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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

DELTA AIR LINES, INC., et al.

Debtors.

Chapter 11

Case No. 05-17923 (PCB)

(Jointly Administered)

**SECTION 1114 COMMITTEE'S REPLY MEMORANDUM IN SUPPORT OF
MOTION TO REQUIRE COMPLIANCE WITH SECTION 1114**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Five critical points, requiring application of Section 1114, remain unrefuted by Delta's and the Creditor Committee's Oppositions:

(1) Delta's severance payments since March 1, 2002 are unauthorized and prohibited by the Trust Agreement for the Delta Family-Care Disability and Survivorship Trust (the "Trust").

(2) The only authorization for Delta's payment of sick time pay out of the Trust was an invalid retroactive amendment of the Delta Family-Care Disability and Survivorship Plan (the "Plan"). Delta made this amendment *two days* before its bankruptcy filing and during the period when amendments are invalidated by new Bankruptcy Code Section 1114(*l*), which became effective in April, 2005.

(3) The plain language of Section 1114 applies to the Trust. It is certainly a protected "plan, fund or program" "maintained or established in whole or in part by the debtor" to pay retiree "accident, disability or death" benefits. 11 U.S.C. § 1114(a). Delta changed (and violated) the payment terms of the already under-funded Trust, which has endangered the security of payment for critical protected benefits.

(4) Section 1114 has only two central requirements: First, prior to implementing a change, the Debtor must provide reasonable information and try to reach an agreement with the retiree Committee. Second, if the parties fail to agree, the Debtor must demonstrate the basic fairness of the changes to this Court under Section 1114(g).

(5) Section 1114, and the relief requested here, impose a small burden of relatively short duration on Delta, particularly in contrast to the accelerating risk to payment of disability and survivor benefits to retirees and their survivors. Section 1114 imposes no absolute bar to change, and does not mandate that the fairness determination be lengthy or oppressive.

Instead of refuting these dispositive points, Delta asserts that it can deplete the Trust and shorten its life because it is not yet cutting off survivor benefits. Delta simply ignores Section 1114's protection of "*any*" benefits, which includes retirees' present **and future** interests in payments from plans and funds like the Trust. Delta also ignores the fact that after Congress's recent amendment adding Section 1114(*l*), it is clear that Section 1114 must necessarily apply to benefits that are "amendable" by the debtor outside bankruptcy. Section 1114(*l*) *only* applies to benefits that the Debtor, in fact, did amend in the 180 days before the filing.¹

The statutory language, fairness, and practicality all require compliance with Section 1114 here. If Delta can freely violate the Trust Agreement and amend the Plan to pay over \$52 million in severance and sick pay, without even the minimal consultation and fairness inquiry of Section 1114, Delta will soon empty the Trust. Difficult negotiations lay ahead with ALPA, with the Unsecured Creditors Committee over the plan, and with exit financing lenders and others. Every time Delta says its cash flow won't support additional large payments, the other party will suggest the extra \$100 million be taken from the Trust to pay a different Delta employee health and welfare expense, with the cash flow thus freed up given to the creditor with leverage. The consequence—if this Court accepts Delta's arguments—would deplete the Trust within months, not years. Congress passed Section 1114 to avoid this exact result, and this Court should apply it.

II. THE DISPOSITIVE FACTS ARE UNCONTESTED.

Delta spends some 12 pages on attempting to create factual disputes regarding the documentation and the relationship between the Trust and the Plan, but concedes the basic facts requiring the application of Section 1114. The Plan has existed for 31 years (Objection and

¹ Delta also regrettably responds with a parade of shrill straw men and meritless personal snipes, completely irrelevant to the dispositive issues and not warranting a response.

Memorandum of Law of the Debtors to the Section 1114 Committee’s Motion to Enforce Section 1114 Obligations (hereinafter “Obj.”) at 5) and until Delta’s amendment two days before the bankruptcy filing to add qualified sick pay as a retroactive benefit, the Plan was used only to pay disability, survivor income, and life insurance benefits. *See id.* The Plan (even as amended and restated by Delta on the eve of bankruptcy) has never permitted payment of severance benefits.

Originally, the Trust was set up solely to fund payments under the Plan, and no other benefit programs. (December 5, 2005 Declaration of Dean M. Gloster in Support of Committee’s Motion to Enforce Debtor’s Section 1114 Obligations (hereinafter “Gloster Decl.”), Ex. D, Trust Agreement, Recital A.) This is how the Trust functioned for almost two decades. (Obj. at 7.) From the time it was set up in the 1980s until the present, the Trust did not authorize payment of any severance obligations, with one brief exception: in the aftermath of September 11, 2005, for a short five-month period, the Trust was amended to temporarily permit payment of severance benefits under several named Delta programs that Delta says are no longer in force. The September 11, 2001 amendment to the Trust (the “Trust Amendment”)—the only amendment to the Trust since it was restated in 1994—added to the definition of “Plan” funded by the Trust three specific, stop-gap severance programs.² At the same time, the Trust Amendment added section 3.1(c) which prohibited payment of severance under any of those programs for claims that arose after March 1, 2002.

² These 9/11 “stop-gap” severance programs were: (1) The Delta Air Lines, Inc. Recovery Plan Voluntary Severance Program; (2) the Delta Air Lines, Inc. Recovery Plan Published Pay Scale Employees Involuntary Reduction in Force Program; and (3) the Delta Air Lines, Inc. Recovery Plan Supervisory/Administrative Employees and Corporate Administrative Support Employees Involuntary Severance Program. (Trust Amendment, Gloster Decl., Ex. B at § 1.)

Delta concedes it is currently paying severance and supplemental unemployment benefits under “a substantial number” of programs that are not those for which the Trust was amended to authorize payment. (Obj. at 9, 27, 34.)

Similarly, until two days before the bankruptcy, nothing in the Plan or the Trust authorized Delta to pay sick pay out of the Trust.³ Then, by an amendment dated September 12, 2005, Delta purportedly restated and amended the Plan effective as of January 1, 2004, and the amendment included the new concept of “Certified Time” in Section 4.02 of the Plan. Before adopting this change to the Plan on the eve of bankruptcy, Delta had already paid over \$22 million in sick pay out of the Trust in 2004, without any authorization, in addition to paying an unknown amount in 2005.

III. ARGUMENT

A. Delta’s Argument That It Had Authority To Pay Severance Out Of The Trust Is Foreclosed By The Clear And Unambiguous Language Of The Trust, The Plan And Section 1114.

Delta concedes that the Plan does not allow payment of severance benefits. Delta argues, however, that the 2001 Trust Amendment allows Delta to fund any “permissible” welfare benefit from the Trust, including severance, without further amending either the Trust or the Plan. The plain language of the Trust, however, does not allow such payment.

³ Delta apparently did revise its procedures for calculating sick time, effective January 1, 2004. That change to sick time was apparently documented as a change to Delta human resource policies, which said nothing about how the benefit change would be funded. (Declaration of Kelley Torpey (hereinafter “Torpey Decl.”), Ex. 12.) Also Section 4.01 of the Plan, added as an amendment on March 1, 1995, did not add sick pay to the covered benefits, but limited short-term disability to those actively under a doctor’s or surgeon’s care in a prescribed treatment plan for a disabling condition.

1. The Trust Does Not Authorize Funding Of Delta-Defined “Plans,” Including “Subsequent Severance Plans,” And Those Terms Are Not Even Used In The Plan Or The Trust.

Delta concedes that “the D&S Plan and the 2001 Severance Plans are the only plans identified by name in the Trust” (Obj. at 29) and that Delta’s severance payments for the last three and a half years have not been made under any of those plans.⁴ (Obj. at 27, 34.) Delta nonetheless argues that the term “Plan,” as defined completely differently in the Trust, should include any *future* severance plan Delta adopts. Therefore, says Delta, it need not have sought to amend the Trust to make severance payments under new plans—it was enough that Delta created new severance plans, even if the Trust or the Plan did not expressly authorize their funding.⁵

There are four problems with Delta’s argument:

(1) It is directly contrary to the language of the Trust, which is unambiguous. The Trust only permits funding of the Plan (which does not include severance payments) and the terminated stop-gap severance programs.⁶

⁴ The Committee has been unable to verify the accuracy of this assertion by Delta. It is clear that severance payments were made in 2002 in violation of the Trust, but some of those prohibited payments may have been under the 2001 Severance Plans. The Committee continues to seek more information from Delta, which until filing its Objection three days ago still had not provided the Committee with copies of the “2001 Severance Plans” or the “Subsequent Severance Plans” identified in Delta’s Objection.

⁵ Delta similarly argues that its Subsequent Severance Plans authorized their funding from the Trust without Delta actually amending the Trust or the Plan. But, again, the plain language of the Trust, as well as applicable law, prohibits this result, since the Trust allows only funding the Plan and the three (expired) stop-gap severance programs. Indeed, even if the Subsequent Severance Plans mandated funding from the Trust, the Trust language controls (Gloster Decl., Ex. D, Trust Agreement at § 2.2) and the Trust does not allow severance payments after March 1, 2002 (*id.* at § 3.1(c)). Under the Trust’s unambiguous requirements of a signed agreement with the Trustee, (*id.* at § 13.2) Delta cannot merely unilaterally authorize “payments from the Trust in a related plan document” not authorized by the Trust. (Obj. at 36.)

⁶ While the Trustee takes payment instructions from the Administrative Committee as Delta argues (Obj. at 33), those payments must “conform to the provisions of the Plan” as defined in the Trust. Again, the only operative Plan is the Plan, which does not allow for severance payments. Trust Agreement at § 3.1(b).

(2) If, as Delta essentially argues, the reference in the amended Trust to the three, stop-gap severance programs should be read with the addition of “and all future severance programs Delta adopts that refer to this Trust,” then the restriction in 3.1(c) must also apply to those future programs. This restriction expressly bars severance claims that arise after March 1, 2002.⁷

(3) The Trust Agreement says that it (and not some future separate program) is the “entire agreement between the parties in connection with the subject matter” (Gloster Decl., Ex. D, Trust Agreement at § 13.2).

(4) The Plan, in § 11.04, requires the restrictions in the Trust to be strictly interpreted, with no disbursement allowed “except as *expressly provided* in the Plan *and* the Trust.” *Id.* (emphasis added).

Again, here there is no dispute: the Trust expressly does not provide for funding of the Subsequent Severance Plans.⁸

2. The “Discretion” Of The Administrative Committee Does Not Permit Disbursements Contrary To The Trust Agreement.

Delta argues that the Administrative Committee can exercise its discretion under the Trust, and that this discretion “necessarily includes determining” which programs are “Plans” under the Trust. (Obj. at 30.) Again, Delta’s interpretation is directly contradicted by the documents: (1) the Trust specifically prohibited payment of severance claims that arose after

⁷ Delta argues that 3.1(c) only applied to the three stop-gap severance programs (Obj. at 8), and that Delta did not make payments after March 1, 2002 under these programs. Delta misses the point. These were the only programs that allowed severance, and the Trust expressly limited severance funding to claims arising prior to March 1, 2002. Either Delta paid severance improperly under these programs, or Delta paid severance improperly under a plan unauthorized by the Trust.

⁸ Delta attempts to muddy the discussion by asserting the great divide between the Trust and Plan and that the Committee blurs the difference between the Plan and the Trust. The documents demonstrate that they are related and must be read in light of each others terms, and that the Committee has correctly interpreted this relationship and the restrictions in each. Delta goes so far as to feature an obvious typo in the Committee’s Memorandum to suggest that the Committee was incorrectly melding the two documents. (Obj. at 2, n.4.)

March 1, 2002 (Gloster Decl., Ex. D, Trust Agreement at § 3.1(c)); (2) a decision by the Administrative Committee cannot effect an amendment to the Trust’s definition of “Plan” because any amendment to the Trust must be in writing and signed by both the Trustee and Delta⁹ (*id.* at § 13.2); (3) broad “discretion” to operate contrary to the express provisions of the Trust is specifically prohibited by Section 11.04 of the Plan, which bars access to any part of the Trust funds “except as *expressly* provided for in the Plan and the Trust” (emphasis added); and (4) deferential review only applies when discretion is expressly invoked by the Trust document; otherwise a *de novo* standard applies.¹⁰ Section 2.3 of the Trust Agreement, cited by Delta as granting unreviewable authority to the Administrative Committee to interpret the meaning of terms in the Trust, merely provides that that Committee has sole responsibility in interpreting *Plan* terms or conditions (a reference to determination of an individual’s availability for benefits); the Trust does not even arguably grant the Administrative Committee any deference in interpreting the *Trust’s* terms, such as the definition of “Plan.”¹¹

⁹ Delta asserts *ipse dixit* that the Administrative Committee’s request for funding of the Subsequent Severance Plans and the Trustee’s payment of these plans constituted a written agreement sufficient to satisfy this requirement. (Obj. at 33.) Delta has, however, produced no written agreements signed by both the Trustee and Delta purporting to constitute an amendment (Delta has not even produced a written request for funding signed by the Trustee). Regardless, such an amendment would be subject to the notice requirements of ERISA, which Delta does not allege it has satisfied. 29 U.S.C. § 1024(b)(1).

¹⁰ Reservations of discretion in an ERISA welfare benefit plan must be stated clearly, *Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (2d Cir. 2005), and the trustee has the burden of proving his or her discretion. *See id.* Furthermore, any ambiguities in the operative document are interpreted against the trustee. *See Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 252 (2d Cir. 1999) (holding that because the plan administrator had the burden of proving discretion, the ambiguities were to be resolved against the administrator, no discretion found, and a *de novo* standard applied). Further, the Second Circuit has suggested that any ambiguities over the scope of authority to make changes should be strictly construed *against* the employer, as drafting party, and that this is particularly true if the employer is trying to assert rights to the detriment of its disabled former employees. *See Feifer v. Prudential Insurance Co.*, 306 F.3d 1202, 1212 (2d Cir. 2002). The court explained “the theory of unilateral contract . . . is that the document containing the contract’s terms is an offer that is accepted by the employee’s commencing or continuing to work for the offeror. If the employee does not like the terms, he or she can decline and seek better terms elsewhere. But this choice is one that an employee, once disabled, cannot make.” (Citations omitted.)

¹¹ Section 2.3, Interpretation of the Plan, provides, in pertinent part, “the Administrative Committee shall be solely responsible for the interpretation of any Plan term or condition affecting any provision of this Agreement.” Trust Agreement at § 2.3.

B. Delta's Amendment To The Plan To Pay Sick Time Out Of The Trust, Two Days Before The Bankruptcy Filing, Was Barred By Section 1114.

As a condition of receiving rights under Chapter 11, Congress specifically prohibited debtors from unilaterally changing retiree welfare benefits within the 180 days before filing a Chapter 11 petition, while insolvent.¹² *See* 11 U.S.C. § 1114(l). This was one of the few provisions of the new bankruptcy legislation given effect immediately upon enactment. Delta's Certified Sick Time amendment of the Plan occurred on September 12, 2005, and therefore cannot become effective without compliance with Section 1114.

Delta, however, claims that its September 12 amendment sidesteps Section 1114(l) because this Court should retroactively deem its amendment effective as of January 1, 2004 since: (1) Delta communicated its decision to revise the Plan prior to January 1, 2004, and (2) it operated the Plan accordingly thereafter. (Obj. at 36-37.) This retroactive amendment notion also has no legal or factual legs. First, amendments need to be in writing. *See Deppenbrock v. Cigna Corp.*, 389 F.3d 78, 83 (3d Cir. 2004) (disallowing a retroactive amendment and finding that Cigna had not exercised its authority to amend its benefit plan until the date the written amendment was executed and formally adopted, reasoning "ERISA specifies that a valid amendment can only be made in the manner specified in the plan document. Regardless of the method specified for amendment, however, an indispensable requirement under ERISA for effective plan amendment is that the amendment be in writing"); *see also Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("an ERISA welfare plan is not subject to amendment as a result of informal communications between the employer and plan beneficiaries").

¹² Other provisions supply a presumption of insolvency during the 90 days before the bankruptcy filing. *See* Section 547(f). In any event, there is little dispute that Delta is insolvent.

Second, Delta's purported retroactive amendment impermissibly undermines the rights of retiree plan participants who are already receiving benefits under the Disability and Survivorship Trust in the form of present benefits and protected future benefits. The threat to such intervening rights ends Delta's ratification argument. *See Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 124-125 (3d Cir. 1998)(rejecting ex post ratifications that defeat intervening rights).

Third, Section 1114(l) means nothing if employers can avoid the statute by changing benefits within the 180 day period but "deem" the change to be effective a year earlier.

C. Even Delta's Own Actuaries Don't Recognize Severance And Sick Pay As Proper "Benefits" Payable Out Of The Trust, Or Treat Delta's Plan Amendment As Ineffective In 2004.

Delta asserts that its September 12, 2005 amendment to the Plan was effective at the beginning of 2004, by virtue of previously delivered notices. But that assertion is undercut by the way Delta's own actuaries reported on the obligations of the Trust for 2004. As late as February, 2005, Delta's actuaries reported that for 2004 "[t]here were no changes in either Disability & Survivorship plan ... affecting the comparability of the plans with the last actuarial valuation" and that there would therefore be no change to their calculation of the accumulated plan benefit obligation. (Serota Decl., Ex. C and Serota Reply Decl. at ¶ 8.) As Mr. Serota explains, if Delta's actuaries "had concluded that there was a change to the Plan going forward in 2004 calling for the continuing payment of certified sick time in that and subsequent years, they should have instead assigned a liability associated with that obligation or disclosed that they are not calculating a liability and stated a reason" but they did not. (*Id.* at ¶ 8.)

Towers Perrin, the Plan's actuaries, did not include any amount for certified sick time payments in the Accumulated Plan Benefit Obligation at either the beginning or the end of the 2004 calendar year. (*Id.* at ¶ 9; Serota Decl. Ex. C.)

Similarly, Delta asserts that its payment of severance and sick pay out of the Trust were properly authorized benefits payments. Again, however, this assertion is contradicted by their own actuaries' filings. Towers Perrin carefully listed severance payments and certified sick time payments completely separate from the category of "Benefits Paid" from the Trust. (*Id.*) The effect of this reporting was to treat severance and sick pay not as benefits payable by the Trust but as an "extraordinary expense" paid out of the Trust. (*Id.*) While its own actuaries' report contradicts Delta's position, that report is consistent with the Committee's view and the facts: the retroactive amendment to authorize sick pay under the Plan was not effective in 2004, and there was no authority then to pay severance or sick pay as a benefit from the Trust. (*Id.*)

D. Section 1114 Applies Fully To the Trust As The Source Of Payments For Covered Plan Benefits, And To Delta's Modifications.

Delta cites no authority for its lynchpin claim that the Trust is exempt from Section 1114 because it is an amendable funding vehicle. Delta sidesteps the relevant language of Section 1114, which establishes that "retiree benefits" protected under the Code include benefits from the Trust's assets, including:

payments to any entity or person for the purposes of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under *any plan, fund, or program* (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

11 U.S.C. § 1114(a) (emphasis added). "Plan, fund, or program" include both the Plan and the Trust, which is obviously a form of "fund." In addition, the Trust protects the retirees' rights to receive future benefits, and is therefore a retiree interest that Section 1114 protects. Collier also supports this basic proposition: "Section 1114(a) defines the term 'retiree benefits' with reference to the class of persons entitled to the benefits, the type of benefits provided, *and the*

arrangement established by the debtor for payment of such benefits.” 7 Collier on Bankruptcy § 1114.02[2][b] (2005) (emphasis added).

Delta concedes that the Plan is “exclusively” funded by the Trust, but now argues for the absurd result that until all the money has been removed from the Trust and there is none left to pay benefits, the survivors and disabled retirees have no protectible interest.¹³ This is not a purely hypothetical concern: Delta now suggests it can use the Trust to pay any of its \$600 million in annual employee health and welfare benefit costs. (Obj. at 28-29.) So under Delta’s position, the Trust that existed for decades to fund only disability, survivor income and life insurance benefits can be drained in six months to fund other expenses without implicating any interest Congress was trying to protect. That result is at odds with both the language and the policy behind Section 1114.

It is also absurd in the current context: Delta is in bankruptcy, and all of Delta’s assets are subject to the liens of its secured lenders. The best (and perhaps only realistic) hope the survivors and disabled retirees have for continued benefit payments is if the separate funded trust for that purpose is not depleted by further raids. Delta cannot even use cash in its own account during a bankruptcy without protecting the other parties with an interest in those funds, by either reaching agreement with them or getting an order from this Court that their interest in the funds is “adequately protected” under Section 363(c)(2). Section 1114 requires no less, particularly since Delta has no right to the Trust funds.

For the same reason, it is clear that Delta’s removal of over \$52 million from the Trust and its doubling of the rate that the Trust funds disappear, is a “modification” that impacts the

¹³ Before Delta began improper withdrawals out of the Trust, Delta’s actuaries concluded that Trust had sufficient assets to pay all the Plan’s obligations, including all future obligations to disabled retirees and the survivors, regardless of a Delta bankruptcy. (Serota Decl., ¶3.)

protected rights of disabled retirees and retirees' survivors under Section 1114. Delta's opening argument in its Objection is that such a dramatic drawdown in Trust assets does not trigger Section 1114 because the Trust is for the moment still making *payments* to retirees. (Obj. at 1-2.) Under this argument, until all the money is gone, there has been no "modification" protectible by Section 1114. But after the money is gone, there is nothing left to protect. That such a catch-22 underlies Delta's argument borders on the frivolous.¹⁴

Delta also argues that because the Plan benefits are amendable and thus outside the scope of Section 1114, so too are benefits payments made from the Trust. Delta's syllogism is flawed. As discussed below, the Plan benefits, even if amendable, are protected by Section 1114. Further, the Trust agreement cannot be amended unilaterally by Delta.

Delta's final attempt to avoid application of Section 1114, by arguing that the benefits aren't provided "under" the Trust rests upon a misreading of the statute. Section 1114 expressly reaches the "payments" for "benefits . . . under any plan, *fund*, or program." *Id.* at § 1114(a) (emphasis added). Because the Trust is the source of the covered "payments," it is subject to protection under Section 1114 irrespective of whether the benefits are provided under the Plan or the Trust.

E. The Trust Is Not Fully Funded, Contrary To Delta's Representations.

Consistent with its misguided argument that depletion of the Trust is not an 1114 issue since the Trust is still paying benefits today, Delta asserts that the Trust is "fully funded" under Delta's singularly unique and situational vocabulary. But according to its actuaries' reports, the Trust was, and is, not fully funded since its assets are over \$212 million less than the present value of the Plan's current and future obligations just to pay disability, life insurance and

¹⁴ Cf. Creditors Committee Objection, ¶¶ 21, 22 and 29.

survivor benefits. (December 5, 2005 Declaration of Mitchell I. Serota (“Serota Decl.”), Ex. C.)¹⁵ Delta’s depletion of Trust assets is therefore increasing the beneficiaries’ risk. Delta now claims, however, that there was a “funding policy” with a funding horizon of one year which did not “require Delta to set aside a particular amount of funds for current and/or future benefits.” (Obj. at 14-15 and 38-40.) This claim does not withstand even moderate examination.

“Fully funded” has a conventional meaning in the case law and actuarial profession. A fully funded trust is one that has adequate assets available to cover the present value of the plan’s current and future obligations.¹⁶ The Committee’s actuarial expert, Mitchell Serota, explains:

Actuaries do not characterize a trust as “fully funded” when the trust does not have sufficient assets on hand to meet the plan’s obligations which have been accrued as of the date of such a determination. . . . I believe that to call the Family-Care Disability and Survivorship Trust “fully funded” is a misuse of a commonly-understood actuarial term and misleads the reader. . . . To have “sufficient funds to pay claims . . . during the current year means only that there is adequate cash on hand for the current year.

(December 15, 2005 Declaration of Mitchell I. Serota (“Serota Reply Decl.”) at ¶¶ 6-8.)¹⁷ Thus, Delta’s assertion that the Plan is underfunded, “only if you look at present value of future claims” (Obj. at 39), in fact refers to the “only” way that actuaries do look at the issue.

¹⁵ And this is even without considering *any* obligation to pay sick pay out of the Trust, since as discussed above Delta’s actuaries did not treat those—or the severance payments—as “benefit” obligations of the Trust and did not treat the Plan as having been amended in 2004 to create a continuing obligation for sick pay. (See Serota Reply Decl. at 9-10.)

¹⁶ Contrary to Delta’s suggestion, it is irrelevant to the question of whether the Trust is fully fund that the law does not require Delta to “fund” the trust to any specified level.

¹⁷ *Accord Withers v. Teachers’ Retirement System of New York*, 447 F. Supp. 1248, 1251 (S.D.N.Y. 1978) (one court’s description of a “fully funded” municipal pension fund, by reference to an actuary’s trial testimony during which he explained that a “fully funded” system was: “one with sufficient assets on hand to cover the accrued ‘past service’ liability to all active members and also to guarantee benefits for life to those presently on the pension rolls”); *Wells Fargo & Co. v. Commissioner*, 120 T.C. 69 at 69, 2003 WL 301884 (U.S. Tax Ct. 2003) (taxpayer can get current deductions for accumulating a reserve in a VEBA trust for “fully funded” benefits obligations, which is the actuarially calculated present value of all the future post-retirement benefits).

Consistent with convention and common sense, neither the Plan nor any produced corporate documents contains any suggestion that any so-called “funding policy” was part of the Plan. The only indication of a funding policy to which Delta directs the Court is a March 17, 2005 letter from Towers Perrin, the Plan actuaries, to Delta’s accountants, briefly mentioning the “funding policy” of the Disability and Survivorship Trust.¹⁸ Delta claims that this letter, unsigned by any Plan administrator or a Trust trustee, “clearly reflects the Company’s funding policy . . . [of] contribut[ing] an amount necessary to have sufficient assets on hand during the plan year to provide participants’ benefits.” (Obj. at 14, citing to Towers Perrin letter to Deloitte & Touche, Torpey Decl., Ex. 16B.) But there is no indication in the letter or in the Plan documents that this “policy” ever meant that the Plan was “fully funded.” That Delta might make a contribution to the Trust for one year’s cost was not remotely close to suggesting that the Plan was fully funded, unless the Plan might only last for one year.

To the contrary, the Plan’s language, common sense and the conventional use of the term “fully funded” contradict Delta’s claim that the so called “funding policy” meant that the Plan was “fully funded.” Section 11.02 of the Plan quoted in Delta’s Objection notes that the actuary “shall give regard to the Plan’s short term and long term financial needs.” Long term financial needs in the context of a disability and survivorship trust fund are obviously not one year. The same actuaries who sent the “funding policy” letter had in the same year reported that the

¹⁸ In pertinent part, the letter states:

Delta Air Lines, Inc.’s funding policy for the Pilots Disability and Survivorship Plan and the Family Care Disability & Survivorship Plan is to contribute an amount necessary to have sufficient assets on hand during the plan year to provide participants’ benefits. In recent years, no deductible contribution has been made for either plan.

(Torpey Decl., Ex. 16B, ¶ 3.)

“Funded status” of the Trust was actually a shortfall of \$212,475,000. The Plan is not “fully funded.”

F. Section 1114(I) Expressly Prohibits Changes To Amendable Benefits And To The Plan.

Delta argues bluntly that because it “has expressly reserved the right to amend or eliminate the [Plan] under applicable non-bankruptcy law,” Section 1114 does not apply. (Obj. at 17.)¹⁹ But any doubt over whether Congress intended to apply Section 1114 to “amendable” benefits was put to rest when Congress passed Section 1114(I) and made that amendment immediately effective. In amending the statute, Congress clarified two things: first, that the statute should be applied broadly to protect retiree benefits, and second, that Section 1114 *must* apply to benefits that the debtor can amend, since Section 1114(I) only applies if the debtor has, in fact, amended the benefits at issue. The legislative history also made it clear that Section 1114 was specifically aimed at benefits which otherwise could be unilaterally modified by a bankruptcy debtor:

Current bankruptcy law prevents a chapter 11 debtor from *unilaterally modifying* certain retiree benefits, such as health insurance, during the pendency of the bankruptcy case unless an authorized retiree representative is appointed and agrees to the modification, or the court authorizes the modification. Section 1403 amends Bankruptcy Code Section 1114 to prevent debtors from evading these requirements by terminating retiree benefit plans on the eve of bankruptcy. The amendment would require retroactive reinstatement of retiree benefits that were modified within 180 days before the debtor filed for bankruptcy protection, unless the court finds that the balance of the equities clearly favors the modification.

H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 154 (2005). (Emphasis added.)

¹⁹ Creditors Committee Objection, ¶ 20.

After Congress's recent amendment to the statute and the related legislative history, there is no longer any reasonable doubt that Section 1114 applies to benefits the Debtor could otherwise unilaterally amend. Thus, Delta's citation to a few pre-2005 cases that failed to follow Section 1114 and applied it too narrowly, is now completely irrelevant, even aside from Delta's misreading of the Second Circuit case law.²⁰

IV. DELTA DOES NOT SERIOUSLY CHALLENGE THAT THE COMMITTEE SEEKS REASONABLE RELIEF

A. The Debtor Objections To The Committee's Request Relief Are Based On Its Meritless Argument That Section 1114 Does Not Apply.

Delta grounds its objection to Section 1114 relief on its misconception that there is no Section 1114 issue, since the Trust is presently paying benefits. (Obj. at 41.) Relief is necessary and appropriate, however, because Delta's ongoing disbursements for severance and sick pay (at a rate of nearly \$1.5 million every two weeks) violates the Trust Agreement and Section 1114. The Court should therefore order Delta to cease payment from the Trust immediately of those benefits or of any other benefits other than disability, survivor income benefits, and insurance provided under the Plan.

²⁰ *Chateaugay* found that the mining companies' obligation to pay benefits ended when the wage agreement expired, and that Section 1114's predecessor (the Retiree Benefits Bankruptcy Protection Act of 1988) did not compel debtors to make retiree health benefit payments in those circumstances. *In re Chateaugay Corp.*, 111 B.R. 399, 404 (S.D.N.Y. 1990). That does not mean that the court found that Section 1114 did not apply where a contractual right was absent. When considering the legislative history of RBBPA, *Chateaugay* noted Senator Heinz's expectation that "[t]he bill will protect retirees from unilateral termination of benefits by a company filing a Chapter 11 bankruptcy petition." The court concluded that the mining companies' termination of payments was not unilateral but a pre-existing contractual provision outside of the Act. Here, in contrast to *Chateaugay*, there is no expired contractual provision to which Section 1114 does not apply. Instead, Delta's retirees are faced with Delta's ongoing unilateral raid on the Disability and Survivorship Trust. Imposing Section 1114 obligations on the Debtor does not create an ERISA-vested right that guarantees the continuation of disability or survivorship benefits, nor does it create a new right that was not in existence prior to the Petition Date. For Delta to claim otherwise is to push a straw man.

The Debtor's reliance on the Second Circuit's opinion in *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 71 (2d Cir. 1996) is also seriously misplaced. The *Ames* Court merely assessed whether Skadden Arps' losing argument (against the application of Section 1114 to life insurance that the debtor could terminate at will, pre-bankruptcy) was frivolous and therefore not to be compensated from the estate. That Skadden's argument was held not to be punishable by sanctions hardly "discredits" the Committee's interpretation of 1114, as Delta pushes. (Obj. at 20.) The Committee never accused Delta in its opening brief of being frivolous, just wrong.

Further, the Committee respectfully requests that the Court order that Delta cannot amend the Trust or the Plan without complying with Section 1114's two central threshold requirements: Delta must: (1) reach agreement with the Committee on changes, after providing reasonable information, or (2) after failing in a reasonable attempt to reach that agreement, must demonstrate to the Court that the changes are fair under the Section 1114(g) standard.

Until Delta completes that simple process, Delta should set aside, in a separate escrow account, the following: an amount equal to all disbursements from the Trust since September 13, 2005 (including, without limitation, checks that cleared after September 13, 2005) for severance under any program, for accident or sick pay under Section 4.02 of the Plan as purportedly amended and restated on September 12, 2005, or for any benefit other than disability, survivor income, or insurance under the Plan (collectively, the "Principal"); and all interest on the Principal from the date of the related post-petition expenditure from the Trust, at the same rate as Delta is currently paying for additional funds borrowed from its Debtor-in-Possession lender.²¹

Delta should also be ordered promptly to provide the Committee the balance of the information it is seeking that is related to the diversion of funds from the Trust. Notably, Delta's Objection does not dispute the propriety of any of this relief qua relief. Delta merely argues that

²¹ Delta argues that, under ERISA, "tracing" of the taken money to Delta is required to create a constructive trust to return that money. Delta argues that the Trust money is not in Delta's possession because it has already paid this money to plan participants. This is mere sleight of hand, and the case law Delta cites does not support its contention that equitable remedies are unavailable because the unauthorized payments cannot be sufficiently "traced." As long as Delta has sufficient funds to cover the diverted Trust res, monies for breach of fiduciary duty may be reclaimed directly from Delta. *See, e.g., In re BMC Industries, Inc.*, 328 B.R. 792, 796 (D. Minn. 1995) ("When cash is the property upon which a party wants the court to impose a constructive trust, it is not necessary for the party to trace the identical funds. It is sufficient to show that the balance in the account into which the funds were deposited has not fallen below the amount claimed to be held in trust."); *Salisbury Inv. Co. v. Irving Trust Co.*, 70 F.2d 313, 316 (2d Cir. 1934). Regardless, the remedy the 1114 Committee seeks here, placement of the unlawfully paid monies from Delta's general operating budget into an escrow account while the parties negotiate, is not a constructive trust under ERISA. Instead it is a remedy available to the Bankruptcy Court under sections 105 and 1114 of the Bankruptcy Code for a post-petition breach of Section 1114.

none of it is appropriate because under Delta's overly narrow interpretation of the statute, Section 1114 does not apply. (*See* Obj. at 41-42.)

B. The Committee Should Be Authorized To Pursue Return Of The Diverted Funds To The Trust As Appropriate.

Delta disputes the availability of a remedy to recover unauthorized distributions out of the Trust, first improperly equating it to a derivative action, and second, suggesting that a constructive or resulting trust is not available under applicable law. As discussed below, Delta is wrong.

1. The Committee Is The Proper Entity To Seek Recovery Of Improperly Diverted Trust Funds.

The 1114 Committee is in the best position to negotiate recovery of the diverted Trust assets with Delta under Section 1114. The Committee represents the majority of injured beneficiaries and has already collected many of the facts and performed substantial legal analysis on this issue. Because the Committee merely seeks negotiations with Delta under Section 1114, and for placement of the funds improperly diverted post-petition into an escrow account while those negotiations are ongoing, at this time there is no argument that derivative standing is needed.

2. The Committee Is Entitled To A Legal or Equitable Remedy To Recover The Money Wrongfully Diverted Or Money Damages From Former Plan Fiduciaries.

ERISA expressly allows individuals and their representatives (such as the 1114 Committee) to bring claims for breach of fiduciary duty in the administration of plan benefits both under ERISA and state common law. ERISA provides for both compensatory and money damages from such claims. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 509-10 (1996) (holding that Sections 502(a)(2) & (3) of ERISA authorize lawsuits for individualized equitable relief, as well as monetary relief, for breach of fiduciary obligations).

3. The Committee Should Also Be The Appropriate Entity To Pursue Claims Against Delta’s *Former* Directors, Officers, and Employees For Breaches Of Fiduciary Duty In Directing The Trust To Make Improper Distributions.

Delta argues that the 1114 Committee must make a showing that it is entitled to derivative standing to be authorized to pursue the former plan fiduciaries. Even if this were correct, which it is not, the 1114 Committee easily meets this standard. Delta has categorically claimed that it and its former fiduciary administrators did nothing wrong in diverting over \$52 million in payments from the Trust to fund Delta operating expenses, all in breach of the then-applicable Plan and Trust documents. As such, Delta is in no position to evaluate and pursue a claim against the former Administrative Committee or Benefit Fund Investment Committee, and the appointment of the 1114 Committee to pursue these claims in the interest of the retirees and the estate may be warranted. *See, e.g., Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 579 (3d Cir. 2003) (en banc) (appointing committee when the company refuses to prosecute the claim); *Smart World Technologies, LLC*, 423 F. 3d 166, 177 (2d Cir 2005) (holding that derivative appointment is necessary to avoid the “inherent conflict of interest that exists when those with the power to pursue a claim are those who may be the target of such a claim” and when there is sufficient likelihood of success to justify the expense of the adversary proceeding).

Appointment of the 1114 Committee to pursue former fiduciaries is particularly appropriate since (1) an action against *former* executives and directors of Delta will not interfere with the current reorganization, (2) their assets, and any directors and officers liability insurance policies, may provide an additional means for the Trust to recover the improperly spent funds,

(3) statute of limitations concerns may require quick action,²² and (4) the availability of recovery from that litigation may both affect the Committee’s negotiations with Delta under Section 1114 and shape the eventual agreement to preserve (or resolve) the litigation claims.

ERISA also contemplates that individuals or their representatives (such as the 1114 Committee) can bring claims for breach of fiduciary duty in the administration of plan benefits both under ERISA and state common law.²³ *See, e.g., Varity Corp.*, 516 U.S. at 509-10 (holding that Section 502(a)(2) & (3) of ERISA authorizes lawsuits for individualized equitable relief, as well as monetary relief, for breach of fiduciary obligations); *see also* 28 U.S.C. § 959(b). Indeed, ERISA expressly provides that a plan beneficiary may seek to impose personal liability on plan fiduciaries in equity, either current or former, to “make good to such plan any losses to the plan resulting from each such breach.” *Id.* at 508. Members of the Administrative Committee and Benefit Fund Investment Committee appear to have clearly violated their duties in directing the Trustee to pay Delta’s severance and sick pay expenses out of Trust assets in violation of the Trust Agreement and Plan, instead of investing those assets for the beneficiaries. This creates a claim for return of those funds under ERISA. *See id.*; *see also* Section 409 of ERISA (“a fiduciary . . . who breaches . . . duties imposed upon fiduciaries . . . shall be

²² Delta has only provided the names of the members of the Administrative Committee and BFIC in the past three days, and has yet to produce the applicable minutes from the meetings of those groups. But considering the relatively short statute of limitations on the discovery of a breach of a fiduciary duty under ERISA, the 1114 Committee may need to move very quickly to file the relevant causes of action. *See* 29 U.S.C. § 1113 (statute of limitation for breach of fiduciary duty claim under ERISA runs three years after actual knowledge of the breach or violation).

²³ Delta argues that ERISA preempts the 1114 Committee’s state law claims for breach of fiduciary duty. While ERISA does generally preempt state law claims relating to plan administration, Delta does not address application of 28 U.S.C. § 959(b), which expressly requires a debtor to manage the assets in its possession in accord with applicable state law. Regardless, the question of state law preemption is mooted because the 1114 Committee is entitled to all of the relief that it seeks—the availability of the equitable return of the diverted money to the Trust and the potential for recovering money damages—under ERISA.

personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary”).

V. CONCLUSION

For the foregoing reasons, the Committee respectfully requests its Motion to Enforce Debtor’s Section 1114 Obligations be granted.

Dated: December 15, 2005

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By: _____ /s/
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Committee