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PRESERVATION ORGANIZATION, INC.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

DELTA AIR LINES, INC., et al.

Debtors.

Case No. 05-17923-cgm

Chapter 11

(Jointly Administered)

**MOTION FOR ORDER APPROVING ESTABLISHMENT OF A
VOLUNTARY EMPLOYEE BENEFIT ASSOCIATION TO OFFER RETIREE
BENEFITS ELIGIBLE FOR HEALTH COVERAGE TAX CREDITS**

The Delta Pilot Pension Preservation Organization, Inc. (“DP3”) respectfully requests an order from this Court under Bankruptcy Code section 105, to authorize formation of a voluntary employee benefit association (a “VEBA”) to offer a health, prescription drug, dental and vision care benefits to Delta pilot retirees, their spouses and dependants (and other eligible Delta retirees, spouses, and dependants) that is eligible for the 80% federal subsidy in the form of the Health Coverage Tax Credit.

DP3 is an organization representing thousands of retired Delta pilots, organized to preserve and protect their pension and other retiree benefits. The Section 1114 Committees otherwise representing the interests of pilot and non-pilot retirees on retiree benefit issues in the

above-captioned bankruptcy case have dissolved under the terms of Delta's confirmed plan of reorganization.

Background

The Health Coverage Tax Credit ("HCTC"), codified in Internal Revenue Code Section 35(e)(1), 26 U.S.C. § 35(e)(1), provides a health care subsidy for those aged 55 or older who have had their pension plans turned over to the Pension Benefit Guaranty Corporation ("PBGC.") See 26 U.S.C. § 35(e)(1)(J)(iii). This tax credit now pays eighty percent (80%) of the cost of the retirees' health insurance and prescription drug premiums (and dental and vision care premiums of any combined program) until they turn 65 and become eligible for Medicare. (It also pays 80% of the premium cost for the benefits of their spouses and dependants, and continues to pay those costs for up to two years after the covered retiree turns 65.) See 26 U.S.C. § 35(g)(9)(A).

The HCTC is an unusual federal tax credit, because instead of being paid to the taxpayer only at the end of the year, the eligible retiree can participate in a monthly reimbursement program, the IRS HCTC advanced payment program, that pays a subsidy each month for the healthcare benefits of eligible retirees (and their spouses and dependants) enrolled in "qualified health insurance." Eligible retirees are those aged at least 55 but not yet 65 receiving payments from the PBGC. "Qualified health insurance" under the statute includes, (1) COBRA continuation coverage as specifically defined, 26 U.S.C. § 35(e)(1)(A); (2) coverage under state plans that have been qualified in many states (but which are not available in all states and which in many states provide only catastrophic coverage of last resort with low benefits and high deductibles), 26 U.S.C. § 35(e)(1)(H); and—since the amendments to the law adopted in February 2009 as part of the American Recovery and Reinvestment Act ("ARRA")—(3)

coverage under a benefit provided by a non-profit voluntary employee benefit association that is either set up by a Section 1114 retiree committee in a bankruptcy case or otherwise “pursuant to an order of a bankruptcy court.”¹ 26 U.S.C. § 35(e)(1)(K). In connection with this last category, DP3 is seeking an order from this Court authorizing formation of a VEBA that could offer a benefit eligible for the 80% HCTC subsidy.

Previously, during Delta’s bankruptcy case, Delta terminated the pilots’ defined benefit pension plan and turned that plan over to the PBGC. Delta did not terminate the non-pilots’ defined benefit pension plan, but many non-pilot Delta retirees may still be eligible for the HCTC because their pensions at a prior airline industry employer have been turned over to the PBGC (as has occurred at PanAm, TWA, Hawaiian Airlines, USAir and other carriers).

There are thousands of retired Delta pilots who are under 65 (or who have recently turned 65 but who have spouses or dependants under 65) eligible for the HCTC. This is particularly true because of past financial incentives to take early retirement and because of former FAA regulations, which until recently prohibited pilots over aged 60 in the cockpit, and effectively forced retirement at age 60. These pilots who are at least 55 but not yet eligible for Medicare are expensive to insure.

Formation of a VEBA under the authorizing order of this Court will allow the VEBA to work with national vendors (such as Blue Cross/Blue Shield, Aetna, and CIGNA) to get competitive quotes on a program designed with the needs of the retirees in mind.

The VEBA would be a separate tax-exempt corporation qualified under Internal Revenue

¹ Internal Revenue Code section 35(e)(1)(k), added by section 1899G(a) of the American Recovery and Reinvestment Act provides that qualifying coverage includes “eligible coverage months beginning before January 1, 2011, coverage under an employee benefit plan funded by a voluntary employees' beneficiary association (as defined in section 501(c)(9)) established pursuant to an order of a bankruptcy court, or by agreement with an authorized representative, as provided in section 1114 of title 11, United States Code.” 26 U.S.C. § 35(e)(1)(K). Internal Revenue Code section 501(c)(9) is the provision regarding non-profit corporations that applies to voluntary employee benefit associations. 26 U.S.C. § 501(c)(9).

Code section 501(c)(9), 26 U.S.C. § 501(c)(9), with directors initially appointed by DP3, formed for the purpose of rolling out an HCTC-qualified benefit for eligible retirees, their spouses, and dependants. Currently, under the term sheet agreement between the pilot Section 1114 Committee and Delta approved in this Bankruptcy Case (together with the similar term sheet agreement for non-pilot retirees approved the same day the “Retiree Term Sheet Agreements” see docket # 3336) Delta generally pays 0% of the health care premium costs for pilots under age 60 who retired before June 1, 2006, and pays only 50% of the health care premium costs for pilots aged 60 through 64 who retired before June 1, 2006.

Requested Relief

DP3 seeks an order from this court under Bankruptcy Code Section 105, authorizing it to form a VEBA to offer a benefit eligible for the HCTC under Internal Revenue Code section 35(e)(1)(K), 26 U.S.C. § 35(e)(1)(K), which requires the order of a bankruptcy court to create that eligibility, and seeks a designation from this Court that any benefit offered is an alternative coverage offered in lieu of COBRA continuation coverage. That latter designation will allow the benefit to continue to be eligible for HCTC subsidies under IRS private letter rulings even if the ARRA legislation regarding VEBAs authorized by a bankruptcy court is not extended. See IRS Private Letter Ruling 2004 PLR 43012 (benefit offered by a VEBA set up in a bankruptcy case by a Section 1114 retiree committee is entitled to HCTC subsidies as in lieu of COBRA continuation coverage.)

Separately, to provide similar relief for some of its retirees, Delta recently announced a “one time” extension of COBRA continuation coverage effective January 1, 2010 for retirees to permit them to enroll in COBRA continuation coverage perhaps to take advantage of HCTC subsidies. Unfortunately, (1) it is unclear whether the affected retirees have actually suffered a

coverage event entitling them to COBRA continuation coverage; (2) as an extension of a “voluntary” COBRA coverage, it is unclear that it is eligible for the HCTC, as it is not coverage under a COBRA provision defined in Internal Revenue Code section 9832(d)(1), as the HCTC statute requires, 26 U.S.C. § 35(e)(1)(A); (3) many retirees may not elect this one-time COBRA continuation coverage and thus miss out on HCTC subsidies, even if they are available; (4) it is unclear under the Delta program how benefits will be coordinated for spouses and dependants who are under 65 and who would be eligible for HCTC subsidies even after the covered retiree turns 65 and the expensive COBRA benefit no longer makes economic sense; (5) this “one time” COBRA election does not protect future retirees and their dependants who might be eligible for the HCTC.; and (6) COBRA coverage requires retirees to pay 102% of what active workers pay for coverage designed for the needs of active workers, not retirees.²

Delta would not be required to expend any significant effort to facilitate this benefit. DP3’s motion contemplates that Delta will not be required to pay anything in connection with establishing the VEBA or for rolling out the benefit. If the benefit is rolled out by a VEBA established by DP3, that should, in fact, save Delta tens of millions of dollars: (1) Delta would pay 0%, instead of 50% of the health care premiums for pilots aged 60 through 64 who retired on or before June 1, 2006, who enroll in the new benefit; (2) Delta would pay 0% for pilot retirees and their dependants in connection with pilots who retired after June 1, 2006 who enroll in the new benefit, instead of substantially higher subsidies Delta pays now; and (3) Delta would save the administrative cost of COBRA benefits and costs associated with including a more expensive retiree population with its active employees’ benefits.

² And inflates the cost of what active employees pay, because typically retirees in the same plan have more medical needs because of their greater age.

To make the program most effective (and to maximize enrollment, thus saving the most money for Delta) some minimal cooperation from Delta would be helpful, and DP3 respectfully submits that the order from this Court should authorize such cooperation:

- Providing historical loss information in connection with the pilot retirees' current benefit plans (similar to what Delta already provides to its current health insurers and similar to what Delta provided to the non-pilot's 1114 committee to permit establishing the existing over-65 plan for non-pilot retirees.)
- Providing contact information for the pilot retirees, solely for purposes of contacting them about the benefit programs, under a confidentiality agreement that prohibits the Pilot VEBA from using or sharing that information for other purposes.
- Designating of the over-65 benefit rolled out through the Pilot VEBA as a "Delta affiliated program" for Pilot and Non Pilot retirees 65 and older, for purposes of Delta subsidies under the Retiree Term Sheet Agreements.
- Agreeing that rollout of the new Pilot VEBA Program will be treated as a "life event" under Delta's current medical plans, so that pilots and non pilots along with their dependants can enroll mid year and withdraw from the Delta benefits, thereby saving Delta money.
- Agreeing that Pilots retirees will continue to have the ability to opt in and out of their respective medical plans during the annual enrollment period each year.

Conclusion

DP3 respectfully requests that this Court enter the proposed order authorizing formation of a VEBA to roll out an HCTC-eligible benefit for retired Delta pilots, their spouses, their survivors (and other Delta retirees, spouses, dependants and survivors eligible for the HCTC.)

The requested order will allow retirees and their dependants who have already lost much of their pensions to save, collectively, millions of dollars through federal tax subsidies for their critical health care benefits, and will also save Delta considerable costs for many years into the future.

Respectfully submitted,

Dated: October 27, 2009

FARELLA BRAUN & MARTEL LLP

By: /s/ Kelley A. Woodruff

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PRESERVATION ORGANIZATION, INC.