IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
UAL CORPORATION, et al.,	)	Case No. 02-B-48191
	)	(Jointly Administered)
Debtors.	)	
	)	Honorable Eugene R. Wedoff
	)	
	)	Hearing Date: January 17, 2006
	)	Hearing Time: 10:30 a.m.
	)	Response Date: January 16, 2006

DEBTORS' MOTION IN LIMINE TO BAR THE "EXPERT" TESTIMONY OF THOMAS JONES AND OTHER EVIDENCE PURPORTEDLY RELATING TO "EMPLOYEE MORALE" OR "SHARED SACRIFICE"

Has a philosopher ever testified in bankruptcy court, reciting Kant, applying the Prisoner's Dilemma, and espousing general, theoretical ideals of business ethics? No. The reason is simple: as interesting as such a discussion might be, it is completely irrelevant to any issue pending before this Bankruptcy Court or, frankly, any court.[1] For that reason, pursuant to Federal Rules of Evidence 401-2 and 702, United moves to exclude: (1) the opinions of the Association of Flight Attendants' ("AFA") proffered expert on business ethics, Thomas Jones, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] and its progeny; and (2) other purported evidence allegedly relating to "employee morale" or "shared sacrifice." As described in detail below, none of this evidence is relevant to the confirmation of United's Plan, nor does it have any – let alone an appropriate – foundation. All such evidence should be excluded.

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1 The practical, real-world bankruptcy court is an especially inappropriate place for philosophical sermons: "[t]here are more things in heaven and earth, Horatio, [t]han are dreamt of in your philosophy." William Shakespeare, HAMLET, Act I, Scene V, at 166-67.

2 509 U.S. 579 (1993).

I. This Court Should Exclude the Expert Testimony of Thomas Jones.

The AFA retained Thomas Jones, a Professor of Business Ethics at the University of Washington School of Business, to testify about the "ethical questions" surrounding United's proposed Management Equity Incentive Plan ("MEIP").[3] After considering the matter for two days, Jones opined that by providing equity-based compensation to certain members of United management, the MEIP violates various theoretical principles of business ethics and moral philosophy (including "the Golden Rule" and Kant's Categorical Imperative).[4] According to Mr. Jones, these ethical issues might indirectly affect United's economic performance by violating the promise of "shared sacrifice" that has underlain United's reorganization.[5] As described below, Jones' opinions are not only entirely unsubstantiated and unreliable but -- more importantly -- are irrelevant to United's plan of reorganization, Section 1129's confirmation standards, or any other provision of the Bankruptcy Code.

Daubert, embracing Federal Rule of Evidence 702, articulates a two-prong test for expert testimony: (1) it must "assist" the trier of fact – a condition that speaks "primarily to [the] relevance" of the proffered evidence; and (2) it must be reliable – that is, "supported by appropriate validation" and grounded "in the methods and procedures of science."[6] Jones' proposed testimony is neither relevant nor reliable, and should be barred in its entirety.

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3 Ex. A, Jones Dep. at 60:24-61:4.

4 Ex. B, Jones Rpt., at 6, 7.

5 *Id.* at 7-8.

6 *Daubert*, 509 U.S. at 590-91; *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996) (noting that *Daubert* requires "judges to distinguish between real and courtroom science"); *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 304 (6th Cir. 1997) ("*Daubert* teaches that expert opinion testimony qualifies as scientific knowledge under Rule 702 only if it is derived by the scientific method and is capable of validation.").

A. Jones' Opinions On Ethics and Morality Are Irrelevant To Any Issue Before This Court.

Jones' views on business ethics and morality, as intellectually stimulating as they may be, have absolutely no bearing on whether United's proposed plan of reorganization should be confirmed or any other question this Court must decide. The primary thesis of Jones' expert report appears to be that "[g]ood ethics will . . . help a firm outperform other similarly situated firms."[7] After explaining the theories of "moral trust" and "moral commitment," Jones applies the Prisoner's Dilemma to conclude that "moral solutions to commitment problems are more efficient than economic incentives" and that "honest, trustworthy individuals will have more opportunities than will those who lack these traits."[8] "Expert" analysis of such general theoretical principles is completely irrelevant to the issues before the Court.[9]

Jones spends about one page of his report purportedly applying his general ethical principles to United's MEIP. Specifically, Jones opines that the MEIP "would make a mockery of shared sacrifice," break some "explicit promise" (thereby violating "the Golden Rule"), and make it "virtually impossible" for United management to "establish[] morally embedded relationships" with their employees.[10] Interestingly, Jones' opinion is ***not*** that United cannot succeed financially by implementing the MEIP -- and in fact he agrees that some MEIP is appropriate -- but rather that this particular MEIP may indirectly harm United's financial

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7 Ex. B, Jones Rpt. at 4.

8 *Id.* at 3-6.

9 *See, e.g., DiBella v. Hopkins*, 403 F.3d 102, 121 (2d Cir. 2005) (excluding business ethics expert as irrelevant); *In re Welding Fume Prods.*, 2005 WL 1868046 (N.D. Ohio 2005) (expert testimony on business ethics excluded as irrelevant under the applicable legal standards); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 543-44 (S.D.N.Y. 2004) (expert testimony on ethics stricken as unhelpful to the factfinder).

10 Ex. B, Jones Rpt. at 7-8.

performance by damaging employee goodwill.[11] Jones does not, and cannot, quantify this alleged harm in any way.

Try as the AFA might, no amount of advocacy can link Jones' opinions to any legal standard relevant here. Indeed, some of Jones' views flat-out contradict key underpinnings of the Bankruptcy Code (and of American capitalism). For example, Jones disagrees both that United's primary goal in this restructuring should be to maximize value for shareholders and that the basic goal of an American corporation is to make money:

> Q. So you don't agree that United's number one goal, coming out of bankruptcy, should be to maximize value for shareholders?
>
> A. No, I guess I don't. I think it is an important goal for a company to remain financially viable, but doing it at all costs, I do not believe that they should it at all costs; I do not believe in that. In other words, I think there are limits to the means by which firms should pursue the profit motive.[12]
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> * * *
>
> Q. Do you agree with me that the goal of a company is to make money?
>
> A. No.[13]

As he must, Jones basically concedes that his theories are inconsistent with the mainstream of corporate America today, and his theories plead for "a different moral community."[14] Respectfully, this Court does not need lectures in philosophy or political theory; it need only apply the Bankruptcy Code to the facts at bar. Jones' teachings address none of these issues.

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[11] Ex. A, Jones Dep. at 82:23-83:19.

[12] *Id.* at 14:9-17.

[13] *Id.* at 13:22-24.

[14] *Id.* at 41:10-42:9.

Jones' so-called "objections" to Douglas Friske's expert report are similarly irrelevant. As a threshold matter, for his part, ***Jones agrees with United that "a MEIP is necessary."***[15] But Jones criticizes Friske for supposedly failing to account for three considerations in evaluating the reasonableness of United's proposed MEIP: (1) "the very substantial sacrifices made by UAL's employees in terms of wages, benefits, vacation time, and pension benefits"; (2) "the contract that Mr. Tilton signed shortly before Chapter 11"; and (3) the alleged "damage done to firm/stakeholder trust."[16] Unfortunately, these factors, like Jones' other opinions, do not bear in any respect on whether this Court should confirm United's plan. As explained in United's response brief, while United certainly considered how their employees might react when they decided to propose the MEIP, the past sacrifices of flight attendants, like the past sacrifices of management employees, are simply not relevant to whether United proposed its plan of reorganization in good faith or has satisfied Section 1129's other requirements.[17]

Simply put, Jones' proposed testimony is immaterial to the questions before the Court and should be excluded under *Daubert*.[18]

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15 *Id.* at 51:14-15.

16 Ex. B, Jones Rpt. at 8-9.

17 *See* Docket No. 14506, Reorganizing Debtors' Memorandum of Law (A) In Support of Confirmation of the Debtors' Second Amended Joint Plan of Reorganization of the Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code and (B) In Response to Objections Thereto ("United Response") at 35-49.

18 *See Daubert*, 509 US at 591 (Court must consider "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."); *DiBella*, 403 F.3d at 121 (excluding ethicist as irrelevant); *Welding Fume Prods.*, 2005 WL 1868046 (same); *Rezulin Prods.*, 309 F. Supp. 2d at 543 (same).

B. Jones' Proposed Testimony Is Unreliable.

Proposed expert testimony must not only be relevant, but also scientifically reliable – that is, based on "more than subjective belief or unsupported speculation."[19] Several factors inform the reliability inquiry, including whether: (i) it has been subjected to the scientific method; (ii) it has been subjected to peer review; (iii) it has been evaluated in light of the potential rate of error of the technique; and (iv) it is consistent with the generally accepted method for gathering the relevant scientific evidence.[20] Jones' proposed testimony does not come close to meeting these standards.

Jones has not applied any identifiable scientific method, nor has he analyzed any data at all, to substantiate his "opinions" about United's proposed MEIP. Indeed, the primary theoretical work upon which he bases his testimony[21] is not published, not peer reviewed, and ***not even completed***.[22] More egregiously, Jones concedes that:

- he performed no analyses of the specific terms of the MEIP;[23]
- he did no research at all, let alone a survey, of United's employees whose trust the MEIP would supposedly breach;[24]
- he did not compare United's proposed MEIP to those at other companies;[25]
- he performed no analyses to determine whether – as United believes – the MEIP is necessary to attract and retain qualified management employees;[26] and

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19 *Daubert*, 591 U.S. at 590.

20 *See Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir. 1996).

21 Ex. B, Jones Rpt., at 3 (describing his in-process paper which "should be completed within a month or two").

22 Ex. A, Jones Dep. at 62:22-63:12.

23 *Id.* at 45:7-11.

24 *Id.* at 83:17-21.

25 *Id.* at 48:24-49:8.

- he did not research how United's management is paid relative to the market.[27]

Indeed, Jones performed no empirical work at all to come to any conclusion regarding the alleged effect of the MEIP on United's employees.[28] Jones' proposed testimony, in fact, is based ***entirely*** on the theoretical application of generic ethical and philosophical principles that, as discussed above, have no relevance to this bankruptcy, much less confirmation of United's plan. Such opinions lack any reliable basis and are inadmissible under *Daubert*.[29]

Jones' criticisms of Friske's report are also completely unsubstantiated. Jones ***did not analyze the data that went into Friske's report***.[30] Nor did he perform any other economic analyses to assess the alleged impact, if any, of the factors he claims Friske should have considered in evaluating the competitiveness of United's proposed MEIP.[31] To his credit, Jones admits that he would be unqualified to undertake any such analyses: he is not an expert on executive or management compensation, labor relations, employee morale, or employee attrition.[32] He has never designed an executive compensation program, consulted any company on management pay issues, worked or been retained by a company's human resources department, done any studies (at United or elsewhere) on employee morale and attrition, or

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26 *Id.* at 49:25-50:6.

27 *Id.* at 50:18-20.

28 *Id.* at 83:22-24.

29 *See Cummins*, 93 F.3d at 370 (excluding engineer's testimony because his opinions were not "derived from the scientific method"); *Rosen*, 78 F.3d at 318-20 (barring cardiologist's testimony because his opinions "while expressing what may be an insightful, even an inspired, hunch concerning the cause of the heart attack . . . , lack[] scientific rigor"); *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 421 (7th Cir. 2005) (holding that "the district court did not abuse its discretion by excluding [the expert's] untestable say-so").

30 Ex. A, Jones Dep. at 49:9-11.

31 *See id.* at 83:21-25; 84:9-17; 99:15-17.

32 *Id.* at 11:7-13:5.

advised a company on labor relations.[33] To be blunt, Jones' opinions about Friske's analysis, like his other opinions, have no reliable basis whatsoever, and this Court should exclude the entirety of Jones' opinions under *Daubert*.

II. Other Evidence of "Employee Morale" Should Also Be Excluded.

In addition to the "expert" testimony of Mr. Jones, the AFA and the Air Line Pilots Association ("ALPA") intend to introduce other evidence that United's proposed MEIP would supposedly harm employee morale by breaching a covenant of "shared sacrifice." Specifically, the AFA plans to call its President, Greg Davidowitch, and ALPA its Communications Chairman, Captain Steven Derebey, to testify on this topic – the theory that the MEIP if accepted will harm employee morale and, thus, United. This Court should exclude this evidence for two separate and independent reasons.

First, as with Jones' proffered testimony, this evidence is irrelevant to the issues that this Court must decide at the confirmation hearing. Whether the proposed MEIP would affect employee morale, or whether it impacts the "shared sacrifice" between United's management and its represented employees, does not bear on any applicable legal standard, and ALPA and the AFA do not contend that it does. Instead, both employee groups focus on the degree to which their members have already sacrificed to further United's restructuring – a concept with which United wholly agrees and appreciates, and the facts underlying of which United would gladly stipulate.[34] But, as explained above and described in detail in United's reply brief in support of confirmation, as much as United appreciates them, the past sacrifices of

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[33] *Id.*

[34] Docket No. 13893, ALPA Conditional Objection at ¶¶ 10-12; Docket No. 13918, AFA Objection at 20-21.

ALPA and AFA-represented employees, like those of salaried and management ("SAM") employees, are irrelevant to whether United proposed its plan of reorganization in good faith.[35]

Second, even if employee morale were somehow relevant to confirmation of United's plan (which it is not), this Court should exclude Davidowitch's and Derebey's proffered testimony because both lack foundation, and their testimony is based entirely on inadmissible hearsay.[36] Neither man has personal, quantifiable knowledge of how other employees view the MEIP. For example, Davidowitch concedes that the AFA has not polled its members or commissioned any studies to determine how flight attendants would react to the MEIP.[37] Rather, Davidowitch admits that his belief that the MEIP would hurt morale is based on "feedback that is garnered through local counsel and communications and conversations over the telephone" with various flight attendants.[38] Davidowitch's and Deresby's proffered testimony lacks foundation and should be excluded.

Because the MEIP is the sole subject about which Davidowitch and Derebey will testify,[39] this Court should exclude their testimony entirely, as well as any other evidence relating to the purported effect of the MEIP on employee morale -- it is irrelevant, and there is no foundation for any such testimony.

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35 Docket No. 14506, United Response at 35-49.

36 *See, e.g., Litton Sys., Inc. v. AT&T Co.*, 700 F.2d 785, 816 (2d Cir. 1983) (excluding notes regarding employee morale as hearsay); *Iva Ikuko Toguri D'Aquino v. U.S.*, 192 F.2d 338, 373 & n.29 (9th Cir. 1951) (memorandum that plaintiff's broadcast improved morale was inadmissible hearsay).

37 Ex. C, Davidowitch Dep. at 6:24-7:22.

38 *Id.* at 9:8-13.

39 *See* Ex. C, Davidowitch Dep. at 63:17-21; Ex. D, AFA Interr. Resp. at 2; Ex. E, B. Ceccotti 1/3/06 e-mail.

WHEREFORE, United respectfully requests that this Court bar the expert testimony of Thomas Jones pursuant to *Daubert* and any other evidence purportedly relating to employee morale as irrelevant.

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Respectfully submitted,

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