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UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK

In re:)	Chapter 11
DELTA AIR LINES, INC., <i>et al</i> ,)	Case No. 05-17923 (ASH)
Debtors.)	Jointly Administered

**DP3's OBJECTION TO DEBTORS' MOTION PURSUANT TO
 SECTION 363 OF THE BANKRUPTCY CODE FOR AUTHORITY TO
 ENTER INTO AMENDMENTS TO PILOT WORKING AGREEMENT WITH
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL**

DP3, Inc. d/b/a Delta Pilots' Pension Preservation Organization and retired pilots James H. Gray, James Haigh, Reuben Black, William Wirth, James Bomar, Ronald Stowe, Richard Colby and Donald Mairose (collectively referred to as "DP3"), by their undersigned attorneys, hereby object to the Debtors' (collectively "Delta's") Motion Pursuant to Section 363 of the Bankruptcy Code for Authority to Enter into Amendments to Pilot Working Agreement with Air

Line Pilots Association, International (Docket Number 2531) (the “Motion”). In support of its objection, DP3 respectfully states:

SUMMARY OF OBJECTION

1. Delta asks the Court to approve the modification of its most significant collective bargaining agreement by means of Letter of Agreement #51 (“LOA #51”) which sets the stage for drastically reducing certain vested pension benefits of approximately 5,800 retired pilots. Delta seeks to use the most lenient standard by which its request may be judged and the most abbreviated process to implement these pension reductions, thereby circumventing more stringent requirements and standards congressionally mandated by Section 1113 of the Bankruptcy Code – the specific statutory basis for modifying a collective bargaining agreement (“CBA”) as well as the procedural and substantive protections accorded by the process for confirming a plan of reorganization. By agreeing to LOA #51, Delta disregarded Section 1113 and ignored its statutory obligation to propose modifications to a CBA only to the extent necessary to permit reorganization. Moreover, Delta failed to negotiate LOA #51 so as to treat fairly and equitably all creditors and affected parties. If approved, the relief requested will dramatically impact the negotiations of a plan without corresponding disclosures and protections afforded creditors in the confirmation process. Even if the use of Section 363 and the corresponding short notice were appropriate, Delta’s proposal should not be approved because it is not being made in good faith and violates ERISA. As such, the Court must deny Delta’s Motion and prevent it from implementing LOA #51 outside of Section 1113 and a plan of reorganization.

BACKGROUND AND JURISDICTION

2. DP3, Inc. is a Delaware, not-for-profit corporation formed in October, 2003 to preserve the earned pensions, health insurance and other benefits promised by Delta to its retired pilots and their dependents and survivors. DP3, Inc. currently has 2,700 members. The individuals who join DP3 in bringing this objection are retired pilots who serve as Trustees for DP3, Inc.

3. Delta currently provides pension and retiree benefits to approximately 5,800 retired pilots or their surviving spouses and children pursuant to benefit plans required under and incorporated into the terms of the Pilot Working Agreement, as amended and modified by letters of agreement, (collectively “PWA”) between Delta and the Air Line Pilots Association, International (“ALPA”).

4. The pension benefits discussed in this objection are vested interests in the Delta Pilots Retirement Plan (or the Western Air Lines Pilots Defined Benefit Plan) (the “Qualified Plans”), as well as the Delta Pilots Bridge Plan or the Delta Pilots Supplemental Annuity Plan (together the “Non-Qualified Plans”) (collectively the “Plans.”).

5. Unable to reach a consensual agreement with ALPA regarding modifications to the PWA and pension benefits, Delta initiated a Section 1113 proceeding by filing a motion with this Court on November 1, 2005 (Docket Number 1004), which was continued to allow Delta and ALPA to submit the arbitration. Delta and ALPA documented the arbitration agreement in Letter of Agreement #50 (“LOA #50”). Delta aborted the Section 1113 proceeding and the arbitration, however, when it subsequently reached an agreement with ALPA. Delta filed the current Motion and placed it on the calendar for a hearing on May 31, 2006, which is also the deadline for the current pilots to ratify LOA #51. Subject to ratification by the current pilots and

the approval of this Court of LOA #51, Delta will attempt to modify the PWA primarily to facilitate its ability to terminate the Plans, resulting in the retired pilots losing significant pension benefits.

6. Delta also seeks authority to issue \$650 million in notes to ALPA in exchange for modifying the PWA, terminating the Plans and having ALPA agree not to oppose plan termination. The notes will be issued “[i]n the event that the Delta Pilots Retirement Plan is terminated.” LOA #51, Bankruptcy Protection Covenant (“BPC”) Attachment 28-1, paragraph 5. In addition to paying ALPA \$650 million in notes, Delta asks the Court to approve a settlement of the current pilots’ claim in bankruptcy which, if approved, will total \$2.1 billion. The notes, the claim allowance and the other “consideration agreed to in the Bankruptcy Restructuring Agreement and this Bankruptcy Protection Covenant is in complete satisfaction of any and all claims and rights of ALPA in connection with the termination of [the Plans.]” BPC, Attachment 28-1, paragraph 6.

7. In addition to the “no opposition to termination” amendments made to Section 26 P. of the PWA, there are numerous additional objectionable terms in the BPC. The BPC provides for the assumption of the PWA as modified but not the assumption of the pension plans which may be terminated. It contains the requirement of an exculpation provision for the benefit of ALPA that may be objectionable, but its contents will be unknown until a plan and disclosure statement are filed. It provides for indemnification for ALPA for 50% for the first \$2,500,000 and then 100% after that for any action ALPA may have taken in negotiating LOA #51. To the extent that ALPA may have violated the rights of the retired pilots, ALPA has requested and Delta has agreed to fund the defense of those violations. The modification provides for the allowance of ALPA’s claim and its treatment under a plan of reorganization. It dictates plan

terms, which if not contained in the confirmed plan, give rise to an administrative claim for the “cost savings” and return the pilots to pre-LOA #50 PWA status with no regard to the impact that intervening events such as benefit plan terminations may have on the ability of the parties to return to that point.

8. Unlike the behind closed doors discussions with ALPA, Delta has neither negotiated with the retired pilots – those who will suffer swift and severe financial effects of the PWA modifications and resulting plan terminations – nor offered them any notes, replacement benefits or certainty as to the amount of their claims in bankruptcy for losses arising from the unilateral termination of their vested pension benefits. No other party is being offered any similar compensation or concession for the financial sacrifice that the approval of this agreement may impose upon them. The closest thing to compensation to other creditors that has been offered is the Rights Offering described in the Memorandum of Understanding (“MOU”) attached to Second Supplement to the Motion filed on May 17 (Docket Number 2561). This MOU was the result of negotiations by the Unsecured Creditors’ Committee. The Rights Offering, if implemented, provides to unsecured creditors the opportunity to fund the payoff of the \$650,000,000 of ALPA notes. Although it ostensibly gives the unsecured creditors a chance to increase their ownership share of the reorganized debtor, it puts hard cash in the pockets of the current pilots. Retired pilots, on the other hand, lose the same pension rights but receive a right to invest more money to buy a chance at recovery. The MOU does not even guaranty an exercise price that would make such an additional investment likely to be beneficial to the retired pilots and other unsecured creditors. The uncertainty of the exercise price is in stark contrast to the ALPA note provisions that in essence guaranty an interest rate high enough to insure that the notes will trade at par upon issuance.

9. Delta in this Motion seeks to ramrod LOA #51 through a hurried and dubious Section 363 process rather than a comprehensive plan approval process, and without the proper appointment of an authorized representative to negotiate for and protect the valuable interests of retired pilots.

10. Although the retired pilots were dues-paying members of ALPA when the rights to the now-vested pension benefits first were negotiated, ALPA has repeatedly stated that it does not represent the interests of retired pilots. ALPA objected to providing any discovery to the unsecured creditors' committee regarding the justification for the compensation ALPA members will receive for their "concessions" under the terms of LOA #51. The one matter in which ALPA did support the retired pilots in this case- DP3's motion to have post-petition payments made to Plans- ALPA has agreed to abandon in the event that the Delta Retirement Benefit Plan is terminated (and their rights to the ALPA notes are triggered.) BPC, Attachment 28-1, paragraph 7. Thus, ALPA denied any representation of the retired pilots in this process and has consistently and deliberately excluded them from its negotiations with Delta. All the while, however, ALPA was bargaining away the retired pilots' vested pension benefits in exchange for \$650 million in notes and a very substantial claim in addition to other benefits.

11. No one represented the retired pilots' interests in the Section 1113 process initiated, but now abandoned, by Delta in connection with its November 1, 2005 motion to reject the CBA (the "1113 Motion"). Likewise, no one represented the interests of the retired pilots at any stage of the negotiations that led to LOA #51.¹ The deliberate exclusion of an authorized representative of the retired pilots from the bargaining table has directly resulted in the disregard

¹ Prior to Delta announcing LOA #51, DP3 filed a motion to be appointed authorized representative for the retired pilots which is set to be heard on the same date as the Motion.

and trampling of the retired pilots' pension rights. Delta now seeks this Court's approval and sanction of this unjust result.

LEGAL AUTHORITY AND ARGUMENT

I. DELTA HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF 11 U.S.C. § 1113, AND ANY AMENDMENT OF THE PWA WITHOUT SUCH COMPLIANCE SHOULD BE DENIED.

12. Once Delta sought the protection of the Bankruptcy Code, it was required to follow a congressionally mandated two-step process before attempting to modify or terminate collectively bargained pension benefits. In step one, Delta must meet the requirements of Section 1113 and remove any requirement from its CBA that prohibits Delta from terminating the pilots' pension plan or any payment due under the Plans. In step two, Delta must satisfy ERISA's distress termination provisions. See 29 U.S.C. § 1341(c)(2)(B)(ii)(IV). The Motion was Delta's effort to satisfy the first step, but Delta seeks to sidestep the requirements of both Section 1113 and the Second Circuit's mandate requiring the appointment of an authorized representative for retirees to negotiate such modifications to collectively bargained pension rights. In re Century Brass Products, Inc., 795 F. 2d 265, 275 (2d Cir. 1986).

13. Section 1113(f) of the Bankruptcy Code provides that, "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." 11 U.S.C. §1113(f). To comply with Section 1113, a debtor in possession must "make a proposal to the authorized representative of the employees covered by [the CBA] . . . which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably." 11 U.S.C. §1113(b)(1)(A).

14. This Court noted the importance of all of these elements being contained in the recent decision involving Comair's Motion to Reject Collective Bargaining Agreement. In re Delta Air Lines, 2006 WL 1233151, *7. Delta never has made such a proposal to the retired pilots, despite their clear status as "affected parties" under LOA #51. Delta apparently assumes that it can unilaterally terminate the vested pension rights of the retired pilots without negotiating with their representative. It is asking this Court to find that reimbursing one group for its "requested sacrifice" with \$650,000.00 in Notes and \$2.1 billion in allowed claims and ignoring another group making the same sacrifice be somehow fair and equitable.

15. Delta's negotiations with ALPA do not save its actions regarding bargaining away retired pilots' vested pension rights and orchestrating termination of the Plans from being unilateral, improper modifications of a CBA and of vested pension benefit rights. ALPA may be the authorized representative for current pilots, but ALPA made it abundantly clear that it did not represent the retired employees. Thus, ALPA cannot negotiate regarding the benefits of the retired pilots. In re Ionosphere Clubs, Inc., 134 B.R. 515, 520 (S.D.N.Y. 1991) ("ALPA, the bargaining unit, cannot negotiate retiree benefits after electing not to represent the pilot retirees under Section 1114. Once ALPA opted out of retiree representation, its ability to do so was extinguished.").

16. Further, in In Century Brass, the Second Circuit stated that while retirees are "generally capable of being represented by the union as their 'authorized representative,'" during § 1113 proceedings, courts have recognized that "it may not always be appropriate for a union to represent both active and retired workers in modification proceedings." In re Century Brass Products, Inc., 795 F. 2d 265, 275 (2nd Cir. 1986); see also Pittsburgh Plate Glass, 404 U.S. 157, 173 (holding that although an employer and union may agree to bargain over the modification of

retiree benefits, forcing a union to represent both active employees and retirees can “create the potential for severe internal conflicts” and create the risk that “union representatives may see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees’ benefits”).

17. In Century Brass, a debtor filed a Chapter 11 petition and initiated discussions with its union wherein the debtor proposed a series of changes to its CBA, including terminating its existing pension plan and changing retirees’ insurance benefits. The union told the debtor that because the union was not the “authorized representative” for retirees, the debtor would have to negotiate directly with retirees regarding any modifications to their vested retirement benefits. The debtor refused to remove from its proposal the issues related to retiree benefits, and the union thus rejected the debtor's proposal to modify the CBA. In re Century Brass, 795 at 275.

18. Century Brass then filed its motion pursuant to § 1113 of the Bankruptcy Code. The bankruptcy court granted the motion and the district court affirmed, but the Second Circuit reversed the rulings and held that Century Brass failed to satisfy the procedural and substantive requirements of § 1113 because the debtor "failed to meet its threshold burden of negotiating with a representative of the company's retired employees covered by [the CBA]." In re Century Brass, Id at 276.

19. The Second Circuit held in Century Brass that, in order to promote the policies of flexibility and equity built into the Bankruptcy Code, retirees should be deemed to be “employees” for purposes of applying § 1113. Id. at 274-75. The court held that if “retiree benefits are the subject of bargaining between the union and the employer, and no modification can occur absent the retirees' consent, those retirees **must be represented in the negotiations.**” Id. at 274 (emphasis added).

20. The court further stated that, while the appointment of an authorized representative for retirees in Section 1113 negotiations and proceedings “departs somewhat from a literal reading of § 1113, well-established precedent for an appointment of this sort is found in other areas of the law.” Id. The Second Circuit then reversed the bankruptcy court's Section 1113 ruling and remanded the case “with instructions to the bankruptcy court to appoint a representative for the retired employees of the debtor, and for such further proceedings under § 1113 as are appropriate.” Id.; See also In re Unimet Corp., 842 F.2d 876, 880 (6th Cir. 1988) (reversing “the judgment of the district court to the extent that it held that 11 U.S.C. § 1113's protection does not apply to retirees covered by provisions of a collective bargaining agreement” and emphasizing that § 1113(f), which states “[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section,” protects both employees and retirees).

21. The Seventh Circuit recently recognized the continued viability of Century Brass. See In re UAL Corp., 2006 WL 8273078 (7th Cir. March 31, 2006). Because of the advanced stage of the proceedings and “to avoid the unraveling of the [termination of the plans] and perhaps the entire bankruptcy,” however, the Seventh Circuit declined to reverse the bankruptcy court’s ruling barring the retired pilots from having an appointed representative in the negotiations leading up to the letter of agreement because “there [was] no longer any feasible remedy that a court could order.” Id. at 12.

22. Unlike the Seventh Circuit facing the issue in UAL Corp., this Court is able to and should fashion a feasible remedy for the retired pilots by (a) denying the Motion until Delta complies with the requirements of Section 1113, and (b) appointing an authorized representative

to negotiate on behalf of the retired pilots to protect their interests in their vested pension and collectively bargained for pension benefits. DP3 currently has a motion pending before this court for such an appointment to be the authorized representative which it filed on April 17, 2006 (Docket Number 2428), and which is set on the same date as the Motion.

23. Century Brass applies directly to this case because Delta is attempting to modify vested retiree benefits without so much as presenting a proposal to the retired pilots, much less actually negotiating with an authorized representative of the retired pilots as required under Section 1113. Further, ALPA – the very union that originally brokered the pension benefits for the retired pilots – has abandoned the retired pilots in this critical negotiation. Moreover, despite Delta and ALPA forsaking the retired pilots, they somehow have seen fit to strike a deal to forfeit retired pilots’ vested pension rights in exchange for valuable consideration that is not even payable to the retired pilots. Nothing about the negotiation or its result could be more at odds with the inherent flexibility and equity of the bankruptcy process or more in keeping with the reason the Second Circuit Court of Appeals established the precedent of Century Brass that when a debtor attempts to unilaterally modify collectively bargained pension benefits, the aggrieved retirees are entitled to representation and the protections established by Section 1113.

24. Because no authorized representative has been appointed to represent the retired pilots' interests in the Plans, the relief sought by approval of the Motion violates section 1113(f), as well as the notions of equity and flexibility inherent in the bankruptcy process, and thus must be denied.

II. DELTA’S RELIANCE ON MERELY A BUSINESS JUDGMENT TEST UNDER §363 AS A BASIS FOR APPROVAL OF MODIFICATIONS TO THE COLLECTIVE BARGAINING AGREEMENT IS INAPPROPRIATE UNDER THE CIRCUMSTANCES OF THIS MOTION.

A. Delta’s Motion is a Modification of a Collective Bargaining Agreement and a Higher Standard Requiring Proof of the Fairness and Equity to All Creditors and Affected Parties Should be Applied.

25. The only statutory basis given by Delta for the approval of its Motion is Section 363(b)(1) dealing with the use, sale or lease of property of the estate. Delta asks to make “certain modifications to the PWA” and contends that doing so is a permitted exercise of its business judgment which the Court should be loath to second guess. However, even before the enactment of Section 1113, the Supreme Court recognized that the treatment of collective bargaining agreements was different than other executory contracts. National Labor Relations Board v. Bildisco, 465 U.S. 513, 524 (1983). “Because of the special nature of a collective bargaining contract . . . a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective bargaining agreement.”

26. The special nature of these contracts was recognized in the enactment of Section 1113 and its requirements for rejection. The language of Section 1113(c) provides that the court shall approve an application for rejection... only if the court finds that the trustee has , prior to the hearing made a proposal that fulfills the requirements of section (b) (1).” 11 U.S.C. § 1113(c). Those requirements include the debtor’s “assuring that all creditors, the debtor and the affected parties are treated fairly and equitably.” 11 U.S.C. §1113 (b)(1)(A). Section 1114 contains similar criteria for changes to retiree benefits. The simplistic “business judgment” standard applicable to Section 363 is not relevant to Delta’s decisions that impact modification governed by Section 1113 and 1114 of the Bankruptcy Code.

27. DP3 anticipates that Delta will contend that Section 1113 and its higher standard are not applicable because Delta reached a consensual agreement with ALPA rather than an application for rejection. The opening preamble of LOA #51, however, exposes the sophistry of

such a simplification of the relief requested. LOA #51 begins with the recital that this “Agreement is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, and Section 1113(c) of the United States Bankruptcy Code” Section B. of LOA #51 further provides that “[e]xcept as specified [herein], this [Agreement] does not change any term of the PWA or any term of the welfare and retirement plans under the PWA.” LOA #51 goes on to specify changes in PWA specifically relating to welfare benefits and retirement benefits for current pilots in Section 25 (Medical, Dental, Optional Life and Accident Insurance Benefits), Section 26 (Retirement, Basic Life Insurance, Disability and Survivor Benefits) and the BPC. Although the Motion purports that the requested relief will not impact the “1114 Provisions” as defined by Delta, there can be no denying that LOA #51 as written undeniably does make such modifications prior to Delta’s compliance with section 1114 of the Bankruptcy Code.

B. The BPC is an Attempt by Delta and ALPA to Dictate Substantial Provisions of the Plan Without the Disclosures and Protections Afforded by the Plan Confirmation Process.

28. In addition to “certain modifications,” the BPC is an entirely new section of the PWA which clearly has an impact on the contents of and the confirmation process for a plan of reorganization from the required plan provisions to the exculpatory and indemnification clauses to springing administrative claims in the event of a confirmed competing plan. LOA #51 and in particular the provisions of the BPC constitutes a *sub rosa* plan that denies the protections of the plan confirmation process to the creditors. The Debtor should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* under section 363. In re Braniff Airways, Inc., 700 F.2d 935,940 (5th Cir. 1983.)

29. The BPC provides for a \$2.1 billion allowed claim for ALPA with no disclosure of what the claim might be without this agreement. That consideration is over and above the \$650,000,000 in ALPA notes that are likely to be paid on the Effective Date with no disclosure of what the Rights Offering exercise price may be. Whether the PWA is assumed or rejected under Section 365 of the Bankruptcy Code remains open. Nevertheless, Delta and ALPA receive the benefits of an assumption while the retired pilots receive the burden of rejection.

30. The BPC also contemplates exculpation of ALPA to the same extent as the management and officers of Delta. If Delta is contemplating a broad release of these nondebtor parties, Delta's agreement to the provision may present a significant hurdle to plan confirmation. Under the stringent standards of the Second Circuit's recent ruling in Metromedia Fiber Network case, ALPA may not qualify for such a release. Deutsche Bank AG et al. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.) 416 F.3d 136, 142 (2d Cir. 2005). ("No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique.") If this relief were requested as part of a plan, the creditors would know the terms of such a release and any corresponding indemnification provision. At a minimum, any approval of the Motion by this Court should reserve to any party the right to object to such exculpation and indemnification provisions to the extent that these provisions are included in a plan of reorganization.

31. In addition to not being afforded the protections of the plan process, the Motion does not provide the retired pilots with any certainty regarding the assumption of the PWA. Had Delta had brought the Motion under Section 365, it would have been forced to inform affected parties as to if, how and when Delta planned to cure the existing defaults. 11 U.S.C. §365(b)(1)(A). Those affected parties then could have raised the issue of Delta's ability to

perform in the future. Delta's attempt to end run all of these protections that contracting parties are given in the Bankruptcy Code should be rejected.

C. Delta's Motion is Not in Good Faith and in the Interests of All Creditors Because it Fails to Consider the Diverse Interests of Creditors and Its Fiduciary Duties as a Plan Sponsor.

32. Delta argues that the only standard by which it should be judged is whether it used good business judgment, relying on In re Global Crossing Ltd., 295 B.R.726, 743 (Bankr. S.D.N.Y. 2003). Delta contends that Global Crossing requires this Court to be "loath to interfere absent a showing of bad faith, self-interest, or gross negligence." (Motion at 9.) Delta's reliance on this case is misguided, however, since courts in this district have repeatedly held that Section 363(b) does not grant the bankruptcy court unfettered discretion to authorize the use of property in an estate. See In re Lionel Corp., 722 F.2d 1063, 1069-70 (2d Cir. 1983). The courts rather have adopted and consistently applied a rule that requires a judge in bankruptcy to analyze all salient factors and, accordingly, act to further the diverse interests of the debtor, creditors, and equity holders alike. Id. at 1071; see also, In re Enron Corp., 335 B.R. 22, 28 (S.D.N.Y. 2005). The court in Lionel stated that appeasement of major creditors and the need for expedition are insufficient justifications to grant approval. Id. Finally, in In re Ionosphere Clubs, 100 B.R. 670, 675 (S.D.N.Y. 1989) the court stated that analysis of each factor enumerated in Lionel should "provide the guidance necessary for determining whether [the company] has indeed met its burden in establishing that it has used good business judgment." Two of those factors are the likelihood that a Plan will be filed in the future and the effect of the proposed disposition on the future plans of reorganization. In re Lionel Corp., 772 F.2d at 1071. The Motion refers to LOA #51 as a "milestone" but does not indicate when it will be reached. Motion at 5. Delta does

describe many of the provisions that it has agreed to put in the plan but does not explain how those provisions may affect confirmation.

33. Even assuming the lenient business judgment standard applies as Delta urges, Delta's alleged business reasons for entering LOA #51 are suspect. The primary justification Delta cites is fear of a strike authorized by ALPA. As this Court recently stated in In re Delta Air Lines, ___ B.R. ___, 2006 WL 1233151, *15 (Bankr. S.D.N.Y.2006) "the Court must be mindful of the needs of a debtor-in-possession and all its constituencies as appropriate under the Bankruptcy Code, a motion to reject under section 1113 must be resolved by applying the tests articulated in the statute." The court should render a decision "based solely on the evidence and statutory merits, *without regard whatsoever to threats by either side.* (emphasis added)" Id. at 15. Further, in determining whether a debtor should be permitted to use property outside of the ordinary course of business, a court should not "blindly follow the hue and cry of the most vocal special interest group." Lionel, 722 F.2d at 1071.

34. Delta improperly attempts to avail itself of a more lenient business judgment standard for its decision to enter into LOA #51 and then improperly attempts to convince the Court that the only salient factor to consider in approving LOA #51 is ALPA's threat to strike. This court should consider, as instructed by Lionel, all salient factors pertaining to LOA #51, including the inordinate inequitable impact of LOA #51 on the retired pilots, and should deny the Motion because it completely ignores the diverse interests of the retired pilots and attempts to dress Delta's submission to ALPA's draconian suicidal threats in the garb of sound business judgment.

D. Delta's Actions in Reaching LOA #51 Violate the Employee Retirement Income Security Act of 1974, as Amended ("ERISA").

35. Congress enacted ERISA to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits. In re Unisys Corp. Retiree Med. Ben. ERISA Litigation, 58 F.3d 896, 901 (3d Cir.1995); see also Hunger v. AB, 12 F.3d 118, 119 (8th Cir.1993) (ERISA ensures that an employee will not lose fully vested, accrued benefits in the event an employer terminates or amends its pension plan). LOA #51 purports to allow Delta to avoid its obligations to pay vested benefits to retired pilots. Were this Court to grant the Motion, and thereby approve LOA #51, it would allow Delta to shirk its obligations to the retired pilots and undermine the central premise of ERISA.

36. It is irrefutable that ERISA exists to protect employees' justified expectations of receiving the benefits their employers promise them. "ERISA . . . seek[s] to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits. . . . [W]hen Congress enacted ERISA, it wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he actually will receive it." Lockheed Corp. v. Spink, 517 U.S. 882, 887 (quoting Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 375 (1980) (citations omitted)). The retired pilots logged years of dedicated service to Delta and, in doing so, fulfilled the conditions required to receive the valuable income Delta promised would be there when they retired. Delta now asks this Court to authorize it to renege on its pension promises despite having capitalized on the dedicated service of the retired pilots. The Court must deny the Motion because it will defeat the retired pilots' retirement benefit expectations, negate Delta's retirement benefit promises, and leave the retired pilots empty-handed – all in contravention of ERISA.

1. Delta Breached Its Fiduciary Duty by Excluding Certain Plan Participants from Negotiating Over the Loss of Their Vested Pension Benefits and By Abusing Its Position of Trust to Advance Its Own Selfish Interests.

37. Delta exercises both discretionary authority and control respecting management of, and disposition of assets from the Plans. Thus, Delta is a fiduciary with respect to the Plan. 29 U.S.C. Section 1002(21).

38. As a fiduciary, Delta is bound to discharge its duties with respect to the Plans solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. 29 U.S.C. Section 1104(a)(1)(A). Courts have construed the “exclusive purpose” rule to require a duty of loyalty pursuant to which all decisions regarding an ERISA plan must be made solely in the best interests of the participants and beneficiaries, and have held that this duty of loyalty is the highest known to the law. Bussian v. RJR Nabisco, Inc., 233 F.3d 286 (5th Cir. 2000).

39. Repeated use of the phrase “the participants and beneficiaries” shows that Congress and the courts intended that this high duty of loyalty extend to **all** Plan participants and beneficiaries. ERISA cannot be construed to permit a fiduciary to act in the best interest of **some** of a plan’s participants. Delta in this case, however, has seen fit to deal with but a chosen few participants in exchanging replacement benefits for forfeited vested Plan benefits.

40. Delta led the retired pilots to believe that ongoing negotiations would not impact the Plans. Further, Delta excluded the retired pilots from important negotiations directly affecting vested pension benefits, even when Delta knew that the only other party to the negotiations had determined not to represent the retired pilots’ interests. By negotiating over pension modifications and plan terminations solely with ALPA and kowtowing to its demands on behalf of but a **special group** of plan participants, Delta derogated its duty of loyalty to **all** plan participants. This Court should deny the Motion and disapprove an agreement that alleges

to bind a group of ERISA plan participants to forfeiting their vested retirement rights despite having been barred from the bargaining table by the very party specifically charged with protecting those rights.

2. Delta's Promise to ALPA to Provide Replacement Benefits Improperly Diverts Funds That Should Go to Fund Current Benefits.

41. Delta promises in paragraph Q of LOA #51 to provide a contribution of 9% of earnings to active pilots who participate in the Delta Pilots Defined Contribution Plan. Delta also promises in paragraph Q of LOA #51 to give active pilots notes in the amount of \$650 million. Delta has made no such promises or any similar offers to retired pilots. Delta has not proposed that any of it be paid to the Plans.

42. In creating a passel of new benefit plans for active pilots, Delta essentially transfers funds to the active pilots that should be used to pay vested pension benefits to retired pilots. Alternatively, these funds at a minimum should be earmarked to improve overall funding levels of the Plans before they are terminated.

43. The Court should deny the Motion based on the tremendous inequity resulting from Delta's pledging money to fund new benefits for active pilots in lieu of funding current vested benefits for its retired pilots.

WAIVER OF MEMORANDUM

44. In as much as the relevant legal authorities are set forth herein, no novel issues of law are raised and in reliance on Order Approving Notice, Case Management and Administrative Procedures entered on October 6, 2005 ("Procedures Order") (Docket Number 660), DP3 has not filed a separate memorandum in support of its objection.

WHEREFORE, DP3 respectfully requests that the Court deny the Motion and grant such further relief as may be equitable under the circumstances of this case.

Respectfully submitted,

/s/ Shelley D. Rucker

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Simultaneously, a true and exact copy of the foregoing was served by deposit thereof in First Class U.S. Mail on the non-ECF service list downloaded from the case information website on May 23, 2006, and dated as of March 16, 2006.

This 23rd day of May, 2006.

/s/ Shelley D. Rucker

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