason to think the Bankruptcy Court erred. Additionally, a determination of the priority of the full required amount of contributions Delta owes the Pilot Plan will materially advance the Debtor's reorganization under the provisions of the Bankruptcy Code.

Fiduciary Counselors timely filed its Notice of Appeal [Bankruptcy Docket No. 961] on October 27, 2005. Following entry of the written order, it filed an Amended Notice of Appeal [Bankruptcy Docket No. 980] on October 31, 2005.

Debtors and the Government regarding the Government's entitlement to have its claim paid as an administrative expense"); *In re Pittsburgh-Canfield Corp.*, 309 B.R. 277, 281 (B.A.P. 6th Cir. 2004) (order denying administrative expense priority to reclamation claims was final and appealable as of right); *In re Healthco Int'l, Inc.*, 272 B.R. 510, 512 (B.A.P. 1st Cir. 2002) ("The order denying appellants' request for administrative priority and demand for payment is a final order."); *In re Hechinger Investment Co. of Delaware, Inc.*, 2001 WL 34368282 (D. Del. 2001) (reviewing Bankruptcy Court order granting in part and denying in part administrative expense priority).

II. STATEMENT OF THE ISSUES

- A. If a collective bargaining agreement obligates an employer to make periodic contributions necessary to fund the employees' pension plan and the employer files a bankruptcy petition and continues to accept employees' labor post-petition under that collective bargaining agreement without modifying or rejecting the collective bargaining agreement, as provided for in 11 U.S.C. § 1113; but then fails to make the full required amount of contributions, how much of the contributions are entitled to administrative expense priority under 11 U.S.C. § 507(a)(1)?
- B. May a fiduciary for a pension plan which is owed post-petition contributions on behalf of employees which have provided post-petition services to the bankruptcy debtor move for administrative priority under 11 U.S.C. § 503(a) to enforce a debtor's payment obligations under 11 U.S.C. § 1113(f)?

III. STANDARD OF REVIEW

The parties agree that the questions presented by this appeal are legal ones,⁶ and thus they are subject to *de novo* review.⁷ The Bankruptcy Court was presented with the question of what legal conclusion could be drawn from stipulated facts, and this Court owes it no deference in that decision.⁸

IV. STATEMENT OF THE CASE

The Bankruptcy Court denied Fiduciary Counselors' request for a determination that the full required amount of certain post-petition contributions to the Pilot Plan are administrative expenses. Fiduciary Counselors filed its request on September 30, 2005. The Bankruptcy Court asked the parties to stipulate to uncontested facts prior to a hearing; the parties supplied that

⁶ "The parties hereto all agree that the dispute pending before the Court ... is a pure issue of law." Joint Statement of Stipulated Facts with Respect to the Motion of DP3, Inc. to Compel the Continued Payment of Collectively Bargained-For Pension Benefits to the Retired Pilots [Bankruptcy Docket No. 711] ("Joint Statement") at ¶ 4.

⁷ *In re 160 Bleecker Street Associates*, 156 B.R. 405, 410 (S.D.N.Y. 1993).

⁸ "As the issues raised on appeal only pertain to the Bankruptcy Court's conclusions of law, all relevant facts having been stipulated to, this Court's review is *de novo*." *In re Golden Distributors, Ltd.*, 152 B.R. 35, 36 (S.D.N.Y. 1992).

stipulation.⁹ At its hearing on October 17, 2005, without giving Fiduciary Counselors an opportunity to be heard on its papers, the Court ruled that no party other than the Debtor could move for relief under Section 1113.¹⁰ A subsequent written order was entered on October 31, 2005.¹¹

V. STATEMENT OF THE FACTS

The questions to be decided by this Court are purely legal ones. The facts that follow establish the presence of an ongoing controversy, but the questions have the same answer in *every* situation in which employees work for a debtor-employer under an unmodified collective bargaining agreement that requires the debtor-employer to make contributions to a defined benefit pension plan.

A. The CBA And The Pilot Plan

Delta's pilots work for the airline under the terms of a collective bargaining agreement, sometimes referred to as the Pilot Working Agreement (the "PWA" or "CBA"). The CBA provides that the airline will provide specifically defined pension benefits to pilots and certain of their dependents after they retire. In order to provide those defined benefits, the CBA required establishment of the Pilot Plan, a tax-qualified defined benefit pension plan.¹² The CBA

⁹ See generally Joint Statement.

¹⁰ October 17 Tr. at 98 ("[Section] 1113 requires that the movant be the debtor and the debtor is not the movant and, therefore, there's nothing in 1113 that's relevant because the debtor is not the movant and that's that.")

¹¹ Order Denying Motion of DP3 Pursuant to Bankruptcy Code § 1113 ("only the Debtor may move for relief under Bankruptcy Code § 1113").

¹² Joint Statement at ¶ 18.

prescribed how and when Delta makes contributions to the Pilot Plan.¹³ Delta agreed in the CBA to make those contributions when due.¹⁴ In addition, the Employee Retirement Income Security Act of 1974 ("ERISA") and certain parallel provisions in the Tax Code imposed additional, statutory obligations on Delta in regard to the Pilot Plan. Plans must be funded on a regular schedule, and are subject to review to determine whether supplemental contributions must be made.¹⁵

The Pilot Plan is currently underfunded; that is, based on actuarial estimates, the Plan currently lacks sufficient assets to pay all of its anticipated obligations. Should Delta fail to pay the full required amount of contributions, the Pilot Plan's failure to meet the statutory minimum funding standards would become worse and the Pilot Plan would become more underfunded than it already is. If there is no assurance that the full required amount of contributions will receive administrative expense priority, the Pension Benefit Guaranty Corporation ("PBGC") – the federal government pension plan insurer – might intervene to terminate the Pilot Plan.¹⁶ Under

¹³ See *id.* at ¶ 5. Section 10.02 of the Pilot Plan specifies Delta's duty to make contributions to the Plan, stating that "[t]he contributions of the Employing Companies shall be paid at reasonable intervals, taking into consideration the recommendation contained in the latest actuarial valuation." *Id.* at ¶ 6. Section 26 of the CBA specifically incorporates the Pilot Plan into the CBA by reference and states that "[t]he Company will pay the entire cost of providing retirement benefits for Pilots." *Id.*

¹⁴ See *id.* at ¶ 4.

¹⁵ *Id.* at ¶¶ 17, 33. These additional contributions may be triggered due to, among other reasons, a decline in market value of Plan assets or a large amount of benefit payments being made from the Plan. *Id.* at ¶ 34.

¹⁶ The PBGC is authorized, but not required, to terminate an underfunded plan that fails to meet the minimum funding standards set forth in the tax code. 29 U.S.C. § 1342(a)(1) (referencing 26 U.S.C. § 412). The likelihood of plan termination increases if the PBGC anticipates that delaying termination would harm the PBGC's financial health. See 29 U.S.C. § 1342(a)(4).

ERISA, if the PBGC terminates the Pilot Plan, it takes the Pilot Plan over and pays benefits according to its own rules.¹⁷

The Pilot Plan's governing documents designated a Delta-controlled fiduciary.¹⁸ On September 1, 2005, Delta approved Fiduciary Counselors as the independent fiduciary for the Plan to, among other things, "pursu[e] claims, if any, against Delta that the Qualified Pilot Plan may have if Delta fails to make a required contribution to the Qualified Pilot Plan when due."¹⁹

Separate from the Pilot Plan, Delta agreed in the CBA to make direct payments to certain retired pilots pursuant to agreements loosely referred to as "non-qualified pension plans."²⁰ These "plans" should not be confused with the Pilot Plan of which Fiduciary Counselors is the fiduciary; the issue presented in Fiduciary Counselors' appeal does not concern payments other than contributions due to the Pilot Plan. Nor does Fiduciary Counselors appeal turn on the timing of the contributions; to provide Delta greater cash flow flexibility, Fiduciary Counselors has *not* asked that the full required amount of contributions be made currently, but has asked for a determination that the Pilot Plan's claim for the full required amount of contributions due post-petition be classified as an administrative expense. Administrative priority should assure that the full required amount of contributions to the Pilot Plan are paid at the time Delta exits bankruptcy.²¹

¹⁷ Joint Statement at ¶ 34.

¹⁸ *Id.* at ¶ 10.

¹⁹ *Id.* at ¶ 11

²⁰ *E.g., id.* at ¶ 47.

²¹ Unless otherwise agreed to, a holder of an administrative expense claim allowed under § 503(b) and entitled to priority under § 507(a)(1) must be paid cash "equal to the allowed amount of such claim" on "the effective date of the plan" for a chapter 11 plan of reorganization to be confirmed. *See* 11 U.S.C. § 1129(a)(9)(A); *In re Teligent, Inc.*, 282 B.R. 765, 770 (Bankr.

B. The Proceedings Below And The Bankruptcy Court's Decision

Delta and its numerous affiliates filed for protection under Chapter 11 of the Bankruptcy Code on September 14, 2005. After the filing of the petition, a contribution to the Pilot Plan was first due on or about October 15, 2005.²² An additional contribution to the Pilot Plan was due on January 15, 2006.²³

After filing, bankruptcy debtors generally have a right either to require contract counterparties to continue performance or to "reject" their contracts altogether.²⁴ However, a defined benefit plan cannot be terminated under the provisions of the Bankruptcy Code, but must be terminated under the provisions of ERISA which provides specific standards for a plan in bankruptcy.²⁵ Significantly, these procedures provide that a debtor cannot unilaterally terminate a defined benefit plan under a collective bargaining agreement.²⁶ At the time Fiduciary Counselors filed its motion in the Bankruptcy Court, Delta had taken no steps to reject the CBA and Delta pilots continued to provide their labor under the terms of the CBA. Subsequent to that

S.D.N.Y. 2002) ("Section 1129(a)(9) ... requires administrative and priority creditors to be paid in full unless they agree to a different treatment of their claims.").

²² Joint Statement at ¶¶ 38-39. Delta made a funding contribution in the sum of \$417,000 on October 14, 2005, the amount of the contribution Delta believe to be due to the Pilot Plan under its theory of the law. Oct. 17 Tr. at 48. The full required amount of contributions due to the Pilot Plan on or about October 14, 2005 was not less than \$160 million, Joint Statement at ¶ 39. Under Delta's theory of the law, about one quarter of one percent of the full required amount of contributions due had to be paid as administrative expenses.

²³ The required contribution due to the Pilot Plan on January 15, 2006 was approximately \$75 million. Delta paid only a small portion of that amount.

²⁴ Most contracts are rejected under Section 365 of the Bankruptcy Code. Section 1113 of the Code creates additional requirements when the contract is a collective bargaining agreement.

²⁵ See 29 U.S.C. § 1341(a)(1).

²⁶ See 29 U.S.C. § 1341(a)(3).

time Delta did file a rejection motion under § 1113 of the Bankruptcy Code.²⁷ If Delta establishes that rejection of the CBA is necessary at the § 1113 hearing, and also wishes to end its obligation to make the required contribution to the Pilot Plan, it will then have to seek to terminate the Pilot Plan pursuant to § 4041(c) of ERISA, 29 U.S.C. § 1341(c).²⁸

On September 23, 2005, Delta Pilots' Pension Preservation Organization ("DP3") – a voluntary association of some retired Delta pilots – filed a motion to compel Delta to continue making the full required amount of contributions to the Pilot Plan. With October 15 looming, Fiduciary Counselors separately asked the Bankruptcy Court not to require actual payment, but to grant administrative expense priority to the full required amount of all contributions due to the Pilot Plan prior to rejection of the CBA.²⁹ At the very beginning of Fiduciary Counselors'

²⁷ On November 1, 2005, Delta filed a motion to reject the CBA. That motion is currently pending before the Bankruptcy Court, but Delta and ALPA signed an interim agreement effective as of December 15, 2005 that provides for a reduction in salaries, but does not affect contributions to the Pilot Plan. The interim agreement provides that if there is not a comprehensive agreement by March 1, 2006, that the Section 1113 issue will be submitted to a panel of three neutral experts for a binding decision on the issue. Even if the Section 1113 relief were ultimately granted, it could not affect compensation which accrued prior to the motion. *Acorn Bldg. Components*, 170 B.R. at 319 (debtor's rejecting collective bargaining agreement did not moot union's request for administrative expense priority for pre-rejection period); *see also Matter of Continental Airlines*, 981 F.2d 1450, 1460 (5th Cir. 1993) (pilots entitled to post-petition furlough pay under collective bargaining agreement with bankrupt airline, despite the fact that the collective bargaining agreement had been rejected). As noted, herein, substantial contributions to the Pilot Plan came due on October 15, 2005 and January 15, 2006, and such contribution obligations will continue to accrue so long as the Plan is not terminated under the provisions of ERISA.

²⁸ *In re Philip Services Corp.*, 310 B.R. 802, 808-09 (Bankr. S.D. Tex. 2004) ("[t]he court concludes that rejection of a pension plan as an executory contract is not permissible if the requirements of distress termination are not met. . . . ERISA provides a considered and comprehensive set of rules and procedures to deal with the problem of underfunded single-employer pension plans.")

²⁹ *See* 11 U.S.C. § 503(b)(1)(A) ("actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered" are administrative expenses); *id.* § 507(a)(1) (administrative expenses have first priority). Fiduciary Counselors

Bankruptcy Court brief, it clearly stated the relief requested: "all of Delta's collectively bargained for pension plan obligations should be paid as administrative expense claims."³⁰ As discussed below, Bankruptcy Code Section 503(a) allowed it to do just that.³¹

At a hearing held on October 17, 2005, the Bankruptcy Court denied the relief sought in Fiduciary Counselors' request for determination of administrative expense priority and in DP3's motion. For the first time, without opportunity to respond, Fiduciary Counselors was told that it could not seek relief under Bankruptcy Code § 1113 -- something it had never attempted to do. Two weeks later, the Bankruptcy Court entered a written order finding "that only the Debtor may move for relief under Bankruptcy Code § 1113."³²

C. Denial of Administrative Expense Status Could Lead To Pilot Plan Termination

All parties agree that "many pilots may get substantially less than their full pension benefits from the Qualified Pilot Plan if the PBGC terminates and takes over the Plan."³³ When the PBGC takes over a pension plan where the assets are insufficient to pay the PBGC's minimum benefit levels, it pays participants and their dependents according to its own rules,

took no position as to DP3's request for immediate payment, as it had not had an opportunity to conduct a full investigation of the amount of required pension plan contributions.

³⁰ Response, Memorandum of Law and Request for Determination of Priority of Fiduciary Counselors Inc. to Motion and Memorandum of Law of DP3 to Compel the Continued Payment of Collectively Bargained for Pension Benefits to the Retired Pilots, at 2 (Sept. 30, 2005). Neither the Bankruptcy Court nor any party ever challenged that Fiduciary Counselors, as the Plan fiduciary, was the appropriate party to seek to protect the Pilot Plan's interests. *See* Joint Statement at ¶ 11.

³¹ 11 U.S.C. § 503(a) ("An entity may timely file a request for payment of an administrative expense....").

³² Order Denying Motion of DP3 Pursuant to Bankruptcy Code § 1113, dated October 28, 2005.

³³ Joint Statement at ¶ 24.

which cap the benefits to individual participants. The current average total pension benefit for pilots is approximately \$8,000 per month;³⁴ but the PBGC cap for an active pilot in 2006 -- if he were retiring at age 65 -- would be \$3,971.59, a 51% reduction in the retirement income on which he had planned and relied.³⁵ But the actual reduction for these active pilots would be even greater, because active pilots must retire before they are 65. The Federal Aviation Administration requires that pilots retire at age 60,³⁶ and the PBGC has a lower cap for those who retire at 60; active pilots would receive only \$2,581.53 monthly in retirement, a 68% reduction in their retirement income.³⁷ And due to the FAA age requirement, working longer at their profession will not be an option.

Such dramatic results should not be effected lightly. Yet if Delta does not have an obligation to pay the full required amount of its contributions to the Pilot Plan as an administrative expense, the PBGC may be prompted to intervene to terminate the Pilot Plan early in the bankruptcy process. The PBGC bears the burden of terminated plans,³⁸ and it is therefore interested in reducing the loss it takes on each terminated plan. "Through 29 U.S.C. § 1342,

³⁴ *Id.* at ¶ 51.

³⁵ See Pension Benefit Guaranty Corporation, Maximum Monthly Guarantee Tables, <http://www.pb.gc.gov/workers-retirees/find-your-pension-plan/content/page789.html#2006> (last visited Jan. 18, 2006).

³⁶ 14 C.F.R. § 121.383(c) (2005). The rules also prevent a retired pilot from returning to the profession.

³⁷ See Maximum Monthly Guarantee Tables, *supra* note 35. Under federal PBGC regulations, the age to be used in calculating reduced, guaranteed pension benefits is the later of the plan participant's age at retirement or at the plan termination date. 29 C.F.R. § 4022.23(c) (2005). For each of the 60 months preceding the participant's 65th birthday, the reduction is calculated by multiplying 7/12 times 1%. *Id.* Therefore, a plan participant who retires at age 60 and whose plan is terminated in 2005 when the participant is 60 years old would have his or her monthly pension benefit reduced by $7/12 \times 1\% \times 60 = 35\%$.

³⁸ See 29 U.S.C. § 1322.

Congress authorized PBGC to terminate a failing plan so that PBGC could nip a plan's increasing losses and thereby reduce PBGC's exposure to mounting liabilities.³⁹ For instance, the PBGC is authorized to terminate a plan when minimum funding contributions are not made.⁴⁰ The potential cost to the PBGC of a Pilot Plan termination grows as benefits are paid while the administrative priority status of the full required amount of contributions by Delta to the Pilot Plan remains unresolved. As the risk to PBGC grows because of the Pilot Plan's failure to meet minimum funding standards, so grows the probability that it will decide to terminate the Pilot Plan.⁴¹ A decision by this Court finding that the full required amount of contributions to the Pilot Plan are entitled to administrative expense priority will prevent a disastrous Pilot Plan termination. Conversely, a denial of administrative priority status to the full required amount of required contributions could lead to such termination.

VI. ARGUMENT

A. This Court Has The Authority To Rule That The Full Required Amount of Contributions Owed To The Pilot Plan Is Entitled To Administrative Expense Priority.

Since the issues in dispute involve solely questions of law, this Court should proceed with the inquiry and find that the full required amount of unpaid contributions to the Pilot Plan has administrative expense priority. District Courts sitting to hear appeals from the Bankruptcy Courts remand when resolution of an issue requires further fact finding. But where the

³⁹ *In re UAL Corp.*, 428 F.3d 677, 681 (7th Cir. 2005).

⁴⁰ 29 U.S.C. § 1342(a)(1).

⁴¹ This is not mere speculation. Recent history in the UAL bankruptcy demonstrates the PBGC's willingness to step in such circumstances of increasing liability and static assets. PBGC Executive Director Bradley D. Belt explained that PBGC sought to terminate the UAL plans to minimize PBGC's losses. PBGC Reaches Pension Settlement with United Airlines, Apr. 22, 2005, <http://www.pbgc.gov/media/news-archive/2005/pr05-36.html> (last visited Dec. 8, 2005) (quoting Bradley D. Belt).

Bankruptcy Court ruled on an issue of law and the basis for its decision -- here, the statute and the stipulation found in the Joint Statement -- is clear, "[r]emand is not necessary."⁴² The parties have presented a discrete legal issue. The Court has the authority to decide the question presented.⁴³

B. The Full Required Amount of Contributions To The Pilot Plan Is Entitled To Administrative Expense Priority.

The parties agree that the CBA, by its terms, requires Delta to make funding contributions to the Pilot Plan.⁴⁴ The parties agree that all consideration for post-petition service under the unmodified provisions of the CBA receives administrative expense priority.⁴⁵ Delta, explicitly recognizing that some portion of the required amount of contributions to the Pilot Plan are entitled to administrative expense priority, has made some small post-petition contributions to the Pilot Plan as noted above.⁴⁶ The only real substantive difference of view among the parties is quite focused: Are these small contributions the entire amount of post-petition compensation due under the CBA for post-petition service, as Delta believes, or is the full

⁴² *In re 160 Bleeker Street Associates*, 156 B.R. 405, 411 & n.8 (S.D.N.Y. 1993) (reversing Bankruptcy Court and ruling for appellants as a matter of law).

⁴³ In papers filed with the Bankruptcy Court after this appeal was taken in Adversary Proceeding No. 05-03278, Delta acknowledged that this Court can decide the issue. Delta asked the Bankruptcy Court to stay the adversary proceeding, in part, because this appeal could decide the legal question of its duty to meet its pension funding obligations. Motion of Delta Air Lines, Inc. to Extend Time to Answer or Otherwise Move, at 9 (Dec. 22, 2005) ("Were the District Court so inclined, it could affirm this Court's order on the alternative basis that the Second Circuit's decision in *Ionosphere II* required that the Motion to Compel be denied.").

⁴⁴ Joint Statement at ¶ 5; e.g., *In re Schatz Fed. Bearings Co.*, 5 B.R. 543, 547 (Bankr. S.D.N.Y. 1980) ("Pension plan requirements may be incorporated by reference in a collective bargaining agreement so that the funding obligation may be regarded as a collectively bargained subject matter.").

⁴⁵ 11 U.S.C. § 503(b)(1)(A).

⁴⁶ See notes 22 and 23 *supra*.

required amount of contributions payable post-petition to the Pilot Plan compensation due under the CBA for post-petition service, as Fiduciary Counselors believes?

This Court has already ruled in accordance with Fiduciary Counselors' view. As noted below, the Southern District of New York has unambiguously found that missed contributions to a pension plan under a collective bargaining agreement deserve administrative expense priority so long as the collective bargaining agreement has not been terminated. What is more, virtually all courts that have ruled on that specific legal question have reached the same conclusion as this District. The law in this District is really quite unremarkable, as it is consistent with decades of law as to the priority of payments due for services rendered under contracts that have not been rejected.

We anticipate that the same arguments to the contrary will be advanced here as in the Bankruptcy Court. First, some arguments may rely on the oral *UAL* decision of the Bankruptcy Court in the Northern District of Illinois, which denies administrative expense priority to pension contributions arising under a collective bargaining agreement that had not been rejected. That decision, however, conflicts with a District Court decision from the same District, and failed to address and distinguish the other on-point precedent to the contrary.

Second, some arguments may point to cases discussing priority for expenditures other than pension contributions, such as the *Ionosphere* litigation. But this District Court has already distinguished the *Ionosphere* decision, and held that it did not apply to pension contributions due *post-petition* -- the very situation we have here. *See 1655 Broadway*. Cases refusing to give

administrative expense priority to *non*-contribution benefits accrued pre-petition are inapplicable.⁴⁷

Third, some arguments may use cases discussing obligations to contribute to a pension plan, but *which did not even address the implications of Section 1113 for a collective bargaining agreement that had not been rejected.*⁴⁸ This is a critical distinction: Because these cases did not discuss the Bankruptcy Code Section 1113 duty of a debtor-employer to continue to meet its collective bargaining agreement obligation to provide current compensation, the issue was simply not before the courts. The Court should not be swayed by such cases, because to do so would ignore the reality of the bargained-for exchange embodied in the CBA. Delta's pilots work in exchange for Delta continuing to make the full required amount of contributions to the Pilot Plan. In short, the pilots agreed to tender their services in exchange for Delta's making contributions to the Pilot Plan that far exceed the amount Delta has paid as post-petition administrative expenses.

⁴⁷ *In re Roth Am., Inc.*, 975 F.2d 949 (3d Cir. 1992) (vacation and severance pay); *In re Moline Corp.*, 144 B.R. 75 (Bankr. N.D. Ill. 1992) (medical benefits and vacation pay); *In re Fleming Packaging Corp.*, No. 03-82408 *et al.*, 2004 WL 2106579 (Bankr. C.D. Ill. Aug. 31, 2004) (holiday, vacation, bereavement and severance pay); *In re Kitty Hawk, Inc.*, 255 B.R. 428 (Bankr. N.D. Tex. 2000) (wages, expenses, vacation and other unspecified benefits); *In re Armstrong Store Fixtures Corp.*, 135 B.R. 18, *reconsideration denied*, 139 B.R. 347 (Bankr. W.D. Pa. 1992) (wages and unspecified benefits); *In re Murray Indus., Inc.*, 110 B.R. 585 (Bankr. M.D. Fla. 1990) (vacation pay); *In re Rayman Martin & Fader, Inc.*, 170 B.R. 286 (D. Md. 1994) (wages and late charges); *In re Spirit Holding Co.*, 157 B.R. 879 (Bankr. E.D. Mo. 1993) (arbitration award for wages and other unspecified benefits); *In re Colorado Springs Symphony Orchestra Ass'n*, 308 B.R. 508 (Bankr. D. Colo. 2004) (wages).

⁴⁸ *In re Chateaugay Corp.*, 130 B.R. 690 (S.D.N.Y. 1991) (no collective bargaining agreement required funding of pension plan payments), *vacated*, 1993 WL 388809 (S.D.N.Y. June 16, 1993); *In re Smarhauserman*, 126 F.3d 811 (6th Cir. 1997) (no collective bargaining agreement required funding of pension plan); *see also In re Kent Plastics Corp.*, 183 B.R. 841 (Bankr. S.D. Ind. 1995); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882 (Bankr. S.D.N.Y. 1993).

We turn to a more in-depth analysis of the governing case law and of ostensibly contrary authority.

1. This District Court and virtually all Courts have held that pension contributions due post-petition under a collective bargaining agreement that had not been rejected must be allowed as administrative expenses

This Court has squarely answered the issue presented here. In *1655 Broadway Restaurant*, the Debtor had "failed to pay, underpaid or paid late its contributions to the Welfare and Pension Funds" which came due post-petition. 1997 WL 104961 at *1. The unions brought on a motion to determine administrative expense priority which was denied by the bankruptcy court. But on appeal, Judge Robert P. Patterson, Jr. found that the "Debtor's failure to make payments to the Funds as required under the CBA constitutes a unilateral modification of the CBA not permitted under 11 U.S.C. § 1113(f)" because the Debtor had neither moved to reject or modify the CBA nor received court approval to do so. *Id.* at *2. The Court noted that, as a result of this unilateral modification, the workers were continuing to perform services for the debtor but were receiving less compensation and benefits than the agreed upon price in the collective bargaining agreement. *See id.* Accordingly, the District Court ordered the Debtor to pay all post-petition contributions immediately and to remain current on its future contribution obligations. *See id.*

Judge Patterson noted that, under Second Circuit precedent, vacation pay earned pre-petition was *not* entitled to priority just because it was payable after the filing of the petition. *See In re Ionosphere Clubs, Inc.*, 22 F.3d 403 (2d Cir. 1994). Distinguishing *Ionosphere*, Judge Patterson correctly reasoned and held, however, that priority would be accorded to pension contributions to a collectively bargained plan arising post-petition because Section 1113(f) requires a Debtor to "remain current on its payment of future contributions to the Funds consistent with the terms of the Collective Bargaining Agreement." 1997 WL 104961, at *2. As

such, pension contributions are due because of post-petition work. Quite clearly, this Court has found that the full required amount of pension contributions are current compensation under a collective bargaining agreement and are due and payable when services are performed, unlike vacation pay and similar benefits accrued pre-petition.

Appellate courts around the country are in accord with this District's distinction between pension obligations due under a collective bargaining agreement and other benefits due under a collective bargaining agreement. In *In re Unimet Corp.*, 842 F.2d 879 (6th Cir. 1988), the Sixth Circuit found that, under Section 1113, the corporate debtor could not avoid its obligations to pay for the benefits of retirees, even though their service had occurred in the past, because the union members who continued to work had a provision for such contributions in their collective bargaining agreement. Similarly, in *In re Hoffman Bros. Packing Co.*, 173 B.R. 177 (B.A.P. 9th Cir. 1994), the Ninth Circuit Bankruptcy Appellate Panel squarely held that pension funding claims coming due in the period between the petition date and date of interim modification under 1113(e) were entitled to priority status.

Those District and Bankruptcy Courts addressing pension contribution claims arising post-petition under collective bargaining agreements in which Section 1113 obligations were considered have also almost uniformly assigned them administrative expense priority. See *In re WCI Steel, Inc.*, 313 B.R. 414, 417-18 (Bankr. N.D. Ohio 2004); *Eagle, Inc. v. Local No. 537 of United Ass'n of Journeymen*, 198 B.R. 637, 639 (D. Mass. 1996); *In re Acorn Bldg. Components, Inc.*, 170 B.R. 317, 321 (E.D. Mich. 1994); *In re Energy Insulation, Inc.*, 143 B.R. 490, 492 (N.D. Ill. 1992); *In re Arlene's Sportswear, Inc.*, 140 B.R. 25, 28 (Bankr. D. Mass. 1992).⁴⁹

⁴⁹ Cf. also *In re Adventure Resources*, 137 F.3d 786, 797 (4th Cir. 1998) (cautioning that "a bankruptcy claim arising from the breach of a collective bargaining agreement may be accorded priority status only insofar as it fits into one of the categories singled out for

2. The rationale for the nearly uniform judicial authority

There is good reason for the nearly unbroken line of precedent, treating pension contributions under a collective bargaining agreement differently from other obligations accrued pre-petition, such as vacation pay. In pension cases, the Courts are typically concerned with obligations to make plan contributions that arise *after* the petition date. While the contributions may ultimately be used in whole or in part to fund benefits earned pre-petition -- money in a plan is fungible -- the obligation to make the contribution is an obligation stated in the collective bargaining agreement as applicable to the post-petition period; the breach, if any, occurs when the contribution is not made subsequent to the petition date. In contrast, in many of the vacation pay claims, the expenses are simply benefits that were accrued by, and owed directly to, the employees prior to the petition date. The vacation obligation occurs *prior* to the petition date, and the courts consider whether the failure to pay these claims is a pre-petition breach that must be cured in connection with assumption of the collective bargaining agreement.⁵⁰ In the case of

preferential treatment in [section] 507," then holding that funding contributions fit into one of the categories).

The sole exception, where a collective bargaining agreement has been explicitly considered by the court in the context of Section 1113, is an oral ruling by the Northern District of Illinois that is presently subject to appeal. *In re UAL Corp.*, No. 02 B 48191 (Bankr. N.D. Ill. Mar. 18, 2005). That decision is contrary to the sole *written* decision by the Northern District of Illinois. In *In re Energy Insulation, Inc.*, 143 B.R. 490, 492 (N.D. Ill. 1992), the District Court found that the Bankruptcy Court below had properly categorized contribution payments to a pension fund as administrative expenses. Again, the Bankruptcy Court's decision in *Energy Insulation* illustrates that pension contributions differ from vacation pay earned pre-petition, which is not entitled to priority treatment in that District. *E.g., Tool & Die Makers Local Lodge No. 113 v. Burke Indus., Inc.*, No. 94 C 5728 *et al.*, 1996 WL 131698 (N.D. Ill. Mar. 20, 1996); *In re Moline Corp.*, 144 B.R. 75 (Bankr. N.D. Ill. 1992) (vacation pay and medical benefits).

⁵⁰ *In re Ionosphere Clubs*, 22 F.3d at 408; *In re Roth Am.*, 975 F.2d at 957; *In re Moline Corp.*, 144 B.R. at 79; *In re Fleming Packaging Corp.*, 2004 WL 2106579, at *4, *6; *In re Kitty Hawk*, 255 B.R. at 436; *In re Murray Indus.*, 110 B.R. at 588.

a pension contribution arising during the post-petition period, there is no breach prior to the petition date, even if the contribution will be used in part to fund current retiree benefits.

Moreover, courts recognize that a collectively bargained obligation to make contributions to a pension plan is a form of consideration for the employees' post-petition labor. Union employees often trade off their current wages for some form of pension plan. "Funding a pension program is a current cost of employing potential pension recipients, as are wages . . . future benefits may be traded off against current compensation."⁵¹ Congress has "recognized that in labor contract negotiations, fringe benefits may be substituted for wage demands." *Columbia Packing Co. v. Pension Benefit Guaranty Corp.*, 81 B.R. 205, 208 (D. Mass. 1988). In other words, part of the compensation under a collective bargaining agreement for which the employees are working post-petition is, along with a post-petition paycheck, a post-petition payment to their pension plans.

Courts are strict in awarding administrative expense priority to *all* of the consideration contemplated by a collective bargaining agreement not rejected under § 1113. "To the extent that the employees held up their end of the bargain under the agreement, post-petition, administrative expense treatment was allowed to the full extent provided for in the agreement."⁵² This Court emphasized that the standard under § 1113 is not the same as that under cases dealing with transactions benefiting the estate. Thus, it awarded the contractual consideration even though the musicians had not performed at all post-petition. Similarly, in *In re World Sales, Inc.*, 183 B.R. 872, 878 (B.A.P. 9th Cir. 1995), the panel held that a monthly contribution to a health plan was required, not because the employees had worked a full month, but because that was the

⁵¹ *Alabama Power Co. v. Davis*, 431 U.S. 581, 592-93 (1977).

⁵² See *In re Colorado Springs Symphony Orchestra Ass'n*, 308 B.R. at 517.

exact requirement of the collective bargaining agreement. "Such consideration must encompass the entire bargain between the parties . . ." *Id.* at 877.

Some may cite *In re CF&I Fabricators of Utah, Inc.*, 150 F.3d 1293 (10th Cir. 1998), as an exception to judicial enforcement of collectively bargained-for pension funding obligations. In that case, however, the Court did not address the effect of any collective bargaining agreement or Section 1113 even once. Because the Court did not even mention Section 1113, the case provides no precedent -- not even dictum -- for the application of Section 1113. The same is true for almost all other cases in which a court denied administrative expense priority to pension contributions.⁵³ "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577, 586 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

As these cases make clear, the sole question under § 1113(f) is whether the employees performed under the collective bargaining agreement. If they did, the Debtor must comply with all of its obligations as provided in the collective bargaining agreement, and provide the "entire bargain between the parties," without alteration. "Because a debtor-in-possession must honor all of the terms of an unrejected collective bargaining agreement, and cannot dissect the agreement and discard those provisions it finds objectionable, to the extent the union employees provide post-petition services to the debtor-in-possession, whatever compensation for those services that accrues under the collective bargaining agreement is entitled to administrative priority, without being subject to reduction."⁵⁴ Here, there is no dispute that the pilots have performed services as

⁵³ See cases cited at note 48 *supra*. In other cases, there seems not to have even been a collective bargaining agreement involved.

⁵⁴ *In re Fleming Packaging Corp.*, 2004 WL 2106579, at *4.

required under the CBA, therefore Delta likewise is required to perform all of its obligations under the CBA and to make the full required amount of contributions to the Pilot Plan.

Moreover, Congress has explicitly provided in Section 1113 a way for Delta to seek interim relief to *immediately* end its collectively bargained obligations, and Delta has chosen not to utilize that provision. Congress realized that in certain cases requiring a Debtor to fully perform all post-petition obligations under a collective bargaining agreement might prevent rehabilitation. Therefore, "Congress chose to give chapter 11 debtors-in-possession a 'safety valve' in § 1113(e), which they may use to avoid the sometimes harsh result of being fully bound to the terms of a collective bargaining agreement during the period from the petition date to the time the rejection of the agreement is approved by the court." *In re Colorado Springs Symphony Orchestra Ass'n*, 308 B.R. 508, 513 (Bankr. D. Colo. 2004). Delta chose not to use this "safety valve" because it wanted the benefits of its employees' continued work. Delta cannot have its cake and eat it too. Having received the benefits of the CBA, Delta must now comply with Section 1113(f) and perform all of its obligations under the CBA, including a recognition that the full required amount of contributions to the Pilot Plan constitute administrative expenses.

3. Delta's statutory obligation to make the full required amount of contributions to the Pilot Plan entitles those obligations to administrative expense priority

Because Delta is required by statute to make contributions to the Pilot Plan until the Plan is terminated under the provisions of ERISA,⁵⁵ those contributions are actual and necessary expenses of the bankruptcy estate, and should be treated as administrative priority expenses.⁵⁶

⁵⁵ See *supra* Section V.B. at pp. 9-10.

⁵⁶ The motions below sought relief with respect to the continuing CBA, so issues relating to possible priority under the ERISA and the Internal Revenue Code -- which are independent of any CBA obligations -- were not argued, and are not at issue in this appeal. Issues surrounding such priority may be raised in the future.

The U.S. Supreme Court has stated: "Congress has repeatedly expressed its legislative determination that the trustee [does not] have carte blanche to ignore nonbankruptcy law."

Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection, 474 U.S. 494, 502 (1986). The Court has ruled that the estate is responsible for the costs of its post-petition conduct under a regulatory scheme. *Reading v. Brown*, 391 U.S. 471 (1968) (priority for tort payments).

It is well-settled that where a statutory obligation arises from post-petition conduct, the resulting liability will be treated as an administrative expense. There are a host of cases under regulatory schemes assigning administrative priority to expenses necessary to assure that the debtor's post-petition conduct is in compliance with a statutory scheme, regardless of any immediate benefit to the estate.⁵⁷ Indeed, the Internal Revenue Service has recently taken this position in regard to the excise taxes imposed under 26 U.S.C. § 4971 for failure to make minimum funding contributions.⁵⁸

⁵⁷ *In re H.L.S. Energy Co.*, 151 F.3d 434, 439 (5th Cir. 1998) (cost incurred by state in plugging debtor's unproductive oil wells in accordance with Texas law was "actual, necessary cost" of managing the estate); *In re N.P. Mining Co.*, 963 F.2d 1449, 1453 (11th Cir. 1992) (civil penalties assessed post-petition against debtor for failure to comply with surface mining reclamation laws qualified as administrative expenses to the extent incurred as a result of post-petition mining operations); *In re National Refractories & Min. Corp.*, 297 B.R. 614, 619 (N.D. Cal. 2003) (where debtor brought hazardous materials to leased premises post-petition and the lessor had to dispose of them to comply with law, lessor entitled to administrative expense priority for the costs of removal); *In re Finevest Foods, Inc.*, 159 B.R. 972, 981 (Bankr. M.D. Fla. 1993) (administrative expense treatment for amount paid to U.S. Dept. of Agriculture under Perishable Agricultural Commodities Act); *In re Motel Investments, Inc.*, 172 B.R. 105, 108 (Bankr. M.D. Fla. 1994) (penalties for post-petition failure to comply with state law relating to compliance of seawall with wetlands laws allowed as administrative expense).

⁵⁸ On December 22, 2005, the IRS Office of Chief Counsel released a notice instructing that excise taxes imposed 26 U.S.C. § 4971 for failure to make minimum funding contributions would be treated as penalties for which the IRS would seek administrative expense priority under 11 U.S.C. § 503(b)(1)(A). Administrative Expense Claims for Pension Underfunding Penalties in Bankruptcy Cases, Notice CC-2006-007 (Dec. 22, 2005), available at <http://www.irs.gov> (last accessed Jan. 12, 2006).

C. The Bankruptcy Court Erred In Holding That It Was Improper For Fiduciary Counselors To Request A Declaration Of Priority; If the Court Does Not Grant Administrative Expense Priority, It Should Remand.

Notwithstanding the foregoing discussion, should the court find that it is not prepared to rule that Fiduciary Counselors is entitled to administrative expense priority, it should reverse the Bankruptcy Court's procedural ruling and remand the case for further proceedings below. The Bankruptcy Court stated at the end of the October 17 hearing: "[Section] 1113 requires that the movant be the debtor and the debtor is not the movant and, therefore, there's nothing in 1113 that's relevant because the debtor is not the movant and that's that."⁵⁹ The stated basis for denial in the written order which followed is that "the Court ... found that only the Debtor may move for relief under Bankruptcy Code § 1113."⁶⁰ The Bankruptcy Court's order must be reversed because it was effectively a non sequitur; it did not address the motion that Fiduciary Counselors had actually made. A review of the law governing rejection and priority in bankruptcy demonstrates that Fiduciary Counselors was doing nothing novel – it was simply invoking the procedures that parties providing post-petition services *always* follow to secure priority in payment from the debtor-in-possession.

⁵⁹ Tr. 98. At the hearing, the Court briefly indicated another possible basis for the ruling: that DP3's request should have come in the form of an adversary proceeding. *Id.* However DP3 should have made its request, Fiduciary Counselors' Section 503(a) motion did not have to be in the form of an adversary proceeding. Rather, a request for administrative expense priority is treated as a contested matter. *See In re AppliedTheory Corp.*, 312 B.R. 225, 228 (Bankr. S.D.N.Y. 2004) ("In this contested matter ... [creditors] move for payment, as an administrative expense with priority over the Debtors' other creditors . . ."); *In re Ames Dept. Stores, Inc.*, 306 B.R. 43, 47 (Bankr. S.D.N.Y. 2004) (treating motion for payment with administrative expense priority as contested matter); *In re Adelpia Business Solutions, Inc.*, 296 B.R. 656, 658 (Bankr. S.D.N.Y. 2003) (same); *see also In re Episode USA, Inc.*, 202 B.R. 691, 692 (Bankr. S.D.N.Y. 1996) (treating objection to administrative expense claim as contested matter); *In re Jamesway Corp.*, 201 B.R. 73, 76 (Bankr. S.D.N.Y. 1996) (same).

⁶⁰ Order Denying Motion of DP3 Pursuant to Bankruptcy Code § 1113.

In *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526 (1984), the Supreme Court held that an employer in bankruptcy could reject its collective bargaining agreement under § 365 if it met a lenient standard. "Congress enacted § 1113 five months later, requiring that a debtor-employer confer with the union and that the Bankruptcy Court approve any rejection of the labor agreement."⁶¹ In other words, Section 1113 is a specialized rejection provision, enacted to create higher standards for rejection of a contract that is a collective bargaining agreement. And just as under Section 365, Section 1113 provides that the debtor must comply with the collective bargaining agreement unless and until it obtains rejection. 11 U.S.C. § 1113(f) ("No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."). Moreover, as set forth above, pensions may not be terminated without compliance with the ERISA termination provisions.

Parties providing services under contracts that have not been rejected would never move *under* the two statutory rejection provisions. There is no dispute that only the debtor may move under Section 1113(a) or (e). It is the *debtor* which must determine whether it will ask the Bankruptcy Court to permit rejection. But until the debtor obtains such a rejection, the party providing service is obligated to continue providing services. Quite naturally, these parties want to know that they are going to be paid for the services they are continuing to perform on the basis of the debtor's decision not seek rejection. "Congress granted priority to administrative expenses in order to facilitate the efforts of the trustee or debtor in possession to rehabilitate the business for the benefit of all the estate's creditors. Congress reasoned that unless the debts incurred by the debtor in possession could be given priority over the debts which forced the estate into

⁶¹ *Ionosphere Clubs*, 154 B.R. at 625.

bankruptcy in the first place, persons would not do business with the debtor in possession, which would inhibit rehabilitation of the business and thus harm the creditors.”⁶² That purpose would be thwarted if persons doing business with the debtor had no legal remedy to clarify their status. It is absurd to argue that creditors cannot redress debtor’s violations of Section 1113(f). So the law provides a means for them to seek such assurance: a motion under Section 503(a) for a determination of administrative expense priority.

The Section 503 process is well-established. Section 503(a) plainly provides that “[a]n entity may timely file a request for payment of an administrative expense.” Section 503(b) provides for notice and hearing to determine whether a claim should be allowed as an administrative expense. The Supreme Court has recognized the breadth of Section 503. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000) (contrasting the breadth of Section 503 with narrower provision of Bankruptcy Code). And the law reports are full of cases in which a creditor faced with nonpayment seeks a determination under Section 503(a).⁶³

For example, in *In re Lason, Inc.*, 314 B.R. 296 (Bankr. D. Del. 2004), the debtor contracted with Dependable Mail Services to provide mail automation and pre-sorting services. After Lason filed its bankruptcy petition, Dependable Mail continued to provide services, and eventually “filed a Motion for Allowance of an Administrative Expense for services performed post-petition under the Service Agreement.” *Id.* at 300. The same procedure, arising out of the same bankruptcy, was followed by an individual seeking compensation under his retention

⁶² *Trustees of Amalgamated Ins. Fund v. McFarlin’s, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986).

⁶³ “Administrative claims are often asserted in bankruptcy cases by the other party to an executory contract and unexpired lease.” Alan N. Resnick & Henry J. Sommer, eds., *Collier on Bankruptcy*, § 503.06[6], at 503-36 (15th rev. ed. 2005).

agreement with the debtor. *In re Lason, Inc.*, 309 B.R. 441 (Bankr. D. Del. 2004). The method by which a party seeks compensation for post-petition services under an executory contract that has not been rejected is by means of a motion to allow administrative expense.⁶⁴ The inability of a creditor to seek relief directly under Section 365 or Section 1113 has never been seen as a stumbling block to the relief Congress provided in Section 503. The Bankruptcy Court ruling should be reversed.

VII. CONCLUSION

By denying the request of Fiduciary Counselors for a determination that the contributions receive administrative expense priority, the Bankruptcy Court has set itself against the great weight of judicial authority. First, the stated basis for denying the request had no application; the Bankruptcy Court ruled that Fiduciary Counselors could not move under Section 1113, which it was not doing. It was moving under Section 503(a), and *all* authority supports the right of a party providing post-petition services under a pre-petition contract to ask the Bankruptcy Court for a declaration of priority. Second, contrary to this Court and virtually all other courts, it erroneously denied administrative expense priority to the full required amount of contributions to a pension plan that come due under the terms of a collective bargaining agreement in exchange for post-petition labor. These errors expose the current pilots and retired pilots to great financial risk.

⁶⁴ In many cases, the motion to allow administrative expense is filed before the contract is rejected, because it is joined with a motion to compel the debtor to assume or reject the contract. *E.g., In re Enron Corp.*, 279 B.R. 695 (Bankr. S.D.N.Y. 2002) (motion to allow administrative expense coupled with motion to compel debtor to assume or reject contract); *In re Drexel Burnham Lambert Group Inc.*, 134 B.R. 482 (Bankr. S.D.N.Y. 1991) (same); *In re Kmart Corp.*, 290 B.R. 614 (Bankr. N.D. Ill. 2003) (same). In other cases, the motion to allow administrative expenses for services follows rejection of the contract. *E.g., In re Midway Airlines Corp.*, 406 F.3d 229 (4th Cir. 2005); *In re Adventist Living Centers, Inc.*, 171 B.R. 310 (N.D. Ill. 1994); *In re Globe Metallurgical, Inc.*, 312 B.R. 34 (Bankr. S.D.N.Y. 2004).

Based on the agreed facts, this Court should reverse the Bankruptcy Court's denial of Fiduciary Counselors' request, and enter an order – in accord with the nearly uniform case law presented above – that the full required amount of contributions Delta owes to the Pilot Plan for the services its pilots continue to perform are administrative expenses.

Dated: January 20, 2006

/s/ Greg R. Yates

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January 2006, I caused copies of the foregoing **BRIEF OF APPELLANT FIDUCIARY COUNSELORS INC.** to be served via facsimile (where listed) and next business day delivery to the parties on the attached Service List.

/s/ Aric A. Anderson
Aric A. Anderson

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