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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 05-17923 (ASH)
. .
DELTA AIR LINES, INC., et al, . New York, New York
. Wednesday, February 22, 2006
Debtors. . 2:37 p.m.
.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE THE HONORABLE ADLAI S. HARDIN
UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commence at 2:37 p.m.)

2 THE COURT: Have a seat, please.

3 Hello, Counsel.

4 MR. HUEBNER: Good afternoon, Your Honor. I am
5 Marshall Huebner of Davis, Polk & Wardwell, here on behalf of
6 Delta Air Lines and its affiliates.

7 As I think we promised on the first day, we're happy
8 to again announce that half of -- or about half of the matters
9 that were listed as contested, even relatively recently, have
10 been resolved. So for the public's benefit, Your Honor, Items
11 1 and 2 will be going forward today; Number 1, the severance
12 motion is contested by ALPA.

13 THE COURT: Right.

14 MR. HUEBNER: Number 2, the Orlando set-off motion has
15 been narrowed to but a single issue --

16 THE COURT: Right.

17 MR. HUEBNER: -- which is the propriety of a certain
18 set-off.

19 Numbers 3 and 4 on the agenda, Your Honor, as
20 indicated, were resolved by stipulations entered by the Court
21 on Friday, so those will not be going forward.

22 Number 5, which is the motion of Ms. Klyman for stay
23 relief, as I think chambers may be aware, we're actually trying
24 quite hard to solve her problem and get her her distributions.
25 I understand that she was possibly on the phone and now off the

1 phone, and that there may be a --

2 THE COURT: Well, I'm told that she may call in. Is
3 that right? And if she does call in, I guess somehow we'll be
4 notified, and we may break in briefly.

5 MR. HUEBNER: That's fine, Your Honor.

6 THE COURT: I gather that her application is not
7 really opposed.

8 MR. HUEBNER: Yeah. The issue, Your Honor -- and I'm
9 happy to have Damian address it later, but we'll try and do it
10 then.

11 THE COURT: Well, we can address it when it calls
12 (sic).

13 MR. HUEBNER: And then Number 6, Your Honor, is a
14 recent development, is resolved.

15 THE COURT: All right.

16 MR. HUEBNER: And so that motion, along with the other
17 orders are submitted at the end, we have a disk ready to go
18 with the order on it, so we need not hear it at all.

19 THE COURT: All right.

20 MR. HUEBNER: So, Your Honor, I find myself with no
21 role today, which is odd for me, so I carved one out, which is:
22 As a small point of intellectual information for the Court, I
23 know that in Footstar Your Honor wrote a very detailed, lengthy
24 opinion on the 365 issue of assumption and assignment by the
25 debtor.

1 THE COURT: Yes.

2 MR. HUEBNER: And only last week, the Fifth Circuit in
3 Mirant issued a ruling that, while on different grounds, came
4 out very much the same way --

5 THE COURT: Oh, really?

6 MR. HUEBNER: -- for interesting policy reasons that I
7 thought the Court might be interested in knowing about, issued
8 only last week.

9 THE COURT: I should be very interested to see that.
10 Thank you very much.

11 MR. HUEBNER: And but for that invented reason to talk
12 to you, I have nothing else to do but introduce my partner Ben
13 Kaminetzky --

14 THE COURT: All right.

15 MR. HUEBNER: -- who will be presenting the severance
16 motion.

17 THE COURT: Let's see. Who's going to argue on each
18 side of this one?

19 MR. KAMINETZKY: I'm Ben Kaminetzky from Davis Polk
20 for Delta Air Lines.

21 MR. WINSTON: Michael Winston from Cohen, Weiss &
22 Simon representing the Air Line Pilots Association, which is
23 the representative -- the bargaining representative for the
24 Delta pilots.

25 THE COURT: And it's Mr. Winston?

1 MR. WINSTON: Correct.

2 THE COURT: Winston, okay.

3 MR. WINSTON: W-i-n-s-t-o-n.

4 THE COURT: Okay.

5 MS. BECKERMAN: And Lisa Beckerman from Akin Gump on
6 behalf of the Creditors' Committee. As the motion indicates,
7 we support the motion, so I'm going to have a few things to say
8 on the record about that.

9 THE COURT: Okay. Very good. Well, I have read the
10 papers, so I should like to have just very brief bullet
11 summaries of your positions, and then I may have some
12 questions.

13 MR. KAMINETZKY: Okay. I'll try my best.

14 Good afternoon, Your Honor. With the support and
15 approval of Delta's personnel and compensation committee,
16 comprised entirely of independent directors who receive nothing
17 under the plan, as well as Delta's Creditors' Committee, as you
18 just heard, we filed a severance motion asking this Court to
19 improve an extraordinarily modest, and might I even suggest
20 unprecedented in its modesty, severance program for 144 of
21 debtors' officers, and what we call "directors." I don't mean
22 board of directors; I mean those folks under the officer level.

23 This group of dedicated employees is the only group of
24 full-time Delta employees that did not have its pre-petition
25 severance policy or program assumed or continued on the very

1 first day of the case.

2 In our motion and supporting declaration, we spell out
3 the dire need for the implementation or, more accurately, the
4 continuation of the severance portion as unwanted un-attritions
5 continues to spike, the attendant cost and damage to the
6 business ensues during these difficult Chapter 11 days.

7 We also discussed the need to implement the severance
8 program immediately because of the company's announced plan to
9 eliminate another \$200 million, roughly twenty percent in
10 annual overhead costs in the coming months, and the job
11 insecurity and additional unwanted attrition that such an
12 announcement invariably causes, especially for executives who
13 are receiving compensation that is far below market.

14 Despite all this, ALPA, the Air Line Pilot Associated,
15 objected to the severance plan. And here's my quandary:

16 ALPA does not, because it could not assert that the
17 severance plan is unnecessary; ALPA does not, because it could
18 not assert that the severance plan is excessive or unreasonable
19 in any way; ALPA does not, because it could not assert that the
20 severance plan is inconsistent with the type of plans that are
21 routinely approved by courts in this district and all around
22 the country; and, finally, ALPA does not, because it could not
23 dispute that the proposed severance plan is actually far more
24 modest than severance plans and retention packages regularly
25 approved.

1 Given that ALPA's objection doesn't but question or
2 even whisper a single word about either the facts that compel
3 implementation of the severance plan or the reasonableness of
4 the plan itself, I'm not sure what we're doing here, quite
5 frankly.

6 I have in court with me today, Mr. Robert Kight,
7 Delta's Vice President of Compensation and Benefits. But
8 because the single objection that we received does not question
9 or even touch upon the facts and opinions of Mr. Kight, I
10 propose that we proceed just with a brief statement, as you
11 said; and, if you want to hear a witness, the person is here,
12 but I don't think that will be necessary.

13 THE COURT: Perhaps it would be a good idea to hear
14 some bullet points from Mr. Winston, and then you'll have
15 something to shoot at.

16 MR. KAMINETZKY: Okay.

17 THE COURT: All right?

18 MR. KAMINETZKY: We have a whole show for you, Your
19 Honor, but I'm ...

20 (Laughter.)

21 MR. KAMINETZKY: I'm willing to defer the show and
22 hear Mr. Winston.

23 THE COURT: Okay. Excuse me.

24 (Court and court personnel confer.)

25 THE COURT: Mr. Winston, give me the bullet point

1 grounds. I appeared in -- years ago, in Florida before Judge
2 Joe Eaton on an antitrust case, and he said in chambers to me
3 and my adversary, he said, "I just want you to give me the
4 cases that you're most proudest of."

5 Well, what I would like you to do is to give me --
6 thank you very much -- give me the bullet points --

7 MR. WINSTON: Well, let me start --

8 THE COURT: -- very, very concisely. I have read your
9 papers --

10 MR. WINSTON: Okay.

11 THE COURT: -- and I've read their papers. So I have
12 some acquaintance with the issues.

13 MR. WINSTON: Okay. First, I'd like to start off by
14 citing one of the cases that is in our papers, which is Geneva
15 Steel, which this --

16 THE COURT: Could I interrupt?

17 MR. WINSTON: Yes.

18 THE COURT: I really -- it's not that I'm not
19 concerned with the precedents, but I'm concerned mostly with
20 the grounds on which you want me to deny this motion.

21 MR. WINSTON: Your Honor, the airline pilots that work
22 for Delta Air Lines have been deemed by Delta itself as a
23 critical group for its successful reorganization. These pilots
24 have been very negatively impacted by the severance plan motion
25 submitted by Delta Air Lines.

1 On Friday, last Friday, they were informational
2 picketing at airports, carrying placards that said, "Career
3 Employees, Turnstile Management." Also, "It's not the cost of
4 fuel, it's the lack of leadership." Now why do we care --

5 THE COURT: All right. Let me just -- let me just see
6 if I understand what you're saying.

7 The first point is that the -- certain of the
8 employees. And I know that that's so. I've received a lot of
9 letters. I get a great many letters from employees and I read
10 them, because they concern me. But your first point basically
11 is that the pilots are angry that the management employees
12 should get a severance. Is it they should get any severance or
13 this severance?

14 MR. WINSTON: Well, there's a history here. But
15 before I go into the history, I think the first thing to
16 understand is that we are -- the Air Line Pilots Association
17 are in the midst of negotiations with Delta over a
18 concessionary agreement. In 2004, the pilots gave up \$1
19 billion per year in concessionary agreements. Now they're back
20 at the bargaining table, where the company is seeking over \$300
21 million, although ALPA has costed --

22 THE COURT: I understand that, I read that.

23 MR. WINSTON: Okay. If --

24 THE COURT: But what does that have to do with the
25 severance that Delta says they need in order to stop the

1 hemorrhaging of employees that are -- or at least try to stop
2 the hemorrhaging of these employees.

3 MR. WINSTON: Delta and ALPA are trying to reach
4 consensual agreements. That agreement -- and both sides are
5 trying to approach this, and both sides are saying that this is
6 beneficial for the company.

7 THE COURT: Which? Which --

8 MR. WINSTON: For a consensual agreement to be reached
9 between the pilots' union and with Delta. That agreement, if
10 it is reached -- and the negotiations are going on currently,
11 and they will be going on most likely next month, as well. If
12 that agreement is reached, it is subject to ratification by
13 these angry pilots. There was an interim agreement --

14 THE COURT: The point is -- I interrupt you because
15 it's -- I have read your papers --

16 MR. WINSTON: No, that's fine.

17 THE COURT: -- but it's important for you to know
18 whether I really understand the points you're making. Fair
19 enough? Okay.

20 MR. WINSTON: Uh-huh.

21 THE COURT: All right. So the point that you're
22 making here is that it is not wise for Delta; it's
23 counterproductive for Delta to -- and for the Court to approve
24 this severance because it is likely to make it much more
25 difficult for Delta to reach an agreement with the pilots that

1 they desperately need. That's about the bottom line of that
2 point, isn't it?

3 MR. WINSTON: That is correct, Your Honor.

4 THE COURT: Okay.

5 MR. WINSTON: And there was an interim agreement that
6 was reached at the end of December, where the pilots accepted a
7 fourteen percent wage cut, as well as other concessions. That
8 agreement was ratified by the pilots, by not a large margin.
9 Now Delta is coming back to the union, which was part of the
10 interim agreement deal, to engage in negotiations and seeking a
11 lot more from the pilots.

12 In the midst of these negotiations, Delta, without
13 consulting -- I know that they claim that they consulted with
14 ALPA -- but without consulting with ALPA, they propose and --

15 THE COURT: Other than through the Creditors'
16 Committee.

17 MR. WINSTON: Other than through the ALPA
18 representative of the Creditors' Committee. That was clearly
19 just lobbying of a creditors' committee member. Had they
20 really sought to consult with ALPA, they would have called the
21 head of the ALPA pilot group, the chair; they would have asked
22 if he wanted to sit down and talk with them, if there was --
23 you know, they wanted to engage in discussions. They did not
24 do that.

25 THE COURT: They didn't handle it well with ALPA.

1 MR. WINSTON: Well, they didn't -- they didn't call --
2 what they did was they called the ALPA representative on the
3 Creditors' Committee because they were lobbying to get the
4 Creditors' Committee to approve the severance plan.

5 THE COURT: Okay.

6 MR. WINSTON: And so, instead of doing that, what they
7 did was they moved for the severance plan, and you have a group
8 of pilots that are very upset about what's going on right now.

9 THE COURT: I can tell you, it's not just the pilots.
10 There are a lot of other people. I get letters saying, I was
11 involuntarily terminated, and I got eight weeks' severance, or
12 whatever it is, and it's not right or fair that the people in
13 the management level who brought the airline to its knees --
14 that's what they say in these letters -- should be getting
15 whatever the numbers are, six months to a year, of severance.

16 MR. WINSTON: Well, on top of it, with regards to --
17 and I'm not going to get into the -- you know, the real nitty-
18 gritty of what's going on with the negotiations, the current
19 negotiations. But the company is proposing cuts in furlough
20 pay, dramatic cuts in furlough pay for pilots, and of course
21 the numbers of pilots has decreased dramatically at Delta. So
22 if these pilots are out on the street, they're going to find
23 themselves with far less in furlough pay.

24 And at the same time, the company is proposing to
25 water down what's called "change-of-control protection" that

1 exists in the collective bargaining agreement. So at the same
2 time that they're proposing cuts for the Delta pilots, they're
3 turning around and proposing a severance plan, a soft landing
4 for a group of management, without consulting with ALPA.

5 And I think that goes to the nub of our difficulty or
6 our opposition to the -- to the severance motion.

7 THE COURT: All right. Well, help me with this. Mr.
8 Kaminetzky said in his oral presentation, ALPA does not claim
9 that the severance plan is unreasonable in amount, et cetera.
10 There were a whole lot of "do not" claims attributed to -- and,
11 indeed, it would appear that ALPA is not claiming any of those
12 things. Is that correct?

13 MR. WINSTON: We did not set forth any of those types
14 of claims in our papers, Your Honor. I think that that is
15 something that should be reviewed in consultation between Delta
16 and ALPA.

17 THE COURT: Why?

18 MR. WINSTON: Because I think that ALPA would have the
19 opportunity at that time to be able to review the plan, to be
20 able to ask questions, and then be able to raise issues --

21 THE COURT: Look, I've reviewed the plan, you've
22 reviewed it. It's not complex. And the thing has been pending
23 for many weeks.

24 When was the motion made? Mr. Kaminetzky, when was
25 the motion made?

1 (Counsel confer.)

2 MR. KAMINETZKY: February 8th, Your Honor. And there
3 was no request for discovery, there was no phone call for more
4 information. And as I think counsel admitted, we did speak to
5 the vice chairman of the Delta's executive MEC back in January
6 on two occasions. He's saying that was the wrong person, but
7 that's the person we talked to and our senior legal advisor
8 actually said, do you have any questions, if you want to
9 discuss it, we're available to discuss, and they decided not to
10 ask any questions and discuss and just -- instead just file an
11 opposition.

12 So I'm a little bit shocked to hear that, number one,
13 that somehow ALPA should have a veto right over something that
14 has really nothing to do with them; and, number two, that now
15 they're asking that they want us to discuss it with -- I mean,
16 they have the plan. The entire plan was attached to the
17 motion. We didn't get a single phone call or question from
18 them.

19 MS. BECKERMAN: And in addition, Your Honor, before
20 the motion was filed, the plan was circulated to our Creditors'
21 Committee. We had two meetings where we discussed it. Our
22 financial -- ALPA is a member of our Creditors' Committee and
23 sits in the deliberations and receives all the information.
24 Our financial advisor did an extensive analysis that was also
25 shared with them before the committee determined to make a

1 decision --

2 THE COURT: "Our" you mean the Creditors' Committee?

3 MS. BECKERMAN: Yes. Yes, the Creditors' Committee
4 financial advisor so that -- that is -- that information was as
5 well available to ALPA and ALPA's representative on the
6 committee, anyway.

7 MR. WINSTON: And ALPA's representative participated
8 in those deliberations.

9 MS. BECKERMAN: That's correct.

10 MR. WINSTON: As a member of the Creditors' Committee.

11 THE COURT: Look, Mr. Winston, I appreciate the
12 position you're in here, but I need some help if I'm going to -
13 - and by that I mean some substantive help in terms of
14 something about this severance plan that is unreasonable in
15 amount, et cetera, et cetera, and there is no what I would call
16 substantive objection from ALPA to the plan itself. And there
17 is, at least as important as that, no attempt to address, let
18 alone rebut, the factual predicate for the motion. And the
19 factual predicate for the motion that's set forth in the papers
20 without anybody contradicting it is that initially management
21 thought that it would be a good idea not to seek a severance
22 plan for management-level people, but that experience has
23 shown, and there are statistics in terms of the escalating
24 attrition or -- I guess "attrition" isn't the right word, but
25 departures of the officer- and director-level personnel that

1 management is concerned about leaving now in what might be
2 termed "droves."

3 What is it, up to eighteen percent in the most recent
4 month, Mr. Kaminetzky?

5 MR. KAMINETZKY: Your Honor, in January and February
6 alone, there were six additional departures, four in January,
7 including, quite ironically, our senior vice president of
8 restructuring. He left to greener pastures for a job outside
9 the industry where he increased his compensation several-fold.

10 THE COURT: So it becomes very hard for the Court to
11 second-guess the business judgment and, indeed, under the
12 business judgment rule recognized by everybody, I think it's
13 very difficult indeed for the Court to second-guess the
14 business judgment of the debtor-in-possession in this case.

15 Now, I've read your argument, appreciate that there
16 ought to be higher scrutiny where "insiders" are benefitting,
17 but the business judgment that we're talking about here really,
18 I gather -- now, correct me if I'm not right in terms of what
19 the papers say, but the business judgment that we're talking
20 about here, I think, is that of the outside board of directors
21 and independent committee of the board of directors and the
22 board's professional advisors.

23 Am I right about that, Mr. Kaminetzky?

24 MR. KAMINETZKY: Yes, Your Honor. The personnel and
25 compensation committee of the board of directors is comprised

1 completely of outside directors and they're the ones that
2 formulated, contemplated, and put together this plan in
3 consultation with an independent outside consultant. And in
4 addition, talking about insiders, the CEO and the COO, as a
5 further sign of leadership, opted out of the plan; therefore, I
6 was kind of shocked to see the case law about basically folks
7 feathering their own nest, single-entity debtors who are doing
8 self-dealing transactions, you know, assuming a lease where
9 they're on the other side of the transaction or the LBO
10 contacts. None of those cases apply here because there's no
11 self-dealings here, there's no insiders here.

12 THE COURT: Now, let me just mention one other thing
13 that I would seek your help on if I'm not understanding this
14 correctly. A lot of the letters that I have received have
15 referred to the significant sacrifices made by employees and
16 you've referred to the significant sacrifices made by the
17 pilots, and those are true and there's no doubt about it. It's
18 been hard times for all of the employees of this union.

19 On the other hand, the motion papers are replete. I'm
20 not going to try to spout the figures out, but the sacrifices
21 have really, it would appear to me, to have applied throughout
22 the company. Certainly from the highest levels, the CEO and
23 the COO, in terms of the diminution in their compensation
24 because you're starting from a much higher level, but
25 nevertheless, these are people who are out there in the

1 marketplace and can get other jobs. Their compensation has
2 been greatly diminished, so also the compensation of the
3 officer and director levels.

4 Now, I didn't endeavor to try to take the two sets of
5 papers and compare which sets of employees have, on the
6 percentage basis or some other basis, given up more, but it's
7 pretty clear that everybody has given up a lot. And I think --
8 I don't know whether it's a question of PR that hasn't been
9 getting out to the people who have written letters to me or
10 what, but let me -- the pain is not one-sided here at all, from
11 what I'm reading in the papers and what is not opposed. So
12 this is why I'm not at all unsympathetic to what you say, but
13 I'm just not sure it's up to me as a judge to say -- basically
14 the argument is management has made a mistake because they've
15 got to deal with ALPA in the ongoing and upcoming negotiations
16 that are critical to the airline, that's true, and better not
17 adopt this severance plan because if you do approve it, Judge,
18 it's going to sour the negotiations from the pilots' point of
19 view, and it may.

20 But I'm just not sure that it's up to me to say -- to
21 assess that risk. It seems to me it's got to be up to the
22 board of directors. Help me on that.

23 MR. WINSTON: Well, Your Honor, I think Geneva Steel
24 says otherwise. And in addition, the plaintiffs -- I'm sorry,
25 Delta's own cases from Enron to Lionel says that the Court

1 should look at all factors and the circumstances, the
2 particular circumstances that exist here. And the particular
3 circumstances that exist here is that you have a very unhappy -
4 - a very angry pilot force that has been asked to sacrifice
5 and, I would argue, considerably more than other employee
6 groups at the top, but they've been asked to sacrifice since
7 2004 a thirty-two-and-a-half wage cut and on top of that
8 they're now being asked for an over-eighteen-percent additional
9 wage cut.

10 You need to reach a consensual agreement, according to
11 Delta, and if the consensual agreement is not reached, then you
12 have a very, very difficult situation, a very risky situation
13 for the debtor because --

14 THE COURT: Am I right that there's a tripod take --

15 MR. WINSTON: If I could just finish the point on
16 that, just so you understand? I'm sorry.

17 THE COURT: Go ahead.

18 MR. WINSTON: But the point that I'm trying to make is
19 important here, which is, as Delta is well aware of, and I
20 think it's important for the Court to understand this, is that
21 if we go ahead with a Section 1113 rejection hearing, which is
22 currently scheduled for mid-March, the Delta pilot union group
23 has said that they are not going to strike -- they are not
24 going to work without a contract and they've already
25 established a strike preparedness committee. This puts that

1 much more importance on the negotiations that are going on
2 currently for the successful reorganization of Delta. And I
3 think it establishes what the Delta company should be focusing
4 on now is not a severance plan, but rather an agreement, an
5 overall comprehensive agreement with the Air Line Pilots
6 Association.

7 THE COURT: Am I right that the negotiations that are
8 ongoing, if they do not result in agreement, will be subject to
9 a three-panel arbitration, in effect?

10 MR. WINSTON: A three-panel neutral panel -- a three-
11 man neutral panel, correct, Your Honor.

12 THE COURT: Yeah. Yeah. And so basically the
13 argument you make is that if they don't reach agreement, they
14 will strike.

15 MR. WINSTON: Well, I'm saying that there is that
16 possibility and that has been spoken about. Delta is well
17 aware of this issue and it's not something that's going to
18 disappear easily and the best way for it to disappear would be
19 for the two sides to reach a consensual agreement and, in
20 addition, for the pilots to ratify that agreement so that it is
21 a final agreement.

22 THE COURT: Well, I don't think there's any doubt
23 about that, everything you say, but I'm not sure that I can
24 relate that to what my task is here today.

25 MR. WINSTON: I think it's the circumstance that the

1 company faces with regard to trying to get a consensual
2 agreement that the two sides -- that ALPA would be able to
3 submit to the pilots and have the agreement ratified. And this
4 severance plan is making that process more difficult.

5 THE COURT: Anything else?

6 MR. WINSTON: No, that's it, Your Honor.

7 THE COURT: All right. Any brief response, Mr.
8 Kaminetzky?

9 MR. KAMINETZKY: Your Honor, I'm not sure what exactly
10 you would like me to respond to. Basically their argument is,
11 please give us a loaded gun because, despite the fact we don't
12 -- we believe the -- I mean, they don't dispute that the
13 severance plan is necessary, they don't dispute the dramatic
14 cuts. And I think it's worth putting up a board, Your Honor,
15 about, you know, you talked about the cuts to management and I
16 think we could -- I don't know how good your eyesight is, Your
17 Honor, but --

18 THE COURT: I'm not sure I know either, but I can see
19 that actually. That's quite a chart.

20 (Laughter.)

21 (Court and court personnel confer.)

22 THE COURT: Can we take a brief recess to hear a pro
23 se matter?

24 MR. KAMINETZKY: That's fine.

25 THE COURT: I'm sorry. Don't go away. We'll get

1 right back to you.

2 (Court and court personnel confer.)

3 (Counsel confer.)

4 (Off the record at 3:06 p.m.)

5 (Proceedings resume at 3:08 p.m.)

6 THE COURT: Hello?

7 MS. KLYMAN: (Via telephone) Hello, Your Honor.

8 THE COURT: Is this Ms. Klyman?

9 MS. KLYMAN: Yes, it is. I can barely hear you, but
10 yes, it's me, Karen Klyman, sir.

11 THE COURT: Okay. Can you hear me now?

12 MS. KLYMAN: Yeah.

13 THE COURT: I'll try to keep my voice up. Thank you
14 for calling in. We have Mr. Schaible, Damian Schaible for
15 Delta. I've read your papers.

16 Mr. Schaible, if you'll speak up, so Ms. Klyman can
17 hear, what's Delta's position on this?

18 MR. SCHAIBLE: Your Honor, Delta's position is that we
19 agree fully with Ms. Klyman that, if, in fact, she has been
20 determined to be disabled under the Social Security
21 Administration's rules for Social Security insurance, that she
22 is entitled to a full distribution of the amounts contained in
23 her 401K account. And we have sent several letters -- or one
24 letter and several e-mails, and had several conversations with
25 Ms. Klyman over the past few weeks, where we have asked her to

1 please send to us any type of verification she might have
2 available to show her eligibility, and Delta stands ready to
3 distribute the amounts to her.

4 THE COURT: Ms. Klyman, do you have some paper or
5 something from the Social Security Administration evidencing
6 their determination?

7 MS. KLYMAN: Well, yes, sir. In the claim, I also
8 sent you a copy of it, a courtesy copy with the notice of the
9 hearing; it was supposed to held at the last hearing, where I
10 showed a pertinent part of my notice of award. And I wanted to
11 affirm -- and you have the ability to swear people in, and I'm
12 not an officer of the Court -- but I just wanted to confirm
13 that it is true that I have been receiving Social Security
14 benefits since 2002; that the Judge that awarded the benefits
15 awarded them retroactive, and he found me disabled since March
16 of '99, when I was too ill to work, and I stopped working for
17 Delta.

18 THE COURT: Uh-huh. Well, your submission here --
19 let's see.

20 MR. SCHAIBLE: Your Honor?

21 THE COURT: Yes.

22 MR. SCHAIBLE: The one-page part of the letter --

23 THE COURT: Yeah.

24 MR. SCHAIBLE: -- appears in Ms. Klyman's proof of
25 claim. If I can approach the bench, I can show it to you.

1 THE COURT: Well, does it comply with what you need?

2 MR. SCHAIBLE: Unfortunately not, Your Honor.

3 THE COURT: What do you need?

4 MR. SCHAIBLE: We just need the whole letter, because
5 the letter doesn't -- the part that Ms. Klyman provided us
6 doesn't provide, you know, the full information about when she
7 was -- you know, when she was actually determined to be
8 disabled and --

9 THE COURT: Well, Ms. Klyman, can you provide
10 something that -- the decision of the Judge that you just
11 mentioned?

12 MS. KLYMAN: Well, I did have what should be
13 acceptable, Your Honor, but the problem is only recently, only
14 in the last three weeks has Delta asked me to provide anything.
15 And my problem with that is, I've been sick, Your Honor, all
16 along; I have not lied at all. Delta has not only refused to
17 acknowledge ever that I've been sick, but they've refused to
18 provide me any of my benefits. They cut off my insurance at a
19 time and date in August (sic), then going from 1999 forward.
20 Now --

21 THE COURT: Let me interrupt, Ms. Klyman.

22 Mr. Schaible, what's wrong with this document, which
23 is on the letterhead of the Social Security Administration.

24 "Karen Klyman," it says:

25 "You are entitled to monthly disability benefits,

1 beginning December 1999, the date you became disabled."

2 That's in bold letters.

3 "We've found that you became disabled under our rules
4 on March '99."

5 What more do you need?

6 MR. SCHAIBLE: Just that's a redacted version of the
7 letter. For Delta to comply with its plan terms, it just
8 requires the letter and we've been asking for several weeks.

9 MS. KLYMAN: It does not say that in the plan.

10 MR. SCHAIBLE: It's not in the text of the plan; it's
11 just the standard operating procedure, or a check stub --

12 THE COURT: Yeah. But what's wrong with this
13 document?

14 MR. SCHAIBLE: We don't know that document is, Your
15 Honor. I mean, it could be --

16 MS. KLYMAN: And I'm telling the truth, and I'm in a
17 lot of trouble if I'm not. I'm telling the truth, and I've
18 affirmed today that I am.

19 THE COURT: Okay. Well, I will grant your motion. On
20 its face, the document purports to be a Social Security
21 Administration notice of award. It's what Ms. Klyman has, and
22 it hasn't been suggested that it's -- that it's not what it
23 purports to be.

24 MR. SCHAIBLE: But, Your Honor, as you can tell from
25 the notation on the face of that letter, that's a redacted

1 version, and we're just not able to tell what was redacted. If
2 she could just send us the letter, then we would be done.

3 THE COURT: Do you have the unredacted version, Ms.
4 Klyman?

5 MS. KLYMAN: I'm sure I have it somewhere. I was
6 looking for it, and I have my stuff like -- I'm sure I have it
7 somewhere, to answer your question, Your Honor, but I'm not
8 sure where. But because I have so many documents from Social
9 Security, that I have a variety of them that should meet their
10 requirements.

11 But my point in bringing this up to Your Honor is, as
12 soon as I did receive the Social Security benefits, I sent
13 notice, I sent word to the general counsel, I said, sir, I
14 truly have been sick, even the Social Security Judge found me
15 to be disabled, can you please -- had Delta truly known that
16 I've been sick, can you please resume (indiscernible) and
17 providing me benefits and sick leave (indiscernible), the 401K.

18 THE COURT: Miss --

19 MS. KLYMAN: And I know they received that, I know the
20 general counsel received that because I got a response from
21 Delta --

22 THE COURT: Ms. Klyman, can I ask that -- is this a
23 redacted letter?

24 MS. KLYMAN: Sir, can you tell me what "redacted"
25 means, please?

1 THE COURT: It's a letter, part of which has been
2 blotted out, so you can't see it.

3 MS. KLYMAN: Well, obviously, yeah. I did black a lot
4 of it out.

5 THE COURT: Why?

6 MS. KLYMAN: Well, a lot of it goes on and it tells me
7 things I need to do. The recent letter that they said would be
8 acceptable goes on and says how a ticket to one program works,
9 and all this sort of stuff, and it isn't that relevant. It's
10 sort of information to me about how the disability works and
11 that sort of thing.

12 MR. SCHAIBLE: Your Honor, as I stated in my letter a
13 few --

14 MS. KLYMAN: And the personal stuff, Your Honor, the
15 Social Security number, the private stuff I didn't want to put
16 on there because it's a public document now, so I blotted that
17 out, too.

18 MR. SCHAIBLE: We understand --

19 MS. KLYMAN: (Indiscernible), Your Honor, this motion
20 goes deeper than that. I think Delta's position has been that
21 that automatic stay does not apply to it, but I contend that it
22 does because --

23 THE COURT: Okay. I'm going to interrupt you once
24 again. I don't mean to be rude.

25 I think, under the circumstances, Delta has expended

1 enough money on this. There's no doubt that she's entitled to
2 the money, it's not contested, and I think this is a sufficient
3 paper. So if you'll do an appropriate order granting the
4 motion, Mr. Schaible, and do what's necessary to provide the
5 dispensation of the fund to her, this --

6 MR. SCHAIBLE: Yes, Your Honor. We're happy to do
7 that, but just to clarify for the order --

8 THE COURT: Yes.

9 MR. SCHAIBLE: I don't believe that the order should
10 grant relief from the automatic stay in order to permit this
11 distribution; the automatic stay is irrelevant. It --

12 THE COURT: If you could do an appropriate order --

13 MR. SCHAIBLE: Sure.

14 THE COURT: -- that would grant her relief and provide
15 for the dispersal of the money to her, that is hers in her 401K
16 plan.

17 MR. SCHAIBLE: Yes, Your Honor.

18 I guess the question would be then: What date -- the
19 plan requires the 401K amounts to be distributed as of the date
20 of the determination of eligibility, and we're not able --

21 MS. KLYMAN: I object to that.

22 MR. SCHAIBLE: We're not able -- I'm not sure. Does
23 that mean that the determination occurred in November of 2002,
24 which is the date of that letter?

25 THE COURT: Well, it says --

1 MS. KLYMAN: It was determine October 2002.

2 THE COURT: What the letter states is that they found
3 that she became disabled under the rules in March of 1999.

4 MR. SCHAIBLE: Right.

5 THE COURT: Can we not accept that?

6 MR. SCHAIBLE: I -- we can, Your Honor.

7 THE COURT: Okay. Very good. Okay. Ms. Klyman, your
8 motion will be granted, and you will be receiving the
9 appropriate distribution from your 401K, based on your
10 disability stemming from March of 1999. And thank you very
11 much for calling in.

12 And, Mr. Schaible, thank you, sir. I appreciate your
13 help.

14 MS. KLYMAN: Your Honor, so the stay isn't lifted for
15 the rest of the case?

16 THE COURT: The motion is granted, and you'll be
17 getting the 401K money. Isn't that what you want?

18 MS. KLYMAN: That was just the start of it, Your
19 Honor.

20 THE COURT: What else is there that you want?

21 MS. KLYMAN: There's a great difference in the value
22 of the fund between (indiscernible) what its current value is,
23 versus what --

24 (Court and court personnel confer.)

25 MR. HUEBNER: Your Honor, let me make this easy. We

1 will distribute to her the value as of 1999, which is what she
2 was looking for --

3 THE COURT: Okay.

4 MR. HUEBNER: -- minus loans and interim distributions
5 that she pulled down from the account in the interim. So we're
6 going her way on this one, I don't think ...

7 THE COURT: Okay.

8 MR. HUEBNER: And to be candid, Your Honor, just so
9 you understand, we've actually been trying very hard to help
10 her the whole time.

11 THE COURT: I can understand that.

12 MR. HUEBNER: Our one issue was that we're not sure
13 what she redacted and whether it's relevant to what was not
14 redacted. With the Court's ruling --

15 THE COURT: I understand why you've taken the
16 position, but ...

17 MR. HUEBNER: -- we're happy -- given the sums
18 involved --

19 THE COURT: Yeah.

20 MR. HUEBNER: -- we're happy to abide by the Court's
21 ruling and call it a day.

22 THE COURT: I appreciate that. Okay. May I ask that
23 you, Mr. Schaible, communicate with her and indicate what
24 relief will be granted.

25 MR. SCHAIBLE: I will, Your Honor.

1 THE COURT: Hopefully that will undermine the
2 controversy and eliminate it.

3 MR. SCHAIBLE: Thank you, Your Honor.

4 THE COURT: Good. Thanks very much.

5 Okay. Mr. Kaminetzky.

6 MR. KAMINETZKY: Yeah. But, Your Honor, I'll just do
7 this very briefly.

8 THE COURT: Okay.

9 MR. KAMINETZKY: Before we go back to the charts, I
10 mean, I was reflecting on what ALPA's position is. Basically,
11 the position is, forget the business judgment rule, forget the
12 debtors' judgment, forget the unrefuted facts, if the pilots
13 don't --

14 (Court and court personnel.)

15 THE COURT: Ms. Klyman. Ms. Klyman?

16 MS. KLYMAN: Yes, Your Honor. I'm sorry. The phone
17 cut off.

18 THE COURT: Okay.

19 MS. KLYMAN: If you want me to just put in additional
20 motions, I will, to save your time today.

21 THE COURT: No. You don't need to put in an
22 additional motion.

23 Mr. Huebner, do you want to repeat what you've said?
24 We've lost Mr. Schaible here, but ...

25 MR. HUEBNER: That would be a very bad event for me,

1 Your Honor.

2 Ms. Klyman, what we're happy to do, given the Court
3 has directed us to accept your redacted SSI letter as evidence
4 of your disability --

5 MS. KLYMAN: Yes, sir.

6 MR. HUEBNER: -- as of 1999, we will distribute to you
7 the balance that was in the account as of March 1999, minus the
8 interim distributions that you took out of the account and the
9 loans, so that you don't need to worry about the decline in
10 value subsequent to that date.

11 MS. KLYMAN: Okay.

12 MR. HUEBNER: You will get the 1999 amount, minus the
13 amounts that you pulled out in the interim. And we promise
14 you, for the good of all involved, we will process that just as
15 quickly as we can.

16 THE COURT: How is that, Ms. Klyman?

17 MS. KLYMAN: No, that's (indiscernible) part of it,
18 Your Honor. It's the other part, I wasn't sure. It may be
19 helpful to the Court for me to just (indiscernible) mentions
20 about the lifting of the stay, adopt the ERISA case. Because
21 this 401K was tied into it, and potential sanctions were
22 involved. I believe the stay with the fine would need to be
23 lifted only by you, if that were to proceed in that way.

24 THE COURT: If you received the value of the plan as
25 of March -- oh, there's Mr. Schaible -- as of March of 1999,

1 less what you've taken out of it, does that not make you whole?

2 MS. KLYMAN: It certainly helps out on the 401K option
3 for the other lost benefits that I've lost, fine benefits, even
4 to go to the doctor, I lost health insurance, and all these
5 sort of things, and how that's affected -- we're talking --
6 it's a long time to be sick, for six years, sir. That all
7 plays into that ERISA case, and I need for you to at least take
8 a look at it, and I need for you to enforce the automatic stay
9 on the ERISA case because Delta claimed that I had no
10 exhaustive administrative remedies when they sent me a letter
11 dated March 13th, 2003, that I had. And this does involve that
12 401K, sir.

13 So you have -- yes, you have -- and I appreciate it,
14 you have solved a portion of it. But there's more to it than
15 that, and it involves that ERISA case that I filed before Delta
16 filed the bankruptcy case.

17 THE COURT: Mr. Schaible, can you enlighten me?

18 MR. SCHAIBLE: Please, absolutely. Your Honor, Ms.
19 Klyman is talking about a lawsuit that she filed on March 17th
20 of 2005, against Delta, the plan fiduciaries, and various other
21 parties in the Northern District of Georgia, which alleged
22 various breaches related to ERISA and various other complaints
23 about work compensation and work conditions. Much of that
24 lawsuit, many of the counts in that lawsuit were dismissed pre-
25 petition, but several counts do remain and would be subject to

1 the automatic stay, Your Honor.

2 The motion that Ms. Klyman filed that is on for today
3 does not deal with that ERISA lawsuit, but deals with the
4 distribution of the 401K, and the ERISA lawsuit, we would
5 contend, would be a separate motion. If Ms. Klyman feels the
6 need --

7 MS. KLYMAN: I can do that.

8 MR. SCHAIBLE: -- to try seek permission to go forward
9 with that lawsuit, which again is a very separate issue from
10 what we're dealing with today, then I guess it would make sense
11 for her to file such a motion --

12 THE COURT: I see.

13 MR. SCHAIBLE: -- seeking a lifting of the stay. But
14 it's a separate issue from what we're dealing with today.

15 THE COURT: I see.

16 MS. KLYMAN: It's somewhat separate. The part that
17 combines it is that they stand open to sanctions for not doing
18 this when they should have, Your Honor. It's great of you to
19 get it done now, and I really appreciate it, but it's just that
20 what's been going on since 2003, at least, when the general
21 counsel knew that they should have released it, and they failed
22 to do so.

23 THE COURT: Is this something that can be handled in
24 the claims process, if she files a claim?

25 MR. SCHAIBLE: Yes, absolutely. Absolutely.

1 THE COURT: Well, I guess you can either make a motion
2 to lift the stay, and I don't know whether it would be opposed
3 or not, or you can file a claim in the Delta bankruptcy. Has
4 the deadline to file claims passed?

5 MR. SCHAIBLE: No, Your Honor, it has not.

6 THE COURT: Okay.

7 MR. SCHAIBLE: The deadline has not been set yet.

8 THE COURT: Or you can file a claim in the Delta
9 bankruptcy and have it adjudicated through the claims process.
10 But I think it's not before me today, Ms. Klyman.

11 MS. KLYMAN: Okay.

12 THE COURT: Okay?

13 MS. KLYMAN: Thank you so much, Your Honor.

14 THE COURT: Thank you very much. Have a good day.

15 MS. KLYMAN: All right. You, too. Thank you.

16 THE COURT: Thank you again, sir. Okay.

17 MR. KAMINETZKY: And we're back to severance.

18 (Laughter.)

19 THE COURT: Back to severance.

20 MR. KAMINETZKY: Should I continue, Your Honor?

21 THE COURT: Please, please, please do.

22 MR. KAMINETZKY: So let me just repeat what I was
23 saying is that ALPA's position boils down to forgetting the
24 business judgment rule, forget the facts, forget the debtors'
25 judgment, forget the fact that this was passed -- this plan was

1 formulated by an outside committee of the board, and bottom
2 line is we don't like it. And who is the "we" here? It's
3 ALPA.

4 They're twelve percent of the work force and, may I
5 add, the highest part -- basically they are 940 of the top
6 1,000 earners at Delta. So if they don't want it, they have a
7 veto power just because. That's their position.

8 I'm going to be very quick now, Your Honor, but I just
9 think we need to touch on a couple of things. We mentioned
10 cuts. As you saw on that chart, there's the history of cuts,
11 2004, 2003, and 2005. I said that in kind of a strange way.
12 But you see in 2005 alone multiple cuts. So when we talk about
13 shared sacrifice I think, you know, a picture speaks 1,000
14 words.

15 And here, this chart over here, Your Honor, where is
16 Delta's management as compared to peer airlines, many of which
17 are in bankruptcy as well? Dead last. This is the top five,
18 aggregate top five that Delta versus other airlines and we are
19 dead last.

20 Next, Your Honor, one more slide, Your Honor. I just
21 can't resist. Indeed, I was tempted to simply stand up today,
22 place this on an easel, and say res ipsa loquitur and sit down.

23 What we have here is Adelphia, which is a company with
24 four billion in annual revenue, that filed for Chapter 11 in
25 this district in June 2002 before Judge Gerber. Delta has more

1 than fifteen billion in annual revenue. Once again, the
2 maximum theoretical cost of Delta's proposed severance for 144
3 employees is 14.3 million and the actual cost is likely a small
4 fraction of that, perhaps three million.

5 As depicted on this slide, this 14.3 million is
6 millions and millions of dollars less than the retention
7 package accrued for the CEO of Adelphia alone and more than \$1
8 million less than the package approved for the COO alone. And
9 here's what the Adelphia court said:

10 "I find the compensation of the CEO and the COO, while
11 high by some measures of comparables, was at a level
12 at which it cannot be found to be unreasonable."

13 And while I'm in the quoting mode, let me just end off
14 by another quote by Judge Gerber in the Adelphia case when he
15 rejected a similar argument that Cohen Weiss, the lawyers for
16 ALPA, made in that case:

17 "The Court must take into account in evaluating the
18 union's objection that tactical objectives with respect to
19 upcoming collective bargaining negotiations may drive, in
20 material part, the objection; and that the union's desires in
21 that regard may be antithetical to those of other
22 stakeholders."

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. WINSTON: Your Honor, if I could just have a

1 couple of points?

2 THE COURT: Yes, but why don't you go last, though,
3 and we'll have the Creditors' Committee, very briefly.

4 MS. BECKERMAN: Yes, Your Honor, very briefly.

5 I just wanted to focus on one of the comments that
6 counsel to ALPA actually said in their remarks, which was
7 "turnstile management." Your Honor is correct in focusing on
8 what was concerning, from our perspective, is that that's
9 exactly what we want to avoid here. And the reason that the
10 committee has been very concerned about that is, as Your Honor
11 properly pointed out, the attrition rate in 2005 and recently
12 has been high, as high as nineteen percent.

13 Delta right now has one of the lowest ratios of
14 management to employees in the entire industry. Management is
15 working more and doing much more and the cost that accrues to
16 the estate of that turnstile management is very heavy. It's
17 the cost as set forth in the papers of replacing somebody,
18 which is more expensive. It's the lost knowledge and
19 information and the transition cost. And it's the turbulence
20 that that causes in the company that's already in a situation
21 where it needs to be focused on stabilizing its business and
22 moving forward and implementing its business plan. It is, in
23 fact, all those issues that turnstile management concerns that
24 is why, in part, the committee has been so supportive of this
25 proposal.

1 The other reason that we've been so supportive of this
2 proposal, Your Honor, is that we do believe that the company
3 has tried to handle this in a way that was rational and
4 appropriate from their perspective and in a way that we think
5 shows reasonable business judgment. They didn't file a motion
6 on the first day and try to slip something by everybody in this
7 case and make me as committee counsel come in later on and try
8 to have something reconsidered. They didn't propose something
9 that was egregious. Unfortunately, I'm sure Your Honor has
10 seen lots of egregious severance CERP proposals and I can tell
11 you, as committee counsel for a lot of big cases over my
12 career, I've seen a lot of those types of situations. It
13 worked with the committee to come up with something that was
14 representative of what had been in existence pre-petition, and
15 even then the top people decided not to take the severance
16 arrangement.

17 I think ideally ALPA's right. It will be great if
18 they reached their agreement and we were standing here before
19 you at a time where that had already passed and that issue was
20 behind us. I agree with that. I certainly agree with many of
21 the things that counsel for ALPA said about the importance of
22 the pilots and reaching an agreement with them, but the company
23 filed and started their negotiations with the pilots before
24 this case filed. It went through an 1113 process where its
25 proposals were known. This has been out there for months and,

1 unfortunately, we can't have a company that has no management
2 that can't -- or we're losing people left and right. That
3 doesn't preserve benefits for the estate either.

4 And from the perspective of the unsecured creditors,
5 we've evaluated what's proposed. We think that the company
6 went about looking at this in a way that came up with something
7 that was modest and not offensive and taking into account some
8 of the things that, for example, ALPA said by not proposing a
9 CERP, agreeing not to do that by trying not to propose
10 something that was more than sort of the lowest level of what
11 was there pre-petition. And because of those things, we are
12 supportive and would ask you to grant the motion.

13 THE COURT: Thank you.

14 Yes, Mr. Winston?

15 MR. WINSTON: Just a few points. ALPA is not saying
16 that the business judgment rule is not applicable here. What
17 we're saying is that there's a heightened standard here where
18 all the circumstances have to be looked at and addressed.

19 Second is if there was consultation, Your Honor, and
20 I'm not saying that any particular part of this plan is
21 unnecessary, however, consultation, I think, would be a better
22 way of addressing that issue, but for example, a severance plan
23 is not supposed to be a windfall for management. As I
24 understand the plan --

25 THE COURT: Let me just interrupt. I don't understand

1 it as a windfall. It is applicable only where an employee in
2 the officer and director categories is laid off, not for cause.
3 So that's sort of not a windfall.

4 MR. WINSTON: Well, let me explain what I was
5 addressing, which is that the program provides, for example,
6 the executive vice presidents obtain twelve months I think it
7 is of -- I don't have the document in front of me -- twelve
8 months of pay as part of the severance package if they are
9 terminated for a covered event.

10 THE COURT: You haven't suggested, in your papers at
11 least, that any such provision of the severance plan is not
12 reasonable.

13 MR. WINSTON: No. What I'm suggesting is that this is
14 something that would be discussed in consultation because the
15 question is that if an executive vice president is terminated
16 and finds employment the very next day, I'm not sure why it's
17 not considered a -- a large amount of money being paid to an
18 executive vice president, why is he receiving the full twelve
19 months as opposed --

20 THE COURT: What's the answer to that, Mr. Kaminetzky?
21 How does the severance plan work in regard to the person who
22 goes right off and --

23 MR. KAMINETZKY: Excuse me, Your Honor? I didn't
24 catch the --

25 THE COURT: What does the severance plan provide for

1 the employee who is asked to leave, not for cause, is entitled
2 to X months, and immediately gets another job?

3 MR. KAMINETZKY: He still gets his severance.

4 THE COURT: He still does?

5 MR. KAMINETZKY: Yeah. But just to put that in
6 context, Your Honor, because, of course, not a word of this was
7 in their opposition papers challenging the reasonableness of
8 any aspect of the plan, but I think it's important to put this
9 in context because, again, perhaps there's a wider audience
10 here.

11 This chart -- that's perfect -- this compares the
12 length of severance, and blue is Delta, of our plan versus
13 Northwest's plan and United's plan. Okay? And this doesn't
14 even tell the full story. You see our plan tops out at twelve
15 months; twenty-four months for executive vice presidents at
16 Northwest and at United.

17 But what I mean by -- if you see on -- I think this is
18 a very important point because -- and again, I'm almost happy
19 that ALPA raised this. See over here? This may seem to Your
20 Honor that our plan is only half as big as their plan, but it's
21 not that. That's only half the story. Let me tell you why.

22 Their plan isn't only based on base salary. They also
23 get severance based upon all their target bonuses as well. So
24 they get base salary plus other elements. Let me show you what
25 I mean by that.

1 Here is our cost of severance for the top five
2 employees, would be \$1.3 million for twelve months' severance.
3 Okay? They have Northwest as twenty-four months' severance.
4 We're using Northwest because they filed the same day. Okay.
5 So twice as long. But it's actually 254 percent more because,
6 as we discussed before, Delta management doesn't make very much
7 money; they're dead last in salary. So twice their base salary
8 is much more than twice in dollar terms; it's 250 percent more.

9 But that's not it. They don't just base their
10 severance on base salary; they also get severance which takes
11 into account their target bonus for two years, and pro rate a
12 portion of their current year bonus. We have nothing, none of
13 that.

14 So to compare or to suggest for one moment that our
15 severance plan isn't completely reasonable; and, in fact, as
16 modest as you can find in the airline industry, I think is
17 quite frankly offensive. We worked very hard to do what's
18 minimally necessary to have someone run our airline. And to
19 suggest otherwise, I think, is rather shocking, if you just
20 look at the numbers and look at the picture.

21 MR. WINSTON: Your Honor, I didn't mean to shock;
22 however, I wasn't comparing Delta's plan to other plans. I was
23 just raising one point that I think is an example of where a
24 consultation would be helpful.

25 Third is, I can't go -- let go unrebutted Delta

1 counsel --

2 THE COURT: Well, let me ask you this.

3 MR. WINSTON: Sure.

4 THE COURT: Don't all severance plans provide that you
5 get X months' severance, and some people will go out and get a
6 job right away, or go to work for their father-in-law or
7 whatever, and some won't? And the plans don't differentiate.
8 Isn't that so with regard to all plans?

9 MR. WINSTON: I think that is not correct, Your Honor.
10 And if you look at the US Airways case, and also the Geneva
11 Steel case, they both address this issue toward the --

12 THE COURT: What about the ALPA severance?

13 MR. KAMINETZKY: No, Your Honor. If a pilot gets
14 furloughed and finds a job the every next day, they get their
15 entire severance, up to six months. Is that correct? And
16 there's no -- that's just the way -- they get the check, and if
17 they find a job at another airline, they keep the check. So,
18 in fact, there is no mitigation in any Delta Air Lines
19 severance packages, so this is completely consistent with what
20 every other employee gets, with respect to their severance.

21 MR. WINSTON: I think that a Delta pilot has a little
22 bit more difficulty finding a comparable job these days than an
23 officer and director would have.

24 THE COURT: I don't know.

25 MR. WINSTON: Well, there is a number of furloughed

1 pilots that are on the street these days. There is a number at
2 Delta Air Lines and -- you know, and also if a Delta pilot
3 accepts a job at another company, they accept that job at the
4 bottom of the seniority list. So they're taking quite a hit as
5 opposed to an officer or a director finding employment at
6 another company.

7 I also want to just address the issue of Delta
8 counsel's statement that 940 of the thousand top earners are
9 Delta pilots. I have a question about the numbers that Delta
10 is using. They gave us a slide with regard to their numbers on
11 the average Delta pilot earnings, which we don't think is
12 correct.

13 But putting even that aside, what is not addressed is
14 the fact that a lot of Delta pilots, and particularly the top
15 earning Delta pilots, are flying a lot of overtime, which is
16 part of -- becomes part of their wages, of course, because
17 they're paid at over the standard rate at that point. And
18 that's because of the fact of a decision by management to cut
19 back the manning. So there's a lot of overtime that's being
20 flown, the pilots are flying a large number of hours, in order
21 to earn -- in order to earn the pay that they're currently
22 earning.

23 Finally, let me just say one thing, which -- just
24 addressing the issue of the turnstile management. What that
25 relates to is the fact that the Delta pilots have indicated

1 that they are dedicated to this company. They expect
2 management to be dedicated to this company. And in the past, I
3 think it's been -- it was addressed in our papers. There was a
4 SERP, a supplemental plan that was set up for management. A
5 number of the management types, they took those SERPs, they
6 left the company. And that was, you know, very disheartening
7 to the pilots to see management have a special plan set up for
8 them, at the same time that the pilots were giving large
9 concessions. That was during the negotiations that led up to
10 the, what's called "Letter of Agreement 46," where the pilots
11 gave up 5 billion in concessions, 1 billion annually. And
12 during that time period, this SERP was announced, and a lot of
13 the top management took the SERP and they left. And that's the
14 type of situation that the -- that the pilots who were
15 informational picketing were addressing.

16 THE COURT: Do you want to address the SERP?

17 (Counsel confer.)

18 MR. KAMINETZKY: We're talking about something that
19 happened in 2002, with respect to a different management team.
20 So I'm not sure -- I mean, we can talk about it. I think some
21 of it is largely inaccurate about, they're saying their people
22 -- it was a hundred percent funded. But I mean, I think ALPA
23 would agree someone has to run this airline. If you just agree
24 with me on that point, what are we supposed to do?

25 Management is compensated dead last. This is the most

1 modest plan one could imagine. We're not giving special
2 bonuses now, we're not doing anything other than what you see
3 here right now, and we hope that this would be enough to stem
4 the tide of departures that Your Honor talked about. It's been
5 reported now in the press. That's it.

6 I mean, you want to talk about what happened in 2002?
7 I suppose we could do that. But Leo Mullen is not here
8 anymore. Those guys are gone. And we need someone to run the
9 airline, and we need this program.

10 THE COURT: All right. Well, this is my ruling.

11 I don't believe I have any choice, but to grant the
12 motion. The debtor has made a very compelling showing on the
13 record before me of the need for the severance plan that's been
14 proposed. That showing has not been contested by anybody.

15 It's true that many other; I guess all, of the other
16 constituencies of Delta employees have been asked to make very,
17 very serious and substantial sacrifices, in order to retain
18 their positions and to assist in making the airline viable as
19 an ongoing business. There's no question about that.

20 But there's also no question that the officer and
21 director -- this is "director" used in the sense, not of the
22 board of directors, but the lower-echelon management levels --
23 the officer and director component of Delta's employee
24 constituencies have themselves made enormous sacrifices. It's
25 not contested that this group of employees is, by far, the

1 lowest compensated of any of the similar airlines with which
2 Delta competes. They have no severance program now. I guess
3 everyone else in the company has severance programs.

4 MR. KAMINETZKY: All full-time employees, Your Honor.

5 THE COURT: All full-time employees have severance
6 programs.

7 The one argument that is advanced by ALPA, in essence,
8 is that the severance plan should have been the subject of
9 negotiation between ALPA and management, or the board of
10 directors, I guess, of Delta. I'm not sure that that's so.

11 But in any event, the severance plan, the evidence is
12 perfectly clear and unrebutted, was proposed to the Creditors'
13 Committee. ALPA sits as a member of the Creditors' Committee.
14 It was thoroughly vetted by the Creditors' Committee and
15 creditors' committee professional advisors, and apparently
16 fully approved by the Creditors' Committee. The ALPA
17 representative on the Creditors' Committee was privy to all of
18 that information, and the deliberative process of the
19 Creditors' Committee, and had every opportunity to seek more
20 information to seek whatever further consultations ALPA wanted
21 to seek.

22 The argument that the ongoing negotiations between
23 ALPA and the debtor may be affected by Delta's adoption of this
24 severance plan, well, maybe it will. I don't know why it
25 should. It would seem to me to be irrational that it should.

1 But neither the Court, nor Delta's Board of Directors, nor
2 perhaps even ALPA can control that.

3 I think, if people understand that every constituency
4 has made, and must make accommodations if the airline is to
5 continue in business, is something that should be well known to
6 everybody. It is not that the Court is insensitive to those
7 negotiations. But I do not believe that I can properly
8 exercise my role here by, in essence -- really, I would have to
9 totally repudiate the business judgment of the outside
10 committee of the board of directors, to say nothing of the
11 endorsement of the Creditors' Committee, if I were to accede to
12 the argument that this severance plan should not have been
13 adopted without negotiations, and presumably the approval and
14 agreement of the Air Line Pilots Association. I don't think I
15 am at liberty to discharge my duties properly by accepting that
16 argument, and I reject it.

17 Will you do an appropriate order, or do you have one?

18 MR. HUEBNER: We will submit one, Your Honor. I
19 believe there was a plain vanilla one attached to the motion,
20 which I doubt is objectionable. It just says, the motion is
21 approved, in essence. And we'll bring that into chambers on
22 the disk with the rest of the orders for today.

23 THE COURT: All right. Very good. Thank you very
24 much, Mr. Winston, I appreciate your argument.

25 MR. WINSTON: Thank you, Your Honor.

1 THE COURT: And I did the best I could.

2 MR. HUEBNER: Well, Your Honor, one area that you've
3 given us guidance on extra-judicially is that, given that Your
4 Honor is seemingly getting many letters, we need to do a
5 somewhat better job communicating to our work force that, in
6 fact, in something I've never seen before, we took care of
7 everyone else on the first day, and not management, and we will
8 endeavor to communicate that better.

9 THE COURT: Yeah, this is a very significant point in
10 my view that certainly has been lost upon the letter-writers.

11 MR. HUEBNER: Yes. Many of whom, in other cases,
12 would not have gotten any severance because the debtors would
13 move to protect only management severance rights. We did the
14 opposite, so thank you.

15 Your Honor, the next matter up for today -- in fact, I
16 think the last matter up for today, which I guess is good news
17 is the lift stay remaining issue on Number 2, which is the
18 Orlando motion, and I would turn the podium over to the
19 litigants for that issue as well.

20 THE COURT: Okay. Let me have the appearances of
21 those who will argue. Who is going to argue?

22 MS. KATZ: Sharon Katz from Davis Polk for the debtor.

23 THE COURT: Ms. Katz?

24 MS. KATZ: Yes, sir.

25 THE COURT: Okay.

1 MR. KOBERT: Your Honor, Roy Kobert, K-o-b-e-r-t. I'm
2 here from Orlando, Florida on behalf of the Orlando
3 International Airport.

4 MR. WEISENBERG: Your Honor, as you know, Brent
5 Weisenberg --

6 THE COURT: Yes.

7 MR. WEISENBERG: -- from Kronish, Lieb, Weiner &
8 Hellman. Mr. Kantowitz, who was also a part of the Orlando
9 counsel team is unable to join us today, and he sends his
10 regards.

11 THE COURT: Okay. My regards to him.

12 MR. WEISENBERG: I will not be arguing today, Your
13 Honor, but let me introduce Roy Kobert, who will be -- Roy has
14 been admitted pro hac vice in this matter --

15 THE COURT: Okay.

16 MR. WEISENBERG: -- and he will argue on behalf of
17 Orlando.

18 THE COURT: Fine. Glad to you have, Mr. Kobert.

19 MR. KOBERT: Thank you.

20 MS. SATYAPRASAD: Shuba Satyaprasad from Akin, Gump,
21 Strauss, Hauer & Feld on behalf of the creditors committee.

22 THE COURT: Just your last name again.

23 MS. SATYAPRASAD: Satyaprasad. I can spell it for you
24 if you'd like.

25 THE COURT: Usual spelling. All right.

1 MS. SATYAPRASAD: Would you like --

2 THE COURT: Yes, sir?

3 MR. KOBERT: Good afternoon, Your Honor. I could
4 either present my brief overview of what we have or as I heard
5 Your Honor indicated earlier, sometimes you like bullet points.
6 So tell me the Court's pleasure and I'd be happy to do so.
7 There was a reply filed on Monday --

8 THE COURT: I just -- I just love, love bullet points.
9 I think it's particular useful in this case because the -- the
10 field of controversy has changed over time. Am I right?

11 MR. KOBERT: Yes, Judge.

12 THE COURT: There's been some resolution.

13 MR. KOBERT: Correct.

14 THE COURT: And so now if I'm not mistaken, I posit
15 this so that you can tell me that I'm not with it, and I don't
16 quite understand it. Am I correct that on the credits -- we
17 call them credits?

18 MR. KOBERT: Yes, Judge.

19 THE COURT: Is that what you call them?

20 MR. KOBERT: We call them "prepaid credits," yes,
21 Judge.

22 THE COURT: Prepaid credits. Prepaid credits.

23 MR. KOBERT: And, Your Honor, I have a chart that
24 shows that, and we can talk in real terms if I can present --
25 if I may approach the bench, Your Honor.

1 THE COURT: Sure. Grateful for that. Thanks.

2 The prepaid credits that we're talking about --

3 MR. KOBERT: Yes, Your Honor.

4 THE COURT: -- are credits -- credits that accrued
5 through September 30. Am I right? '05?

6 MR. KOBERT: They accrue over the year. It's based
7 upon --

8 THE COURT: Over the year, but ending September 30.

9 MR. KOBERT: Your Honor, that's correct. That's our
10 fiscal year is September 30th, 2005.

11 THE COURT: Okay. And the only issue that remains is
12 whether or not the balance of those credits, some having been
13 used in connection with a settlement that you've reached,
14 correct?

15 MR. KOBERT: You're correct, Your Honor.

16 THE COURT: The balance of those credits which are
17 substantial --

18 MR. KOBERT: Yes, Your Honor.

19 THE COURT: -- Orlando takes the position should be
20 offset against the pre-petition rejection claim, correct?

21 MR. KOBERT: Exactly, Your Honor.

22 THE COURT: And that's the only thing that remains?

23 MR. KOBERT: Exactly, Your Honor. If you look at the
24 chart that we handed up, Delta and my client, the Orlando
25 International Airport have vetted these numbers. They're in

1 the stipulations. There's no dispute over the numbers. I put
2 together a very simple chart.

3 Your Honor is correct about the fiscal year being
4 September 30th, 2005. Delta is our largest carrier at the
5 airport, has been that way since 1978, Judge. They've been
6 there for twenty-eight years in our modern era. Delta and
7 ComAir are the largest user at our airport. Unfortunately,
8 with their downsizing and rejection which has been
9 accomplished, they'll fall behind Southwest, but it's their
10 business, Judge, and we defer to their professionals and
11 business judgment.

12 But, Judge, on this chart, what's happened is by
13 agreement, by stipulation, Your Honor sees the post-bankruptcy
14 prepaids. It's only fifteen days on the chart, Judge, which
15 obviously there's no unpaid pre-petition invoices for those.
16 There's \$168,000 of post-petition prepaids.

17 The stipulation provides that --

18 THE COURT: Right.

19 MR. KOBERT: -- Delta can take those \$168,000 and
20 direct us to apply them to post-petition invoices and rent, and
21 Delta has told us how to do that, where they want us to put the
22 money.

23 The next line item, Judge, Delta had \$4.1 million of
24 prepaid credits. It's undisputed that Delta owed us at the
25 time of the bankruptcy for rent and landing charts,

1 approximately \$1.5 million. So, clearly, again, mutuality pre
2 -- against pre -- you know --

3 THE COURT: Isn't that settled?

4 MR. KOBERT: That's settled as well, Judge.

5 THE COURT: All right.

6 MR. KOBERT: So, if you apply that, four million minus
7 one point five, we're left with a positive balance of \$2.5
8 million.

9 THE COURT: That's not on my chart --

10 MR. KOBERT: No, Your Honor.

11 THE COURT: -- math.

12 MR. KOBERT: If you take the \$4 million, and you pay
13 the -- take the pre-petition prepaids and pay the pre-petition
14 invoices --

15 THE COURT: Right.

16 MR. KOBERT: -- zero it out, we're down to \$2.5
17 million of available prepaids.

18 THE COURT: Okay.

19 MR. KOBERT: We're in the unique, I guess, envious
20 position of actually when the music stops, we actually have a
21 positive balance of pre-petition prepaids. Basically, Judge,
22 very simply, the airport would like to apply with Your Honor's
23 permission -- and that's why we're here, we're the movant,
24 asking for stay relief for set off.

25 We want to apply the \$2.5 million of pre-petition

1 prepaids against pre-petition rejection damages. Delta
2 respectfully disagrees.

3 They want to apply the \$2.5 million of pre-petition
4 prepaids against post-petition future invoices. We disagree.

5 THE COURT: And, as I understand it, at the
6 appropriate times, Delta requested that the prepaids be offset
7 against the October, November and December charges. Am I
8 correct?

9 MR. KOBERT: No, Your Honor. There is some dispute --
10 and I don't want to get into a he said/she said, and we can
11 come back with fact witnesses from Orlando and Atlanta, if
12 necessary. I don't think a factual record is necessary on
13 that, whether it was requested orally or not, clearly there's
14 no dispute --

15 THE COURT: It doesn't matter?

16 MR. KOBERT: It doesn't matter, Judge.

17 THE COURT: All right. Then let's not pay any more
18 attention --

19 MR. KOBERT: Okay, Your Honor.

20 THE COURT: Now, one thing that has buffalood me --

21 MR. KOBERT: Sure.

22 THE COURT: -- in my ignorance, undoubtedly, is that
23 we're dealing with an agreement.

24 MR. KOBERT: Yes, Your Honor.

25 THE COURT: And the agreement governs under state law

1 what's supposed to be done with the prepaid credits, right?

2 MR. KOBERT: Yes, Your Honor.

3 THE COURT: I haven't seen the agreement. It hasn't
4 been quoted. Help me.

5 MR. KOBERT: Well, Your Honor --

6 THE COURT: Is it completely irrelevant?

7 MR. KOBERT: Well, no, it's not, Your Honor. We have
8 --

9 THE COURT: Then why don't I see it? As we say, let's
10 go to the videotape.

11 MR. KOBERT: Your Honor, we -- we put forward the
12 agreement -- Delta didn't put forward the agreement because of
13 proprietary concerns. They dropped a footnote on that, and we,
14 you know, wanted to respect that. We went ahead and put
15 forward a declaration of our head of finance of how the
16 procedure works.

17 I can talk about the mechanics if Your Honor wishes --

18 THE COURT: No, I don't --

19 MR. KOBERT: -- about the prepaid program.

20 THE COURT: I don't want to know about the mechanics.
21 I know what the agreement says relevant to this. Your Honor,
22 it's interesting that the agreement was quoted. It wasn't
23 annexed to any of the papers and it was quoted only once in the
24 papers that I could find, forgive me if I've overlooked it, and
25 that is at Page 3 of Delta's surreply.

1 And what it is at Page 3 in Paragraph 3, the text not
2 of the agreement but of the surreply says:

3 "Moreover, the agreement plainly imposes upon the GOAA
4 the obligation to apply the Credits (which accrued during the
5 fiscal year ended September of '05) to 'airline fees and
6 charges for the first three months of [the] next succeeding
7 fiscal year,' which the GOAA failed to do."

8 And the citation is to Agreement, Section 9.02.8(b),
9 and what struck me as so odd that -- that this provision which
10 would appear to be relevant wasn't even quoted by Delta until
11 the surreply. So that leaves me feeling that I don't
12 understand something since all the lawyers who understand this
13 much better than I and are much smarter than I didn't put it in
14 until the surreply. Help me.

15 MR. KOBERT: I'd be happy to, Judge, and let me --

16 THE COURT: Doesn't -- by the way --

17 MR. KOBERT: Yes, sir.

18 THE COURT: -- the reason I raise it is it seems to me
19 that the quote from Section 9.02.8(b) of the agreement would
20 seem to say that this is what you do with the credits. You,
21 yourself, said in the brief that these are not cash --

22 MR. KOBERT: Correct, Your Honor.

23 THE COURT: -- they are credits. Well, the question
24 is credits against what, and I wondered what until I read the
25 Page 3 that I just quoted from Delta's brief, and the what

1 seems to be the airline fees and charges for the first three
2 months of the next succeeding year.

3 Now, maybe there's something else in the agreement
4 that hasn't been quoted to me that's relevant, but that's the
5 only thing that I have in front of me as to what the agreement
6 says.

7 MR. KOBERT: Judge, you bring up an excellent point
8 that's been troubling me as well.

9 What we have, Your Honor, is we have an agreement from
10 1978. As I said, Delta has been our longest-running customer -
11 -

12 THE COURT: Venerable agreement.

13 MR. KOBERT: Excuse me?

14 THE COURT: A venerable agreement.

15 MR. KOBERT: A venerable agreement. It's actually
16 done on mimeograph paper. You don't even see this kind of
17 type-base anymore in the modern era.

18 THE COURT: Let me stand up only so that I don't
19 atrophy. Go ahead.

20 MR. KOBERT: Okay. And, Your Honor, what you see in
21 this eight and a half by fourteen mimeographed agreement is
22 some peculiar things, and maybe they worked in 1978, but the
23 custom and the practice between my client, the airport and
24 Delta -- Delta is over here -- Delta has been a course of
25 conduct for twenty-eight years.

1 The way my airport works with Delta as our main
2 signatory airlines is as a signatory along with ComAir, they
3 enjoy the profits of the airport. The airport does well, they
4 do well.

5 THE COURT: I understand that. I understand that.

6 MR. KOBERT: And, Your Honor, in that agreement, what
7 it says is okay, our fiscal year as Your Honor pointed out ends
8 September 30th of 2005 each year, and at that point in time, we
9 start this process of figuring out the prepaid credits, and it
10 does, Your Honor -- you're absolutely correct. Delta does
11 quote it accurately.

12 It does say apply it to the first three months, and we
13 know what that is --

14 THE COURT: Is there anything else in the agreement
15 that says what you do with the credits?

16 MR. KOBERT: No, Your Honor.

17 THE COURT: Okay.

18 MR. KOBERT: You're absolutely correct. The --

19 THE COURT: So you're telling me that by a course of
20 conduct something else has been done. The course of conduct
21 isn't in the papers either.

22 MR. KOBERT: The course of conduct is in the papers,
23 Your Honor --

24 THE COURT: Oh, it is?

25 MR. KOBERT: -- with all due respect.

1 THE COURT: I'm sorry.

2 MR. KOBERT: It's contained in the declaration of
3 Jackie Churchill, the director of finance, un rebutted by Delta
4 in terms of what they've doing with my client for twenty-eight
5 years, what we're doing with every other airline --

6 THE COURT: What are you doing?

7 MR. KOBERT: Look at one fact. We have at the end of
8 this past fiscal year -- it's in the record -- we have -- we
9 had \$22 million of prepaid credits for all the signatory
10 airlines.

11 Sitting here last week, Your Honor, we still have \$14
12 million of prepaid credits. We've only been told by the
13 airlines to use seven million of it.

14 Why is that? There's a myriad of reasons why. Judge,
15 as we pointed out, some airports -- or airlines have a
16 different fiscal year. Some have a different way of
17 accounting. They may want to hold those credits back to apply
18 against some sort of loss carrying-forward. Some airlines,
19 Judge, because we are a seasonal airport in Orlando, Florida
20 want to hold back some of those prepaids when things are slow
21 and we are out of season.

22 There's a whole bunch of reasons, and every year, the
23 airlines come forward and tell us this is how we want you to
24 apply the prepaid credits. That's what's done --

25 THE COURT: And you honor that?

1 MR. KOBERT: And we honor that, Judge.

2 THE COURT: In failing.

3 MR. KOBERT: Except, Your Honor -- let's presume
4 arguendo that -- we said the facts weren't important. Let's
5 presume they did ask, okay, and we said no. Okay. And I would
6 have recommended to my client that we do say no. Why? Because
7 of the unique intersection between Section 553 set-off and
8 365(g).

9 One of the benefits and cornerstones of why Delta is
10 here in this court is because of the wonderful requirements and
11 allowances in the Bankruptcy Code that allows a debtor to
12 reject a contract, and Your Honor, they've rejected the
13 contract with us already. They've asked for it. It's rejected
14 as of January 19th, 2006. It's already happened, but one of
15 the benefits, Judge, is to reject leases like ours and give us
16 rejection damages on an unsecured pennies on the dollar or --
17 or reorganized stock as they wish. You must take the benefits
18 with the burdens.

19 Judge, we're in a unique situation. We are a creditor
20 that happens to have after the set-off is done, which we've
21 done with permission of Delta, we will have a balance, and that
22 balance should be available to apply toward our rejection
23 damages.

24 Your Honor mentioned Judge Eaton in Florida who is --

25 THE COURT: Joe Eaton.

1 MR. KOBERT: Joe Eaton, a Floridian as well. And
2 Judge Eaton -- your quote I think was -- I wrote it down
3 because I liked it, "Tell me the cases you're most proudest
4 of."

5 THE COURT: That's right.

6 MR. KOBERT: And if I can do that a moment, Judge.

7 THE COURT: Okay.

8 MR. KOBERT: There are three cases that I am most
9 proud of, and Judge, we cited those in our papers. The first
10 was the Levin case, the Mace Levin (phonetic) case at Section -
11 - or Page 144.

12 And what that case told us was that a claim like a
13 rejection damages claim need not have matured or be liquidated
14 in order to apply Section 553.

15 We also cited to one of my second most favorite cases
16 that I'm proud of, Express Straight Lines (phonetic) case,
17 which says:

18 "-- nor is it necessary that the debt sought to be set
19 off be due when the case is commenced."

20 Even better, Judge, we went back and looked at
21 Colliers on bankruptcy and Colliers, which I consider to be a
22 learned treatise actually talks about this unique intersection,
23 if I may approach. Unique intersection between 365(g) and 553.

24 And what Colliers tells us is that the eligibility for
25 set off against mutual pre-petition debts is twofold. First,

1 the Bankruptcy Code expressly provides these claims are pre-
2 petition in nature. We know that. And there's no reason to
3 conclude Congress did not intend a designation to hold true for
4 set-off.

5 Second, rejection damages claims are in reality pre-
6 petition claims that have been specially deferred in the
7 ultimate resolution pending the debtors' decision to either
8 assume or reject our contract.

9 Clearly, Judge, if they assume, we don't have this
10 issue, but they have chosen to reject, and they're allowed to
11 do so, and what they want to do, Judge, is take our pre-
12 petition prepaids and apply them toward post-petition ongoing
13 invoices. You can't do that.

14 Because of 365(g), you get the benefit of having the
15 rejection damages not as a post-petition claim. It clearly
16 happened effective with Your Honor's signing the stipulation on
17 January 19th. We engage in this bankruptcy legal fiction as if
18 it occurred just prior to the petition date of September 14th,
19 2005.

20 Judge Beatty pointed out very clearly in her decision
21 from March 17th of 2005, I quoted her, Your Honor, in her
22 Genuity, Inc. case coming out last year, where she talks about
23 the fact that you can't allow this pre/post-petition crossover
24 that Delta wants to do.

25 The court said, and this is Judge Beatty, she said:

1 "That is, the pre-petition dollars and post-petition
2 dollars are considered different under the code.
3 Under the plans of reorganization, debtors routinely
4 pay for actual dividends, percentages on the dollar to
5 their pre-petition unsecured creditors."

6 Probably going to happen here.

7 "Post-petition administrative expenses are paid in
8 full."

9 Hundred cents on the dollar.

10 "It is not fair, nor is it equitable to allow the
11 satisfaction of post-petition obligations or
12 fractional dollars."

13 We have the crossover here that Delta wants which is
14 impermissible under the Code and by Judge Beatty's ruling.

15 Our airport again is a unique situation, Judge. You
16 don't see this a lot. We still have pre-petition money left to
17 apply to a pre-petition debt. Delta wants to take our pre-
18 petition money, the credits and apply it post-petition toward
19 ongoing bills, and in exchange, they're going to give us either
20 pennies on the dollar or stock in the reorganized Delta, and we
21 say, Judge, that is wholly inappropriate.

22 This issue has been vetted before by other airline
23 cases. You typically don't see it, Your Honor, and you want to
24 know why? Because, after you apply the set-off like we've done
25 which is typical, you know, prepaids against pre-petition,

1 there's usually no money left. We're in a unique situation
2 where you actually have a positive balance. That is unique.

3 There are several cases where other airlines and
4 airports have addressed. Your Honor, we cited to the case of
5 US Airways, Judge Mitchell. I was before him in Alexandria,
6 Virginia, and on April 19th, 2005, we attached as Exhibit B of
7 the pleading from Judge Mitchell's case.

8 He allowed Charlotte and USAir to reach a stipulation,
9 and in that stipulation of Paragraph 3, this is what the
10 parties agreed and Judge Mitchell approved:

11 "Charlotte agrees to return the remaining portion of
12 the U.S. Airway's share for use even though rejection of the
13 U.S. Airways may occur" -- obviously, in the future -- "which
14 but for the stipulation would have allowed Charlotte to set off
15 pre-petition claims arising from the rejection against this
16 U.S. Airways share."

17 THE COURT: That was a stipulation.

18 MR. KOBERT: Your Honor, clearly, we've indicated in
19 our footnote, I acknowledge, that was a stipulation. There may
20 have been other business reasons that we're not privy to that
21 go on in these sort of airport/airline relationships --

22 THE COURT: Is there any other case that --

23 MR. KOBERT: Your Honor, I have another one.

24 THE COURT: All right.

25 MR. KOBERT: United Airlines, Judge Weidoff sitting in

1 Chicago. I've had the pleasure of appearing before him, also a
2 recent decision, January 24th, 2005, attached as Exhibit C.

3 Judge Weidoff allowed the Port of Oakland to offset
4 against its rejection damages. The Port of Oakland, California
5 had a pre-petition overpayment made by the airline, United
6 Airlines. They also had a security deposit, and their lease
7 was rejected, and the Port of Oakland was allowed to set off
8 against its prepaid credits, the overpayment -- security
9 deposits against its rejection claim.

10 Same we have here. Now, I will concede again, Judge,
11 but that was done by "consent of the debtor." We don't know
12 the business reasons that went on. Clearly, Judge, in this
13 case, before Your Honor --

14 THE COURT: So --

15 MR. KOBERT: Delta is not consenting --

16 THE COURT: -- it was not a litigated decision?

17 MR. KOBERT: No, Judge. We put that in our footnote.
18 It was not ligated. It was not fully vetted. It was done by
19 consent, and this case at bar, Delta is not obviously agreeing
20 to allow us to do that, but Delta can't escape, if you will,
21 from the requirements of Colliers and the case law that I've
22 cited to.

23 Your Honor, at bar, we have a December 22nd rejection.
24 We have a January 19th effective date of that rejection by
25 stipulation, and Delta gets the benefits of that, but with that

1 comes the burdens that we've talked about briefly here today.

2 So I think, Judge, it's appropriate on my two bullet
3 points you asked me to limit myself to, to allow my airline --

4 THE COURT: I didn't limit you to two.

5 MR. KOBERT: Well, you said you wanted bullet points
6 and I'm trying to stay with my best --

7 THE COURT: You can have as many bullet points as you
8 want.

9 MR. KOBERT: Okay. I'm trying to stay with my best
10 cases, my favorite cases.

11 But you've got to take the benefits with the burden.
12 And clearly, Judge, we're going to have a twelve-million-dollar
13 rejection damages claim. Delta disagrees with that number.
14 We're not here to --

15 THE COURT: Whatever it is.

16 MR. KOBERT: Whatever it is. We're not here to
17 litigate that right now.

18 We have two-and-a-half-million dollars' worth of
19 prepaid pre-petition credits that will satisfy twenty percent
20 of our claim. We're still going to have an eighty-percent
21 rejection damages claim. We'll get what every other unsecured
22 creditor gets and we'll have to live with it.

23 THE COURT: Let me ask you this. Isn't it correct
24 that Section 553 preserves the set-offs that would be allowed
25 under state law?

1 MR. KOBERT: Yes, Your Honor.

2 THE COURT: It doesn't go beyond that. It doesn't
3 purport to go beyond that.

4 MR. KOBERT: No pun intended, but at 10,000 feet,
5 looking at the statute, you're absolutely correct. We need to
6 fly lower, Judge, take a closer look at the statute. And I
7 would concede, Judge, as well, I'm a person willing to concede
8 bad facts. It doesn't come pretty. You don't get to pick your
9 facts. You don't get to pick your law. That's what I love
10 about bankruptcy, there's cases everywhere on every issue.

11 But, Judge, Florida law -- and they cite the Aquasport
12 case, it's an 11th Circuit decision -- talks about that, no,
13 under Florida law Delta's correct. You can't set off against
14 contingent, unmatured claims. And Delta says a rejection
15 damages claim is typically contingent or unmatured because you
16 don't know if the lease is going to be rejected or not.

17 Here we do, we know it happened. And Delta says, aha,
18 you dragged your feet --

19 THE COURT: Well, let me ask a different question
20 because my -- I read the briefs and what you're talking about
21 is in the briefs. But my question is a little different and I
22 don't think it is in the briefs.

23 Putting aside Florida law on that point, the agreement
24 says something about this. Doesn't the agreement govern what
25 can be done with the credits?

1 MR. KOBERT: Your Honor, let me answer that question
2 and then finish my point. Your Honor is correct. We have
3 twenty-eight years of course of conduct with every airline at
4 the airport, number one. Number two, the agreement sets us up
5 for an impossibility.

6 If Your Honor would allow me, I have a chronology
7 chart, my last little handout today, of what happens at -- if I
8 may approach, Your Honor?

9 THE COURT: Sure.

10 MR. KOBERT: What happens at the airport, and
11 especially in this case. Judge, it would be impossible -- we
12 talked about applying them for October, November, December.
13 That is an impossibility. Obviously, when the airport closes
14 its books on September 30th, we need to find out from Delta and
15 the other airlines what are the landing weights, what happened
16 in September, and we have to wait for the self-reporting
17 information from the airline which sometimes can take a month
18 to come to us.

19 And, Your Honor, what I have on this time line, if I
20 may, we have first obviously September 14th. That's the
21 effective date. That's what the code teaches us of 365(g) of
22 rejection, which is also the same day as Delta's Chapter 11
23 filing. We have next, as Your Honor pointed out earlier, the
24 end of Orlando's fiscal year 2005 was September 30th. The
25 signatory airlines, Judge, share in the revenue surplus based,

1 in part, on their landing weights, and Delta's our largest
2 participant in that successful program.

3 Judge, it's clear in the declaration attached,
4 unrefuted, that on October 28 of this past year the airport
5 came forward and released the estimated prepaid calculations.
6 It's attached as Docket Entry 2118, Exhibit A-1. And we take
7 the self-reporting from the airlines and prepare this final
8 calculation.

9 Now, it's not a final final calculation because we
10 have to go through an audit. We're audited every year, as we
11 have been for twenty-eight years, by Ernst & Young. And Ernst
12 & Young audited our books and came up with a result. And on
13 December 12th, it's also contained in the record Exhibit A-2,
14 we prepare and release a report showing the final final. These
15 are the final numbers that you airlines can go ahead and give
16 us direction on how you want to apply those credits.

17 Delta moved for rejection -- let me stop there.

18 So obviously, Judge, on December 12th it is
19 impossible, it is impossible just by the sheer passage of time,
20 for either Delta to claim or for us to apply prepaid credits to
21 October, November, December because time has already passed.
22 It's too late. So typically we either -- either the airline
23 will decide that they don't want to pay October, November,
24 December, or we typically apply them for most of our airlines
25 to January, February, March.

1 As I indicated, we have \$14 million of prepaid still
2 on accounts.

3 THE COURT: Let me ask you this. Is there anything in
4 the agreement that provides for allocation of the credits to
5 pre-petition obligations?

6 MR. KOBERT: Well, Your Honor, the 1978 agreement on
7 mimeograph paper doesn't talk about bankruptcy, doesn't talk
8 about pre-petition.

9 THE COURT: No, no, no. I'm not talking about
10 bankruptcy. Is there anything in the agreement -- surely back
11 in 1978 they must have contemplated the possibility that on
12 September 30th, the close of the fiscal year, some airlines
13 would probably have owed something from the prior year, right?
14 Right.

15 MR. KOBERT: Well, Your Honor, let me try it this way.
16 I think it's a tenet of Florida law that -- let's take the
17 bankruptcy out of the equation. Let's say Delta -- I'll pick
18 on Southwest. Southwest Airlines decides, for whatever reason,
19 they're not going to pay us, pay my airport for six months.
20 And then it's now October 1st and Southwest says, we know we
21 have prepaid credits coming. We want you to apply our prepaid
22 credits for October. I think my airport would be with in the
23 tenet of Florida law, and I think New York law as well,
24 landlord/tenant law and contract practice, to say no, you can't
25 stiff us for six months and then say we want our prepaid

1 credits and we want you to apply them to October. Clearly, you
2 can't do that.

3 THE COURT: Is there anything in the agreement that
4 says anything about it? I guess the answer is no.

5 MR. KOBERT: Your Honor, the answer is no.

6 THE COURT: Okay. Now let's look at the practice.
7 What has been the practice?

8 MR. KOBERT: The practice, Judge, very simply has been
9 when December 12th or December 14th, whenever the time rolls
10 around in early December every year, we look to the airlines to
11 tell us how do you want to apply prepaids. And as we sit here
12 today, two-thirds of them have yet to tell us how they want to
13 apply the prepaid money. Again, they may have a myriad of
14 business reasons why, but the airlines are in control. They
15 tell us how they want to apply the money.

16 THE COURT: And so that's been the practice?

17 MR. KOBERT: For twenty-eight years, Your Honor.

18 THE COURT: And do they ever -- have they ever said
19 for twenty-eight years we still owe you some money prior to
20 September 30, apply them to that for that balance due?

21 MR. KOBERT: Your Honor, I haven't been there for
22 twenty-eight years, but I'm sure it's happened; I'm sure it
23 could happen.

24 THE COURT: So the answer, you don't know.

25 MR. KOBERT: I don't know the answer, Judge.

1 THE COURT: Okay. Well, I don't either.

2 MR. KOBERT: I could find out.

3 So we're here on our motion, Judge, as the movant
4 asking the Court permission to apply the pre-petition prepaids,
5 the balance we are fortunate to have, at least some, toward our
6 rejection damages, whatever that number is. We'll come back on
7 objection to claims, determine what the number is, by agreement
8 or otherwise, to satisfy in part our claims.

9 THE COURT: Okay. Well, let me hear from Ms. Katz for
10 a little bit.

11 MR. KOBERT: Thank you, Judge.

12 THE COURT: I'll come back to you, if I may?

13 MR. KOBERT: I'll be here. Thank you, Judge.

14 THE COURT: Thank you, sir.

15 MS. KATZ: Good afternoon, Your Honor.

16 Well, this morning, Your Honor, the Court entered the
17 stipulation an order rejecting this lease --

18 THE COURT: I did.

19 MS. KATZ: -- so I was going to start out by saying
20 that Delta and GOAA are parties to a lease, but I guess it's
21 were parties to this particular lease as of this morning. And
22 at the end of the airport's fiscal year, September 30, the
23 airport in effect, as Mr. Kobert has said, calculates the
24 overpayments that have been made by the airlines and those are
25 returned to the airlines in the form of credit. So even though

1 we called them credits, they really are the equivalent of cold,
2 hard cash.

3 In this case, the credits are payable in October,
4 November, and December of 2005. Now, Mr. Kobert and I
5 discussed whether we wanted to get into the he said/she said
6 about who requested what and when, and the parties decided that
7 they didn't want to really do that, Your Honor. It was part of
8 a much larger settlement and, as you've seen, we settled many,
9 many things.

10 THE COURT: Right.

11 MS. KATZ: But it is very clear, and I think Mr.
12 Kobert said it already today, assuming Delta had made the
13 request for the credits -- we, of course, would say they did
14 but we don't want to get into the dispute -- but even assuming
15 that he did, his advice to them would have been do not pay
16 them. And the reason for that is because they were trying to
17 situate themselves so that when and if there was a rejection at
18 some point in the future -- and they certainly didn't know that
19 there was going to be one; they might have suspected it, but
20 they didn't know there was going to be one as of October --
21 they would not have paid the amounts that were due to Delta so
22 that they could come here at that point in time and argue that
23 they were entitled to set off against the rejection damages
24 claim.

25 Now, I want to point -- as we discussed, the parties

1 did agree to a set-off of approximately \$1.5 million of the
2 credits against an equal amount of pre-petition debt that was
3 owed to the GOAA. And of course, that pre-petition debt was
4 not contingent and it was not unmatured at the time that the
5 credits became due and payable.

6 And Your Honor is absolutely right. It's not a matter
7 of Section 553. You have to go to state law and see whether or
8 not there's a right of set-off under state law and as of
9 October, when those credits became due and payable, the pre-
10 petition debt was also due and payable and there was a set-off
11 because Florida law governs here, not Section 553 of the
12 bankruptcy code. The difference between that pre-petition debt
13 and this claim for rejection damages is that as of October,
14 that claim for rejection damages was really just a figment of
15 everyone's imagination. There was no such claim. It was
16 beyond contingent. Nothing had happened yet.

17 Now, the GOAA -- can I call you the GOA? Orlando, I'm
18 not sure how it's pronounced.

19 MR. KOBERT: Whatever your pleasure.

20 MS. KATZ: Okay. The GOAA therefore acted improperly
21 in withholding these amounts, and I'm going to explain in a
22 little more detail why. They violated the automatic stay.
23 They breached the contract. They did this for a period of more
24 than four months and now they're coming to the Court and
25 they're saying, ah, we've got a rejection and we've got a claim

1 of rejection damages now. We want you, in essence, Judge, to
2 ratify our violation of the stay and I dare say that if the
3 Court were willing to do this, I am sure there are other
4 airports sitting out there and other counter-parties to various
5 executory contracts who might decide to employ the same
6 strategy.

7 Now there are really three integrated -- interrelated
8 legal and equitable reasons why the Court should refuse to
9 grant this motion. First, there is no dispute that when the
10 credits became due to Delta, the GOAA had an absolute
11 obligation to apply them, and that's under the terms of the
12 contract. It failed to do that. It may have believed that
13 Delta was going to reject its contract some day, but that
14 provides no excuse for its failure to honor its then-current
15 contractual obligations to turn over the credits.

16 The First Circuit, in a very similar case that we
17 cited in our papers --

18 THE COURT: Why do you say "then-current." Isn't it
19 still current?

20 MS. KATZ: Oh, yes, then and still. Yes, absolutely.
21 My point simply being that's when it arose. Yes.

22 But the First Circuit said, in a very similar context,
23 that a creditor's fear of a forthcoming rejection does not
24 excuse that creditor from its interim obligations under the
25 contract. So they cannot say we thought you might reject in

1 the future, therefore, we don't have an obligation to perform
2 now. So they should have honored their obligations and they
3 should have applied the credits during that period of time and
4 we wouldn't be here at all now if they had done exactly what
5 both the contracts and the law require.

6 Now of course, had they been entitled to set off the
7 credits in October against the anticipated rejection damages
8 claim, they could have come to the Court and sought relief to
9 do that. And the reason that they couldn't do that was
10 because, under Florida law, all they had was, at best, a
11 contingent claim and Florida law does not allow a contingent
12 claim to be the subject of a set-off, and that's all they had.
13 So they didn't -- they couldn't do that. So what did they do?

14 Well, in order to try to position themselves in a
15 different place in anticipation of a possible rejection motion,
16 the GOAA exercised unauthorized self-help and it simply
17 withheld the credits that were due to Delta. That was a
18 violation of the automatic stay, as I said, and the GOAA
19 doesn't dispute that. Indeed, their only response to the fact
20 that they violated the automatic stay and withheld these
21 credits was that Delta somehow should have engaged in extra
22 contractual self-help and gone out and simply applied the
23 credits on its own to post-petition rents and post-petition
24 landing fees.

25 But Delta believed there was a contract and that there

1 was a way to do this appropriately and it tried to do that and
2 expected that its counter-party was going to behave in
3 accordance with the terms of the contract as well. Delta was
4 guilty, at worst, of naivete, but Delta was not obligated to
5 exercise extra contractual remedies and its failure to do so
6 did not waive its right to immediate receipt of the credits.

7 THE COURT: Can I ask you a question?

8 MS. KATZ: Yes, sir.

9 THE COURT: The arrears that were owed at the date of
10 filing, a million and a half, whatever the figure was, were
11 they long-time arrears or were they simply the current amount
12 that was due that hadn't yet been paid when the filling took
13 place?

14 MS. KATZ: They were just very shortly before the
15 petition filing date I believe, you know, very recent arrears.

16 THE COURT: All right. Let me ask you another thing
17 under the agreement, and you can focus on this, too, Mr.
18 Kobert.

19 If an airline that's using the facilities of the GOAA
20 persists in not paying its obligations, what's the GOAA's
21 remedy? What happens?

22 MS. KATZ: If they don't, I -- that would be a breach
23 of the agreement. This is a real property lease. I haven't
24 looked at all the details. There may well be an ability to
25 evict, and so on and so forth. I'm not clear, though.

1 THE COURT: What do you say, Mr. Kobert?

2 MR. KOBERT: Your Honor, what I say is that if an
3 airline doesn't pay, it is a breach. We'd either terminate the
4 agreement or, at our election, we consider it an ongoing
5 default and allow them to stay and let that default continue.
6 And then when the prepaid credits --

7 THE COURT: Can you, under the agreement -- or do you
8 know? Maybe you don't know the answer to this. Don't
9 speculate if you don't. Under the agreement, do you have the
10 right to shut them down without going to landlord/tenant court?

11 MR. KOBERT: It's never happened, Judge. I don't know
12 the answer, but one other remedy we would have is once the
13 prepaid credits were determined, you could set off against
14 those under bankruptcy law. Now we could go ahead and do that
15 and try to recoup some of our damages, clearly.

16 MS. KATZ: The point being once they have a matured
17 claim, not in anticipation of there being a matured claim.

18 I guess this really all brings me to the third reason
19 that this motion should be denied and I think, again, it goes
20 back to the point that Mr. Kobert was making. They were
21 holding these. They were doing this very intentionally and
22 purposefully so as to position themselves so that when and if
23 there were a rejection of the contract, they could come into
24 the court and argue that this all relates back under 365(g).

25 THE COURT: That's not disputed, is it?

1 MR. KOBERT: It is, Judge.

2 THE COURT: It is?

3 MR. KOBERT: It is. I don't think it matters. My
4 point about the facts earlier, Judge, was that we had done this
5 prior to the rejection by Delta or before. I think the outcome
6 should be the same. The only thing I would point out to Your
7 Honor is the New Hampshire case she's citing to in her
8 certification does make that distinction. And under that First
9 Circuit case, if we had come earlier in the case, knowing that
10 Delta was disagreeing with us, that they were not going to --
11 they wanted these prepaid credits now, then we would have come
12 obviously maybe a month or two ago instead of coming now. Then
13 the New Hampshire case would be adverse to us.

14 I think the New Hampshire case is wrong. Colliers
15 (sic) tells us that, so do the other cases we cited, but she is
16 absolutely correct. If we had come prior to the rejection, the
17 New Hampshire case tells us you'll have a matured claim.
18 You're speculating and we're not going to speculate. That's
19 what New Hampshire tells us and I want to distinguish that for
20 you.

21 MS. KATZ: Well, of course, they did come here before
22 the rejection. The rejection was approved today and it's
23 actually effective as of January 19th by agreement of the
24 parties and so there was no rejection and there is no rejection
25 going back. They may have a claim that they're claiming is a

1 pre-petition claim, but the rejection itself is effective
2 January 19th. And by that point in time, we should have
3 received everything we were entitled to under the credits.

4 MR. KOBERT: Your Honor, that's correct. We did file
5 our motion on January 5. I guess what counsel is saying is if
6 I was really truly devious, I should have waited until after
7 January 19th to file a motion. I don't think it happened.

8 MS. KATZ: Well, Your Honor, getting back to the third
9 reason for their -- that their motion should be denied, the
10 GOAA had no right of set-off with respect to these credits
11 against the contingent pre-petition -- I'm sorry, the
12 contingent rejection damages claim. But anticipating that
13 someday in the future Delta would reject its agreement, it
14 improperly withheld those credits that were owed to Delta,
15 hoping that with the passage of time it could position itself
16 to argue that the conditions for a set-off had ripened.

17 Now first, as an equitable matter, GOAA should not be
18 permitted to take advantage of the fact that it violated the
19 automatic stay, breached the contract, and withheld the
20 debtors' property, speculating that a rejection motion would be
21 forthcoming and that it could then claim a retroactive right to
22 set-off. Nothing in the code permits it, inequity screams out
23 against it.

24 In similar circumstances in denying a set-off where a
25 creditor tried to manipulate the timing of its obligations in

1 order to gain a benefit over other creditors, the Seventh
2 Circuit, in a very recent United decision, stated that the
3 parties will be held to their deals and they may not manipulate
4 the timing of payments in order to exploit the vulnerabilities
5 of the other. And that is exactly what the GOAA did and it
6 certainly should not be rewarded for it. Indeed, rewarding it
7 would be a signal to other counter-parties that they need not
8 fulfill their contractual obligations as they become due if
9 they can imagine that there may be a rejection motion somewhere
10 in the future; they should just be able to sit on it and wait.

11 We didn't really talk about the Stump (sic) case, Your
12 Honor, but I want to point out the differences between that --
13 we cited it once in our brief. I just want to point out the
14 differences between that case and what the GOAA did here
15 because in that case, at the time of the withholding, at the
16 time the bank withheld monies, the debtor was already in debt.
17 There was not -- it was not a contingent claim. The debtor
18 already had defaulted on the bank loan. The bank, for a very
19 short period of days, four or five days, put a temporary hold
20 on monies that it owed back to that debtor and immediately
21 sought relief from the stay. And the Supreme Court said under
22 those circumstances, a very short withholding where there is a
23 non-contingent matured claim --

24 THE COURT: Right. Right.

25 MS. KATZ: That is not the circumstance here. So now

1 they suggested that Section 365(g) somehow gets them out of
2 this problem, but again, I want to point the Court to the
3 Aquasport case which we did cite. It's the Florida law that
4 says that contingent claims cannot be subject to set-off.

5 And in that case, the creditor argued that although
6 Florida law did not permit a set-off of unmatured debt, that
7 its debt should be deemed matured pursuant to Section 502(b) of
8 the code, a different section. And the court rejected the idea
9 that a bankruptcy code provision which will deem a claim as
10 having arisen at some time or other, a certain point of time,
11 would have an effect on the reality of what occurred and would
12 alter Florida law. The court said that won't happen. It
13 stated the bankruptcy code provision could not provide a legal
14 vehicle by which the creditor could legitimize an entitlement
15 to set-off under Florida law.

16 We get back to that point. You have to look to
17 Florida law. They may be able to file a proof of claim now
18 that they can say it's a pre-petition claim, but the fact is at
19 the date that these credits were due, they only had contingent
20 claims for set-off and Florida law does not permit them to
21 engage in that set-off and they shouldn't be able to use the
22 fiction of the code in order to, you know, go backwards, after
23 having held these credits for over four months in violation of
24 the stay.

25 I want to make one additional point about this claim

1 in there for \$12 million, which is at the very end of their
2 brief. Mr. Kobert suddenly put in that they have this twelve-
3 million-dollar rejection claim.

4 If you look at their opening papers, they've admitted
5 that the structure of their agreements with the airlines,
6 including Delta, is such that they are made whole every fiscal
7 year. They don't suffer losses and if they have losses, those
8 are budgeted into the next year's obligations and payments that
9 the airlines have to make. And, Your Honor, to the extent that
10 they lost anything, Delta itself will be paying higher fees as
11 it goes forward because it is still one of the largest airline
12 carriers down in Orlando.

13 So we are going to dispute this twelve-million-dollar
14 claim. I just want to make that clear for the record and thank
15 you.

16 THE COURT: Let me ask you something, Mr. Kobert.

17 MR. KOBERT: Yes, Your Honor.

18 THE COURT: You said that the practice of the
19 agreement for twenty-eight years -- practice of the parties
20 under the agreement for twenty-eight years was that the credits
21 would be calculated in the months following September 30 and
22 that the debtor -- excuse me, the airlines would then, at some
23 point, instruct the GOAA as to how they wanted those applied
24 and those instructions would be honored uniformly. Where does
25 it say that in the papers that are in the record before me? I

1 heard you say it, but after all, you're just a lawyer.

2 MR. KOBERT: Just a country lawyer from Orlando,
3 Judge. It says it in the -- attached to our reply, Your Honor,
4 it set forth --

5 THE COURT: Okay. Let me find it.

6 MR. KOBERT: I'll take you right there, Judge, if I
7 could. It's -- if you look at --

8 THE COURT: Is this attached to the response or --

9 MR. KOBERT: Yes, Your Honor. I'm sorry. Exhibit
10 2118, Docket 2118, the response, Your Honor.

11 THE COURT: Okay. And it's appended to that?

12 MR. KOBERT: If you look at Exhibit A, Your Honor --

13 THE COURT: Jackie Churchill?

14 MR. KOBERT: That's the finance director. If I take
15 Your Honor to --

16 THE COURT: I should keep turning the pages?

17 MR. KOBERT: Yes, Judge. Let me find the -- well,
18 it's -- well, Paragraph 6, Your Honor, tells you how it's
19 calculated and when we give the estimate.

20 THE COURT: Wait, wait.

21 MR. KOBERT: I'm sorry. I'm sorry, Your Honor.
22 Exhibit A, the affidavit or declaration of Jackie Churchill.

23 THE COURT: Oh, we're back to Jackie Churchill.

24 MR. KOBERT: Yes, Your Honor.

25 THE COURT: Okay. So this is where I should look, in

1 Paragraph 6?

2 MR. KOBERT: If you take a moment and look at -- I
3 guess, Your Honor, in fairness, starting with Paragraph 5, 6,
4 7, 8, and 9. I'll give Your Honor a moment just to take a look
5 at those four paragraphs with citations to the agreement
6 itself.

7 (Court reviews documents)

8 THE COURT: All right. Anything else?

9 MR. KOBERT: Yes, Your Honor. And obviously, this
10 one-third, one-third, one-third of October, November, December
11 talks about, in Paragraph 8, that they may take them as a
12 credit. Clearly, from a cash-flow point of view, you can
13 understand our position. We don't want everyone taking their
14 prepaid credits in October. We would starve. We would have no
15 cash flow. Clearly, an airline, they want to take their
16 prepaid credits, as most have elected, for whatever reason,
17 because we have \$14 million still in our kitty out of twenty-
18 two, to apply that during the slow months at Orlando or at the
19 end of their applicable year.

20 I would just respond to a few points raised by
21 counsel. She talks about, Your Honor, if you don't have the
22 law argue the equities and makes it sound like this evil
23 airport and a lot of planning and strategizing out there that
24 we "breached for four months" and violated the automatic stay
25 by holding these prepaid credits. Your Honor, as was explained

1 and offered to you, the time line, we didn't have them for four
2 months.

3 First of all, we've got to wait, as we indicate, for
4 the September landings from Delta. That comes out usually
5 about a month later. And then we give an estimated in October,
6 we get audited, so by December 12th, yes, we know what the
7 prepaids are at that point in time. And, yes, Judge, once we
8 knew we had the prepaids and once we understood Delta disagreed
9 with us, not Delta itself but Delta's lawyers disagree with us
10 on how they'd be applied, because Delta paid October, November,
11 and December. They're on an auto-pay system. They didn't send
12 us a note saying, we're paying under protest or use our set-
13 offs. None of that occurred. They paid as they normally do.
14 The paid us on a going-forward basis.

15 When it came clear with the rejection that they took a
16 different position on how the allocation of prepaids should go,
17 then, Your Honor, we would, as the movants, came before this
18 Court and filed our motion. It was set for hearing earlier, we
19 agreed to defer it to today, and I'm glad we did. We resolved
20 ninety percent of what Your Honor would have heard today and
21 that's what you want us to do, but it wasn't a four-month
22 capture.

23 They talk about, Your Honor, this New Hampshire case,
24 and I conceded that if, in fact, we had moved for stay relief
25 earlier prior to the rejection, we would have been,

1 unfortunately, under the New Hampshire, but, Your Honor, the
2 New Hampshire case, again, I think is misplaced. And it's not
3 controlling, I believe, on Your Honor. Your Honor, the New
4 Hampshire case says -- and let me quote from it at Page 12.
5 The New Hampshire court made the following acknowledgment,
6 which is important to concede. New Hampshire says the
7 following quote, Page 12:

8 "We acknowledge that, when triggered by a timely post-
9 petition rejection, the relation-back rule served to transform
10 a future action for breach of an executory contract into a pre-
11 petition claim subject to set-off."

12 Clearly, Your Honor, we knew that with the rejection
13 motion --

14 THE COURT: That court held something else.

15 MR. KOBERT: Yeah, the court held something else
16 because under the facts of that case, Judge, there was no
17 pending rejection. So what the court said was you can't
18 complain --

19 THE COURT: Did the rejection come along later?

20 MR. KOBERT: I don't know. It doesn't tell us. But
21 it hadn't happened at that time.

22 But, Judge, what I'm saying is whether we do a New
23 Hampshire or not, it doesn't matter. We've set forth cases, my
24 favorite cases, my Judge Eaton cases, that say --

25 THE COURT: Well, let me ask you this. Suppose that

1 there never was a rejection. So then what?

2 MR. KOBERT: Judge, if there never was a rejection, I
3 think we still win. Let me tell you why.

4 If there is no rejection, what Colliers tells us, what
5 the cases we cited to, the Mays case --

6 THE COURT: Well, what would you be offsetting?

7 MR. KOBERT: We are allowed --

8 THE COURT: If there were no rejection.

9 MR. KOBERT: The intersection, which is not in Florida
10 law, there is no 365(g) in Florida law. It's made up by
11 congress only in bankruptcy court and what would happen --

12 THE COURT: If there were no rejection, then what
13 would you argue?

14 MR. KOBERT: Judge, if there was no rejection -- well,
15 first of all, if there was an assumption, we wouldn't be here.
16 Clearly, we all agree on that. But presume that there was no
17 rejection and rejection was Your Honor allowed them up to
18 confirmation to make that decision, which may be a year or two
19 years down the road, but let's presume you're correct, that we
20 don't know. We didn't know that rejection --

21 THE COURT: Wouldn't they be entitled to say, well,
22 we'll take the offsets now in accordance with the agreement?

23 MR. KOBERT: Your Honor, under the learned treatise of
24 Colliers and the cases we cite, we would have the right to come
25 in here like we're doing now and say, Judge --

1 THE COURT: Well, unfortunately, Colliers doesn't have
2 to decide this case.

3 MR. KOBERT: No, Your Honor.

4 But, Your Honor, what would happen, we'd come before
5 the Court like we're doing now and say, Judge, please don't
6 allow them to compel us, on turnover or otherwise, to utilize
7 these credits for post-petition activity.

8 THE COURT: Even though that's what the agreement
9 specifically says and that's what Florida law specifically
10 would allow?

11 MR. KOBERT: Well, Your Honor, again, on the contract
12 we have course of conduct for twenty-eight years and on Florida
13 law --

14 THE COURT: But you've just described it more amply
15 than Jackie Churchill did and what you've described is that the
16 airlines, after they learn what their entitlement is, tell you
17 exactly when they want them offset and you do it.

18 MR. KOBERT: Well, Your Honor, look at the opposite.

19 THE COURT: Which is understandable since that's what
20 the agreement says.

21 MR. KOBERT: But let's look at the opposite. If what
22 we're telling is instructive from the debtor, then I think the
23 teaching point for every future airline case or every future
24 debtor case is if you know that your creditor has some money
25 they owe you, even after doing the pre-against-pre, like the

1 two-and-a-half million dollars we're talking about, if you know
2 that exists, what Delta should have done -- what we're
3 instructing here is file a motion for turnover or for violation
4 of the stay, get Orlando International Airport to turn over the
5 two-and-a-half million dollars to apply to post-petition
6 obligations, and then, once you've spent their money, then
7 strategically reject. And now, sorry, creditor, you have
8 nothing to set-off against because your pre-petition money,
9 contrary to what Judge Beatty told us, has been perverted and
10 used to satisfy a post-petition obligation and we're going to
11 give you stock in the reorganized debtor and cents to the
12 dollar.

13 THE COURT: You know, it's really -- in a sense, it's
14 pre-petition money.

15 MR. KOBERT: Yes, Your Honor.

16 THE COURT: But as a contractual matter, the contract
17 says this is what you do with the credit. You use those
18 credits to offset post-year-end obligations. That's what it
19 says.

20 MR. KOBERT: Your Honor, you're correct, but there's a
21 big assumption in there. And it's clear under Florida law, and
22 New York law as well, I'm sure, it's a tenet of basic contract
23 law we all learned in school. If Delta had not paid pre-
24 petition, and that's what rejection damages are, pre-petition,
25 then we would have a right under anticipatory repudiation to

1 set-off against those amounts before we'd have to give them the
2 credits. Before we'd have to give them the credits.

3 THE COURT: I think I've got it. I think I have the
4 points. Is there anything else?

5 MR. KOBERT: Your Honor, if I can just talk about the
6 United case that was cited to by counsel?

7 THE COURT: Very briefly.

8 MR. KOBERT: Okay. Your Honor, the United case came
9 out last week by the Sixth Circuit -- Seventh Circuit last
10 Monday. I'm sure all airline lawyers talk to each other and
11 they were following that, so maybe precipitously they waited
12 and continued the hearing to wait for the ruling from the
13 Seventh Circuit. I'll never know. But we can sit here and
14 speculate all we want.

15 THE COURT: It's a conspiracy, I think.

16 MR. KOBERT: I think so, too, Judge. You know those
17 debtor aviation lawyers all get together and share their
18 stories and share their strategies.

19 And Delta's using one of those strategies that USAir
20 started. What is that? Reject the lease, as they did with the
21 airport and they're allowed to, and then instantaneously come
22 back and sign a lease for less space. We have to allow that
23 because we have FAA requirements and we have a duty to the
24 flying public.

25 So to the flying public, it's seamless. They don't

1 see a difference, but Delta gets the economic advantage, and
2 they're allowed to under the bankruptcy laws, to reject our
3 contract and then come back and mandate that we sign a new
4 contract with them for less space. Delta did that, that's
5 their business advantage, but they can't escape the fact that
6 if they want to do that, if they want to gin the game and
7 reject the lease, they've got to take the benefits with the
8 burden. And the burden is you took a claim that occurred post-
9 petition and they got rid of it, but they've created a pre-
10 petition claim. And we're in that unique situation where we
11 are pre-petition creditor with the pre-petition money to use
12 for pre-petition debt. Judge Beatty, in her case, would not
13 allow them to use our pre-petition money for a post-petition
14 obligation.

15 On the United Airlines case, Judge, I'm sorry, you
16 asked me to speak very briefly to it. In that case, Judge, you
17 look at the facts. U.S. Bank had authority pre-petition to
18 disburse funds on behalf of United. United Airlines made a
19 pre-petition draw request. U.S. Bank delayed it and waited for
20 United to file bankruptcy. Not our facts.

21 At bar, there is no money. These are credits. They
22 can't go out and spend them somewhere else. We're not making
23 payment to a third party. It's a pre-petition failure to act,
24 one within their control if they chose to say we're not going
25 to pay you, we're going to utilize the pre-petition credits and

1 treat it as such. We couldn't evict them. They're in
2 bankruptcy, Judge. We'd have to come before you and argue for
3 our set-off rights and we're also limited by the requirements
4 of the Federal Aviation Administration.

5 So, Judge, they're in control. They kept auto-paying
6 post-petition. We presumed they agreed with us. Obviously,
7 they do not. We can't reimburse them for October. They've
8 paid October, they've paid November, and paid December. They
9 get the benefit of rejecting the contract. We're stuck with
10 that, but they can't escape the fact that pre-petition dollars
11 should go to pre-petition debts as recognized in 365(g) and the
12 intersection with 553.

13 Thank you, Judge.

14 THE COURT: Ms. Katz

15 MS. KATZ: On one sentence, Your Honor.

16 THE COURT: Last word?

17 MS. KATZ: Last word.

18 Just want to make one point which I actually think you
19 had made already, which is unless and until the contract is
20 rejected, the parties had an obligation to abide by the
21 contract. And this contract was not rejected, except now as of
22 today, effective January 19th. And so up until that time they
23 had the obligation to abide by the contract and they failed to
24 do that.

25 THE COURT: I didn't sort of make it as a point;

1 rather, as giving rise to a conundrum. And the conundrum is:
2 Why should there be a difference in result because one airline
3 knows that it's going to reject, needs to reject very early,
4 but another airline doesn't, and exercises its right under the
5 code not to reject or is granted the right if it's contested
6 until confirmation? Or maybe it doesn't reject at the end of
7 the day, or maybe it's all worked out by stipulation.

8 MR. KOBERT: Your Honor, I agree --

9 THE COURT: Where is the principal way to
10 differentiate those situations? And I have a problem with
11 that, and I have a problem merging that with the fact that the
12 agreement says what it says. The agreement is very clear, what
13 it says. And you've been very clear, and Jackie Churchill's
14 affidavit is pretty clear as to what the practice is; and, that
15 is, that the airline tells GOA, apply it to these months, and
16 so we won't have to pay you for these months, and that's what
17 happens. And that's what they're entitled, as a matter of
18 contract law, to have happen.

19 Now is that contract entitlement to be set aside
20 because -- not under state law, but because of the overlay of
21 the Bankruptcy Code, which provides what has been referred to -
22 - I think not inaccurately -- as something in the nature of a
23 fiction; it's a pro-debtor fiction, if you will, of saying that
24 rejection damages are deemed to be pre-petition; i.e., the day
25 before the filing. Does that overlay, in essence, change state

1 law, state law contract obligations?

2 Especially where the set-off provision, 553, seems to
3 say that you get a set-off where you have a right of set-off
4 under state law. But your claim, Mr. Kobert, seems to be
5 predicated on state law with an overlay of the Bankruptcy Code,
6 and I'm not sure that that's what was contemplated by 553.

7 Anyway, I'll have to wrestle with it because you all
8 have been tremendously cogent in your arguments, and I'm very
9 grateful.

10 MR. KOBERT: Can I make one more point on that, on the
11 conundrum?

12 THE COURT: Absolutely, sure.

13 MR. KOBERT: I never looked at it that way, and that
14 is an interesting conundrum. I know -- realize, sitting in
15 your seat, you're looking for consistency and certainty in
16 outcome, and why should one airline case be treated differently
17 than another just because Delta made the decision early, rather
18 than waiting until confirmation. And that's an excellent
19 point.

20 And thinking about that here at the podium, which is
21 always where sometimes the interesting thoughts come --

22 THE COURT: Or, rather than waiting the issue to arise
23 until Delta gave an unequivocal instruction to offset as
24 against February, March and April, and then the issue would
25 arise, and you would make your arguments -- you see the

1 problem.

2 MR. KOBERT: I see the problem with we have a merger -
3 -

4 THE COURT: And I articulated seeking your assistance
5 in how to deal with it, of course --

6 MR. KOBERT: Well, Judge, you bring up an excellent
7 point. We've got a merger of contract law, state law,
8 bankruptcy law, and which one is on top of which. And we don't
9 get a chance to do a lot of good academic exercise sometimes in
10 the practice. And this case, I think has some good,
11 interesting academic challenges for us on a pretty pedestrian
12 topic; unique because, for my airport, we actually have money
13 left over, and the number is substantial. Typically, it's
14 economics, you don't bring it up; or because, typically, there
15 is no money left off when you -- after you set off pre against
16 pre, so we normally don't see this very much.

17 But what I would point out to solve -- I think to
18 solve your conundrum is there shouldn't be a difference in
19 outcome. I think that's what Your Honor was begging the answer
20 (sic), I think it should be the same. And I think the
21 Colliers, as well as the two cases we cited to, and the litany
22 of cases following, say the outcome should be the same, whether
23 it's -- whether you've moved to reject, or whether you wait
24 until confirmation, you can't gin the game that way. Airlines
25 or debtors should not be ginning the game that way. Whenever

1 they decide, there still is that right, because of 365(g), that
2 when it happens, you have this pre-petition claim.

3 Now when you mention state law, yes, state law, our
4 state, Florida, the Office Sport case, talks about, you know,
5 setting off against contingent plans, but they don't talk about
6 365(g) because 365(g) engages in this, I consider it legal
7 fiction, that it -- and pretend it happened back on September
8 13th, that there was this claim. That's an advantage for
9 Delta, and it's also a detriment in this case, because very
10 rarely do you have an airport that actually has money left
11 over. Every other airport that went before us, I think after
12 they did the pre against pre, the typical stuff you see every
13 day, there's no money left.

14 We happen to be in the envious position where we
15 actually have a positive balance, and Delta shouldn't be able
16 to take advantage of that. We should be able to take advantage
17 of that. We finally got one little victory for the creditors,
18 where they can reject, their prerogative, and do that. If they
19 didn't want to reject, they could have just assumed.

20 THE COURT: All right. Yes?

21 MS. KATZ: And just a last statement. If you follow
22 this, Your Honor, then they could simply, as you pointed out
23 earlier, withhold that money until the end of the case, then we
24 were entitled to that money, and they shouldn't be allowed to
25 position themselves that way.

1 MR. KOBERT: The case law is clear. Come in here,
2 file a motion for turnover, a motion for violation of stay.
3 They did not do that. We move, not them, Your Honor.

4 THE COURT: Yes?

5 MS. SATYAPRASAD: If I may, Your Honor.

6 THE COURT: Yes.

7 MS. SATYAPRASAD: Again, Shuba Satyaprasad on behalf
8 of the Creditors' Committee.

9 Your Honor, this is an issue that really concerns the
10 committee because the GOAA is trying to benefit from violating
11 the automatic stay in the Bankruptcy Code and from a breach of
12 an agreement. The agreement was very clear that credits --
13 stating how credits are to be applied, and the GOAA failed to
14 do that. And under GOAA's theory, parties can fail to perform
15 under contracts just in case a debtor may reject a contract in
16 the future. I don't think that's what the Bankruptcy Code
17 contemplates, and certainly that's a violation of the automatic
18 stay.

19 And here, the GOAA should not be able to benefit from
20 violating the stay and breaching its agreement, and nor should
21 others be emboldened to initiate similar self-help remedies.
22 And, therefore, Your Honor, the Committee joins the debtors'
23 objection to the motion. Thank you, Your Honor.

24 THE COURT: Okay. Well, thank you.

25 Mr. Huebner has risen portentously. Are you going to

1 argue, too?

2 MR. HUEBNER: Just -- oh, have I gained that much
3 weight, Your Honor?

4 (Laughter.)

5 MR. HUEBNER: We have nothing else for today, Your
6 Honor. Our next hearing is, I believe, March 14th; and, as
7 with this one, we will endeavor to lighten the docket as it
8 approaches.

9 THE COURT: All right. I thank you all very much for
10 really excellent presentations. I shall consider it, and try
11 to get a decision out quite promptly.

12 MR. HUEBNER: Thank you very much, Your Honor.

13 THE COURT: Thanks a lot.

14 COUNSEL: Thank you, Judge. Thank you, Your Honor.
15 Thank you for your time, Your Honor.

16 THE COURT: Have a nice day.

17 MR. KOBERT: You, too, Your Honor.

18 THE COURT: Don't stand on ceremony. I'm going to
19 just pick up my papers here.

20 (Counsel confer.)

21 (Proceedings concluded at 4:58 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

February 23, 2006

Coleen Rand
Certified Court Transcriptionist/Agency Director