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
	)	

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

James H.M. Sprayregen, P.C.
Marc Kieselstein, P.C.
David R. Seligman
James J. Mazza, Jr.
Chad J. Husnick
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Counsel for the Debtors and Debtors in Possession

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H.R. Rep. No. 595, 95th Cong., lst Sess. (1977) 7, 14, 113

S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 7, 14, 21

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Fed. R. Bankr. P. 3020(d) 117

Fed. R. Bankr. P. 8005 128

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1123 COLLIER ON BANKRUPTCY ¶ 1123.01[4][b] 86

1327.02 COLLIER ON BANKRUPTCY ¶1327.02.. 101

503.02 COLLIER ON BANKRUPTCY ¶ 503.02.. 113

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7-1129 COLLIER ON BANKRUPTCY § 1129.01 .... 43, 67, 81

7-1129 COLLIER ON BANKRUPTCY ¶ 1129.03 .... 18, 52

7-1129 COLLIER ON BANKRUPTCY ¶ 1129.06 119

7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1754 (2005) 122

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Richard H. Gibson, *Home Court, Outpost Court: Reconciling Bankruptcy Case Control With Venue Flexibility in Proceedings*, 62 AM. BANKR. L .J. 37, 62-4 (1988).. 123

Robert Comment & G. William Schwert, *Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures*, 39 J. FIN. ECON. 3 (1995) 72

Sharon Hannes, *Private Benefits of Control, Antitakeover Defenses, and the Perils of Federal Intervention*, 2 BERKELEY BUS. L.J. 263 (Spring, 2005) 71

Sharon Hannes, *The Role and Limits of Legal Regulation of Conflicts of Interest (Part II)*, 6 THEORETICAL INQUIRIES L. 391 (July, 2005).. 71

PRELIMINARY STATEMENT

This Court should confirm United's Plan of Reorganization, which marks the culmination of United's three-year transformation in Chapter 11.[1] During the three years of these Chapter 11 Cases—which are among the largest and most complex in history—United has restructured almost every aspect of its business, including revamping its labor and pension costs, marking to market its aircraft fleet, restructuring its municipal bond obligations, and renegotiating its leases and contracts, notwithstanding industry woes of epic proportions, while delivering greatly improved operational performance to its customers. Since these cases began, United has plotted a course around myriad obstacles besetting legacy carriers, including historically high fuel prices, persistently low yields, unrelenting competition from low cost carriers, and increased fare transparency. With a head of steam—Standard and Poor's and Moody's rating services just assigned their "B+" and "B1" ratings respectively to United's $3 billion exit facility—United is at last poised to emerge from Chapter 11 with a resilient balance sheet, a strong cash position, and a renewed and sustainable ability to compete for the long term.

United now presents a largely consensual Plan to this Court for confirmation. In a ringing endorsement of United's future, United's creditors voted overwhelmingly in favor of the Plan. On an aggregate basis, approximately 16,000 creditors voting more than $17 billion in Claims—almost 90% of the eligible voting creditors and 98% of the total dollar amount of Claims—accepted the Plan. Specifically, the percentage of accepting voting creditors in each Class, on a consolidated basis, ranged from 64% to 100%, easily exceeding the necessary 50%

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[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan.

per Class required under Section 1126(c) of the Bankruptcy Code. The accepting dollar value of votes per Class on a consolidated basis ranged from 84% to 100%, well above Section 1126(c)'s two-thirds threshold.[2]

United submits this memorandum (the "Memorandum") to explain how it easily satisfies its affirmative burden to demonstrate by a preponderance of evidence that the Plan satisfies all requirements of Section 1129 of the Bankruptcy Code.[3] This Memorandum also addresses the 56 Plan objections—22 of which were submitted by *pro se* parties—received by United. Virtually none of the 56 objections raise traditional plan confirmation issues, such as classification, feasibility, the best interests test, or the absolute priority rule. Indeed, most of the objections were limited in nature, only requesting clarifications of plan language or seeking to reserve or assert what are purported to be specific individual legal rights. The "major" objections to the Plan relate to the Plan's Management Equity Incentive Plan, selection of the Reorganized UAL's post-emergence board, and distributions to salaried and management employees on account of their wage and pension sacrifices during the restructuring. As discussed below, these objections have no merit.

Nevertheless, United has been working with the objecting parties to resolve their objections, and, as of this filing, can report that 17 objections have been resolved through agreements and/or Plan modifications. Attached as Exhibit A is a chart listing the identity of each objecting party and the status of its particular objection. Prior to the confirmation pre-trial

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[2] None of the eligible 20 voting creditors in Class 1E-1 returned ballots to the Debtors' solicitation agent. As discussed below, this Class should be deemed to accept the Plan. If not, United can meet the requirements of Section 1129(b) for this Class.

hearing on January 17, United will file a revised Exhibit A to update the Court on the status of additionally resolved objections. Unless otherwise stated herein, this Memorandum responds to those objections that remain unresolved as of this date in the Response Section below.

I. BACKGROUND

On September 7, 2005, after many months of close collaboration with its stakeholders, the Debtors filed their Plan and Disclosure Statement.[4] At a hearing on October 20, 2005, this Court approved the adequacy of information in United's Disclosure Statement and allowed United to solicit votes on its proposed Plan.[5] On October 24, United filed its first amended Disclosure Statement, which included the Plan as Appendix A.[6] On October 27, 2005, Poorman-Douglas Corporation, United's solicitation agent, began to distribute solicitation packages to United's creditors.[7] The deadline for creditors to submit ballots to accept or reject the Plan was December 19, 2005.[8]

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[3] Before the Confirmation Hearing begins, United will file an Exhibit Book in Support of Confirmation of the Plan.

[4] *See* Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code [Docket No. 12638]; Disclosure Statement for Reorganizing Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code [Docket No. 12640].

[5] *See* Order Approving (A) the Disclosure Statement and (B) Approving the Solicitation Procedures and Form of Solicitation Documents and Notices [Docket No. 13285] (the "Disclosure Statement and Solicitation Procedures Order").

[6] *See* First Amended Disclosure Statement for Reorganizing Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code [Docket No. 13321].

[7] *See* Declaration of Poorman-Douglas Corporation Regarding Service of Solicitation Documents [Docket No. 13512].

[8] *See* Order (A) Scheduling Certain Hearing Dates And Deadlines in Connection with Proposed Confirmation of Debtors' Plan of Reorganization; (B) Establishing a Record Date

(Continued…)

II. VOTING STATUS

On December 30, 2005, Poorman-Douglas filed a ballot report (the "Ballot Report") setting forth the Plan voting results.[9] In sum, all Classes in which ballots were cast voted to accept the Plan on a consolidated basis.[10] On an unconsolidated basis, all Classes that returned ballots accepted the Plan, except for Class 17E.[11]

Classes 1A, 1B-1, 1B-2, 1C, 2A, 2B-1, 2B-2, 2C, 3A, 3B-1, 3B-2, 3C, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B, 6C, 7A, 7B, 7C, 8A, 8B, 8C, 9A, 9B, 9C, 10A, 10B, 10C, 11A, 11B, 11C, 12A, 12B, 12C, 13A, 13B, 13C, 14A, 14B, 14C, 15A, 15B, 15C, 16A, 16B, 16C, 17A, 17B, 17C, 18A, 18B, 18C, 19A, 19B, 19C, 20A, 20B, 20C, 21A, 21B, 21C, 22A, 22B, 22C, 23A, 23B, 23C, 24A, 24B, 24C, 25A, 25B, 25C, 26A, 26B, 26C, 27A, 27B, 27C, 28A, 28B, 28C (collectively, the "Deemed Accepting Classes"), consisting of Holders of DIP Facility Claims, Secured Claims, and Priority Claims, are Unimpaired under the Plan and are deemed to accept the Plan. In addition, Classes 1F, 1G , 1H, 1I, 2H, 2I, 3H, 4H, 5H, 6H, 7H, 8H, 9H, 10H, 11H, 12H, 13H, 14H, 15H, 16H, 17H, 18H, 19H, 20H, 21H, 22H, 23H, 24H, 25H, 26H, 27H, and 28H (collectively, the "Deemed Rejecting Classes"), consisting of Holders of TOPrS Claims (Class

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in connection with the Debtors' Plan of Reorganization; and (C) Establishing a Process to Resolve Certain Claims [Docket No. 12880].

[9] *See* Declaration of Poorman-Douglas Corporation Certifying Ballots Accepting and Rejecting the Debtors' First Amended Joint Plan Of Reorganization and Setting Forth Other Ballot-Related Information [Docket No. 14313].

[10] None of the eligible 20 voting creditors in Class 1E-1, which consists of Holders of Unsecured Retained Aircraft Claims against UAL, returned ballots to the Debtors' solicitation agent.

[11] *See* Exhibit A-3 to Declaration of Poorman-Douglas Corporation Certifying Ballots Accepting and Rejecting the Debtors' First Amended Joint Plan Of Reorganization and Setting Forth Other Ballot-Related Information [Docket No. 14313].

1F), Interests (Classes 1G and 1H-28H), and Subordinated Securities Claims (Classes 1I and 2I), which are subordinate to all other Classes of Claims under the Bankruptcy Code's priority scheme, are completely impaired under the Plan, and therefore are deemed to have rejected the Plan. As discussed herein, United easily satisfies Section 1129(b)'s "cramdown" requirements with respect to the Deemed Rejecting Classes.

III. MODIFICATIONS OF THE PLAN

To resolve a number of Plan objections, United has made certain modifications to the Plan. Prior to the confirmation hearing, United will file and serve on the 2002 notice list and all Plan objectors a "blackline" version of the Plan highlighting changes to the version of the Plan distributed with the Disclosure Statement and solicitation materials. As the Debtors continue to work toward resolution of objections, certain additional modifications may be referenced on the record during the Confirmation Hearing. United submits that all modifications to the Plan are immaterial because they address individual concerns raised by individual creditors and do not adversely affect the treatment of creditors who voted to accept the Plan. As a result, all creditors that had previously accepted the Plan should also be deemed to accept the Plan, as modified, without United having to resolicit Plan acceptances.[12]

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[12] *See* 11 U.S.C. § 1127(d); *In re Dow Corning Corp.*, 237 B.R. 374, 378 (Bankr. E.D. Mich. 1999) (holding that where proposed modification does not adversely impact previously accepting claimants, such claimants are deemed to accept the modified plan); *In re Westwood Plaza Apts.*, 147 B.R. 692, 698 (Bankr. E.D. Tex. 1992); *In re Am. Solar King Corp.*, 90 B.R. 808, 823-26 (Bankr. W.D. Tex. 1988) (holding resolicitation not required where proposed modification does not adversely and materially impact parties who previously voted for the plan); *In re Frontier Airlines, Inc.*, 93 B.R. 1014, 1023-24 (Bankr. D. Co. 1988) (holding that resolicitation is not required unless plan modifications constitute a material adverse change to treatment of creditors); *In re Mount Vernon Plaza Cmty. Urban Redevelopment Corp. I*, 79 B.R. 305 (Bankr. S.D. Ohio 1987) (holding that where creditors voting in favor of plan were not negatively affected, resolicitation not required).

ARGUMENT

I. THE PLAN SHOULD BE CONFIRMED[13]

To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of Section 1129 of the Bankruptcy Code by a preponderance of the evidence.[14] United submits that the Plan complies with all relevant sections of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and applicable non-bankruptcy law. In particular, the Plan fully complies with all of the requirements of Sections 1122, 1123 and 1129 of the Bankruptcy Code. This Memorandum addresses each requirement individually.

A. The Plan Complies With Section 1129(a)(1) of The Bankruptcy Code

Section 1129(a)(1) of the Bankruptcy Code requires that a plan of reorganization comply with the applicable provisions of Chapter 11 of the Bankruptcy Code.[15] The legislative history of Section 1129(a)(1) indicates that a principal objective of this provision is to assure

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[13] Any facts referenced in this Memorandum are supported by the Affidavit of Kathryn A. Mikells in Support of Confirmation, which will be filed separately with the Court, and is incorporated herein by reference.

[14] *See Heartland Fed. Savings & Loan Ass'n v. Briscoe Enters., Ltd. III (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993) ("[t]he combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under 11 U.S.C. § 1129(a) and in a cramdown."); *see also In re 203 N. LaSalle St. L.P.*, 190 B.R. 567, 576 (Bankr. N.D. Ill. 1995) (Wedoff, J.), *rev'd on other grounds*, 526 U.S. 434 (1999) ("Although the matter has been debated, it now appears fairly well established that the burden of proof is by a preponderance of the evidence"); *In re Envirodyne Indus., Inc.*, 1993 WL 566565, at *28 (Bankr. N.D. Ill. Dec. 20, 1993) ("The appropriate standard for determining compliance with § 1129 of the Bankruptcy Code is the 'preponderance of the evidence'"). Even if the clear and convincing evidentiary standard applied to confirmation, the Plan must still be confirmed.

[15] 11 U.S.C. § 1129(a)(1).

compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan of reorganization.[16] As explained below, the Plan complies with both Section 1122 and 1123 in all respects.

(1) The Plan Satisfies 11 U.S.C. § 1122's Classification Requirements

The Plan satisfies Section 1122's classification requirements. Section 1122 of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonably necessary for administrative convenience.[17]

The Seventh Circuit has recognized that under 11 U.S.C. § 1122 "a debtor in bankruptcy has considerable discretion to classify claims and interests in a chapter 11 reorganization plan."[18] The Seventh Circuit has further identified several grounds justifying separate classification, including: (i) where the legal rights of holders of claims are sufficiently different to render the claims not substantially similar; (ii) where there are good business reasons for separate classification; and (iii) where claimants have sufficiently different interests in the

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[16] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978); H.R. Rep. No. 595, 95th Cong., lst Sess. 412 (1977); *In re S&W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the legislative history of [Section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was more directly aimed at were Sections 1122 and 1123").

[17] 11 U.S.C. § 1122.

[18] *In re Wabash Valley Power Assoc., Inc.*, 72 F.3d 1305, 1321 (7th Cir. 1996) (citing *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994)).

plan.[19] Thus, the Bankruptcy Code also does not, as a categorical matter, require the same classification of claims that may share some similar attributes.[20]

Here, unsecured creditors have been separately classified based upon their different rights and the different attributes of their Claims. For example, the Plan classifies Holders of Unsecured Aircraft Claims (*e.g.*, Classes 2E-1 and 2E-2) separately from Holders of Other Unsecured Claims (Class 2E-6). The reason for this is simple. Holders of Unsecured Aircraft Claims have rights (*i.e.,* Section 1110 rights in aircraft equipment) different than those of Holders of Other Unsecured Claims.[21] In fact, in the case of Unsecured Aircraft Claims, the Plan separately classifies these unique creditors into further subgroups based on the treatment of their aircraft. In particular, Class 2E-1 consists of Holders of Unsecured Retained Aircraft Claims (*i.e.*, creditors whose aircraft are subject to postpetition agreements entered into by the Debtors) while Class 2E-2 consists of Holders of Unsecured Rejected Aircraft Claims (creditors whose aircraft were rejected or abandoned during these Chapter 11 Cases). Other examples of separate classification are the Unsecured PBGC Claims, the Unsecured Chicago Municipal Bond

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[19] *See id.*

[20] *See, e.g.*, *Matter of Jersey City Med. Ctr.*, 817 F.2d 1055, 1060 (3d. Cir. 1987) ("[t]he express language of this statute explicitly forbids a plan from placing dissimilar claims in the same class; it does not, though, address the presence of similar claims in different classes"); *Teamster Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., (In re U.S. Truck Co.,)* 47 B.R. 932 (E.D. Mich. 1985), *aff'd* 800 F.2d 581 (6th Cir. 1986) ("Section 1122(a) specifies that only claims which are "substantially similar" may be placed in the same class. It does not require that similar claims *must* be grouped together, but merely that any group created must be homogenous"); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989) ("a debtor may place claimants of the same rank in different classes and thereby provide different treatment for each respective class").

[21] *See, e.g., Matter of Woodbrook Assocs.*, 19 F.3d 312, 319 (7th Cir. 1994) (holding that separate unsecured classification of creditor with an unsecured deficiency claim and special rights under Section 1111(b) to not only be proper but required under Section 1122(a)).

Claims, and the Unsecured Public Debt Aircraft Claims, each of which are separately classified based on settlement agreements approved by this Court resolving such parties' unique Claims against the Debtors' estates and providing for unique treatment. In each instance of separate classification, the Plan uses similar logic. As such, valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan. Thus, the Plan satisfies Section 1122 of the Bankruptcy Code.

Not a single party objected to the rationale behind the Plan's classification scheme, which lends further support to the conclusion that the Plan is entirely consistent with the Bankruptcy Code in this regard.[22]

(2) The Plan Satisfies the Seven Mandatory Plan Requirements of 11 U.S.C. § 1123(a)(1)-(a)(7)

The Plan meets Section 1123(a)'s seven mandatory requirements, and no party has filed an objection suggesting otherwise. Specifically, Sections 1123(a)(1)-(7) require that a plan:

(i) designate classes of claims and interests;

(ii) specify unimpaired classes of claims and interests;

(iii) specify treatment of impaired classes of claims and interests;

(iv) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim agrees to a less favorable treatment of such particular claim or interest;

(v) provide adequate means for the plan's implementation;

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[22] Although URPBPA has objected to the Plan's "classification" of distributions to active pilots as separate from retired pilots' claims, URPBPA's complaint is not with the underlying logic behind the classification scheme itself, but rather, with the fact that URPBPA's members were not given the same consideration as ALPA's members under the ALPA Restructuring Agreement.

(vi) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and

(vii) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors.[23]

Article III of the Plan satisfies the first three requirements of Section 1123(a) by: (i) designating classes of Claims and Interests, as required by Section 1123(a)(1); (ii) specifying the Classes of Claims and Interests that are not Impaired under the Plan, as required by Section 1123(a)(2); and (iii) specifying the treatment of each Class of Claims and Interests that is Impaired, as required by Section 1123(a)(3). The Plan also satisfies Section 1123(a)(4)—the fourth mandatory requirement— because the treatment of each Claim or Interest within a Class is the same as the treatment of each other Claim or Interest in that Class, unless the Holder of a Claim or Interest agrees to less favorable treatment on account of its Claim or Interest.

Article VI and various other provisions of the Plan provide adequate means for the Plan's implementation, thus satisfying Section 1123(a)'s fifth requirement.[24] Article VI's provisions relate to, among other things: (a) the continued corporate existence of the Debtors; (b) the vesting of assets in the Reorganized Debtors; (c) sales of New UAL Common Stock on behalf of Holders of Unsecured Convenience Class Claims and Unsecured Retiree Convenience Class Claims; (d) restructuring transactions, including Roll-Up transactions, to effectuate the

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[23] *See* 11 U.S.C. §§ 1123(a)(1)-(7).

[24] *See* 11 U.S.C. § 1125(a)(5). Section 1123(a)(5) specifies that adequate means for implementation of a plan may include, *inter alia*, (i) retention by the debtor of all or part of its property; (ii) the transfer of property of the estate to one or more entities; (iii) cancellation or modification of any indenture; (iv) curing or waiving of any default; (v) amendment of the debtor's charter; (vi) or issuance of securities for cash, for property, for existing securities, in exchange for claims or interests or for any other appropriate purpose.

Plan; (e) generally allowing for all corporate action necessary to effectuate the Plan, including the adoption and filing of the New UAL Charter and New UAL By-laws, appointment of officers and directors of the Reorganized Debtors, implementation of the Management Equity Incentive Plan and the Director Equity Incentive Plan, and the execution, delivery, and performance of the New Credit Facility to satisfy the DIP Facility Claims, make other payments under the Plan, and conduct the Debtors' post-reorganization operations; (f) substantive consolidation of the Estate of each of the United Debtors (*i.e.*, all Debtors other than UAL) into the Estate of United for all purposes associated with confirmation and consummation of the Plan; (g) listing the sources of consideration from which the Debtors will make payments under the Plan; (h) the issuance of New UAL Plan Securities, including New UAL Common Stock, Junior Preferred Stock, New UAL ORD Settlement Bonds, New UAL Convertible Employee Notes, and New UAL PBGC Securities; (i) providing for the listing of New UAL Common Stock on a securities exchange; (j) restrictions on resale of securities to protect net operating losses; (k) cancellation of stock and related obligations; (l) cancellation of stock and related obligations; and (m) preservation of rights of action.

Section 1123(a)'s <u>sixth</u> requirement—that the plan prohibit the issuance of nonvoting equity securities—is also met. In particular, Article VI.G of the Plan provides that the certificate of incorporation of Reorganized UAL will be amended to prohibit the issuance of nonvoting equity securities for two years.[25]

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[25] *See, e.g., In re Kmart Corp.*, Case No. 02-2474 (Bankr. N.D. Ill. 2002), Joint Plan of Reorganization at Article VII, Section 7.4(c)(i) (plan provision prohibiting issuance of non-voting equity securities for a period of two years after the effective date).

Finally, the Plan fulfills Section 1123(a)'s seventh element, which pertains to the selection of a reorganized debtor's officers and directors, because the manner of selecting the officers and directors of the Reorganized Debtors is entirely consistent with Delaware corporate law, the Bankruptcy Code, and the interests of creditors, equity security holders, and public policy.[26] While the OCUC has objected to the proposed selection process, for the reasons discussed below, the OCUC's objections have no basis in fact or law, and the OCUC's expert report is based on flawed facts and logic. Therefore, the OCUC's objections must be overruled, and this Court should find that the Plan satisfies the requirements of Section 1123(a)(7).

B. Discretionary Contents of the Plan

Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan of reorganization, but are not required. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. A plan also may provide for (i) "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate," or (ii) "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest."[27] Finally, a plan may "modify the rights of holders of secured claims … or … unsecured claims, or leave unaffected the rights of holders of any class of claims" and may "include any other appropriate provision not inconsistent with the applicable provisions of [Title 11]."[28] Here, the Plan employs various

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[26] 11 U.S.C. § 1123(a)(7).

[27] 11 U.S.C. §§ 1123(b)(3)(A)-(B).

[28] 11 U.S.C. § 1123(b)(5)-(6).

provisions in line with Section 1123(b)'s discretionary authority. For example, Article III of the Plan provides for the impairment of certain Classes of Claims and Interests, while leaving others unimpaired. The Plan also proposes treatment for executory contracts and unexpired leases, provides a platform for settlement of Claims and Interests, and seeks to implement release, exculpation, and injunction provisions.[29] While certain parties have objected to the Plan's implementation of discretionary provisions as they pertain to their own individual interests, the Debtors submit that the Plan is in accord with Section 1129(b)'s discretionary authority.[30] As discussed below in the Response Section of this Memorandum, these "one-off" objections to certain discretionary provisions of the Plan are not impediments to confirmation.

C. The Debtors Have Complied Fully With The Applicable Provisions Of The Bankruptcy Code (Section 1129(a)(2))

The Debtors have satisfied Section 1129(a)(2), which essentially requires that the Debtors comply with the solicitation provisions of the Bankruptcy Code. This is made clear by the legislative history and cases discussing Section 1129(a)(2).[31] The Debtors have complied

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[29] *See* respectively, Article VII (Treatment of Executory Contracts and Unexpired Leases), Article X.D (Compromise and Settlement of Claims and Controversies), Articles X.F, X.G, X.J (Releases by the Debtors, Exculpation, and Injunction) of the Plan.

[30] For example, certain parties have taken issue with the Plan's treatment of their own executory contracts, the Plan's implementation of releases as to them, and the Plan's proposal for a Plan Oversight Committee.

[31] *See Mabey v. Southwestern Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.,*) 150 F.3d 503, 512 n.3 (5th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999) ("…a plan may not be confirmed unless the plan complies with…§ 1129(a)(2), which provides that a plan may not be confirmed unless the proponent of the plan complies with the applicable provisions of Title 11") (citations omitted); *In re Texaco, Inc.*, 84 B.R. 893, 903 (Bankr. S.D.N.Y. 1988) ("The principal purpose of Section 1129(a)(2) is to assure that the proponents have complied with the requirements of Section 1125 in the solicitation of acceptances to the plan."); *In re Butler*, 42 B.R. 777, 782 (Bankr. E.D. Ark. 1984) ("The principal purpose of §1129(a)(2) is to require…that the Court ascertain whether the proponent of the plan under

(Continued…)

with Section 1129(a)(2) of the Bankruptcy Code by distributing their Disclosure Statement and soliciting acceptances of their Plan through their solicitation agent as authorized under the Disclosure Statement and Solicitation Procedures Order.[32] No party has suggested that the Debtors did not fulfill their solicitation obligations in connection with the Plan.

D. The Plan Has Been Proposed in Good Faith and Not By Any Means Forbidden by Law (Section 1129(a)(3))

(1) Section 1129(a)(3)—The Plan Was Proposed in Good Faith

Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law."[33] In the context of Section 1129(a)(3), good faith is not some free-floating conception of ethics or morality but rather has a specific meaning: good faith "is generally interpreted to mean that there exists a 'reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'"[34]

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consideration has complied with §1125 of the Code…"); S. Rep. No. 989, 95th Congr., 2d Sess. 126; H.R. Rep. No. 595, 95th Cong., 1st Sess. 412.

[32] *See* Declaration of Poorman-Douglas Corporation Certifying Ballots Accepting and Rejecting the Debtors' First Amended Joint Plan Of Reorganization and Setting Forth Other Ballot-Related Information [Docket No. 14313].

[33] 11 U.S.C. § 1129(a)(3).

[34] *In re Madison Hotel Assocs.*, 749 F.2d 410, 424-25 (7th Cir. 1984); *see Official Comm. Of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 165 (3d Cir. 1999) (finding good faith requires "some relation" between the Chapter 11 plan and the "reorganization-related purposes" of Chapter 11); *see also In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999) (holding good faith requires that the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code); *In re New Valley Corp.*, 168 B.R. 73, 80 (Bankr. D. N.J. 1994) ("It is generally held that a plan is proposed in good faith if there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purpose of the Bankruptcy Code.").

The fundamental purpose of Chapter 11 is to enable a distressed business operation to reorganize its affairs to prevent the loss of jobs and the adverse economic effects associated with disposing of assets at their liquidation value.[35] And to determine whether the plan seeks relief consistent with the Bankruptcy Code, courts look to the reorganization plan itself.[36] Thus, where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of Section 1129(a)(3) is satisfied.[37]

Here, United has proposed the Plan in good faith, with the legitimate and honest purposes of reorganizing United's ongoing business and maximizing the value of each of the Debtors's value and the recovery to creditors. Therefore, the Plan has been proposed in good faith as interpreted under the Bankruptcy Code. While the OCUC, AFA, ALPA, IAM and URPBPA have raised specific "good faith" objections, primarily based on the Plan's implementation of the MEIP, these objections are not well founded. United addresses these objections in the Response section of this Memorandum.

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[35] *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *see also B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) (stating "the two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start."); *see also In re Bonded Mailings, Inc.*, 20 B.R. 781, 785 (Bankr. E.D.N.Y. 1982) (holding Bankruptcy Code's policy of equitable distribution amongst creditors should not be thwarted by actions of a single creditor).

[36] *Madison Hotel Assocs.*, 749 F.2d at 425; *see also*, *In re Sound Radio, Inc.*, 93 B.R. 849, 854 (Bankr. D.N.J. 1988) (holding focus of good faith inquiry on plan itself rather than other factors), *aff'd in part and remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990).

[37] *See In re Century Glove, Inc.*, 1993 WL 239489 at *4 (D. Del. Feb. 10, 1993); *see also Fin. Sec. Assurance, Inc. v. T-H New Orleans L.P. (In re T-H New Orleans L.P.)*, 116 F.3d 790, 802 (5th Cir. 1997) (same).

(2) The Plan Has Not Been Proposed by Any Means Prohibited by Law

Additionally, the Plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code and is not proposed by any means forbidden by law, and no party has suggested otherwise. Therefore, the good faith requirement of Section 1129(a)(3) of the Bankruptcy Code has been fully satisfied.

E. The Plan Provides For Bankruptcy Court Approval Of Certain Administrative Payments (Section 1129(a)(4))

Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, by the debtor, or by a person issuing securities or acquiring property under the Plan, be subject to approval of the Court as reasonable. Specifically, Section 1129(a)(4) requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to approval of, the court as reasonable.[38]

This section has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by the Court as to their reasonableness.[39] All payments made or to be made by the Debtors for services or for costs or expenses in connection with the Chapter 11 Cases, including all claims of retained professionals, have been approved by, or are subject to approval of, the Court as reasonable. Article II.A of the

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[38] 11 U.S.C. § 1129(a)(4)

[39] *In re Future Energy Corp.*, 83 B.R. 470 (Bankr. S.D. Ohio 1988); *U.S. Truck Co.,* 47 B.R. 932.

Plan provides for the payment of only Allowed Administrative Claims.[40] In addition, Article XI.B of the Plan provides that all final requests for payment of Claims of a Professional shall be filed no later than 45 days after the Confirmation Date. After notice and a hearing in accordance with the procedures established by the Bankruptcy Code and prior Final Orders of the Bankruptcy Court, the Allowed amounts of such Professional Claims shall be determined by the Bankruptcy Court. Accordingly, the Plan fully complies with the requirements of Section 1129(a)(4) of the Bankruptcy Code, and no party has objected to the Plan on that basis.

F. Post-Emergence Directors and Officers Will Be Disclosed Before Confirmation and Their Appointment Is Consistent With Public Policy (Section 1129(a)(5))

United has complied with all the elements of Section 1129(a)(5) of the Bankruptcy Code (in addition to compliance with the related provisions of Section 1123(a)(7), discussed elsewhere herein). In particular, Section 1129(a)(5)(A) requires that prior to Confirmation, the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors and that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy. In addition, Section 1129(a)(5)(B) requires a plan proponent to disclose the identity of an "insider" (as defined by 11 U.S.C. § 101(31)) to be employed or retained by the reorganized debtor and the "nature of any compensation for such insider."[41]

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[40] *See In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (holding that requirements of Section 1129(a)(4) were satisfied where the plan provided for payment of only "allowed" administrative expenses).

[41] *See In re Apex Oil Co.*, 118 B.R. 683, 704-705 (Bankr. E.D. Mo. 1990) (finding Section 1129(a)(5)(B) satisfied where plan fully disclosed that certain insiders will be employed by

(Continued…)

United's Plan satisfies the first of Section 1129(a)(5)'s requirements because United already has disclosed that the existing offers and directors of the United Debtors (*i.e.*, all Debtors except UAL) and the existing officers of UAL shall continue to serve initially in their current capacities on and after the Effective Date. Contemporaneously herewith, the Debtors are filing a list of the Reorganized Debtors' officers and the nature of their compensation. And as discussed in greater detail below, the Nominating/Governance Committee of the existing Board currently is considering individuals, including current Board members and individuals suggested by the OCUC, for appointment to the Reorganized UAL Board. United will disclose publicly the identities of the Reorganized UAL Board members prior to the confirmation hearing. Thus, United will satisfy Section 1129(a)(5)(A)(i).

In addition, the evidence will show that the proposed directors and officers of the Reorganized Debtors will comply with Section 1129(a)(5)(A)(ii), which requires that the bankruptcy court find that the proposed directors and officers are qualified and honest as a matter of fact.[42] Indeed, on December 27, this Court specifically recognized that the only relevant

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reorganized debtor and the terms of employment of such insiders); *In re Texaco, Inc.*, 84 B.R. 893, 908 (Bankr. S.D.N.Y.), *appeal dismissed*, 92 B.R. 38 (S.D.N.Y. 1988) (finding requirements of Section 1129(a)(5)(B) satisfied where the plan discloses debtors' existing officers and directors who will continue to serve after plan confirmation).

[42] *See* 7-1129 COLLIER ON BANKRUPTCY ¶ 1129.03[5][b] ("public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."); *Bank of America, Ill. v. 203 North LaSalle Street P'ship*, 195 B.R. 692 (Bankr. N.D. Ill. 1996), *aff'd*, 126 F.3d 955 (7th Cir. 1997), *rev'd on other grounds*, 526 U.S. 434 (1999) (rejecting argument that proposed management of reorganized debtors was incompetent for purposes of Section 1129(a)(5)(A)(ii) because of management's failure to pay real estate taxes during case).

inquiry under Section 1129(a)(5)(A)(ii) is the *bona fides* of United's proposed officers and directors.[43]

Finally, United will have disclosed publicly the identity of all insiders to be employed or retained by the Reorganized Debtors and the nature of any compensation for such insiders in compliance with Section 1129(a)(5)(B). Indeed, contemporaneously herewith, United is disclosing in a separate court filing the nature of compensation for officers of the Reorganized Debtors. And United already prepared and distributed to the MEIP Objectors a detailed analysis of insider compensation in conjunction with its expert report in support of the MEIP.

G. The Plan Does Not Require Governmental Regulatory Approval (Section 1129(a)(6))

Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the plan. The foregoing provision is inapplicable in these Chapter 11 Cases. No regulatory commission has any jurisdiction over rate changes by the Debtors. Further, the Plan does not provide for rate changes by the Debtors. Therefore, the Plan satisfies the requirements of Section 1129(a)(6) of the Bankruptcy Code. No party has objected to the Plan's satisfaction of this provision.

H. The Plan is in the Best Interests of Creditors and Interest Holders (Section 1129(a)(7))

Section 1129(a)(7) of the Bankruptcy Code—the "best interests test"—requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest of such class under the Plan on account of such claim or interest:

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[43] Hrg. Tr. Dec. 27, 2005 at 7:8-12.

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.[44]

The best interests test applies to individual dissenting creditors rather than classes of claims,[45] and is generally satisfied through a liquidation/recovery analysis.[46] As Section 1129(a)(7) makes clear, the best interests test applies only to non-accepting impaired claims or equity interests.

Here, the Plan satisfies the best interests test. As demonstrated by the liquidation and valuation analyses included in Appendix B to the Disclosure Statement, estimated recoveries for members of each Impaired Class are equal to or in excess of the recoveries estimated in a hypothetical Chapter 7 case. On a consolidated basis, the Debtors estimate that the net proceeds available for distribution to Creditors by a Chapter 7 trustee would be approximately $4.4 billion in a forced liquidation and approximately $5 billion in an orderly liquidation. In either scenario, the Chapter 7 liquidation proceeds would satisfy in full all DIP Facility Claims and Secured Claims. However, Administrative Claims would not be paid in full, and Unsecured Creditors would receive no distribution. Meanwhile, under the Plan, Holders of Unsecured Claims are estimated to recover 4-8% of their Claims.

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[44] 11 U.S.C. §§ 1129(a)(7)(A)(i)-(ii).

[45] *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999).

[46] *In re A.G. Consultants Grain Div., Inc.*, 77 B.R. 665 (Bankr. N.D. Ind. 1987); *In re Jartran, Inc.*, 44 B.R. 331, 389-93 (Bankr. N.D. Ill. 1984) (finding best interests test satisfied by showing that, upon liquidation the cash received would be insufficient to pay priority claims and secured creditors and that unsecured creditors and shareholders would receive nothing).

On an unconsolidated basis, only Unsecured Creditors of ULS (*i.e.*, Class 23E) would receive any distribution in Chapter 7 liquidation: a 2.07% recovery in a forced liquidation and a 2.83% recovery in an orderly liquidation. Even though Unsecured Creditors of ULS may receive a distribution in a Chapter 7 liquidation, that distribution is still less than they would receive under the Plan (4-8%). Thus, irrespective of whether the Debtors are substantively consolidated, the Plan satisfies the best interests test. Again, no party in interest has contested the methodology employed by the Debtors in the liquidation analyses nor the outcome of these analyses.

I. Acceptance Of Impaired Classes (Section 1129(a)(8))

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. Pursuant to Section 1126(c), a class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the claims in that class actually vote to accept the plan.[47] Pursuant to Section 1126(d), a class of interests accepts a plan if holders of at least two-thirds in amount of the allowed interests in that class that actually vote to accept the plan.[48] A class that is not impaired under a plan, and each holder of a claim or interest of such class, is conclusively presumed to have accepted the plan.[49] On the other hand, a class is deemed to have rejected a

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[47] 11 U.S.C. § 1126(c).

[48] 11 U.S.C. § 1126(d).

[49] 11 U.S.C. § 1126(f); *see also* S. Rep. No. 989, 95th Cong. 2d Sess. 123 (1978) (Section 1126(f) of the Bankruptcy Code "provides that no acceptances are required from any class whose claims or interests are unimpaired under the Plan or in the order confirming the Plan."); *Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater)*, 836 F.2d 1263, 1267 (10th Cir. 1988) ("For purposes of acceptance of a Plan, Section 1126(f) provides that a class that is not impaired under the plan is 'conclusively presumed' to have accepted the Plan.").

plan if the plan provides that the claims or interests of that class do not receive or retain any property under the plan on account of such claims or interests.[50]

As evidenced in the Ballot Report, all Impaired Classes that cast ballots voted to accept the Plan on a consolidated basis. None of the eligible 20 voting creditors in Class 1E-1—the Unsecured Retained Aircraft Claims Class against UAL—returned ballots to the Debtors' solicitation agent, and thus this Class should be deemed to have accepted the Plan.[51] But even if this Class is not considered an accepting Class, the Plan must still be confirmed because the Plan is "fair and equitable" and does not "unfairly discriminate," thereby satisfying the "cramdown" requirements of Section 1129(b), as discussed below.

Moreover, on an unconsolidated basis, all Impaired Classes that cast ballots voted to accept the Plan, except Class 17E. In addition, all of the Deemed Rejected Classes are deemed to reject the Plan because the Plan does not provide them with any distributions. Nevertheless, as discussed more fully below, the Debtors have met the "cramdown" requirements of Section 1129(b) to confirm the Plan over any rejecting Classes.

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[50] *See* 11 U.S.C. § 1126(g).

[51] *See Ruti-Sweetwater*, 836 F.2d at 1266 (holding that nonvoting, nonobjecting judgment lien creditor who was only member of class was deemed to have accepted plan of reorganization); *In re Neff*, 60 B.R. 448 (Bankr. N.D. Tex. 1985 *aff'd*, 785 F.2d 1033 (5th Cir. Tex. 1986) (classes of claims whose ballots had not been received prior to confirmation hearing "were deemed to have accepted the plan by the failure to vote); *but see Department of Hous. & Urban Dev. v. Westwood Plaza Apartments (In re Westwood Plaza Apartments)*, 192 B.R. 693 (E.D. Tex. 1996) (distinguishing *Ruti-Sweetwater, Inc.* and holding that inaction by a class consisting of a single creditor was not a deemed acceptance); s*ee also In re Trans World Airlines, Inc.*, Case No. 01-00056 (Bankr. D. Del. 2001), Hrg Tr., June 14, 2002, 13: 8-11 ("In this case, the claimants agreed by the simple act of not saying no; i.e., not registering an objection in writing to the debtor.")

J. **<u>The Plan Complies With Statutorily Mandated Treatment Of Administrative And Priority Tax Claims (Section 1129(a)(9))</u>**

Section 1129(a)(9) of the Bankruptcy Code requires that persons holding claims entitled to priority under Section 507(a) receive specified cash payments under the plan. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, Section 1129(a)(9) of the Bankruptcy Code requires the plan to provide as follows:

> (A) with respect to a claim of a kind specified in Section 507(a)(1) or 507(a)(2) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;[52]
>
> (B) with respect to a class of claims of a kind specified in Section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of [the Bankruptcy Code], each holder of a claim of such class will receive
>
> (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim;
>
> (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and
>
> (C) with respect to a claim of a kind specified in Section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

As required by Section 1129(a)(9) of the Bankruptcy Code, Article II of the Plan provides for payment in full of the unpaid amount of Administrative Claims and in cash on the first Periodic Distribution Date or as soon as reasonably practicable thereafter or upon such other

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[52] Claims having priority under Section 507(a)(1) of the Bankruptcy Code are administrative expenses allowed under Section 503(b) of the Bankruptcy Code. Claims having priority under Section 507(a)(2) of the Bankruptcy Code arise in an involuntary case and, therefore, do not apply to these Chapter 11 Cases.

terms as agreed upon by the holder thereof and the relevant Reorganized Debtor. Further, Article II of the Plan provides that on the first Periodic Distribution Date or as soon as reasonably practicable thereafter, each Holder of an Allowed Priority Tax Claim that is due and payable on or prior to the Effective Date shall be provided with, at the sole option of the respective Debtor, in full satisfaction, settlement, release, and discharge of and in exchange for such Priority Tax Claim, (i) payment in full in Cash; (ii) deferred quarterly Cash payments, over a period not exceeding six years after the date of assessment of such Priority Tax Claim, of a value, as of the Effective Date of the Plan, equal to the amount of such Allowed Priority Tax Claim plus simple interest on any outstanding balance from the Effective Date, calculated at the interest rate available on five-year United States Treasury Notes on the Effective Date; or (iii) such other amount and terms as agreed to by the respective Debtor and such Holder. Therefore, the Debtors submit that such treatment is in full compliance with the requirements of Section 1129(a)(9). However, certain taxing authorities assert that the Plan does not satisfy Section 1129(a)(7). United responds to these arguments below.

K. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding The Acceptances of Insiders (Section 1129(a)(10))

Section 1129(a)(10) of the Bankruptcy Code provides that at least one impaired class of claims or equity interests must accept the plan, excluding acceptance by any insider. Here, eleven (11) Impaired Classes (representing more than 16,000 creditors and $17.3 billion of accepting dollar amounts) voted to accept the Plan on a consolidated basis, while sixty-four (64) Impaired Classes voted to accept the Plan on an unconsolidated basis. Therefore, the Plan satisfies the requirements of Section 1129(a)(10).

L. <u>The Plan Is Feasible (Section 1129(a)(11))</u>

Section 1129(a)(11) of the Bankruptcy Code requires the Bankruptcy Court to find that the plan is feasible as a condition precedent to confirmation. Specifically, the Bankruptcy Court must determine that:

> [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.[53]

To demonstrate that a plan is feasible, it is not necessary that success be guaranteed. Rather, only a reasonable assurance of success is required.[54] As demonstrated below, the Plan is feasible within the meaning of Section 1129(a)(11).

In determining standards of feasibility, courts have identified the following probative factors:

(1) the adequacy of the capital structure;

(2) the earning power of the business;

(3) economic conditions;

(4) the ability of management;

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[53] 11 U.S.C. § 1129(a)(11).

[54] *See Briscoe*, 994 F.2d at 1166 ("Only a reasonable assurance of commercial viability is required"); *Morrill v. Waern Bldg. Corp. (In re Morrill v. Waern Bldg. Corp.)*, 145 F.2d 584, 588 (7th Cir. 1944) ("[t]he word feasible does not connote absolute insurance of success…Since there is reasonable ground for concurring in the court's view that the plan will succeed, we shall not disturb his holding"); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 832-33 (Bankr. E.D. Pa. 1995) (finding plan is feasible "so long as there is a reasonable prospect for success and a reasonable assurance that the proponents can comply with the terms of the plan"); *The Mut. Life Ins. Co. of N.Y. v. Patrician St. Joseph Partners L.P. (In re Patrician St. Joseph Partners L.P.)*, 169 B.R. 669, 674 (Bankr. D. Ariz. 1994) ("A plan meets the feasibility standard if the plan offers a reasonable prospect of success and is workable").

(5) the probability of the continuation of the same management; and

(6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[55]

In the instant case, the Plan satisfies the applicable standards of feasibility. The Debtors have thoroughly analyzed their ability to meet their obligations under the Plan post-confirmation, and submit that confirmation of the Plan is not likely to be followed by liquidation or the need for further reorganization. The Financial Projections, included as Appendix D to the Disclosure Statement, support United's ability to meet its obligations under the Plan.[56] In general, based on the Financial Projections, United believes that with a significantly deleveraged capital structure, the Debtors' business will return to viability. The decrease in the amount of debt on the Debtors' balance sheet will substantially reduce their interest expenses and improve cash flow. Upon emergence, the Debtors will have billions less of debt and other liabilities on its balance sheet. Thereafter, based on the Projections, the Debtors should have sufficient cash flow to pay and service their debt obligations, including the exit facilty, and to fund operations. Thus, the Debtors believe that they will satisfy their obligations under the Plan and that confirmation of the Plan will not be followed by the need for liquidation or further financial reorganization. Accordingly, the Debtors believe that the Plan satisfies the feasibility requirement of Section 1129(a)(11) of the Bankruptcy Code.

Only one party, Sabre, Inc., initially objected to the feasibility requirement, but that objection has been withdrawn. More importantly, recent independent third-party evaluations

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55 *U.S. Truck*, 800 F.2d at 589; *see also 203 North LaSalle Street Ltd. P'ship*, 190 B.R. at 594 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed.") (quotation omitted).

of the Debtors' business lend significant support to the feasibility of the Plan. In fact, just yesterday, Standard & Poor's ("S&P") and Moody's each issued new credit ratings for the restructured United that reflect the company's strengths. In particular, S&P issued a B rating with a stable outlook for United, while the company's new $3-billion exit financing facility was rated B+, with a recovery rating of 1, reflecting an expectation of full recovery. Moody's gave United a Corporate Family Rating of B2 with a stable outlook. Moody's also gave the exit financing facility a Corporate Family rating of B1 and a Speculative Grade Liquidity Assessment Rating of 2. These ratings are superior to the ratings of a number of United's non-bankrupt network competitors,[57] thus providing a powerful third-party validation of the Debtors' business plan and demonstrating that United passes the feasibility standard with flying colors. Indeed, commentators and securities analysts appear to endorse the successes United has achieved in its reorganization.[58]

In addition, the underwriting of the Debtors' six-year $3 billion exit facility has been highly competitive. As announced last month, General Electric Capital Corporation committed to joining JP Morgan Chase & Co. and Citigroup, Inc. in underwriting the exit facility. The proceeds of the exit facility will be used to repay outstanding loans under the DIP Facility and other Chapter 11 expenses, provide working capital, and support other general

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[56] *See* Disclosure Statement, Appendix D.

[57] "United Airlines Receives Ratings from Standard and Poor's and Moody's," January, 9 2006, http://www.united.com/press/detail/0,6862,53558,00.html (last accessed January 10, 2006).

[58] *See e.g.* Kyle Peterson, "United Airlines to emerge stronger from bankruptcy -- analysts," REUTERS, 1/4/2006.

corporate purposes, among other things. Thus, it is clear that United has amply demonstrated its satisfaction of Section 1129(a)(11)'s feasibility standard.

M. The Plan Provides For The Payment Of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12))

Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930. Article XV.C of the Plan provides that such fees will be paid on or before the Effective Date. The Plan, therefore, complies with Section 1129(a)(12) of the Bankruptcy Code, and no one has suggested otherwise.

N. The Plan Complies With Section 1129(a)(13) Of The Bankruptcy Code

Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue to be paid post-confirmation at any levels established in accordance with Section 1114 of the Bankruptcy Code.[59] Article VI.R of the Plan provides that following the Effective Date of the Plan, the payment of all retiree benefits as defined in Section 1114 of the Bankruptcy Code shall continue at the levels established pursuant to subsections (e)(1) or (g) of Section 1114 of the Bankruptcy Code, except as may be modified at any time prior to the Effective Date, for the duration of the periods the Debtors have obligated themselves to provide such benefits. In light of the foregoing, the Plan satisfies the requirements of Section 1129(a)(13) of the Bankruptcy Code, and no party has objected to the Plan's satisfaction of this requirement.

O. The Plan Satisfies the "Cramdown" Requirements

To the extent necessary, the Plan meets Section 1129(b)'s "cramdown" requirements. In particular, Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of Section 1129(a) are met, save for Section 1129(a)(8), a Plan may be

confirmed so long as it does not discriminate unfairly and it is fair and equitable with respect to a class of claims and interests that is impaired and has not accepted the Plan.[60] Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims and interests either accept a plan or be unimpaired under the plan. 11 U.S.C. § 1129(a)(8). Thus, to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[61]

The Plan provides for the substantive consolidation of the United Debtors into a consolidated Estate. Article VI.F of the Plan describes the effects of the Plan's proposal for substantive consolidation. Under the Plan, the Estate of each of the United Debtors (*i.e.*, all Debtors other than UAL) shall be substantively consolidated into the Estate of United for all purposes associated with confirmation and consummation of the Plan, including for purposes of voting and Confirmation. As a result of substantive consolidation, among other things: (a) all

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[59] 11 U.S.C. § 1129(a)(13).

[60] *See* 11 U.S.C. § 1129(b)(1).

[61] *See In re Snyder*, 144 B.R. 393, 396 (C.D. Ill. 1990) (stating that "if all of the requirements required for confirmation other than the requirements in § 1129(a)(8) are present, the court must confirm the plan if it is fair and equitable to each class of claims which have not accepted the plan."); *Zenith Elecs.*, 241 B.R. 105 (explaining that "[w]here a class of creditors or shareholders has not accepted a plan of reorganization, the court shall nonetheless confirm the plan if it does not discriminate unfairly and is fair and equitable"); *see also Liberty Nat'l Enters. v. Ambanc La Mesa L.P. (In re Ambanc La Mesa L.P.)*, 115 F.3d 650, 653 (9th Cir. 1997) ("…the Plan [must satisfy] the "cramdown" alternative… in 11 U.S.C. § 1129(b), which requires that the Plan "does not discriminate unfairly" and "is fair and equitable" towards each impaired class that has not accepted the Plan."); *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 n.5 (3d Cir. 1993) (The plan "…must not discriminate unfairly against and must be fair and equitable with respect to all impaired classes that do not approve the plan.").

assets and liabilities of the United Debtors shall be treated as though they were merged into the United Estate for purposes of the Plan; and (b) the Estates of the United Debtors shall be deemed to be one consolidated Estate for United, for purposes of tallying acceptances and rejections of the Plan.[62] No party has objected to the Plan's proposal for substantive consolidation.[63]

On a substantively consolidated basis, cramdown under the Plan is only required with respect to consolidated Deemed Rejecting Classes, because the requisite number of eligible creditors in all consolidated Classes of Claims accepted the Plan. As noted above, the Deemed Rejecting Classes consist of TOPrS Claims (Class 1F), Interests (Classes 1G and 1H-28H), and Subordinated Securities Claims (Classes 1I and 2I), which are subordinate to Holders of all other Classes of Claims under the Bankruptcy Code's priority scheme.[64] As discussed, below United can satisfy the cramdown requirement for the Deemed Rejecting Classes. In addition, while none of the creditors in Class 1E-1 (Unsecured Retained Aircraft Claims Class at UAL) returned ballots to the Debtors' solicitation agent, these creditors should be deemed to have accepted the Plan.[65] However, even Class 1E-1 is considered an accepting class, the Plan still must be

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[62] *See* Article VI.F.2 of the Plan.

[63] In its objection, the United States suggests, without explicitly saying so, that substantive consolidation of the Estates impairs the United States' joint and several claims. The United States' argument is wrong because the Plan simply does not affect the joint and several nature of the United States' cliams. The Debtors address the United States' objection below.

[64] While none of the creditors in Class 1E-1 returned ballots to the Debtors' solicitation agent, these creditors should be deemed to have accepted the Plan. *See Ruti-Sweetwater*, 836 F.2d at 1267. However, even Class 1E-1 is deemed not to accept the Plan, the Plan must still be confirmed because the Plan is "fair and equitable" and does not "unfairly discriminate."

[65] *See id.* at 1266 (holding that nonvoting, nonobjecting judgment lien creditor who was only member of class was deemed to have accepted plan of reorganization; *Neff*, 60 B.R. at 448 (classes of claims whose ballots had not been received prior to confirmation hearing "were deemed to have accepted the plan by the failure to vote"); *but see Westwood Plaza*, 192 B.R.

(Continued…)

confirmed because it easily satisfies Section 1129(b)'s cramdown requirements on a consolidated basis, as discussed below.

Moreover, as required by Section D.6 of the Solicitation Procedures approved by the Bankruptcy Court on October 21, if an objection to a claim has been filed after the "Record Date" (which was the date of the disclosure statement hearing), the Ballot for or against the Plan with respect to that claim cannot be counted absent a "Resolution Event" taking place before the Confirmation Hearing. A "Resolution Event" includes the entry of an order temporarily allowing such disputed claim for voting purposes only pursuant to Bankruptcy Rule 3018(a), after notice and hearing. As a result, in the Ballot Report, Poorman-Douglas did not count votes submitted for or against the Plan with respect to claims that were the subject of pending objections, including without limitation the Debtors' Thirty-Fifth Omnibus Objection to Claims (the "Omnibus Objection").[66] Had the Omnibus Objection not been filed, (i) the accepting percentage of creditors and voting claims for Class 1D would have been approximately 48% and 99%, respectively, literally a handful of creditors short of the 50% numerosity requirement, and (ii) the accepting percentage of creditors and voting claims for consolidated Classes 2E-6, 3E-3, and 4E-28E would have been approximately 46% and 70%, respectively, approximately 200 votes short of the 50% numerosity requirement. However, even if the Omnibus Objection had not been filed and such Classes were rejecting Classes, United can still easily meet the cramdown requirements of Section 1129(b), as discussed herein.

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693 (distinguishing *Ruti-Sweetwater, Inc.* and holding that inaction by a class consisting of a single creditor was not a deemed acceptance).

[66] *See* Ballot Report, Exhibit F (listing those votes for and against the Plan subject to a pending objection and thus not counted towards tabulation).

Finally, on an unconsolidated basis, all Impaired Classes that cast ballots voted to accept the Plan, except for Class 17E. In addition, all of the Deemed Rejected Classes are deemed to reject the Plan on an unconsolidated basis because the Plan does not provide them with any distributions. As discussed below, the Debtors meet the "cramdown" requirements in Section 1129(b) of the Bankruptcy Code to confirm the Plan over Class 17E and the Deemed Rejecting Classes on an unconsolidated basis.

(1) The Plan is Fair and Equitable With Respect to Impaired Classes That Have Not Voted to Accept the Plan

Sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests if the plan provides that the holder of any claim or interest that is junior to the claims or interests of such class will not receive or retain under the plan on account of such junior claim or interest any property.[67] This central tenet of bankruptcy law—the absolute priority rule—requires that if a class of creditors receives less than full value for its claims, no claim or interest holder junior to that class may receive any interest in property under the plan.[68]

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[67] *See* 11 U.S.C. §§ 1129(b)(2)(B)(ii) and (C)(ii). Section 1129(b)(2)(A), which sets forth the absolute priority rule as to secured claims, is not applicable here because the Plan leaves all Holders of Secured Claims Unimpaired.

[68] *See 203 North LaSalle Street P'ship*, 526 U.S. at 441-42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'")

The Plan satisfies the absolute priority rule with respect to all Claims and Interests. No junior Holder of a Claim or Interest receives any distribution when the Holders of higher priority Claims do not receive the full value of their Claims. In particular, all Secured and Priority Claims are paid in full under the Plan. And all Holders of Unsecured Claims receive the same treatment under the Plan on account of those Claims (a pro rata share of the Unsecured Distribution, which is estimated at 4-8% of the value of each Unsecured Claim). And because Holders of Unsecured Claims are Impaired under the Plan, junior classes (i.e., the Holders of Interests, TOPrS Claims, and Subordinated Securities Claims) will receive no distributions under the Plan. Accordingly, the requirements of Sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) are satisfied for all Classes of Claims and Interests. Thus, the Plan is fair and equitable.

(2) The Plan Does Not Unfairly Discriminate With Respect to Impaired Classes That Have Not Voted to Accept the Plan

The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists.[69] Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[70] At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights

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[69] *See 203 N. LaSalle,* 190 B.R. at 585 (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established").

[70] *See*, *e.g.*, *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances"); *In re Aztec Co.*, 107 B.R. 585, 589 (Bankr. M.D. Tenn. 1989) (noting that courts "have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination").

from receiving materially different treatment under a proposed plan without compelling justifications for doing so.[71]

Here, the Plan's classification of Claims and Interests is proper, for similarly situated claimants will receive substantially similar treatment. Indeed, as noted above, all Holders of Unsecured Claims—regardless of Class—receive the same treatment under the Plan on account of those Claims (a pro rata share of the Unsecured Distribution, which is estimated at 4-8% of the value of each Unsecured Claim). Additionally, to the extent the Plan provides different treatment to certain Classes—*e.g.*, the Unsecured PBGC Claims, the Unsecured Chicago Municipal Bond Claims, and the Unsecured Public Debt Aircraft Claims—all of those differing treatments track precisely the terms of settlement agreements previously approved by this Court resolving such parties' unique Claims and unique legal rights against the Debtors' estates, such as PBGC's ERISA rights, aircraft financiers' Section 1110 rights, and airport authorities' alleged Section 365 rights. Thus, all instances of differing treatment under the Plan are justified. Thus, the Plan does not unfairly discriminate with respect to Impaired Classes and the cramdown test is satisfied.

II. RESPONSES TO OBJECTIONS

A. Categories of Pending Objections

The foregoing analysis makes clear that United has satisfied its affirmative burden to confirm the Plan. Following is a discussion of why the pending objections to the Plan should not stand in the way of confirmation. The pending Plan objections can be grouped into the following four categories: (1) objections by various parties to the MEIP proposed under the

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[71] *See, e.g.*, *Aztec*, 107 B.R. at 589-91; *Ambanc*, 115 F.3d at 656.

Plan; (2) a "corporate governance" objection by the OCUC; (3) an objection to the Plan's distribution of stock and notes to SAM employees; and (4) a number of miscellaneous objections raising issues with aspects of the Plan (*e.g.,* the Plan's treatment of executory contracts, implementation of releases, and reservations of rights) that affect their own provincial concerns. As discussed in detail below, this Court should overrule all of these objections and confirm the Plan.

(1) The Proposed Management Equity Incentive Plan Does Not Render The Debtors' Plan Unconfirmable.

Various objectors (OCUC, AFA, IAM, ALPA, and URPBPA, collectively, the "MEIP Objectors") argue that the Plan is unconfirmable because it contains the Debtors' proposed management equity incentive plan (the "MEIP"). The MEIP-related objections fall into three categories: (1) the Plan does not comply with Section 1129(a)(1) because the MEIP purportedly violates Section 363 of the Bankruptcy Code; (2) the Plan was not proposed in good faith pursuant to Section 1129(a)(3) because the awards contemplated under the MEIP are allegedly excessive; and (3) the Plan violates Section 1129(a)(5) because the Debtors have not yet disclosed the nature of insider compensation. Most of these objections fundamentally misunderstand the Bankruptcy Code, and none of them have any merit as a matter of law or fact.

Nonetheless, the Debtors are particularly sensitive to the objections to the MEIP by United's unions, who argue that they believe that the MEIP violates the spirit of shared sacrifice that formed the basis of United's labor restructuring initiatives in these cases. The Debtors have repeatedly stated that they appreciate the necessary sacrifices made by all employees, union and non-union alike. But at the same time, the Debtors need to implement a program that directly aligns management's incentives with that of shareholders (including employees who will receive shares under the Plan) on a going forward basis. Absent the ability

to provide this competitive incentive program, it will be difficult for United to retain and attract the management talent necessary to ensure that United is a leader in the industry.

(a) The MEIP Complies With All Applicable Provisions Of Law.

Two MEIP Objectors (OCUC and AFA) argue that the MEIP does not comply with Section 1129(a)(1) of the Bankruptcy Code because, they contend, the MEIP violates Section 363 and its requirement that the use of property outside the ordinary course of business receive court approval. This argument, simply put, misrepresents the applicable standards for confirming reorganization plans, and must be rejected.

Section 363 of the Bankruptcy Code is completely irrelevant to confirmation. That section of the Code, a case administration provision applicable to all bankruptcy chapters, permits a debtor-in-possession to sell or use property of the estate during the administration of the bankruptcy case. However, Chapter 11 contains an entirely separate provision that addresses the transfer or sale of property revested in a reorganized debtor under a plan of reorganization, in the form of 11 U.S.C. §§ 1123(a)(5)(B) and (D).[72] Indeed, Section 1123(a)(5)(J) of the Bankruptcy Code even allows a debtor to propose a plan that permits the "issuance of securities of the debtor…for any…appropriate reason." Provisions such as this demonstrate that Congress understood the limitations of Section 363 and intended to give debtors—with the support of their stakeholders—broader discretion to develop and implement a plan of reorganization. Thus, the

72 ("Notwithstanding any otherwise applicable non bankruptcy law, a plan shall—(5) provide adequate means for the plan's implementation, such as—(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan; … (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate.").

MEIP Objectors' position that Section 363 is applicable in the confirmation context belies the express language of the Bankruptcy Code and renders Section 1123(a)(5) superfluous.[73]

Likewise, applying the business judgment standard here is completely inappropriate given the procedural safeguards inherent in the confirmation process. Section 363 requires that certain transactions during a bankruptcy case, but outside of a plan, occur only after notice and hearing, and courts interpreting the provisions have required that those transactions—when objected to— be consistent with a debtor's reasonable business judgment.[74] The reason for this requirement is simple: unusual transactions during a bankruptcy case should be subject to judicial oversight because creditors cannot vote on them.[75] Thus, the "business judgment" standard of Section 363 clearly applies to key employee retention programs ("KERPs") and other transactions proposed by a Debtor ***outside of*** a plan of reorganization—the situation in every

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73 *See Matter of Merchants Grain, Inc. By and Through Mahern*, 93 F.3d 1347, 1353-54 (7th Cir. 1996) ("We examine the statute according to the conventional rules of statutory construction: absent statutory definitions, we accord words and phrases their ordinary and natural meaning and avoid rendering them meaningless, redundant, or superfluous; we view words not in isolation but in the context of the terms that surround them; we likewise construe statutes in the context of the entire statutory scheme and avoid rendering statutory provisions ambiguous, extraneous, or redundant; we favor the more reasonable result; and we avoid construing statutes contrary to the clear intent of the statutory scheme.")

74 *See Bildisco*, 465 U.S. at 523; *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983).

75 *See Lionel*, 722 F.2d at 1071 (holding that a debtor must present a good business reason to obtain court approval of a sale outside of a plan because "[i]n enacting the [Bankruptcy Code] Congress…clearly indicated as one of its purposes that equity interests have a greater voice in reorganization plans—hence, the safeguards of disclosure, voting, acceptance and confirmation in present Chapter 11"); *see also In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 674-675 (Bankr. S.D.N.Y. 1989) (noting that "the need for disclosure before a debtor will be allowed to circumvent the safeguards of Chapter 11 by a § 363(b) sale…requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.")

case relied on by the MEIP Objectors.[76] But that standard is unnecessary and does not apply to transactions, like the MEIP, implemented through a plan of reorganization that creditors can vote for or against at their discretion.[77] And even if not all classes of creditors vote to accept a plan containing a management equity plan, Section 363's business judgment standard is still inapplicable; in that circumstance, the Bankruptcy Code still contemplates an approval process according to Section 1129(b)'s cramdown standards.

The confirmation of U.S. Airways' most recent plan of reorganization, which included a retention and severance program, is illustrative of this bedrock principle of bankruptcy law. Prior to filing its plan, U.S. Airways had sought approval of a "KERP" and severance program for management employees.[78] The bankruptcy court, applying Section 363 and its business judgment standard, recognized the problem of approving transactions that "may preclude or limit the consideration of alternative reorganization plans."[79] The court also suggested that the absence of "mitigation" provisions raised questions as to whether the KERP was the product of reasonable business judgment. Thus, the Bankruptcy Court held that the KERP and severance plan could not be approved at that time.[80]

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[76] *See* OCUC Obj. at 4-5 (citing *In re Regensteiner Printing Co.*, 122 B.R. 323 (N.D. Ill. 1990) (debtor proposing a postpetition bonus program for management outside of a plan of reorganization); *In re Am. West Airlines, Inc.*, 171 B.R. 674, 678 (Bankr. D. Ariz. 1995) (debtor proposing an emergence bonus program outside of a plan of reorganization); *In re Geneva Steel Co.*, 236 B.R. 770, 773 (Bankr. D. Utah 1999) (debtor proposing retention and severance bonus outside of plan of reorganization).

[77] *See In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000) ("Section 363 governs the sale of assets outside of the reorganization plan.").

[78] *See In re U.S. Airways, Inc.*, 329 B.R. 793, 794-95 (Bankr. E.D. Va. 2005).

[79] *Id*. at 800.

[80] *Id.* at 801.

At confirmation, U.S. Airways proposed the ***exact same retention and severance plan*** in its plan of reorganization. Various parties (including the AFA and IAM) objected to U.S. Airways's plan, arguing that it was not proposed in good faith because it included the exact same KERP and severance plan that the bankruptcy court had previously rejected, and "mitigation" provisions had not been added. But those rejections were overruled, and rightly so. As the bankruptcy court noted, unlike in its prior decision, which had applied a "business judgment standard" where creditor approval during the bankruptcy case, "a plan ha[d] now not only been filed but overwhelmingly accepted by the creditor body."[81] Moreover, the court opined that "we now have a very different situation. The question is not what type of contract is appropriate for the executives of a debtor-in-possession but what is appropriate for a reorganized company that is going to be competing in the marketplace."[82]

It is particularly interesting that the MEIP Objectors continue to object to the MEIP even after the Plan has been accepted by the creditor body. Indeed, on several occasions throughout the Debtors' bankruptcy, the MEIP Objectors have objected to various settlements proposed under Section 363 as *sub rosa* plans that—even if supported by sound business judgment, were supposedly impermissible encroachments on creditor democracy.[83] Yet

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81 *In re US Airways, Inc.*, (Bankr. E.D. Va. Case. No. 04-13819) Hrg. Tr. at 14:10-11 (September 16, 2005).

82 *Id.* at 15:9-13.

83 *See, e.g.*, URPBPA and Certain Individual Retired Pilots' Objection to Debtors' Emergency Motion to Approve Agreement with Pension Benefit Guaranty Corporation at 12-14 [Docket No. 1116] (arguing that the PBGC Agreement could not be approved because the agreement impermissibly dictated the terms of a plan of reorganization without going through the confirmation process); Objection of the Official Committee of Unsecured Creditors to Debtors' Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with the Air Line Pilots Association at 10-15 [Docket No. 9556] (arguing that the

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trampling creditor democracy is precisely what the MEIP Objectors seek to do here: they would have this Court implement an entirely different management equity incentive plan despite the fact that have voted in favor of a Plan that contemplated the Debtors' proposed MEIP. This Court should not countenance the MEIP Objectors attempt to interfere with the Debtors' exclusive right to propose a plan that the Debtors see fit. And as long as the Debtors' plan complies with the Bankruptcy Code's legal requirements and receives the requisite votes—as it does here—the fact that the MEIP Objectors would have authored a different incentive plan is irrelevant. Simply put, at this stage, the MEIP is a "deal point" that is part of a confirmable plan.

Moreover, even if Section 363 were applicable to the MEIP (which it is not), the MEIP Objectors' contention that management equity plans are subject to "heightened scrutiny" is patently frivolous. Even in the context of mid-bankruptcy KERPs that authorized payments to insiders, the law is clear: Section 363 merely requires a debtor to use reasonable business

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Debtors' settlement agreement with ALPA "expressly dictates the terms of a plan in the context of a section 363 motion *without the critical protections of the plan confirmation process*.") (emphasis added); International Association of Machinists and Aerospace Workers' Brief in Opposition to Debtors' Motion to Approve Letter of Agreement Modifying the Collective Bargaining Agreement With the Air Line Pilots Association, International at 6-8 [Docket No. 9561] (arguing that the effect of the Debtors' settlement agreement with ALPA "is to settle material terms of the Debtors' reorganization plan now, before any plan has ever been proposed or any disclosure statement filed. Such an attempt to short circuit the plan confirmation process is fundamentally inconsistent with the Bankruptcy Code…"); International Association of Machinists and Aerospace Workers' Brief in Opposition to Debtors' Motion to Approve Agreement with Pension Benefit Guaranty Corporation at 8 [Docket No. 11145] (arguing that the PBGC Agreement dictated the terms of a plan without first proposing a plan of reorganization and disclosure statement); Objection of the Association of Flight Attendants-CWA, AFL-CIO to Debtors' Motion to Approve Letter of Agreement With ALPA at 9-13 [Docket No. 9571] (arguing that the Debtors' settlement agreement with ALPA should not be approved because "the Debtors and ALPA seek to dictate the terms of any reorganization plan. A plan of reorganization, however, can only be established through the procedures set forth in Chapter 11…").

judgment in formulating a fair program.[84] Indeed, in objections to three previous KERPs in this bankruptcy, the MEIP Objectors conceded that the business judgment standard—not a heightened scrutiny standard—applied to proposed management compensation programs.[85] As the OCUC stated earlier in this case, it "does not dispute the general legal principles recited by the Debtors that bankruptcy courts may approve a key employee retention program if a debtor has used proper business judgment in formulating the program and the court finds the program to be fair and reasonable."[86] The MEIP Objectors' willingness to so readily abandon their previous discussions of the law in this very case underscores their desperation to conjure up any conceivable argument to challenge an obviously appropriate Plan.

Moreover, the cases the MEIP Objectors cite for the proposition that a standard higher than "business judgment" applies to management compensation are completely inapposite. For example, *In re Regensteiner*[87] involved a liquidating debtor's proposal to pay bonuses as administrative expenses to certain employees before those employees would provide the services necessary to facilitate an orderly liquidation. Unlike the liquidating debtor in *Regensteiner*, United is on the verge of completing a successful reorganization. And contrary to

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[84] *See, e.g.*, *U.S. Airways*, 329 B.R. at 797; *In re Aerovox, Inc.*, 269 B.R. 74, 80 (Bankr. D. Mass. 2001); *America West*, 171 B.R. at 678; *In re Interco, Inc.*, 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991); Tr. Hrg. on Sept. 21, 2005 at 75:25-76:13 (approving a key employee retention program where the Debtors demonstrated that the program was the product of sound business judgment).

[85] *See, e.g.*, Docket No. 903, AFA Obj. to KERP, at ¶ 28, p. 10; Docket No. 3195, AFA Obj. to Technical and Professional Employee KERP, at ¶ 16, pp. 7-8; Docket No. 12671, AFA Obj. to MyPoints KERP, at ¶ 16, pp. 7-8; Docket No. 3224, OCUC Obj. to Technical and Professional Employee KERP, at ¶ 3, p. 4; Docket No. 12685, IAM Obj. to MyPoints KERP, at ¶ 1, p. 1.

[86] Docket No. 3224, OCUC Obj. Technical and Professional Employee KERP, at 4, ¶ 3.

the other cases cited by the Objectors, the Debtors are not proposing to lock-up assets of the estate outside of a plan of reorganization.[88] Instead, the Debtors have proposed a forward-looking, equity-based compensation program to incentivize and retain the Reorganized Debtors' management to increase the overall value of the enterprise for the benefit of all stakeholders. Further, there is absolutely no basis for the MEIP Objectors' new assertion that management compensation programs like the MEIP are subject to "heightened" scrutiny, especially after the creditors have voted in favor of the Plan.

The bottom line is that individual parts of a plan of reorganization are not treated like transactions subject to singular motions filed by a debtor-in-possession during a bankruptcy case, nor are they subject to challenge merely because individual parties believe more thought should go into them and the result should be different. For example, the OCUC has proffered an expert witness who seeks to testify that a 5% "OCUC management equity incentive plan," rather than the 11% proposed by the Debtors, is sufficient to meet the Debtors' retention needs for the next three years. But this entirely misses the point of voting on, and confirming, a plan of reorganization. The MEIP is not a transaction outside the ordinary course of a business and exempt from creditor voting that the Court must scrutinize for reasonable business judgment. Rather, it is part of the Debtors' Plan that was disclosed to the creditor body and resoundingly

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[87] 122 B.R. 323, 326 (N.D. Ill. 1990).

[88] *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (equitably subordinating the claim of a debtor's sole shareholder where the shareholder had perpetrated a fraud that left nothing for distribution the debtor's remaining creditor); *In re Bidermann Indus.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997) (refusing to authorize the debtor's entry into a lock-up agreement to facilitate a management-sponsored leveraged buyout).

approved by it. No further evidence of the Debtors' "business judgment" is required or relevant to confirmation.

And the fact that the OCUC believes that a different, 5% MEIP should be adopted is not a proper basis to object. This is the Debtors' Plan, which must be approved as a whole package if it complies with the applicable confirmation standards.[89] Just because the OCUC believes a different plan should be confirmed is not a basis to deny confirmation. The OCUC was free to lobby its constituents to vote against the Plan because of the MEIP or for any other reason, or to oppose further exclusivity so it could file a competing plan with features more to its liking. It did not, and now the creditor body has voted in favor of the Debtors' Plan.

(b) The Debtors Exercised Good Faith in Proposing the Plan, Including The MEIP.

The MEIP Objectors also argue that the Plan was not proposed in good faith merely because the equity-based awards under the MEIP are, in their opinions, excessive and inconsistent with reasonable business judgment. These objections must fail.

Initially, the MEIP Objectors misstate both law and fact when attempting to apply the "good faith" standard here. Although the Code does not define "good faith" in Section 1129(a)(3), it "is generally interpreted to mean that there exists a 'reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'"[90] Moreover, good faith applies to a Plan as a whole; a court will not myopically look at

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[89] 7-1129 COLLIER ON BANKRUPTCY § 1129.01[2] ("So long as the mandatory types of [plan] provisions appear, the plan's ultimate structure, form, and effect are left to the plan's proponent.").

[90] *Madison*, 749 F.2d at 424-425; *see SGL Carbon*, 200 F.3d at 165 (finding good faith requires "some relation" between the Chapter 11 plan and the "reorganization-related purposes" of

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a particular provision out of context to determine good faith.[91] The fundamental purpose of Chapter 11 is to enable a distressed business operation to reorganize its affairs to prevent the loss of jobs and the adverse economic effects associated with disposing of assets at their liquidation value.[92] Thus, the Debtor's obligation to propose a plan in "good faith" is satisfied when the plan was developed with a legitimate and honest purpose to reorganize and has a reasonable hope of success.[93]

Chapter 11); *see also Zenith*, 241 B.R. at 107 (holding good faith requires that the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code); *New Valley*, 168 B.R. at 80 ("It is generally held that a plan is proposed in good faith if there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purpose of the Bankruptcy Code.").

[91] *See, e.g.*, *T-H New Orleans*, 116 F.3d at 802 ("[t]he requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start."); *Madison Hotel*, 749 F.2d at 425 (holding that the there is a "legal distinction between the good faith that is required to confirm a plan under section 1129(a)(3) and the good faith that has been established as a prerequisite to filing a Chapter 11 petition for reorganization"); *In re WCI Cable, Inc.*, 282 B.R. 457, 482 (Bankr. D. Or. 2002) ("good faith determinations in the context of confirmation are made based on consideration of the totality of the circumstances, with a distinct focus on the provisions of the plan."); *In re Walker*, 165 B.R. 994, 1000-1001 (Bankr. E.D. Va. 1994) ("Whether a plan is filed in good faith is a matter to be assessed in view of the totality of the circumstances which necessitated the plan, in perspective of the purposes of the Bankruptcy Code.").

[92] *See, e.g., Bildisco*, 465 U.S. at 528; *see also B.D. Int'l*, 701 F.2d at 1075 n.8 (stating "the two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start."); *see also Bonded Mailings*, 20 B.R. at 785 (holding Bankruptcy Code's policy of equitable distribution amongst creditors should not be thwarted by actions of a single creditor).

[93] *See Bravo*, 331 B.R. at 472 ("Denial of confirmation for lack of good faith is appropriate particularly when there is no realistic possibility of an effective reorganization and it is evident that the debtor seeks merely to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.") (internal citations and quotations omitted); *In re Bush Indus., Inc.*, 315 B.R. 292, 304-305 (Bankr. W.D.N.Y. 2004) (denying confirmation where

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Here, there is absolutely no evidence to dispute that the Plan as a whole was proposed in good faith. None of the MEIP Objectors' briefs even addresses that question. Some Objectors assert that the amount of stock reserved in the MEIP should be less. The AFA alone claims that there should be no MEIP at all despite the Debtors'—and in fact the OCUC's—good faith belief that a MEIP is necessary to run the business after exit by building incentives for managers to maximize the value of the company for the benefit of all stakeholders, including employees with equity. Respectfully, these are not even plausible, let alone well-founded, challenges to the Debtors' good faith in proposing the Plan.

If required to do so, the Debtors will present evidence of how they developed the MEIP—a process that proves beyond doubt the Debtors' good faith. Specifically, beginning in the Fall of 2003, the Human Resources Subcommittee of the Debtors' Board of Directors (the "HRSC") asked its compensation consultants, Towers Perrin ("Towers"), to provide it with data on what a competitive post-exit management equity plan might look like.[94] Beginning in January 2004 and, after a hiatus caused by the ATSB's denial of the Debtors' application for loan guarantees, continuing in mid-2005, Towers refined its analysis of the "market" for such plans along with the HRSC.[95] At the same time, Towers and the Debtors studied the compensation of the Debtors' salaried and management employees, including those who would participate in the

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debtor's primary goal in negotiating a plan was obtaining a "golden parachute" for its principal officer).

94 Friske Expert Report, at ¶¶ 9-12.

95 *Id.* at ¶¶ 9-19.

MEIP, and determined that those employees are significantly undercompensated relative to opportunities elsewhere, particularly when compared to opportunities in general industry.[96]

The Debtors and the HRSC, acting on the advice of Towers, designed the MEIP to be consistent with the market data and serve a number of goals, including: aligning the post-exit management group with the interests of shareholders as of the exit date, compensating its management team on a going forward basis at market rates through an emphasis on risk-based components of compensation such as the MEIP, and giving management incentives to remain with the Company.[97] The value of MEIP awards is consistent with the marketplace, but at the same time highly uncertain and entirely dependent on the performance of the stock of the reorganized company post-exit, making the value of all awards performance-based. Moreover, all of the MEIP awards vest over a multi-year period, meaning that the members of the post-exit management team will have a continued interest in the Debtors' success.

Clearly, the MEIP Objectors are raising the question not of "good faith" but of "how much." Specifically, the OCUC concedes the propriety of reserving some amount of equity into a management equity incentive plan, and has proffered a report in support of what its expert calls "the OCUC's management equity incentive plan"—5% of the Debtors' equity allocated over three years. Of course, the Debtors appreciate the OCUC's input and have participated for months in arm's-length, good faith negotiations with the OCUC, ultimately agreeing to reduce the MEIP stock reserve from 15% to 11% (of which 8% will be issued upon emergence, with further grants in the discretion of the Reorganized UAL Board). United

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[96] *Id.* at ¶¶ 9-19, 22-24.

[97] *Id.* at ¶ 20.

believes that this concession addresses the concerns raised by the OCUC and the other MEIP Objectors.

But the OCUC's "objection" simply misses the point and ignores the law. There is no "OCUC management equity incentive plan," and switching out the MEIP for the OCUC's preferred substitute is not a possibility. The only incentive plan before the Court is the MEIP, which was disclosed to, voted on and approved by the creditors, including the OCUC's constituents. The OCUC's assertions—disputed by the Debtors—that the MEIP may be above market, and may (depending on the ultimate value of the Debtors' stock) lead to above-market compensation are irrelevant. The Debtors proposed the MEIP because they have a sincere and good faith belief based on substantial information that the MEIP would assist the Company in retaining its management team and attracting other high performers from a broad range of industries, while increasing the Company's enterprise value for all constituents. Even if the "business judgment" standard (or any other standard) applied to the Debtors' decision-making process (which it does not), the Debtors would pass with flying colors.[98]

The AFA's objection goes far further afield, introducing concepts that have no relevance whatsoever to the matters before the Court. The AFA correctly notes that its members have sacrificed significantly during the course of this bankruptcy—as have the MEIP participants. The Debtors recognize and sincerely appreciate those sacrifices—as the Debtors do

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[98] *See In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (once the debtor has articulated a valid business purpose, a presumption arises that the debtor's decision was made on an informed basis, in good faith and in the honest belief that the action was in the best interest of the company); *In re Logical Software*, 66 B.R. 683, 686 (Bankr. D. Mass. 1986) (a debtor's business decision should be approved by the court unless it is shown to be "so

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for all of their employee group— which were necessary to achieve a successful reorganization. But while the Debtors certainly considered how their other employee groups might react when they decided to propose the MEIP, the necessary changes to wages, benefits and working conditions of flight attendants, or any other labor group, cannot and should not bar the adoption of a MEIP. The MEIP was proposed by the Debtors with the good faith, commonplace and commonsense intention of aligning management with shareholders immediately after exit and providing MEIP participants with more competitive compensation packages to ensure their retention and the attraction of talented new executives.[99] The Debtors appreciate the "shared sacrifice" of all employees that has helped make this reorganization a success, but the MEIP has been approved by the Debtors' constituents because of one indisputable fact: it will improve the prospects for all stakeholders after emergence.

(c) The Debtors Will Disclose the Nature of Insider Compensation On or Before the Confirmation Hearing in Compliance with Section 1129(a)(5)

The MEIP Objectors also argue that the Debtors have not complied with Section 1129(a)(5) of the Bankruptcy Code because, they contend, the Debtors have not disclosed the identity of their "insiders" and the "nature of any compensation for such insider." Not so. In their expert report, the Debtors have identified the "nature of compensation" for all of their insiders, and have disclosed everything about the MEIP that Objectors are entitled to know prior to the confirmation hearing. Moreover, contemporaneously herewith, the Debtors are filing with the Court a disclosure setting forth the nature of compensation for the officers of the

manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, or whim or caprice").

Reorganized Debtors (with director compensation to follow). Thus, the Debtors are in compliance with Section 1129(a)(5)(B).[100]

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Overall, the MEIP Objectors have no basis, legal or factual, for challenging the MEIP as violative of with the Bankruptcy Code's confirmation standards. United's creditors voted in favor of the Plan —which disclosed the MEIP—and the MEIP Objectors cannot force United to change the Plan overwhelmingly affirmed by its future owners under the guise of "good faith" or "business judgment." But the bottom line is that the MEIP would satisfy any standard the Court might employ: it will align management's and shareholders' interests and provide participants with competitive compensation packages thereby helping to improve United's post-exit prospects for all stakeholders. All objections to the Plan based on the MEIP should be overruled.

(2) The OCUC's Objection to the Reorganized Debtors' Corporate Governance Structure and Ability to Issue Serial Preferred Stock Should be Overruled

The OCUC has objected to certain corporate governance aspects of the Plan. In the main, the OCUC argues that the selection process for Reorganized UAL's board of directors violates Section 1123(a)(7), which requires that the manner of selection and replacement of a reorganized debtor's board must be consistent with the interests of creditors and public policy.

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99 Friske Expert Report, at ¶ 20.

100 *Apex Oil*, 118 B.R. at 704-705 (finding Section 1129(a)(5)(B) satisfied where plan fully disclosed that certain insiders will be employed by reorganized debtor and the terms of employment of such insiders); *Texaco, Inc.*, 84 B.R. at 908, *appeal dismissed*, 92 B.R. 38 (S.D.N.Y. 1988) (finding requirements of Section 1129(a)(5)(B) satisfied where the plan

(Continued…)

Although the OCUC's original confirmation objection complained that the unsecured creditors were being denied an undefined "fair representation" on the post-exit board, the OCUC's expert, Professor Macey, now suggests that public policy demands that the OCUC itself determine the size, structure, and composition of that board. Additionally, OCUC argues that Reorganized UAL's proposed corporate charter, which authorizes the issuance of "blank check" serial preferred stock, violates Section 1123(a)(7) because the preferred stock could form the basis of a rights plan that could inappropriately entrench management.[101]

The OCUC is wrong on both counts. Section 1123(a)(7) merely requires that the post-emergence manner of selection and replacement of a reorganized debtor's board must be in conformity with applicable state corporate governance law. And even if this Court must analyze the pre-confirmation selection of Reorganized UAL's board to be installed at emergence, then United will present overwhelming evidence that the process for selecting Reorganized UAL's board has been entirely consistent with the Bankruptcy Code, Delaware corporate law, and the interests of creditors, equity security holders, and public policy. And OCUC's preferred stock objection is wholly illogical. On the preferred stock point, the OCUC does not suggest that a preferred stock-based rights plan is illegal or improper; in fact, the OCUC's own expert supports a charter provision allowing for the issuance of preferred stock that is virtually identical to the one currently proposed by the Debtors. Nevertheless, there is nothing about Reorganized UAL's ability to issue preferred stock that renders the Plan unconfirmable.

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discloses debtors' existing officers and directors who will continue to serve after plan confirmation).

(a) Section 1123(a)(7) Only Applies Post-Emergence

It is critical to underscore that the OCUC and its expert do not suggest that any provision of Reorganized UAL's corporate charter (including the corporate governance and preferred stock provisions) violates Delaware corporate law in the slightest. And the OCUC must acknowledge that, the day after Reorganized UAL's emergence from Chapter 11, the new shareholders of Reorganized UAL can replace Reorganized UAL's board pursuant to Reorganized UAL's charter and Delaware corporate law by a special shareholders meeting or thereafter at the first annual shareholders meeting after emergence.

Instead, the OCUC originally suggested that Section 1123(a)(7) requires that the Bankruptcy Court independently determine whether the pre-confirmation manner of selection of Reorganized UAL's board is "consistent" with what it considered to be vague concepts of "the interests of creditors" and "public policy." (And now the OCUC—through its expert report — suggests that the selection of the board by anyone but the OCUC violates Section 1123(a)(7)). But all that Section 1123(a)(7) requires is that the post-emergence manner of the selection and replacement of Reorganized UAL's board must be consistent the interests of creditors and public policy.

To explain, Section 1123, entitled "Contents of Plan," lists various provisions that must be contained in a plan of reorganization.[102] Section 1123(a)(7) requires the plan to contain provisions with respect to the manner of selection of officers and directors and their

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[101] OCUC also has argued that the Debtors have not complied with the disclosure requirements of Section 1129(a)(5), but as discussed above, the Debtors will comply with those disclosure obligations prior to confirmation. *See* 11 U.S.C. § 1129(a)(5).

[102] *See* 11 U.S.C. § 1123.

replacements that are consistent with the interests of creditors and public policy. Typically the relevant plan provisions call for a new corporate charter that provides for the manner of selection and replacement of officers and directors post-emergence. But those "plan provisions" (and the new charter) by definition only become applicable and effective once the plan has been confirmed. Thus, Section 1123(a)(7) only applies to corporate governance ***after*** the debtor's emergence from Chapter 11.

In contrast, Section 1129, entitled "Confirmation of Plan," lists various requirements for the confirmation of a plan of reorganization. Among them is Section 1129(a)(5), which requires the plan proponent to disclose before confirmation the identity of the officers and directors proposed to serve after confirmation, and which also requires that the appointment of such specific individuals is consistent with the interests of creditors, equity security holders, and public policy.[103] Section 1129(a)(5)'s confirmation standard basically requires that the bankruptcy court find that the proposed board members are qualified and honest as a matter of fact.[104] Because the bankruptcy court must determine the bona fides of the specific individuals proposed to serve on the reorganized debtor's board post-emergence, the manner of

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[103] *See* 11 U.S.C. § 1129(a)(5)(A), (B).

[104] *See* 7-1129 COLLIER ON BANKRUPTCY ¶ 1129.03[5][b] ("public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."); *Bank of America, Illinois v. 203 North LaSalle Street P'ship*, 195 B.R. 692 (Bankr. N.D. Ill. 1996), *aff'd,* 126 F.3d 955 (7th Cir. 1997), *rev'd on other grounds*, 526 U.S. 434 (1999) (rejecting argument that proposed management of reorganized debtors was incompetent for purposes of Section 1129(a)(5)(A)(ii) because of management's failure to pay real estate taxes during case).

the pre-confirmation selection of those individuals is entirely irrelevant.[105] Put another way, if the members of the board as of emergence are qualified and honest as a matter of fact, their names could have been picked out of a hat and Section 1129(a)(5) would still be satisfied. If, however, that protocol were to govern the selection of future boards ***post-emergence***, Section 1123(a)(7) would be violated. The OCUC simply conflates the requirements inappropriately.

Thus, the interplay between Sections 1123(a)(7) and 1129(a)(5) becomes clear. Section 1129(a)(5) requires that before a corporate debtor's plan of reorganization can be confirmed, the plan proponent must propose individuals to serve on the debtor's post-emergence board, and the bankruptcy court must determine that those specific individuals are appropriate to serve in such capacity as a matter of fact. Section 1123(a)(7) separately requires that the ***post-emergence*** manner of selection and replacement of the reorganized debtor's board also must be consistent with the interests of creditors, equity security holders, and public policy. And there is no reason for the bankruptcy court to determine under Section 1123(a)(7) that the plan proponent's ***pre-confirmation manner of selection*** of the post-emergence board is consistent with the interests of creditors, equity security holders, and public policy because the court, as part of confirmation, ***already will have determined*** under Section 1129(a)(5) that the ***appointment*** of specific individuals to the post-emergence board is in fact consistent with the interests of creditors, equity security holders, and public policy. To apply Section 1123(a)(7)'s standards to the manner of the plan proponent's pre-confirmation selection of the post-emergence board would necessarily require the retroactive application of the plan of

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[105] *Cajun*, 230 B.R. at 740 ("no evidence was presented at confirmation to suggest that the continuation of some or all of the current officers and directors would not be consistent with

(Continued…)

reorganization to the pre-confirmation period, which makes no sense. And to apply Section 1123(a)(7) retroactively would also render Section 1129(a)(5) a nullity, for there would be little reason for a court to validate the bona fides of post-emergence directors if the court already had determined that the very same directors had been selected consistent with the interests of creditors, equity security holders, and public policy.

Case law, including cases cited by the OCUC, also supports the view that Section 1123(a)(7) only applies to corporate governance (i.e., the manner and selection of the board) post-emergence. Indeed most if not all cases analyzing Section 1123(a)(7) hold that it merely requires the reorganized debtor's post-emergence corporate governance regime to comply with applicable state corporate law, as a proxy for "the interests of creditors and . . . public policy." For example, in *In re Machne Menachem, Inc.*, a case cited by OCUC, the debtor was a non-profit corporation organized under New York law that proposed a corporate charter through its plan of reorganization that calling for the selection and replacement of officers and directors in violation of New York corporate law.[106] To determine whether the manner and selection of the reorganized debtor's officers and directors was consistent with public policy for purposes of Section 1123(a)(7), the *Machne* court looked to applicable state law: "The various public policies of a state are found in its constitution, acts of the legislature, and decisions of its courts."[107] The *Machne* court went on to say, "I find the removal or selection of Debtor's directors in a manner contrary to New York's public policy, as codified in its [Not-for-Profit

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the interest of creditors and equity security holders and with public policy.").

106 304 B.R. 140, 143 (Bankr. M.D. Pa. 2003).

107 *Id.* at 143 (quoting *Building Service Employees Intern. Union, Local 262 v. Gazzam*, 339 U.S. 532, 537-538 (1950)) (internal quotations omitted).

Corporation Law], would directly violate §§ 1123(a)(7) and 1129(a)(1) and (2) of the Bankruptcy Code."[108] Other cases, including those cited by the OCUC, also undertake a similar analysis.[109]

These cases make clear that once the bankruptcy court has determined under Section 1129(a)(5) that the individuals proposed under the plan to serve on the post-emergence board are qualified as a matter of fact, Section 1123(a)(7) requires the court to determine that the "plan provisions" propose a corporate governance scheme for the post-emergence selection and replacement of that board that complies with applicable state corporate governance law, as a reflection of public policy. And as discussed above, Reorganized UAL's proposed corporate charter is entirely consistent with Delaware corporate governance law, and the OCUC has not suggested otherwise.

(b) The Board Selection Process Is Consistent with the Interests of Creditors

Even if this Court ruled that it had to apply Section 1123(a)(7) to the Debtors' pre-confirmation selection of those individuals proposed to serve on Reorganized UAL's board, the Debtors will demonstrate at the confirmation hearing that the selection of the proposed board is consistent with the interests of creditors, equity security holders, and public policy as a matter of fact and law.

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[108] *Id.*

[109] *See, e.g.*, *In re Eagle Bus Mfg., Inc.*, 134 B.R. 584 (Bankr. S.D. Tx. 1991) (plan satisfied Section 1123(a)(7) where selection of officers of reorganized debtors would be in the control of board of directors in accordance with applicable corporate law); *Wabash Valley*, 1991 WL 11004220 at *74-75 (plan confirmation denied for failure to comply with state law); *In re Mahoney*, 80 B.R. 197, 202 (Bankr. S.D. Cal. 1987) (plan confirmation denied due to violation of California law).

As an initial matter, it is no longer clear what role the OCUC seeks in the selection of the initial Reorganized UAL board. In its Objection, the OCUC begins by pointing out that "[t]he Debtors and the Committee have continued discussions" regarding many issues, among them "the composition of the post-emergence Board of Directors and other corporate governance issues."[110] And the OCUC's Objection goes on to state that it simply desires to ensure "an active participation in the selection of the post emergence Board by the new shareholders." Indeed, over the past several months representatives and principals of the Debtors and the OCUC have had countless meetings regarding the composition of Reorganized UAL's board. Just recently, the OCUC provided the names of several individuals to the Nominating / Governance Committee of UAL's current board to be considered as members of Reorganized UAL's board. Here, it is clear that the OCUC already has played a significant role in the selection of Reorganized UAL's board, thereby enjoying the fruits of its "active participation."

However, despite the OCUC's limited desire to play a role in the board selection process, Professor Macey, OCUC's expert, argues that the OCUC "should be permitted to select the composition of the new Board."[111] So now the OCUC—through Professor Macey's expert report -- apparently seeks to appoint the ***entire*** Reorganized UAL board. But the Macey Report—as well as the OCUC's application seeking to retain Macey[112]—are based on several major false premises. First, that the selection of the board must be in the "best interests" of

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[110] OCUC Objection, Preliminary Statement, pp. 1-2.

[111] Expert Report of Jonathan R. Macey (the "Macey Report"), ¶ 38.

[112] *See* Reply of the Official Committee of Unsecured Creditors to Debtors' Response to Emergency Application of Creditors' Committee to Retain Jonathan R. Macey as Corporate Governance Expert [Docket No. 14284].

creditors. Second, that the current UAL board is "unelected.[113] Third, that the Reorganized UAL board is being "selected by management."[114] Fourth, that the current UAL board and the Reorganized UAL board have or will disregard their fiduciary duties. And fifth, that the OCUC is somehow better suited to selecting the Reorganized UAL board than the current board and its Nominating / Governance Committee. Professor Macey's report is a string of baseless assumptions, one feeding into the next, none grounded in fact or corrupted by logic—that assume UAL's current management is pulling the strings of the current UAL board, which according to Professor Macey is unelected and illegitimate, for the sole purpose of keeping current management in control. Simply put, Professor Macey's report is unsupportable, lacks no foundation, and should be ignored.

(i) Section 1123(a)(7) Requires a Manner of Selection "Consistent with the Interests of Creditors"

Perhaps the OCUC's new demand for sole control over the size, composition and structure of Reorganized UAL's Board comes from the OCUC's misreading of the applicable standard under Section 1123(a)(7), which requires a manner of selection **consistent** with the interests of creditors. Section 1123(a)(7) does not say "**best"** interests of creditors. In a colloquy during the hearings on Professor Macey's retention, the OCUC's counsel more than once claims that Section 1123(a)(7) requires a selection process in the "best interest of creditors."[115] This misreading of Section 1123(a)(7) is parroted in the Macey Report.[116] Yet the applicable

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[113] *See* Macey Report, ¶¶ 2(c), 22, 25, 43, 44, 69, 70(a), 70(c).

[114] *See* Macey Report ¶¶ 21, 24, 26, 28, 29, 37, 63, 70(a).

[115] *See, e.g.*, Hrg. Tr. Dec. 27, 2005 at 6:9; 8:10.

[116] Macey Report at ¶ 21(a).

statutory standard requires that the selection process must be merely "***consistent with*** the interests of creditors."[117] This is first false premise underlying the Macey Report.

The phrase "best interests of creditors" is found in several places in the Bankruptcy Code.[118] It is also the name of the "test" in Section 1129(a)(7) requiring that each holder of a claim in a class either accept a plan or receive at least as much as it would receive in a Chapter 7 liquidation."[119] Congress chose to use different words in Section 1123(a)(7), presumably because Congress meant to impose a different—and more relaxed—standard. Logically, requiring that something be in a person's "best interests" is a higher standard than merely requiring that something be "consistent with" that person's interests. Grafting a stricter standard onto Section 1123(a)(7) is inappropriate and misleading (although it would not change the result here). Consequently, Section 1123(a)(7) contemplates more than one type of appropriate "manner of selection" of the Reorganized UAL board, in contrast to the position of the OCUC, which believes that it should be the final arbiter of all aspects of that board.

(ii) The Current UAL Board is in Fact Elected

The second false premise of the Macey Report is that the current UAL Board is "unelected." This is patently false. The current UAL Board was duly elected at the last annual meeting of the stockholders of UAL Corporation on May 16, 2002.[120] This election was in

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[117] 11 U.S.C. § 1123(a)(7) (emphasis added).

[118] *See, e.g.*, 11 U.S.C. §§ 521(i)(4) and (j)(2), 943(b)(7), 1104(a)(3), 1112(b)(1) and § (b)(2), and 1307(c).

[119] *See, e.g.*, *Briscoe*, 994 F.2d at 1167.

[120] *See* UAL Corporation, Form 10-Q for the Quarter Ended June 30, 2002, Item 4, No. 1. The "employee directors" (Messrs. Bathurst, Canale and Ford) were elected according to the relevant provisions of the UAL Charter.

accordance with Delaware law[121] and UAL's Bylaws.[122] Under Article Fifth, Section 2.3 of the UAL Certificate of Incorporation, "each Director shall hold office until the next annual meeting of Stockholders and until his or her successor is elected and qualified, subject to such Director's earlier death, resignation or removal." Because of the absence of a shareholder meeting since UAL's bankruptcy filing, the directors have continued in office under the "or until his or her successor is elected and qualified" language of the Certificate of Incorporation. Three directors (Dipak Jain, (Robert S.) Steve Miller and George Weiksner) were appointed to fill board vacancies during the pendency of the UAL bankruptcy case by the Board's Nominating / Governance Committee. Their appointment fully complied with Delaware law[123] and UAL's Bylaws.[124]

Simply put, there has been no evidence suggested by OCUC or Professor Macey that UAL did not comply with any applicable state or federal law—including Delaware corporate law, federal securities law, or the Bankruptcy Code—in the election or appointment of the current UAL board. *Sotto voce* suggestions that the current UAL Board is somehow "illegitimate" are not well-taken.

And if by "unelected" Professor Macey means Reorganized UAL's board, the suggestion is still not well taken. Section 303 of the Delaware Corporate Code governs the actions of a Delaware corporation during the pendency of a bankruptcy case. Specifically, Section 303 allows a Chapter 11 corporate debtor in possession to, *inter alia*, "constitute or

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[121] *See* 8 Del. Code § 211(b).

[122] *See* Amended and Restated Bylaws of UAL Corporation ("UAL Bylaws"), § 3.3.

[123] *See* 8 Del. Code § 303(b).

reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in addition to all or some of the directors or officers then in office; . . ."[125] And Section 303 also provides that a confirmed plan of reorganization that calls for the appointment of a new Reorganized UAL board is treated as though approved unanimously by the board of directors and shareholders.[126]

(iii) Reorganized UAL's Board Will Not Be Appointed by Management

The OCUC's third false premise is that Reorganized UAL's Board will be "appointed by management." However, Delaware law[127] and the UAL Bylaws[128] allow UAL's board to form committees, and indeed § 4.1(c) of the UAL Bylaws requires that "the Board shall at all times maintain . . . a Nominating/Governance Committee." The three members of the Nominating/Governance Committee (James J. O'Connor (Chairman), W. James Farrell and Paul E. Tierney, Jr.) are independent directors, who have been meeting for the purpose of vetting candidates for *all* the director slots of the Reorganized UAL board—including current board members and candidates submitted by OCUC. The Macey Report only offers innuendo.[129] There is no evidence suggesting that management is the "man behind the curtain" manipulating the Nominating/Governance Committee's activities. The very reason for having independent

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[124] *See* UAL Bylaws § 3.13.

[125] 8 Del. Code § 303(b); *see also In the Matter of Gaslight Club, Inc.*, 782 F.2d 767, 772 (7th Cir. 1986) (Section 303 can be used to replace corporate official during a bankruptcy case).

[126] 8 Del. Code § 303(b).

[127] 8 Del. Code § 141(c)(1).

[128] UAL Bylaws § 4.1(a).

directors is to ensure credibility and objectivity.[130] Therefore, the Macey Report's conclusions are based on mere speculation.

(iv) The OCUC Disregards the Board Members' Fiduciary Duties

The OCUC's fourth false premise is that current and future UAL directors will ignore their fiduciary duties. In fact, the opposite is true. UAL's current directors have been acting for all stakeholders, including the current creditors (both as creditors and future shareholders) during the entire course of United's Chapter 11 cases, and the OCUC has not questioned the integrity of the board during these three years. Once a corporation is in the "zone of insolvency," the fiduciary duties of its directors shift from being owed to shareholders to being owed to the entire enterprise—including creditors and other stakeholders. Upon emergence those duties shift again to being owed to the reorganized company's shareholders.[131] Thus, UAL's board owes fiduciary duties to, among others, the same constituents represented by the OCUC—creditors now, shareholders tomorrow. Current UAL directors that take part in the selection of the Reorganized UAL board must act consistently with their fiduciary duties owed not to current shareholders or current management, but to current creditors/future shareholders.

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[129] *See* Macey Report, p.10 ("Board being hand--picked by management," "management--slated board"); p. 11 ("provisions allowing management to pick the Board.")

[130] *See e.g. In re Consumers Power Co. Derivative Litigation*, 132 F.R.D. 455, 469 n.34 (E.D. Mich. 1990) ("One of the reasons corporations select outside independent directors is to improve stockholder and public confidence that the corporate management is held to account by review of distinguished individuals whose success, wealth, prestige, and integrity are not dependent on, nor likely to be sacrificed for the corporation").

[131] *See e.g.* Richard M. Cieri & Michael J. Riela, *Protecting Directors and Officers of Corporations That Are Insolvent or in the Zone or Vicinity of Insolvency: Important Considerations, Practical Solutions*, 2 DEPAUL BUS. & COM. L. J. 295, 297, 300-301.

Moreover, the Reorganized UAL board, once selected, must act consistently with its fiduciary duties not to the prior board or future management, but to all stakeholders, including Reorganized UAL's shareholders. But for the OCUC or Professor Macey to assume without any foundation that UAL's directors will focus on self-perpetuation to the exclusion of all else (unless of course appointed by the OCUC) is to suggest that they will ignore their fiduciary duties (at their peril).[132] Yet neither OCUC nor Professor Macey suggest that any evidence exists to support these groundless allegations.

And Professor Macey's "one size fits all" approach, which treats all directors as illegitimate unless appointed by the OCUC, undermines the credibility of his own conclusions. For instance, some of the UAL directors were elected and others were union-appointed. Is Professor Macey suggesting, for example, that if the current Nominating/Governance Committee designated the current ALPA and IAM directors on the Reorganized UAL Board, that those two directors are necessarily illegitimate? If so, ALPA and IAM would surely want to respond to this suggestion.

(v) The OCUC Is No Better to Designate the Reorganized UAL Board

The OCUC's fifth false premise is that the OCUC is necessarily more qualified and appropriate than the current UAL Nominating/Governance Committee to select the Reorganized UAL Board. However, there is no basis for this conclusion.

The UAL Nominating / Governance Committee is a body specifically established for the purpose of reviewing and recommending candidates for the UAL board of directors. The

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[132] *See* Macey Report, ¶ 26 ("biased and beholden to management").

three independent director members of this Committee (Messrs. O'Connor, Tierney and Farrell) are all experienced business executives, Messrs. O'Connor and Farrell serving as Chairman and CEO of Unicom Corporation and Illinois Tool Works, respectively, and as such have had extensive experience in working with boards and in corporate governance issues. Mr. Tierney has been a senior venture capital executive for many years and in that capacity has been involved numerous times in recommending directors for slots at portfolio companies. As independent directors, they were elected by a broad spectrum of public shareholders, have no financial stake in the selection of any particular director, and of course now have a fiduciary duty to all stakeholders, including current creditors (i.e., future shareholders), which they understand well based on their substantial corporate experience. Therefore, these three directors have a long-term view.[133]

In contrast, the OCUC is a committee of creditors appointed by a single person—the U.S. Trustee—for completely different purposes and for reasons only known to the U.S. Trustee. Some of the OCUC's members have significant claims, some have relatively small claims, and some have claims that already have been satisfied in full. Some of the OCUC's members will receive New UAL Common Stock under the Plan, and some will not. Some of the OCUC members will never do business or invest in United again, and others will be close business partners for years to come. And some of the largest claims in these cases are not even held by OCUC members. Rather, substantial claims are held by creditors such as aircraft lessors and financiers that have had no involvement or interaction with the OCUC—in other words, the

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[133] In fact, Mr. O'Connor is the longest-standing member of the UAL board, having begun to serve in 1984. This is a long-term view indeed.

universe of unsecured creditors is far from monolithic. As one commentator has pointed out, "[A]lthough a creditors' committee is formed to represent the rights of all creditors in a bankruptcy . . . the interests of large creditors frequently are different from those of the holders of lesser amounts of debt."[134]

Moreover, there is absolutely no evidence to suggest that members of the OCUC, or the OCUC as a whole, is less focused on expediting short-term creditor recoveries, as opposed to future shareholder or enterprise value. Professor Macey refers multiple times to the OCUC as "the representative of the future equity holders,"[135] but that is not true. The OCUC is a representative of current creditors, many but not all of whom are going to receive Reorganized UAL Common Stock on the Plan's effective date, when the OCUC will be dissolved. And contrary to the impression the OCUC and Professor Macey would like to give, the United creditor body itself has changed over time. As of the filing of this pleading at least 156 claim assignments, totaling approximately $540 million, have been filed, to say nothing of the likely trading of billions of dollars of publicly-traded aircraft-backed and bond debt throughout the course of these cases. It is simply unknowable whether these new "creditors" are interested in long-term ownership in UAL, or whether they look to the OCUC as their "representative." Not only that, but some UAL creditors slated to receive large amounts of stock upon UAL's emergence have publicly stated that they intend to sell the stock as quickly as possible. In fact, at one point PBGC was concerned that the Plan's proposed NOL trading restrictions would

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[134] Brett Goldblatt, *Getting Out After It's Too Late: Exit Strategies in Chapter 11 Bankruptcies*, Oct. 2004 AM. BANKR. INST. J. 26, 57.

[135] Macey Report, ¶¶ 4, 18, 24, 29, 37.

impair its ability to sell the securities it receives under the Plan.[136] Therefore, the OCUC cannot purport to necessarily represent this group, who will change markedly in a short time after the effective date.

It is certainly possible that many if not most creditors receiving New UAL Common Stock under the Plan will move quickly to sell their shares in the open market, and that there will be a high turnover of shareholders within the first several months after United's emergence. If so, this would be an even stronger reason why the Reorganized UAL board should be populated with those individuals, like those on the current UAL board, who have a long-term view and interest in the enterprise value of United, rather than those appointed by the OCUC, who likely will be more focused on the share price in the short term and maximization of value and speed of distributions under the Plan.

Moreover, neither the OCUC nor Macey offer any evidence suggesting that the directors the OCUC might appoint would be any more "independent" than the current directors, or necessarily do a better job at running the company.[137] The Debtors do not mean to imply that the candidates for potential membership on the post-emergence UAL board suggested by the OCUC are somehow deficient—evaluation is the job of the Nominating/Governance Committee—but only that the qualifications of those submitted are not necessarily in any way

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[136] *See* Objection of Pension Benefit Guaranty Corporation to Debtors' Motion for Order (a) Approving the Disclosure Statement and (b) Approving the Solicitation Procedures and Form of Solicitation and Notices [Docket No. 13125], ¶ 9, pp. 4-5 ("Indeed, PBGC fully expected that it would have the right to liquidate all of the New PBGC Common Stock issued in connection with the Unfunded Liability Claim as promptly as reasonably practicable after the effective date of a plan of reorganization.")

superior to the qualifications of the current UAL board members based on who appointed them. United, like any large public business, desires to have a board with certain areas of expertise. For example, the three directors appointed to the UAL board during the bankruptcy case were nominated for that very reason: Deepak Jain is a marketing expert, Steve Miller a restructuring expert, and George Weiksner a finance and capital formation expert. To the extent the candidates submitted by the OCUC have outstanding credentials and possess expertise needed at this stage of UAL's existence, the Nominating/Governance Committee will evaluate them favorably. Additionally, no evidence has been provided as to what process the OCUC may have engaged in to select and rate candidates it deems appropriate.

The view that the current board of a company possess the expertise and duty to select post-emergence board members who are qualified has been validated by the Delaware legislature. Section 303 of the Delaware Corporations Code specifically allows a corporation in bankruptcy to implement a plan of reorganization by "constitute[ing] or reconstitute[ing] and classify[ing] or reclassify[ing] its board of directors . . . with like effect as if exercised and taken by unanimous action of the directors and stockholders of the corporation."[138] Therefore, the board approved by a plan of reorganization is by definition the representative of shareholders upon emergence.

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[137] In fact, commentators and securities analysts appear to have endorsed the successes United has achieved in its reorganization. See, e.g., Kyle Peterson, United Airlines to emerge stronger from bankruptcy – analysts," REUTERS, 1/4/2006.

[138] 8 Del. Code § 303.

(c) The OCUC's Objection Is Not Proper – It Is a "Deal Point"

Finally, if OCUC did not like UAL's board selection process, or the individual board members, it could have advised its constituents to vote against the Plan or it could have sought leave to propose its own plan. Absent these two options, the membership of the board is a "deal point" rather than a valid legal confirmation issue. As this Court has said:

> [T]here is no right to object to an otherwise legal management structure, because that management structure may not be the most advantageous. That's the sort of thing that people make decisions on in deciding whether to vote in favor of a plan.[139]

As *Collier* points out, "So long as the mandatory types of provisions appear, the plan's ultimate structure, form and effect are left to the plan's proponent."[140]

(d) The Authority Of The New UAL Board To Issue Serial Preferred Stock Is Benign And Compliant With Applicable Law

Article VI.G. of the Plan recites amendments that will be made to the UAL certificate of incorporation and bylaws. The section provides in part for the amendment of the certificate of incorporation to, *inter alia*, "authorize a certain number of shares of serial preferred stock."[141] This provision, common in the certificates of incorporation of large public (and other) companies,[142] simply authorizes the UAL board to issue such stock. There has been no

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[139] Tr. Hrg. Dec. 27, 2005 at 10:8-13 (emphasis added).

[140] 7-1129 COLLIER ON BANKRUPTCY ¶ 1129.01[2].

[141] *See also* Restated Certificate of UAL Corporation ("Certificate of Incorporation"), at pp. 1-2 ("Part I -- Serial Preferred Stock"), included as part of the Plan Supplement.

[142] *E.g.*, AMR Corporation: 770 million authorized: 750 million common; 20 million serial preferred (Articles of Incorporation, Article Fourth, p. 7); Wm. Wrigley Jr. Company: 1.32 billion authorized: 1 billion common; 300 million Class B common; 20 million preferred (Article Fourth, Section I, p. 2); Delta Air Lines, Inc.: 920 million authorized: 900 million common; 20 million serial preferred (Article Fourth, Section A, p. 4); GAP, Inc.:

(Continued…)

announcement or suggestion by United that it definitively will issue such preferred stock, or what that stock might be used for, such as raising capital and/or maintaining or increasing liquidity.

The OCUC and Professor Macey, however, have jumped across an evidentiary chasm to the unsupported conclusion that Reorganized UAL will issue preferred stock to implement a rights plan, not for the best interests of shareholders, but only to entrench themselves in control of the company.[143] The Macey Report devotes a significant amount of discussion to the alleged evils of rights plans, but ultimately concludes that a rights plan is acceptable with certain limitations—limitations virtually identical to ones previously proposed by United—so long, of course, as the OCUC gets to appoint the entire Reorganized UAL board.[144] Professor Macey must reach this conclusion because he certainly must recognize that rights plans are perfectly legal -- and commonplace -- in Delaware corporations and elsewhere. As one recent Delaware decision stated:

> The Delaware courts first examined and upheld the right of a board of directors to adopt a poison pill rights plan fifteen years ago in *Moran v. Household International, Inc*. Since that decision, others have followed which affirmed the validity of a board of directors' decision to adopt a poison pill rights plan. Today, rights plans have not only become

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2.39 billion authorized: 2.3 billion common; 60 million Class B common 30 million serial preferred (Article Fifth, Section 1.iii, p. 19); Rite Aid Corporation: 320 million authorized: 300 million common; 20 million serial preferred (Article Fourth, p. 2).

143 OCUC Objection, ¶ 7, pp. 13-14.

144 Macey Report, ¶ 65. Again, Macey totally undercuts his own argument by ultimately concluding that the OCUC's proposed poison pill is reasonable.

> commonplace in Delaware, but there is not a single state that does not permit their adoption.[145]

Therefore, the OCUC has no basis upon which to challenge the legality of a poison pill (were one ever to be adopted), and any implication to the contrary is misplaced.

Simply put, OCUC's objection to the proposed Reorganized UAL charter is that the charter should be different. But as discussed above, unless the charter renders the Plan unconfirmable or otherwise violates the law, it is simply not enough to say that the charter should be different. It is a "deal point" on account of which the OCUC was free to lobby its constituents to reject in the Plan. But once the creditors voted in favor of the Plan, the OCUC's objection not only loses what little merit it may have had, but puts the OCUC in the incongruous position of being at crossed swords with the clear wishes of its own constituency.

In any event, the Debtors have tried to accommodate the OCUC's concerns by agreeing to enact a Reorganized UAL board policy that essentially provides that board will not implement a rights plan without shareholder approval, unless the board specifically determines that it is in the best interests of shareholders to do so, and then the shareholders ratify that plan within one year. This is essentially the proposal contained in Professor Macey's report, although he suggests that these limitations should be contained in the by-laws, not a board policy, even though there is no practical distinction between the two, because a board can amend a policy or

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[145] *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909 at *1-5 (Del. Ch. 2000) (footnotes omitted). It is interesting to note that in *Hilton* the shareholders challenging the poison pill did not even bother to argue that the board had no authority to adopt it, since the authority to the contrary was so well-settled. *Id.* at *5 ("Under *Moran* and *Revlon*, the Hilton Board has the power to adopt the Plan under 8 Del. C. §§ 141 and 122(13). As *Moran* clearly held, the power to issue the Rights to purchase the Preferred Shares is conferred by 8 Del. C. § 157.") (footnotes omitted).

by-law by majority rule. (United believes that the best practice of large companies is to include such a limitation as a policy.)[146]

Nevertheless, OCUC still lodges three complaints about the grant of serial preferred stock authority: (i) the intent to implement a poison pill should have been disclosed in the Debtors' Disclosure Statement, (ii) poison pills adopted without shareholder vote will have a negative effect on stock values, and (iii) this preferred stock could be used by the Reorganized UAL board to block an acquisition attempt and thus be detrimental to shareholders.[147] All three of these objections are without merit.

First, OCUC argues that the Debtors failed to disclose their intent to issue a poison pill in the Disclosure Statement. The OCUC simply misses the point. There is no dispute that the Debtors' Disclosure Statement included a proposed charter that provided for the issuance of blank check preferred stock. But the issuance of preferred stock for a rights plan is total speculation on the part of the OCUC. The Debtors have no present intent to issue preferred stock

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[146] *See, e.g.,* ExxonMobil Corporation, Policy Statement on Poison Pills "If ExxonMobil ever were to adopt a rights plan, the Board would seek prior shareholder approval [except in exigent circumstances] . . . If a rights plan is adopted without prior shareholder approval, the plan must either be ratified by shareholders or must expire, without being renewed or replaced, within one year;" General Electric Corporation, Governance Principles, par. 19, Policy on Poison Pills ("[I]f GE were ever to adopt a poison pill, the board would seek prior shareowner approval [except in exigent circumstances] . . . If the GE board of directors were ever to adopt a poison pill without prior shareowner approval, the board would either submit the poison pill to shareowners for ratification, or would cause the poison pill to expire, without being renewed or replaced, within one year"); Intel Corporation, Board of Directors Guidelines on Significant Corporate Governance Issues, par. F, Policy on Poison Pill Plans ("The Board of Directors shall seek and obtain stockholder approval before adopting any stockholders 'rights plan'").

[147] OCUC Objection, ¶ 7, pp. 13-14.

to implement a rights plan, and may just as likely issue preferred stock for capital formation, liquidity, or other reasons.

Second, OCUC (through Professor Macey) argues that the Debtors should not implement a poison pill without shareholder approval. The fact of the matter, however, is that poison pills are implemented by boards of directors, not by shareholders, so this limitation would be improper under applicable corporate law.[148] In any event, as discussed above, the Debtors already have agreed to ask their shareholders to ratify any rights plan within one year of enactment.

Third, the OCUC claims that a rights plan may reduce shareholder value. But these fears are misplaced:

> [E]ven with a poison pill in place, a bidder can solicit the votes of shareholders in order to replace an incumbent board. If the solicitation succeeds, the newly elected directors can remove the poison pill, since 'poison pills can be removed by a board of directors as easily as they can be installed.' Once the pill is removed, the bidder may proceed to purchase the target's stock. In this manner, the voting process may overcome the harsh effects of the poison pill and allow the bidder to finalize the hostile takeover.[149]

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[148] Sharon Hannes, *The Role and Limits of Legal Regulation of Conflicts of Interest (Part II)*, 6 THEORETICAL INQUIRIES L. 391, 397 (July, 2005) ("Hannes I") (poison pills are implemented by boards); Sharon Hannes, *Private Benefits of Control, Antitakeover Defenses, and the Perils of Federal Intervention*, 2 BERKELEY BUS. L.J. 263, 275 (Spring, 2005) (same). While it is true that under Delaware law shareholders have concurrent authority, along with the board, to amend a corporation's bylaws (see 8 Del. Code Ann. § 109), Delaware law does not authorize bylaws that limit poison pills. *See, e.g.*, *Northwest Airlines Corporation*, SEC No-Action Letter dated January 11, 2001, 2001 WL 114960 at * 5, *8 - *13 (legal opinion of Delaware law firm Richards, Layton & Finger); Novell, Inc., SEC No-Action Letter dated November 30, 1999, 2000 WL 223715 at * 1 - 3, *6 - *9 (legal opinion of Delaware law firm Morris, Nichols, Arsht & Tunnell). Therefore, the relief OCUC is seeking is simply not available under Delaware law.

[149] Hannes I, *supra*, at pp. 395-96 (footnotes omitted).

Therefore, by itself a poison pill does not hinder the likelihood of a business being taken over.[150] In fact, as suggested by the passage above, a poison pill can actually be used to enhance shareholder value, in the sense that a potential acquirer may well agree to sweeten its offer to obtain the removal of the poison pill. So, the glass can be viewed as half full as opposed to half empty, as the OCUC and Professor Macey would have it.

Reorganized UAL's board's proposed authority to issue preferred stock is simply to allow the board flexibility to act consistent with its fiduciary duties to shareholders. This authority may never be used, but to deny the board the use of this tool because the board members may somehow, some day "go off the deep end," disregard their fiduciary responsibilities and act to barricade themselves in the UAL boardroom simply has no basis in fact, and is therefore fantasy at this point. It is also clear that the OCUC again—as with the Section 1123(a)(7) issues—implicitly and erroneously predicts that the UAL board will ignore its fiduciary duties. As discussed above, post-emergence Reorganized UAL board's fiduciary duties will shift back to shareholders. Clearly, then, in a takeover situation the board's fiduciary responsibility would be to maximize shareholder value.[151] And, in fact, the Debtors have proposed a board policy allowing Reorganized UAL's board the ability to implement a rights plan <u>only when it is in the best interest of shareholders to do so</u>. There is simply no credible basis to speculate that at some point in the future (that may never arrive) Reorganized UAL's

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[150] *See* Robert Comment & G. William Schwert, *Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures*, 39 J. FIN. ECON. 3, 4 (1995).

[151] *See, e.g.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (requiring directors of a Delaware corporation to seek the maximum offering price when the company has been put up "for sale").

board will abandon its fiduciary duties and become a rogue board. The OCUC has not produced—and cannot produce—any evidence to support this scenario.

Finally, it is hard to miss the fact that OCUC does not cite any Bankruptcy Code section or precedent (indeed, *any* authority at all) to support this portion of its Objection. This lack of authority is not surprising, because it would be almost inconceivable for a court to consent to entertain a Plan objection such as this where the scenario complained about may never come to pass. The most that could possibly be said is that this is an issue for another day—if, some day, UAL actually created a poison pill, and then was, some day, subject to an acquisition attempt, and in that attempted transaction it appeared that the board was acting in its own interests (or that of management) rather than observing its fiduciary duties. Delaware law creates remedies for that situation, up to and including calling a special meeting of shareholders and replacing the board. But that is not the situation here. All the Debtors are attempting to do today is confirm a Plan that gives the board the authority to issue preferred stock as it sees fit—with shareholder ratification in the appropriate context—which is a proper function of a board. This Objection must therefore be overruled.

(3) The OCUC's Objection to the Plan's Provision of SAM Notes and Equity Distribution Should Be Overruled

In the Plan, United proposes to make equity and note distributions to salaried and management ("SAM") employees, as agreed upon to reflect SAM employees' wage, pension and other concessions during United's 2003 and 2005 labor restructuring initiatives. There are approximately 8,400 SAM employees ranging from the CEO and other officers to secretaries and payroll clerks. United, in its business judgment, had determined that it was fair and equitable—as well as good business—to treat SAM employees the same as all other employee groups by making proportional distributions of stock and notes as compensation for wage and related-labor

concessions and lost pension benefits. As reflected in the Ballot Report filed by United on December 30, eligible voting creditors have accepted the Plan with this provision. The OCUC, however, is opposing the distribution, arguing not that the Debtors have failed to meet any of the confirmation requirements of Section 1129, but rather that the distributions to SAM employees are inappropriate because SAM employees have no pending claim against United for their losses because they are at-will employees, and therefore the Debtors could have unilaterally reduced their wages and benefits without any consideration for such reductions. The OCUC also suggests that a separate notice and hearing in accordance with Section 363(b) should have been held to consider the SAM distributions. Finally, the OCUC also makes an irrelevant argument about this Court's inability to use its equitable powers under Section 105 to allow the SAM distribution.

As an initial matter, the OCUC's "claim objection" is misguided. The Plan provides for the distribution of notes and stock to SAM employees. As previously discussed in this Memorandum, that makes the SAM distribution a "deal point" in the Plan, which was approved by creditors. The OCUC cannot "cherry-pick" this one provision out of the Plan as unacceptable, particularly when the distribution does not render the Plan unconfirmable. The OCUC could have lobbied creditors to vote against the Plan or could have sought leave to file a competing plan that did not recognize the sacrifices made by the company's 8,400 SAM employees, thereby treating them unfairly as compared to other union groups, but the OCUC did nothing. United—as plan proponent—has the right and discretion to design the Plan as it deems appropriate, so long as the Plan is confirmable. That the OCUC does not like this element of the Plan does not transform this into a confirmation issue.

In any event, the OCUC objects to the SAM distributions because—according to the OCUC—it is not made on account of a pending claim in United's bankruptcy. The OCUC argues that unlike union represented employees, SAM employees are at-will, and thus had no right to continued employment at any rate of salary, and thus United has received no consideration for the SAM distribution. But this argument is plain wrong. This Court already has commented on this precise issue in the context of the Debtors' motion to approve the 2005 ALPA Restructuring Agreement in January 2005. PBGC objected to the 2005 ALPA Restructuring Agreement, arguing that the Debtors could not give notes to the pilots as compensation for lost pension benefits because any pension termination claims belong to PBGC. However, the Court noted the question of whether or not an employee has a claim for losses arising from labor concessions is irrelevant.[152] Instead, all the employee has to have is the right to negotiate a higher amount of wages for ongoing services to help compensate that employee for what he or she perceives as a loss of benefits.[153] The Court also clearly recognized the importance of a debtor maintaining good working relations with employees during a restructuring. In particular, the Court stated:

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[152] *See* Tr. Hrg. Jan. 6, 2005 at 85:12-19, 22-24 ("The union members, I'm quite confident you're correct don't have a claim to losses that they would incur in the future because of the underfunding of a pension plan that has to be terminated. That's PBGC's claim for sure. But, of course, the workers do have a claim for their continued present services. … They have a right to be paid for the services that they provide on an ongoing basis to the company.").

[153] *See id.* at 86:1-8 ("Now, if in their own minds [the employees] think, 'In order to provide our current and ongoing services, we want to be paid something that will help compensate us for what we perceive as a loss of pension benefits, and therefore we are asserting our claim to be paid for our present and ongoing services in an amount that is higher than it might otherwise be,' what's wrong with that?").

> I am required to give some deference to the business judgment of the debtors because. . .there are a number of intangibles here. The debtor may very well be willing to pay something to maintain a good working relationship with the union members. That is something that can't be quantified, but it's apparent to me that that kind of good working relationship is absolutely crucial to the survival of this business. … [T]here is necessarily some leeway that's given to the debtors' management in exercising its judgment as to what is a reasonable price to pay for the services that its [employees] are providing to it.[154]

Thus, the OCUC's focus, like PBGC before, is misdirected. Whether an employee is at-will or is union represented is simply irrelevant. The fact that at-will employees could quit if they perceived themselves as being treated unfairly compared to other employees was sufficient reason—but note the entire basis—for the company to decide, in its business judgment, that it should treat SAM employees the same as all other labor groups.

But more importantly, the Debtors agreed to the SAM distribution to treat all employees alike by providing equity distributions that reflect the economic contributions that SAM employees (like union employees) made during the restructuring. This distribution also incentivized SAM employees (like union employees) to continue to contribute to United's restructuring efforts, and to maintain a stable, positive, and fair working environment. United recognized the real threat of potential resignations of these employees in light of wage and benefit reductions. Treating all employees alike and maintaining a stable, positive, and fair working environment while reducing labor costs is a difficult balancing act, yet critical to the restructuring process. With respect to all of its employees, United's corporate philosophy has always been to treat employees fairly and to incentivize them to continue working for and

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[154] *Id.* at 89:23-90:7, 90:11-15.

contributing to United, even as painful sacrifices were made. Without dedicated employees—SAM or otherwise—United would be incapable of effectively reorganizing. Additionally, as a result of the SAM equity distributions, SAM employees -- like their union counterparts -- will have a tangible, direct interest in the financial future of the company, thereby incentivizing them to perform in ways that are in the interests of shareholders. [155]

It is undisputed that since the first days of these cases, all stakeholders, especially the OCUC, understood that SAM labor savings were critical to the overall labor savings necessary for a successful reorganization. Both the SAM labor savings and distributions to SAM employees were clearly described in United's 2003 labor model and Gershwin business plans circulated to the OCUC and unions during the Section 1113 processes.[156] The Debtors' professionals also made a presentation to the OCUC's professionals in July 2004 about all labor savings and the proposed distributions to union and SAM employees, and continued to provide the OCUC additional information on the proposed distributions as part of the 2005 Section 1113 process.

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[155] Also, absent the SAM distributions there was a possibility that SAM employees would fight the termination of their pensions, which they most certainly had a legal right to do under ERISA. *See* 29 U.S.C. § 1370(a) (any party in interest can contest termination).

[156] Each of the union Distribution Agreements from 2003 specifically contemplate a distribution to SAM employees in return for agreed-upon wage and benefit reductions. For example, the 2003 Pilot Distribution Agreement letter (Ltr. 03-07, p. 439 of the 2003-2009 Agreement), Paragraoh 3, states: "In addition, any Plan proposed or supported by UAL and/or the Company will provide the pilot group with at least 43.5% (subject to review of the pilot portion of the total agreed-upon labor cost savings from the 2003 Restructuring Agreement through April 30, 2009) of the common equity, securities and/or other consideration provided to all Company employees under the Plan in connection with employee cost reductions." In paragraph 2 of the same letter, the amount of the "claim" is defined by reference to "Labor Model 1.1a," which included SAM savings as constituting 13.34% of the total employee

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The OCUC also argues that a Section 363 hearing is required to obtain court approval of the SAM Distribution, but this is nonsensical. As previously stated in the MEIP discussion above, Section 363 of the Bankruptcy Code is inapplicable in the confirmation context. Section 1123(a)(5) of the Bankruptcy Code authorizes a debtor in its plan to provide adequate means for the plan's implementation, including issuance of securities of the debtor for any appropriate purpose.[157] Moreover, the fact that voting creditors, including the OCUC's constituency, have accepted the Plan calling for the SAM distributions speaks volumes. Indeed, given the OCUC's statements earlier in this case that the Debtors' use of Section 363 was an impermissible end-run of the plan process, the OCUC's current position rings hollow.

The Debtors also note that the OCUC recently purported to file a "claim objection" to the SAM distribution and set it for hearing on January 20 (in violation of the case management procedures approved by the Court). The OCUC's filing is an improper attempt to carve out a critical element of the Plan through the guise of a "claim objection" and must be rejected. The OCUC's filing also is in direct contradiction to the OCUC's confirmation objection in which the OCUC argues that the SAM distribution is not on account of any bankruptcy claim. And finally, even if this Court were to entertain the OCUC's "claim

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savings. Each group was expected to receive equity in proportion to their sacrifice as measured by the formula in Labor Model 1.1a.

[157] The OCUC's argument that this Court cannot use its equitable powers under Section 105 of the Bankruptcy Code to override other provisions of the Bankruptcy Code is irrelevant in this context because the Debtors are not seeking such a remedy. The Debtors are solely requesting that the Court confirm the Debtors' Plan pursuant to Section 1129 of the Bankruptcy Code, which Plan properly contains a provision for a securities distribution to SAM employees as allowed pursuant to Section 1123(a)(5)(J) of the Bankruptcy Code.

objection," the Court should reject it—the Court just held that the OCUC lacks independent standing to bring claim objections.[158]

(4) The Plan's Implementation of a Plan Oversight Committee is Appropriate

Article XV.D of the Plan provides for the dissolution of the OCUC and the appointment of a Plan Oversight Committee ("POC") upon the Effective Date. The OCUC has objected to the Plan arguing that the POC should have increased powers in connection with the post-confirmation administration of the Debtors' estate. While the Debtors have continued to negotiate with the OCUC on this issue, there is no statutory authority or case law supporting the OCUC's position.[159] Creation of a post-confirmation oversight body is a creature of contract only.[160] It is completely discretionary for the Debtors to propose a POC in their Plan, and the Debtors believe the existing powers granted to the POC are more than adequate. For instance, the Plan grants the POC standing to object to claims under certain circumstances laid out in Article XV.D.2.e.ii, even though this Court recently ruled that the OCUC lacked standing to independently prosecute claim objections.[161] The OCUC's wish for more is simply a "deal

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[158] *See* Tr. Hrg. Jan. 6, 2006 at 14:21- 15:1 ("This overwhelming body of law consistently stating the same rule clearly requires this court to interpret the phrase 'party in interest' in the context of Section 502(a) not to accord a right to a creditor or a creditors committee generally to assert objections to proofs of claim.")

[159] The case cited by the OCUC, *Hansen, Jones & Leta v. Segal*, 220 B.R. 434, 473 (D. Utah 1998) provides no support for the OCUC's position and in fact is factually and legally irrelevant to this case.

[160] *See Advisory Committee of Major Funding Corp. v. Sommers*, 109 F.3d 219, 222 (5th Cir. 1997) ("the postconfirmation creditors' committee is a creature of contract. Its powers and duties are derived solely from the Plan.")

[161] Tr. Hrg. Jan. 6, 2006 at 14:21- 15:1 ("This overwhelming body of law consistently stating the same rule clearly requires this court to interpret the phrase 'party in interest' in the context of

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point" in United's proposed plan, but is not a proper basis for plan objection: "So long as the mandatory types of [plan] provisions appear, the plan's ultimate structure, form, and effect are left to the plan's proponent."[162]

Again, the bottom line is that the OCUC could have lobbied its constituents to vote against the Plan because of the "deal," as opposed to legal or other perceived deficiencies. It failed to do so, and the creditors have given the Debtors a mandate for this Plan through the ballot box. Simply put, the OCUC's parochial desire to play more of an active role in the administration of the post-confirmation estate is no reason to hold up confirmation of a Plan that creditors have voted to accept.

(5) Assignment of 45% of PBGC's UBL Claim Is Proper

As this Court is aware, on May 11, 2005 this Court approved a global settlement between United and PBGC in which United, among other things, agreed to the allowance of PBGC's unfunded benefits liability ("UBL") claim arising from the termination of United's pension plans in an amount calculated pursuant to PBGC's regulations. The PBGC Settlement Agreement also provided that PBGC was required to assign 45% of its claim at United's direction. The OCUC negotiated with United and PBGC over the final terms of the PBGC Settlement Agreement, which was modified at the OCUC's request. Among other things, the PBGC Settlement Agreement was revised to provide that any assignment of the 45% of PBGC's UBL claim would made in a manner consistent with the best interests of creditors, after notice to and consultation with the OCUC, after notice to the 2002 List and a hearing in the Bankruptcy

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502(a) not to accord a right to a creditor or a creditors' committee generally to assert objections to proofs of claim.").

Court. The OCUC even filed a statement in support of the PBGC Settlement Agreement.[163] The Court ultimately approved the PBGC Settlement Agreement.[164] This Court already has approved one direction of assignment of a portion of PBGC's UBL claim to the public aircraft debt group.[165] And since the approval of the PBGC Settlement Agreement, United has had numerous discussions regarding the possible assignment of the remainder of PBGC's UBL claim.

Now, the OCUC, through a purported Plan objection, argues that any possible assignment of the remainder of the 45% of PBGC's UBL claim, and certain corporate debentures repurchased by United, would violate "the Bankruptcy Code's priority scheme or the requirement of equal treatment of similarly situated creditors," creating "a private cache for management to use to further discriminate against general unsecured creditors."[166] The OCUC alludes to the absolute priority rule, and cites a number of what it calls "gift doctrine" cases to

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[162] 7-1129 *COLLIER ON BANKRUPTCY* ¶ 1129.01[2].

[163] Support of the PBGC Agreement as Amended by the Official Committee of Unsecured Creditors to Debtors' Emergency Motion to Approve Agreement With PBGC [Docket No. 11147] (OCUC "supports the PBGC Agreement to resolve issues with the PBGC with certain agreed modifications to be set forth in an amended agreement and a form of order incorporating the same.").

[164] At the May 10, 2005 hearing on approval of the PBGC Settlement, the following colloquy occurred between the Court and counsel for the OCUC: "MR. JACOBSON: As we filed in our pleading, Your Honor, after arm's-length negotiations with the company, we agreed, based upon the modifications that you heard read into the record today and will be included in the order, to support the goal and the actuality of the company's agreement with the PBGC to resolve its differences with the PBGC. THE COURT: Okay. I suppose it goes without saying that you've made the determination then that on balance this agreement is in the best interest of the estate? MR. JACOBSON: Yes, that is correct, Your Honor." May 10, 2006 Hng. Tr. 73:15-25 - 74:1-3.

[165] *See* Order Approving Settlement and Term Sheet with Trustees and Controlling Holders for Public Debt Group [Docket No. 12927].

[166] OCUC Objection, ¶ 3, p. 9.

support its alleged theory. In two of these cases, a senior creditor is prohibited from assigning consideration to equity when a junior creditor is not being paid in full.[167] The other two cases cited as "gift doctrine" cases are not, and appear to be mainly irrelevant.[168] In the end, however, the OCUC concedes—as it must—that "[n]one of the gifting cases [cited by OCUC] involve the Debtors' use of plan consideration as the Debtors reserve the right to use it here," thereby acknowledging that none of its cases are really on point.[169]

The OCUC's position is ludicrous, because any assignment of a portion of PBGC's UBL claim was ***previously approved by this Court with the OCUC's blessing***. How the OCUC could have endorsed such an assignment originally, then allowed the Court to approve a partial assignment in the global deal with the Public Debt Group, but now object to any further assignment through a Plan objection is beyond United's understanding. Moreover, no one has suggested that the Plan takes away the OCUC's rights under the PBGC Settlement Agreement to be consulted about and/or object to any particular assignment of PBGC's UBL

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[167] *See In re Armstrong World Industries, Inc.*, 2005 WL 428523 (D. Del. Feb. 23, 2005); *In re CGE Shattuck, LLC*, 254 B.R. 5 (Bankr. D. N.H. 2000).

[168] *In re Scott Cable Communications*, 227 B.R. 596 (Bankr. D. Conn. 1998) (debtor sought confirmation of plan the purpose of which was to avoid taxes); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 862-65 (Bankr. S.D. Tex. 2001) (an "unfair discrimination" case in which two similarly-situated classes of unsecured creditors were treated differently under the plan).

[169] The only case in the Seventh Circuit cited by the OCUC, *Nostalgia Network, Inc. v. Lockwood*, 315 F.3d 717 (7th Cir. 2002), holds that a "collusive arrangement to convert estate assets available for all creditors generally to assets available for selected creditors favored by the Debtors may be viewed as a fraudulent transfer as to the disfavored creditors who no longer have access to such assets." But *Nostalgia* was a case of out-and-out fraud, where money was fraudulently "parked" by means of a gratuitous transfer by an attorney to his girlfriend's bank account. The court unwound the transfer as fraudulent. The case specifically turned on the gratuitous nature of the transfer. But here, any assignment would be in the context of a court-approved settlement.

claim. When and if United directs any additional assignment of PBGC's UBL claim, the OCUC retains all of its rights. And to the extent that United assigns any portion of its corporate debentures, it will only do so with court approval. The OCUC's objection is simply not relevant to confirmation and should be rejected.[170]

Moreover, the OCUC is wrong to suggest that any such assignments violate the absolute priority rule. The "absolute priority rule" merely requires that in a confirmation cramdown scenario, no junior creditor can receive a distribution unless senior creditors are paid in full.[171] But the OCUC does not even suggest that United would direct an assignment to equity while its unsecured creditors receive cents on the dollar.[172] In any event, this is not a confirmation issue— the OCUC is free to make any objections to any such assignments at a hearing in this Court.

In sum, the OCUC complains because the Plan allows the Debtors "to distribute consideration on a discriminatory basis to favored parties without any oversight or objection."[173] However, differential treatment is perfectly permissible under the Bankruptcy Code as long as

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[170] Even if OCUC's objection were a confirmation issue, there is nothing improper about a creditor receiving an assignment of value from another creditor as part of a settlement or compromise, even if that means one creditor is treated differently under a plan than another creditor. There is nothing in the Bankruptcy Code that per se prohibits a plan from treating substantially similar claims differently, so as long as other confirmation requirements are met.

[171] 11 U.S.C. § 1129(b)(2)(B)(ii); *See, e.g., Matter of Snyder*, 967 F.2d 1126, 1128 (7th Cir. 1992).

[172] Even if United did so direct such an assignment, *In re S.P.M. Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993), and its progeny allow a senior creditor, in the context of a settlement with the debtor, to assign part of its distribution to equity while "skipping over" unsecured creditors, based on the principle that the senior creditor is free to do with its distribution what it wants.

[173] OCUC Objection, ¶ 3, 2d paragraph, p. 9.

made pursuant to a consensual settlement—as it was here—a settlement which the OCUC approved. This is therefore not a Plan confirmation issue, and this portion of the OCUC's Objection should be overruled.

(6) URPBPA'S Remaining Objections Should Be Overruled

URPBPA raises two Plan objections, in addition to its objections to the MEIP and to the Plan's release and exculpation provisions (discussed below). First, URPBPA argues that the Plan discriminates against retired pilots as compared to active pilots. URPBPA claims that United has provided active pilots with $550 million of notes plus stock distributions pursuant to the 2005 ALPA Agreement, which called for those active pilots to make significant labor concessions and agree not to contest a voluntary termination of Pilot Pension Plan, but that the Plan does not provide retired pilots with similar compensation. Second, URPBPA complains that some of its members who retired in 2005 received ballots in unliquidated amounts on account of non-qualified pension claims, even though they did not file proofs of claim and did not have valid non-qualified claims.

(a) The Plan's Treatment of Retired and Active Pilots Is Entirely Consistent With Applicable Law

URPBPA first argues that the Plan is unconfirmable because it does not provide retired pilots with compensation similar to that provided to active pilots under the ALPA Agreement, supposedly in violation of Sections 1122 and 1123 of the Bankruptcy Code. In essence, URPBPA argues that similar claims should be treated similarly. This argument must be rejected for several reasons.

As an initial matter, active pilots' distribution rights under the ALPA Agreement are fundamentally different than the claims of retired pilots. Active pilots are entitled to convertible notes and stock distributions as a result of negotiating an amended collective

bargaining agreement with United that provided United with significant labor and pension savings in lieu of a contested Section 1113 trial. Also, in consideration for stock and notes under the ALPA Agreement and a new defined contribution plan, the active pilots agreed that non-qualified pension benefits would cease upon termination of the Pilot Plan. In contrast, retired pilots have no right to notes or stock distributions and (as retirees, by definition) they could not have negotiated an amended CBA under Section 1113.[174] The retired pilots, however, never reached an agreement with United. Nevertheless, United is providing the retired pilots with non-qualified pension claims estimated at approximately $616 million in the aggregate--claims they might not be entitled to under applicable law. Thus, the claims and rights to payment of active and retired pilots under the Plan are fundamentally different. And consistent with this reality, the Plan provides for different treatment of the rights and claims of active and retired pilots. "Claims may also be separately classified if there are good business reasons to do so...."[175] Here, United has a sound business reason to treat the rights of active pilots differently from the retired pilots, consistent with the 2005 ALPA Restructuring Agreement.

But such different treatment does not violate Section 1122, 1123 or any other provision of the Bankruptcy Code. Section 1122 merely prohibits a plan from placing substantially dissimilar claims in the same class. However, Section 1122 is not relevant because

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[174] This Court rejected URPBPA's argument that it had Section 1113 rights. Tr. Hrg. Dec. 14, 2004 at 7:2 - 7:5 ("[T]he parties to the contract, that is to say [ALPA] on one hand and United on the other, are the ones who are appropriately engaged in negotiations at this point."). The District Court dismissed as moot URPBPA's appeal of the Court's ruling and ruled that once United sought approval of the ALPA Agreement and withdrew its Section 1113 rejection motion, there was no pending Section 1113 proceeding and thus URPBPA members had no 1113 rights. URPBPA did not appeal, which makes the District Court's ruling the law of the case.

active pilots do not have "claims" like retired pilots do; rather, active pilots have rights to receive various forms of consideration pursuant to an assumed collective bargaining agreement. URPBPA's argument is really no different than a lessor whose lease is rejected arguing that his rejection damages claim should be paid in full because another lessor whose lease is assumed is being paid in full as part of cure.

In any event, even if active and retired pilots had substantially similar claims—which they do not—Sections 1122 and 1123 do not prohibit the separate classification and treatment of such claims.[176]

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[175] *Wabash Valley*, 72 F.3d at 1321.

[176] *Id.* ("A debtor in bankruptcy has considerable discretion to classify claims and interests in a chapter 11 reorganization plan. … Claims may also be separately classified if there are 'good business reasons' to do so <u>or</u> if the claimants have sufficiently different interests in the plan.") (internal citations and quotations omitted) (emphasis added); *In re Bryson Props., XVIII*, 961 F.2d 496, 502 (4th Cir. 1992) ("Section 1122 requires substantial similarity between claims that are placed in the same class. It does not, however, require that all substantially similar claims be placed within the same class, and it grants some flexibility in classification of unsecured claims."); *In re Chateaugay Corp.*, 155 B.R. 625, 632 (Bankr. S.D.N.Y. 1993) ("Section 1123(a)(4) requires that each claim or interest of a particular class receive the same treatment; however, it only requires equality of treatment of claims or interests placed in the same class.") (internal citations and quotations omitted); *In re UNR Indus., Inc.*, 143 B.R. 506, 523 (Bankr. N.D. Ill. 1992), *rev'd on other grounds*, 173 B.R. 149 (N.D. Ill. 1994). *See generally* 7-1122 COLLIER ON BANKRUPTCY ¶ 1122.02[3][a] ("Generally speaking, all unsecured claims outstanding as of the commencement of the case may be classified together as general unsecured claim. However, the Code does not require that all such claims be placed within a single class."); 1123 COLLIER ON BANKRUPTCY ¶ 1123.01[4][b] ("The equality addressed by section 1123(a)(4) extends only to the treatment of members of the <u>same class of claims and interests</u>, and not to the plan's overall treatment of the creditors holding such claims or interests.").

(b) United Provided Pilots Who Retired In 2005 With The Opportunity To Vote On The Plan Even Though They Do Not Have Valid Non-Qualified Pension Claims

Second, in its Objection URPBPA complains that 168 of its members who retired after January 1, 2005—the effective date of the ALPA Agreement—received ballots in unliquidated amounts on account of non-qualified pension claims. However, these "2005 Retirees" did not file proofs of claim and do not have valid non-qualified claims. Nevertheless, after receiving URPBPA's Objection, United—while fully reserving all of its rights—worked with URPBPA to distribute ballots, and to collect ballots from, these 2005 Retirees and ensure that any ballots were timely submitted to United's solicitation agent, Poorman-Douglas. Therefore, contrary to URPBPA's objection, United believes that the 2005 Retirees had the opportunity to fully participate in the Plan voting process.[177]

Since then United has objected to the ballots submitted by the 2005 Retirees on substantive grounds because the 2005 Retirees retired after January 1, 2005, which was the effective date of the 2005 ALPA Agreement. Under the ALPA Agreement, effective January 1, 2005, non-qualified benefits ceased upon termination of the Pilot Plan. The 2005 Retirees were active employees as of January 1, 2005 and therefore bound by its collective bargaining representative, ALPA. It is black letter law that a union, as the exclusive bargaining agent of its members, can bind a member in collective bargaining, even over the objection of that member.[178]

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[177] Only 18 of the possible 168 ballots were returned, all of which asserted non-qualified claims in unliquidated dollar amounts and elected to opt out of the Retiree Convenience Class.

[178] *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991); *see also Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 202 (1944) (holding that Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents); *NLRB v. Allis-Chalmers Mfg. Co.*,

(Continued…)

The only reason that URPBPA may think that the 2005 Retirees are entitled to non-qualified benefit claims for future periods is that those 168 retirees actually received non-qualified benefits from January through September, 2005. However, this anomalous circumstance is merely due to the fact that the Bankruptcy Court ordered United to continue paying non-qualified benefits pending the conclusion of PBGC's involuntary termination proceeding against the Pilot Plan, and then the Bankruptcy Court terminated the Pilot Plan retroactive to December 30, 2004. In contrast, those 3,248 pilots who retired before January 1, 2005 were not represented by ALPA as of the effective date of the ALPA Agreement, were not bound by that part of the agreement, and thus never relinquished their non-qualified benefit claims pursuant to the Section 1113 collective bargaining process. But to the extent that URPBPA believes that the 2005 Retirees should be entitled to non-qualified benefit claims, that is a claims objection issue and need not be decided in connection with confirmation.

(7) The Plan's Conditional Assumption of the AFA CBA Is Appropriate

In addition to objecting to the MEIP, AFA also objects to the Plan's conditional assumption of the AFA CBA, with the reservation of United's right post-confirmation to seek to reject the AFA CBA under Section 1113 and initiate an ERISA § 4041 voluntary distress termination proceeding if the Flight Attendant Defined Benefit Plan is restored.

The reason for United's reservation of rights is simple. AFA's ERISA § 4003 action against PBGC seeking a declaration that PBGC's termination of the Flight Attendant Plan

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388 U.S. 175, 180 (1967) ("Only the union may contract the employee's terms and conditions of employment . . . <u>The employee may disagree with many of the union decisions but is bound by them</u>") (decided in the context of the National Labor Relations Act) (emphasis added).

violated ERISA § 4042 remains pending in the District Court for the District of Columbia. And the time for petitioning the Supreme Court for a writ of certiori with respect to the Seventh Circuit's ruling upholding the United-PBGC Agreement has not expired. Although the final outcome of both proceedings are still unknown, and United reserves all of its rights with respect to the effect of any ruling in either proceeding, one possible outcome is that the Flight Attendant Plan is restored. Thus, while this litigation remains unresolved, United must reserve its rights under Section 1113 and ERISA to ensure that United's pension liability is not reimposed post-emergence without United having the opportunity to bring a voluntary termination proceeding to the extent required. Otherwise, United would have to consider staying in bankruptcy merely to wait until the ultimate conclusion of this litigation—including all appeals and petitions for certiori—to preserve its right to bring a Section 1113 proceeding as a debtor-in-possession. That is in no one's interest, particularly the AFA, who objected almost every time United sought an extension of exclusivity on the ground that United should be moving faster to exit bankruptcy.

United also had reserved its right to re-initiate a Section 1113 proceeding with respect to the AFA CBA in the event that the System Board of Adjustment ruled in AFA's favor in AFA's grievance proceeding regarding whether United in fact had obtained the proper amount of wage and other labor savings from its salaried and management employees. Just recently, however, the System Board denied AFA's grievance, completely validating the sacrifices that SAM employees have made during these Chapter 11 cases.[179] As a result, United can narrow the scope of the Plan's reservation of rights under Section 1113 to apply only to the termination of the Flight Attendant Plan if restored.

In any event, AFA's objection to the Plan's conditional assumption of the AFA CBA is based on two flawed points. First, AFA argues that this Court cannot exercise jurisdiction over a renewed Section 1113 motion to reject the AFA CBA and an ERISA voluntary distress termination proceeding. Second, AFA argues that United is "judicially estopped" from seeking to terminate the Flight Attendant Plan after confirmation because United irrevocably chose to allow involuntary termination of the Flight Attendant Plan to go forward.

(a) This Court Can Exercise Jurisdiction Over A Section 1113 Rejection And ERISA § 4041 Proceeding.

AFA misunderstands a bankruptcy court's post-confirmation jurisdiction, which often includes allowing a debtor to reject executory contracts post-confirmation.[180] Courts have recognized that, as a practical matter, every issue in a bankruptcy case may not be resolved by the time a debtor is ready to leave bankruptcy protection.[181] This logic applies here. While the AFA CBA is an executory contract entitled to the protections of Section 1113, its fate like any other executory contract may not be completely resolved prior to emergence.[182] AFA should

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[179] A written opinion from the System Board on this decision is expected later this month.

[180] *See In re Greater Southeast Cmty. Hosp. Corp.*, 327 B.R. 26, 34 (Bankr. D.D.C. 2005) (finding that a debtor could reject executory contracts postconfirmation when cure amounts turn out to be unreasonable); *In re Gunter Hotel Assocs.*, 96 B.R. 696, 699-700 (Bankr. W.D. Tex. 1988) (extending a debtor's deadline to reject executory contracts postconfirmation because it would be impractical to delay a debtor's exit from bankruptcy on account of having to make all executory contract assumption/rejection decisions); *see also TMS Assocs. v. Kroh Bros. Dev. Co. (In re Kroh Bros. Dev. Co.)*, 100 B.R. 480, 486-87 (W.D. Mo. 1989).

[181] *See Gunter Hotel*, 96 B.R. at 699-700 (the "[p]olicy inherent in reorganizations makes it impossible and impractical to require all issues involving motions to reject executory contracts to be finally adjudicated prior to confirmation.").

[182] Indeed, because a CBA is covered by Section 1113 of the Bankruptcy Code, which, unlike Section 365, does not contain any temporal restriction on assumption or rejection, the Bankruptcy Court arguably has plenary power to retain postpetition jurisdiction over a

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certainly have the right to exhaust its legal remedies, but at the same time United should not have to make a Hobson's choice between delaying its exit from Chapter 11 for years or waiving its right to seek 1113 relief should the AFA's so-far unsuccessful campaign of appeals and ancillary litigation actually change the status quo.

Nevertheless, AFA tries to parlay its right to litigate into forcing United to make this Hobson's choice. AFA tries to turn the shield of its rights under ERISA and Section 1113 into a sword to destroy United's right to restructure, exit bankruptcy, and make distributions to creditors.[183] Although United's need to initiate a Section 1113 and ERISA § 4041 proceeding is admittedly remote, at this point, United's conditional assumption is the only responsible choice. And AFA has not cited any authority to the contrary, but merely cites cases where the bankruptcy court's retention of jurisdiction was tenuous at best. Two of the cases, *Cary Metal Products*[184] and *Schwinn Bicycle*,[185] involved attempts to reserve the bankruptcy court's jurisdiction to adjudicate state law successor liability disputes between a purchaser of the debtors' assets and third parties long after the bankruptcy cases had closed.[186] And the court in

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Section 1113 proceeding. *Cf. Southern Labor Union Local 188 v. Blue Diamond Coal Co.*, 160 B.R. 574, 576 (E.D. Tenn. 1993) (finding that the enactment of Section 1113 "withdrew the collective bargaining agreement from the rubric of [Section] 365").

[183] *See Gunter Hotel*, 96 B.R. at 699-700 ("[r]equiring final determination prior to confirmation of all applications to reject … [an executory contract], with subsequent appeals and possible imposition of stays, would postpone confirmation of a debtor's plan of arrangement, thus impeding the debtor's rehabilitation and return to the marketplace.") (quotation omitted).

[184] *In re Cary Metal Prods.*, 158 B.R. 927, 933 (Bankr. N.D. Ill. 1993).

[185] *In re Schwinn Bicycle Co.*, 210 B.R. 747, 754 (Bankr. N.D. Ill. 1997).

[186] *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994) (finding that 28 U.S.C. § 1334(b) "cannot possibly be applicable to this dispute between two nonparties to the bankruptcy proceeding").

the *Pettibone* case cited by AFA refused jurisdiction to consider a debtor's ***state*** statute of limitations defenses to personal injury lawsuits that resumed after the stay was lifted—an issue state courts clearly were competent to decide themselves.[187] In contrast, here only the Bankruptcy Court can rule on Section 1113 and ERISA § 4041 proceedings—no doubt core proceedings involving two parties to the bankruptcy case.[188] Thus, retention of jurisdiction is entirely appropriate.

(b) United did not waive its right to seek to re-terminate the Flight Attendant Defined Benefit Plan.

AFA next argues that United should be judicially estopped from commencing a Section 1113 proceeding post-exit even if this Court retains jurisdiction.[189] Not so. Judicial estoppel requires that:

(i) the estopped party's position must be clearly inconsistent with a position earlier taken;

(ii) the estopped party must have prevailed on the basis of its earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled;

(iii) the estopped party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped;

(iv) the operative facts remain the same in both cases.[190]

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[187] *In re Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991) (emphasis in original).

[188] *See In re Fulton Bellows & Components, Inc.*, 301 B.R. 723, 725 at n.2 (Bankr. E.D. Tenn. 2003) ("A motion to reject a collective bargaining agreement is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O)"); 29 U.S.C. § 1341(C)(2)(B)(ii) (setting forth standard for bankruptcy court to use in determining whether a distress termination is appropriate).

[189] Despite AFA's clear inability to satisfy the judicial estoppel standard, this Court need not decide this issue to confirm the Plan. Only if United has to seek to re-initiate the 1113 process would the question of judicial estoppel be ripe for adjudication by the Court because then, and only then, can AFA raise this issue as a defense in a termination proceeding, not to confirmation of the Plan.

Here, AFA fails to prove that any four of the judicial estoppel requirements are met.

AFA first argues that United's position in the hearing to approve the PBGC Settlement Agreement and subsequent withdrawal of its Section 1113 motion to reject the AFA CBA is inconsistent with its conditional assumption of the AFA CBA under the Plan. But United's position in defending the PBGC Settlement Agreement is entirely consistent with United's position now—in both cases, United maintains that termination of the Flight Attendant Plan is necessary for United's successful emergence from Chapter 11.

Then, to conjure up an "inconsistency," AFA suggests that its action seeking judicial review of PBGC's involuntary termination under ERISA § 4003 means that "the ship has sailed" on a voluntary distress termination. According to AFA, ERISA provides "two distinct paths" to plan termination—voluntary and involuntary—and that once one is started the other is unavailable.[191] AFA goes as far as to say that if the Flight Attendant Plan is restored, a voluntary distress termination proceeding would be an improper collateral attack on that restoration. But while AFA is correct that ERISA § 4041 and § 4042 represent two distinct paths with completely different legal standards, AFA fails to recognize that one does not preclude the other. In fact, in appealing the PBGC Settlement Agreement, AFA argued that once United filed a Section 4041 application, it was precluded from withdrawing that application and negotiating a termination pursuant to Section 4042. But the Seventh Circuit rejected that argument:

> AFA misapprehends the nature of what the [PBGC] agreement settled. The agreement … settled matters between United and PBGC. The agreement did not settle, as AFA would have it,

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[190] *See Jarrard v. CDI Telecommunications, Inc.*, 408 F.3d 905, 914-915 (7th Cir. 2005) (setting forth four factors for judicial estoppel to apply).

[191] AFA Obj. at p.30.

> United's §§ 1113(c)/§ 1341(c) motion against AFA. United withdrew that motion. Consequently, whether United can reject its CBA with AFA under § 1113(c) and thereby terminate the Flight Attendant Plan under § 1341(c) *is an unresolved question, not a settled one.*[192]

Simply put, if the pension plan is restored, PBGC's commencement (or implementation) of a Section 4042 distress termination does not preclude the sponsor's commencement of a Section 4041 termination proceeding—particularly here, where United is reserving its rights to do so. And similar to the D.C. District Court's refusal to rule on this Court's approval of the PBGC Settlement Agreement,[193] if this Court had to adjudicate a Section 1113/Section 4041 proceeding with respect to the AFA CBA and Flight Attendant Plan in the future, United would not ask this Court to pass judgment on the propriety of any Section 4003 ruling by the D.C. District Court.

Next AFA tries to satisfy the <u>second</u> judicial estoppel prong (allegedly misleading the court) and <u>third</u> judicial estoppel prong (unfair advantage) by claiming that United misled the Court when United stated that AFA was entitled to judicial review of PBGC's actions under ERISA § 4003, which somehow now would provide United with an unfair advantage in a subsequent Section 1113 proceeding. It is not entirely clear how United's acknowledgement of AFA's statutory right to seek judicial review misled anyone or would provide United with an unfair advantage in the future.

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192 *In re UAL Corp.*, 428 F.3d 677, 683 (7th Cir. 2005) (emphasis added).

193 AFA also suggests that United should have adopted the position that the Bankruptcy Court would need to consider another Section 1113 motion if the Flight Attendant Plan were restored in the pending ERISA § 4003 litigation in the D.C. District Court to avoid judicial estoppel. AFA is wrong. United is not a party to the ERISA § 4003 litigation and its decision not to become one hardly amounts to taking a position inconsistent with the reservation of rights under the Plan.

Finally, to satisfy the fourth judicial estoppel prong (same operative facts), AFA argues that the facts in a subsequent Section 1113/4041 termination proceeding would be the same because United "has consistently maintained that it is the metrics of its exit lenders that have dictated its purported need to abandon its pension obligations."[194] This makes no sense. By definition, if United brought another Section 1113/Section 4041 termination proceeding, it would be because the Flight Attendant Plan had been restored, resulting in a dramatic new set of facts and financial obligations. If AFA truly believes that United cannot satisfy its Section 1113/4041 burden, then AFA has nothing to worry about.

(8) ALPA's Conditional Objection Should be Overruled

ALPA filed a conditional objection to the Plan contending that the Plan violates the terms of its restructuring agreements. ALPA misreads both the Plan and its restructuring agreements.[195]

ALPA first claims that the ALPA Restructuring Agreement requires the Debtors to distribute New UAL Common Stock "upon the effective date of the Plan" and that any delay in the making the distribution is contrary to the parties' Agreement.[196] This is simply untrue. The Distribution Agreement which is part of the ALPA 2005 Restructuring Agreement specifically amended and restated the ALPA 2003 Restructuring Agreement to state that any Plan proposed by the Debtors "shall provide that, on or as soon as reasonably practicable after the effective date of such Plan, the pilot group will receive a percentage distribution of the

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[194] AFA Obj. at p. 32.

[195] United has resolved ALPA's objection to the Plan's retention of jurisdiction by acknowledging that ALPA may challenge jurisdiction postconfirmation.

[196] ALPA Obj. at p. 5.

equity, securities and/or other consideration provided to general unsecured creditors under the Plan."[197] The Debtors specifically negotiated that modification with ALPA because they anticipated tax, liquidity, securities and various practical common concerns of United and ALPA that would necessarily and significantly impact the pace of distributions to ALPA and the Debtors' other employee groups. In anticipation of these issues, the Debtors proceeded to negotiate even more flexible distribution implementation timelines with their other unions.[198]

Indeed, the Plan itself provides for this flexibility, stating that the first distribution date is to occur "as soon as the Debtors determine to be practicable" after the Effective Date.[199] As represented in the Plan, the Debtors fully intend to distribute New UAL Common Stock to all employee groups, including ALPA, just as soon as is reasonably practicable. However, as the Debtors correctly anticipated in the 2005 Restructuring Agreement negotiations, there are a number of issues, particularly with respect to ALPA, that make distribution immediately upon the Effective Date infeasible. These issues include the withholding and subsequent liquidation of shares necessary to pay all applicable withholding taxes; the need to parse the distribution to individual pilots into amounts for employer contributions to their Pilots' Directed Account Retirement Income Plan ("PDAP") accounts by plan year as well as direct distribution as appropriate; the mechanics of depositing New UAL Common Stock into employees' PDAP or

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[197] *See* Exhibit 19 to the Plan Supplement (Amended ALPA Restructuring Agreement, Exhibit G).

[198] *See, e.g.*, Exhibit 17 to the Plan Supplement (Amended AFA Restructuring Agreement, Appendix D, ¶ 3) "The Company (in consultation with AFA) will develop and implement a mechanism and timetable for issuing the Distribution or Alternative Distribution to the AFA members, which would take into account tax, legal, corporate liquidity and securities concerns as well as practical considerations."

[199] *See* Definition of "Distribution Date." Article ID.¶ 77 of the Plan.

Computershare accounts; the need to complete the necessary systems programming to implement $7.5 billion in employee distributions; and the possible impact on liquidity and market stability that may be caused by the establishment of the conversion price for the employee convertible notes within the first 60 days of trading. Timing is also dependent on resolving as many disputed/invalid claims as possible over the course of the next few weeks so as to maximize distributions to unsecured creditors as soon as possible.

In addition to the challenges presented by these general issues, ALPA has self-imposed an additional and unique set of requirements compared to other unions that may result in additional administrative complexity and delay. For example, both the administrator, record keeper and fund manager for the PDAP are different from the other employees' 401K administrator, which presents the Debtors with a different set of administrative hurdles that could cause delay. Nonetheless, ALPA and the Debtors are working together to find solutions to these implementation issues so as to avoid potential distribution delays.

But, if despite the Debtors' best efforts and intentions in the face of these administrative challenges, ALPA believes that the Debtors are not making distributions as soon as reasonably practicable after the Effective Date, ALPA can always seek to compel the Debtors' compliance with the Plan, which incorporates the ALPA Distribution Agreement. For all of the foregoing reasons, ALPA's conditional objection on this basis is <u>not</u> a plan confirmation issue, and therefore should be overruled.

ALPA also asserts that there are several provisions of the proposed indenture between United, UAL and Bank of New York for the issuance of notes to the Debtors' pilots that

are inconsistent with the ALPA Restructuring Agreements.[200] The Debtors believe that the two most important issues still to be agreed upon are: (1) whether noteholders would be entitled to a "make whole" payment in the event of a change in control (the Debtors dispute the propriety of such a provision); and (2) whether the Debtors can optionally redeem the ALPA notes for cash or whether they should be limited to doing so only when the stock is trading at 125% of the value of the conversion price (the Debtors do not believe that they should be limited to where the stock is trading at 125% of the conversion price). On both issues, the Debtors believe that their positions are consistent with the ALPA Restructuring Agreement. Nonetheless, the parties continue to negotiate, and the Debtors hope to resolve the matter amicably.

(9) The Plan's Release, Exculpation and Injunction Provisions are Permissible and Should Be Approved.

(a) Releases By Holders of Claims Should be Approved as Consensual.[201]

URPBPA, Illinois Department of Revenue, the California Department of Toxic Substance Control, Independence Air, the United States, and the Texas Comptroller of Public Accounts all object to the Plan's third party releases. The Plan provides that only those creditors

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[200] ALPA also raises an issue about the Debtors' corporate charter. The Debtors believe that this issue is now resolved between the parties, but reserve their rights if ALPA has any continuing objection.

[201] Although no party objected to the Debtors' releases in the Plan, the Debtors submit that Article X.F of the Plan represents a valid settlement of claims of the Debtors against the Released Parties pursuant to Section 1123(b)(3)(A) of the Bankruptcy Code. The Debtors do not believe that they have any claims against the Released Parties and that they have no intention of pursuing any claims against the Released Parties. Therefore, the Debtors submit that they are not waiving any valuable claims or assets of their Estates. Further, the Released Parties have all provided ample consideration for the release by making indispensable contributions to the restructuring process. For this reason, the Debtors believe that the Debtors' releases under Article X.F of the Plan should be approved.

entitled to vote on the Plan who either (i) vote to accept the Plan or (ii) abstain from voting and elect not to opt out, shall release certain "Released Parties" as defined in the Plan, except for acts or omissions resulting from gross negligence or willful misconduct. Because all objecting parties were either not entitled to vote on the Plan or had their ballot opt out recognized by United, they are deemed not to have given the third-party release contained in the Plan; therefore, their objections should be overruled. However, URPBPA also objects to the Plan's third party release provisions to the extent that any retired pilot is deemed to have released the "ALPA Released Parties." URPBPA's objection should also be overruled because any such release is consensual, consistent with Seventh Circuit authority, and therefore is reasonable and appropriate.

(b) Legal Standard

Consensual third party release provisions are routinely approved in this Circuit.[202] Consent certainly exists when a party votes in favor of the Plan.[203] Consent also exists when a party has the opportunity to opt out of a release but chooses not to do so. In fact, nearly identical third party releases to those in the Plan were approved in the case of *In re Conseco, Inc.*[204] In that case, the debtors initially filed and moved for approval of a plan that provided that,

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[202] *See Matter of Specialty Equip. Cos., Inc.*, 3 F.3d 1043 (7th Cir. 1993) (explaining that 11 U.S.C. § 524(e) does not forbid the release of suits by parties *consenting* to a plan against third-party non-debtors); *see also, In re Keck, Mahin & Cate*, 241 B.R. 583, 591 (Bankr. N.D. Ill. 1999) (Barliant, J.); *In re Artra Group, Inc.*, 300 B.R. 699, 704 (Bankr. N.D. Ill. 2003) (Hollis, J.).

[203] *See, e.g., Keck, Mahin & Cate*, 241 B.R. at 591 ("creditors who affirmatively accept a plan are bound by its releases and injunctions"); *In re Conseco, Inc.*, 301 B.R. 525, 527 (Bankr. N.D. Ill. 2003) (Doyle, J.) ("creditors who vote to accept a plan containing releases of non-debtors have consented to the releases"); *Artra Group, Inc.*, 300 B.R. at 704.

[204] Case No. 02-49762 (Bankr. N.D. Ill. 2002).

regardless of whether the creditor voted in favor or against the plan, receipt of a distribution would constitute consent for a third party release. The court indicated that it would not approve such a provision. However, the court did approve a change to the plan that allowed the debtor to send out new notices to voters who voted against the plan or who had not voted on the plan asking specifically whether they wished to opt out of the releases. Specifically, in describing such approval the court said:

> After the court informed the parties that it would not confirm a plan containing third party releases by creditors who did not accept the plan, the debtors redrafted the Plan. In the 6th Amended Plan, each creditor receiving a distribution under the Plan was given the opportunity to opt out of the release of non-debtors contained in Article X of the Plan. The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that Specialty Equipment permits.[205]

Such "deemed acceptance" is found in other plan voting contexts. In *In re Trans World Airlines, Inc.*,[206] the debtors proposed a liquidating plan that did not guarantee payment of administrative expense claims in full, but the disclosure statement noted that an administrative creditors' failure to object to the plan would be deemed an acceptance of "alternative treatment" under 11 U.S.C. § 1129(a)(9). The bankruptcy court confirmed the plan over the U.S. Trustee's objection, stating that it did not believe that Section 1129(a)(9) required affirmative consent.[207] The court found that creditors had "easy access" to information regarding this aspect of the

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[205] *Conseco*, 301 B.R. at 528.

[206] Case No. 01-00056 (Bankr. D. Del. 2001).

[207] *See generally In re Trans World Airlines, Inc.*, Case No. 01-00056 (Bankr. D. Del. 2001), Hearing Tr., June 14, 2002, 13: 8-11 ("In this case, the claimants agreed by the simple act of not saying no; i.e., not registering an objection in writing to the debtor.")

debtor's plan, and thus held that non-objecting administrative creditors had agreed to the alternate treatment under Section 1129(a)(9).[208]

(i) The Third Party Releases are Appropriate

Here, the Debtors sent ballots to all impaired creditors entitled to vote on the Plan. The Disclosure Statement and solicitation materials clearly stated that creditors could vote for or against the Plan, or abstain from voting and opt out of the third party releases contained in the Plan. In fact, prior to solicitation the Debtors shared the form of ballot for retired pilots with URPBPA had the opportunity to comment on the form of retiree ballots. And 252 creditors—including many retired pilots—who abstained from voting also opted out of the third party releases.[209]

URPBPA nevertheless complains that the third party releases are improper. URPBPA fails to understand that retired pilots who voted in favor of the Plan (including the releases) will be bound by those releases, and those retired pilots who were not entitled to vote or

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[208] *Id.* Moreover, in the Chapter 13 context, courts also have held that failure of an administrative or priority creditor to object to full payment under a Chapter 13 plan is the equivalent of an agreement to treatment other than as provided in the Bankruptcy Code. *See, e.g.*, *In re Facciponte*, 1992 WL 722289 (Bankr. N.D.N.Y. 1992); *In re LaForgia*, 1998 WL 59480 (Bankr. M.D. Pa. 1998) ("'The better view is that the issue of compliance with Section 1322(a), like other issues pertaining to whether a plan is confirmable, must be raised at the confirmation hearing or else they are barred.'") (*citing* 8 Lawrence P. King, 1327.02 COLLIER ON BANKRUPTCY, ¶1327.02[1][c] at 1326-6, 7 (15th ed. rev. 1996)); *In re Herbert*, 61 B.R. 44, 46-47 (Bankr. W.D. La. 1986) (holding that the failure of the IRS, a priority tax creditor, to object to its treatment under a Chapter 13 plan that did not provide for payment of such claim in full constituted its "agreement" to such treatment under Section 1322(a)(2)).

[209] Pursuant to the voting procedures set forth in this case, if a party voted in favor of the Plan, it is deemed to accept the releases. If a party votes against the Plan, it is deemed to opt out of the releases. If a party abstains from voting, it may choose to opt out of the releases; if it does not opt out of the releases, the party consents to the releases. If a party is not entitled to vote on the Plan, that party will not be giving the release.

who voted against the Plan will not be bound by the releases. With respect to those retired pilots who abstained from voting but did not opt out of the releases, as *Conseco* court held, the failure of creditors not to opt out of the releases constitutes consent to such releases. URPBPA members certainly were aware that if they abstained but did not opt out of the releases, they would be bound by the third party releases. In fact, URPBPA sent a letter to its members advising them to vote against the Plan and to opt out of the third party releases. And the fact that 252 creditors (including many retired pilots) authorized to vote on the Plan in fact opted out of the third party releases illustrates that parties were aware of their opt out rights and were able to take advantage of them. The Court should overrule these objections.

(c) The Exculpation Provision is Appropriate.

URPBPA, the United States, the Texas Comptroller of Public Accounts, the California Department of Toxic Substances Control, and the Illinois Department of Revenue also object to the Plan's exculpation provision, which exculpates certain "Exculpated Parties" with respect to acts in connection with the Chapter 11 Cases, except for acts or omissions resulting from gross negligence or willful misconduct. Exculpation, however, is "commonplace" in large and complex reorganization cases such as this one, and it has been found appropriate not only for debtors but also for other parties who have participated and made a meaningful contribution to a debtor's reorganization.[210] For the reasons stated below, the Exculpated Parties' roles in the Chapter 11 Cases have been critical, and without their participation it is quite possible that the Debtors could not have been at the confirmation stage.

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[210] *PWS Holding*, 228 F.3d at 246.

(i) Purpose of Exculpation Clauses

Negotiation and compromise among key stakeholders of a bankruptcy estate is one of the hallmarks of Chapter 11. Without them, it would be markedly more difficult for a plan proponent to formulate a feasible plan of reorganization. And yet, where negotiation of the terms of a plan and/or the compromises necessary to the formulation of a feasible plan could not have occurred without protection from liability for the constituents involved, it is appropriate to offer protection in the form of exculpation.[211] In particular, where a plan requires the settlement of numerous, complex issues, protection of third parties against legal exposure may be a key component of such settlement.[212] Exculpation is the logical solution to this problem, and, as a result, exculpation provisions are routinely approved as part of Chapter 11 plans.[213]

An exculpation provision does not affect the liability of parties per se (as a release does), but rather states the appropriate standard of liability under the Bankruptcy Code for parties who have played a critical role in a debtor's restructuring and the formulation of a plan of reorganization.[214] In effect, by including an exculpation provision in a plan, a plan proponent is asking a court to afford the same standard of liability to parties who played an integral role in the

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[211] *In re WorldCom, Inc.*, 2003 WL 23861928 at *28 (Bankr. S.D.N.Y. 2003).

[212] *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285 (2nd Cir. 1992); *WorldCom, Inc.*, 2003 WL 23861928 at *28.

[213] *PWS Holding Corp.*, 228 F.3d at 246; *see also In re Conseco, Inc.*, 02-49762 (Bankr. N.D. Ill. 2002); *In re Kmart Corporation*, Case No. 02-2474 (Bankr. N.D. Ill. 2002); *In re National Steel Corp.*, 02-8699 (Bankr. N.D. Ill. 2002); *In re Harnischfeger Industries, Inc.*, Case No. 99-2171 (PJW) (Bankr. D. Del. May 18, 2001) (Plan Confirmation Order); *Ameriserve Food Distribution Inc., et al.*, Case No. 00-358 (Bankr. D. Del. May 18, 2001) (Plan Confirmation Order); *In re Enron Corp.*, Case No. 01-16034 (Bankr. S.D.N.Y. July 15, 2004) (Plan Confirmation Order); *In re WorldCom, Inc.*, Case No. 03-13533 (Bankr. S.D.N.Y. October 21, 2003) (Plan).

formulation of the plan as it does for the plan proponent. As such, an exculpation provision represents a conclusion of law that flows inevitably from several different findings of fact a court must reach in confirming a plan.

(ii) The ALPA Released Parties are Entitled to Exculpation

URPBPA's objection to exculpation focuses on the exculpation of the ALPA Released Parties, which essentially includes ALPA and its advisors. The Debtors are asking the Court to make a finding that the ALPA Released Parties have played a central role and participated in good faith with respect to the Debtors' restructuring, and to conclude, as a matter of law, that the ALPA Released Parties are entitled to protection from lawsuits from disgruntled individuals arising out of the Debtors' restructuring. The Debtors believe that the facts of this case support this result.

Whether an exculpation provision is appropriate requires a fact-intensive analysis. Courts often have considered the following factors to determine whether an exculpation provision is appropriate:

- an identity of interest between the debtor and the third party, usually an indemnity, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
- substantial contribution by the non-debtor of assets to the reorganization;
- the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;
- an agreement by substantial majority of creditors to support the injunction, especially if the impacted class "overwhelmingly" votes to accept the plan; and

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[214] *PWS Holding Corp.*, 228 F.3d at 246

- provision in the plan for payment of all or substantially all of the claims or class of claims affected by the injunction.[215]

Here, it is clear that exculpation of the ALPA Released Parties is appropriate. First, there is a clear identity of interests between United and the ALPA Releases Parties. Among other reasons, under the ALPA 2005 Restructuring Agreement, the Debtors agreed to indemnify ALPA, its members, officers, committee members, agents, employees, counsel, financial advisors and representatives from any and all losses relating to the negotiation or implementation of the ALPA 2005 Restructuring Agreement (except where such party committed gross negligence, fraud or willful misconduct). As such, without an exculpation clause that applies to the ALPA Released Parties, United's estate might be responsible for indemnifying the ALPA Released Parties in any lawsuit by a third party in connection with the ALPA 2005 Restructuring Agreement, to the detriment of all creditors.

Second, the ALPA Released Parties made a substantial contribution to United's reorganization. The ALPA Released Parties agreed to provide necessary—yet tremendous—labor savings and cost concessions in two rounds of Section 1113 negotiations. This included the painful yet critically important concession to be the first union to agree not to object to the termination of the Pilot Pension Plan under certain circumstances. Without that agreement, and the momentum it provided, it is difficult to say whether the Debtors could have achieved consensual savings as a result of their 2005 labor restructuring initiatives. Since the Court's approval of the 2005 ALPA Agreement, the ALPA Released Parties have continued to play a

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215 *See, e.g.*, *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *Drexel Burnham Lambert Group,* 960 F.2d at 293; *In re A.H. Robins Co.*, 880 F.2d 694, 702 (2nd Cir. 1989); *Zenith*, 241 B.R. at 110 (*citing In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D.Mo. 1994)).

significant role in working through the literally hundreds of issues that must be addressed for the Debtors to make distributions to its employees under the Plan in a quick and efficient manner.

Third, United's agreement to exculpate the ALPA Released Parties in the Plan was critical in the final negotiations of the 2005 ALPA Restructuring Agreement. As previously mentioned, without that Restructuring Agreement, it is unclear whether the Debtors would have consensually obtained the pilot savings it actually did obtain, and thus unclear whether the Debtors would have gained the momentum to reach consensual arrangements with its other unions. At the very least, absent the 2005 ALPA Restructuring Agreement, these Chapter 11 Cases likely would have been materially prolonged, to the determent of all stakeholders.

Fourth, as noted above, an overwhelming majority of creditors have voted in favor of the Plan. On an aggregate basis across all classes, approximately 89% of all voting creditors voted in favor of the Plan, representing approximately 98% of the dollars voted. Therefore, the creditor body is deemed to support the exculpation provisions of the Plan.

Fifth, the Plan provides a significant distribution on account of substantially all claims affected by the exculpation provision. As discussed above, unsecured creditors will receive a distribution between 4-8 percent of their claims. Secured, administrative, and priority creditors will be paid in full. Only creditors in classes below unsecured claims (equity and subordinated claims) are bound by the exculpation but are not receiving any distribution under the Plan.

In sum, because the ALPA Released Parties are entitled to a finding that they played a central role in the reorganization, this Court may properly conclude, as a matter of law, that the standard of liability applying to the ALPA Released Parties for all actions or omissions to act related to the restructuring should be limited to gross negligence or willful misconduct.

(iii) The Other Exculpated Parties are Entitled to Exculpation

Similarly, each of the other Exculpated Parties are entitled to exculpation. With respect to the first factor noted above, the Debtors, the Reorganized Debtors, the DIP Facility Agent, the DIP Lenders, the New Credit Facility Agents and the New Credit Facility Lenders, the Servicers, the OCUC and its members, and the ESOP Committee all have a vested interest in seeing the company reorganize and thus share an "identity of interest" with the Debtors.

With respect to the second factor, the other Exculpated Parties all made substantial contributions to the reorganization. For example, the DIP Facility Agent and Lender negotiated the terms of a favorable debtor in possession facility that ensured that the Debtors were able to make a smooth entry into Chapter 11. They also provided much needed financial capital to the Debtors throughout the Chapter 11 Cases that allowed the Debtors to restructure and file the Plan, including the granting of numerous waivers and amendments necessitated by the industry ups and downs that occurred over the past 37 months. The New Credit Facility Lenders are providing the Debtors with the financing to exit Chapter 11 and to finance the Plan itself. The Servicers provided much needed assistance with respect to the transmission of information to various holders of bonds and corporate debentures—something the Debtors needed to obtain approval of the Plan in addition (in some cases) to settlements entered during the Chapter 11 Cases. With respect to the Debtors' officers and directors and other agents, they all worked tirelessly to achieve an effective operational and financial restructuring.[216] Therefore,

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[216] *See, e.g., Zenith*, 241 B.R. at 111 (holding that with respect to the officers and directors, the officers and directors made a substantial contribution by designing and implementing the operational restructuring and negotiating the financial restructuring, thus entitling them to the releases at issue in that case).

there can be no doubt that the Exculpated Parties have provided substantial, and indeed indispensable, contributions to the Debtors' reorganization.

With respect to the third factor, exculpation is an integral part of the overall Plan. For example, it is important for the Debtors' reorganization that their directors and officers not be distracted by future litigation.[217] The DIP Facility Agent, the DIP Facility Lenders, and the New Credit Facility Lenders each required some protection from liability to provide the Debtors with the financing it needed. The TWU Released Parties, the PAFCA Released Parties, and the ESOP Committee each entered into compromises important to the Debtors' reorganization. Therefore, the exculpation provision must be viewed as integral to the Plan. And finally, both the fourth and fifth factors are satisfied for the reasons discussed above regarding the ALPA Released Parties.

Thus, all Exculpated Parties are entitled to a finding that they played a central role in the reorganization, and this Court may properly conclude, as a matter of law, that the standard of liability applying to the other Exculpated Parties for all actions or omissions to act related to the restructuring should be limited to gross negligence or willful misconduct.

(d) The Injunction Provision is Appropriate

The Texas Comptroller of Public Accounts, the Illinois Department of Revenue, the California Department of Toxic Substances Control, and URPBPA have objected to the Plan's injunction provision to the extent it enforces the release, exculpation, and discharge

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[217] *See id.*

provisions of the Plan. To the extent that this Court approves the release, exculpation, and discharge provisions, this Court should approve the injunction provision to the same extent.[218]

(10) The Plan's Treatment of Executory Contracts Is Proper

The OCUC filed similar objections to the Plan asserting that the Plan's treatment of executory contracts and unexpired leases violates the Bankruptcy Code by allowing the Debtors to amend their decisions to assume or reject following confirmation of the Plan. The OCUC is wrong. The Bankruptcy Code permits questions of assumption or rejection under a plan to be determined after confirmation of a plan calling for such post-confirmation determination.[219]

Courts have recognized that a debtor should be given great latitude in determining whether to assume or reject an executory contract.[220] Further, though the Bankruptcy Code

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[218] The United States also raises several related jurisdictional arguments. First, the United States argues that the Bankruptcy Court does not have the authority to "discharge" the claims against third parties under the Plan, citing to Section 524(e) of the Bankruptcy Code. However, as noted above, the Debtors are requesting only consensual non-coercive third party releases (which do not affect the United States in any event) and an exculpation of certain third parties. As such, the Plan is not "discharging" non-debtors. Second, the United States also argues that the Plan enjoins actions against third parties that do not constitute "cases or controversies." As noted above, the United States is not affected by the releases and with respect to exculpation the Bankruptcy Court is merely setting forth the standard of liability for the Exculpated Parties with respect to acts in connection with the Chapter 11 Cases - it is not absolving such parties of liability per se. Finally, the United States argues that approval of the releases, exculpation and injunction are not within the Bankruptcy Court's "related to" jurisdiction. However, for all of the reasons stated above, the releases, exculpation, and injunction are "related to" the jurisdiction of this Court as they will affect the amount of property available for distribution or the allocation of property among creditors. *See, e.g., Matter of Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987).

[219] *See Greater Southeast*, 327 B.R. at 34; *Gunter Hotel Assocs.*, 96 B.R. at 699-700; *see also TMS Assocs. v. Kroh Bros. Dev. Co. (In re Kroh Bros. Dev. Co.)*, 100 B.R. 480, 486-87 (W.D.Mo.1989).

[220] *See In Re W & L Associates, Inc.*, 71 B.R. 962, 967 (Bankr. E.D. Pa. 1987).

provides that a debtor assume or reject a contract by confirmation of any plan, the Bankruptcy Rules allow extensions for any otherwise proscribed time period under the Bankruptcy Code. Rule 9006(b) reads:

> ... when an act is required ... to be done at or within a specified period by ... court order, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed.[221]

In the present case, the "cause shown" would be that the Debtors' chances for a successful reorganization increase greatly if its assumptions and/or rejection decisions relating to its overwhelming number of executory contract/unexpired lease are extended past the confirmation hearing. And, on the other hand, the Debtors chances' for a successful reorganization could be substantially impaired if rejection/assumption is compelled at this time. In particular, the Debtors may be unable to reach agreement on the cure obligations required to assume their agreements with certain of their counter-parties. If the Debtors are not provided the necessary flexibility to understand the cure required to assume these agreements prior to assumption, the Debtors could unwittingly take on excessive and unnecessary obligations that could of, and should have, been otherwise discharged by the Plan.[222]

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[221] Fed. R. Bankr. P. 9006(b).

[222] Allowing a debtor until after confirmation to assume or reject contracts is not unusual is not unusual. For example, US Airways' plan of reorganization, as confirmed, contained a provision giving the Debtors the right to designate executory contracts for "Post-Effective Date Determination." *See* Joint Plan of Reorganization of US Airways, Inc. and its Affiliated Debtors and Debtors-In-Possession, US. Bankruptcy Court for the Eastern District of Virgnia, Case No. 04-13819 [Docket No. 2754], Section 8.1(c); Exhibit U-5 ("Post-Effective Date Determination Schedule") [Docket No. 3183].

Moreover, none of the cases cited by the OCUC support the proposition that the Bankruptcy Court cannot extend the time a debtor has to assume or reject contracts post-confirmation. Indeed, the OCUC's Objection cites to *Kroh Bros.*, conceding that "the time may be extended post confirmation where there is a pending motion on confirmation pursuant to the court's retention of jurisdiction."[223]

Lastly, with respect to the OCUC's objection, neither Section 365 of the Bankruptcy Code, nor any other section of the Bankruptcy Code, limits, in any way, a contract counter-party's right to agree to an extension of time to assume or reject an executory contract or an unexpired lease that such counter-party may have with a debtor. In the present case, there are no remaining objections by contract counter-parties to the amount of time provided under the Plan to assume or reject contracts. Consequently, to the extent that the remaining contract counter-parties have not objected to such treatment, the consensual extension of time to assume or reject is consistent with the Bankruptcy Code.

(11) The United States' and State and Local Government's Remaining Objections Are Unsupported By Law And Must Be Overruled

The United States of America (the "United States") and certain state and local governments[224] have raised various objections to the Debtors' Plan.[225] While the Debtors have

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[223] OCUC Objection, docket # 13767, pg. 11 fn 13.

[224] The following government entities filed objections to United's Plan: the Illinois Department of Revenue, the Texas Comptroller of Public Accounts, the Texas Taxing Authorities (*i.e.*, Bexar County, Dallas County, Harris County/City of Houston, Houston Independent School District, and Tarrant County), and the California Department of Toxic Substances Control. The City of Philadelphia and the New York State Department of Taxation also filed "joinders" which are discussed below.

been able to negotiate resolution of some of the objections, the remaining objections fall into the following seven categories and should be overruled: (1) the discharge is too broad; (2) the administrative claim bar date and restrictions on amendments to proofs of claim are unreasonable; (3) the interest rate on priority tax claims is too low; (4) the Plan impairs the Texas Taxing Authorities' lien rights; (5) the Plan does not contain default provisions; (6) the Plan impairs the United States' joint and several claims without fully paying those claims; and (7) the Distribution and Effective Dates under the Plan are uncertain.[226] Each of these objections are addressed in turn.

(a) The Plan's Discharge Is Appropriate

First, the United States and the California Department of Toxic Substances Control ("CDTSC") argue that the Debtors' discharge under Article X.B. of the Plan is too broad. The Debtors have agreed to clarify that the discharge of liability to the United States and the California Department of Toxic Substances is only to the fullest extent permitted under applicable law. Despite the Debtors' willingness to clarify the Plan's discharge provision, the United States and CDTSC continue to argue that the discharge provision is overbroad. The United States and CDTSC's position is absurd: it simply cannot be that the discharge provision is overbroad as it applies to the United States when that provision is expressly limited to the fullest extent permitted under applicable law.

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[225] The United States raised various additional objections that the Debtors believe will be resolved in advance of confirmation. However, to the extent such objections have not been resolved, the Debtors reserve the right to address such objections at the confirmation hearing.

[226] The United States' objections to the releases, exculpation, and injunction provisions are discussed above.

(b) The Debtors Have Discretion to Set the Administrative Bar Date

Second, United States, the Illinois Department of Revenue, and the Texas Comptroller of Public Accounts object because Section XI.D. of the Plan requires that all Administrative Claims must be filed and served by the Administrative Claim Bar Date, which the Plan sets at 30 days after the Effective Date.[227] However, neither the Bankruptcy Code or Bankruptcy Rules preclude such an administrative claims bar date.[228] As one court has said:

> Section 503 of the Bankruptcy Code makes two references to the timing of requests for administrative fees. First, section 503(a) states that "[a]n entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause." This provision appears intentionally vague and broad. Legislative history reveals that Congress intended to leave the setting of specific filing deadlines to the Rules of Bankruptcy Procedure.[229]

"The legislative history optimistically stated that '[t]he Rules of Bankruptcy Procedure will specify the time, the form, and the method of such a filing.'[230] Unfortunately, the rules do not give the guidance Congress had hoped they would. In fact, they give no guidance at all."[231]

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[227] *See* Plan, Section I.D.4.

[228] 503.02 COLLIER ON BANKRUPTCY (15th Ed. Rev. 2005), ¶ 503.02[2] ("Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure sets forth a specific limitation period for the filing of administrative expense claims, so courts can exercise their discretion in setting bar dates according to the circumstances of each case"); *In re Southern Soya Corp.*, 251 B.R. 302, 311 (Bankr. D. S.C. 2000).

[229] *Matter of DP Partners Ltd. P'ship*, 106 F.3d 667, 671-72 (5th Cir. 1997).

[230] H.R. Rep. No. 595, 95th Cong., 1st Sess. 355 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6311.

[231] *In re MacDonald*, 128 B.R. 161, 165, n. 5 (Bankr. W.D. Tex. 1991). *See also In re Eagle-Picher Industries, Inc.,* 278 B.R. 437, 446 (Bankr. S.D. Ohio 2002) (same); *In re Polysat, Inc.*, 152 B.R. 886, 895 (Bankr. E.D. Pa. 1993) (same).

In this case, United seeks finality by finding out by a date certain what administrative expense claimants and claims may exist, since all administrative claims must be paid in full.[232] There is clearly no authority constraining United from picking any reasonable date for that purpose. It is reasonable to assume that persons holding administrative claims will know by thirty days after the Effective Date whether they are likely to have a claim. If the amount is still unknown by that date, it is not a heavy burden to require such persons to file and serve an administrative claim, giving United the information it needs so that such claims may be paid in a timely fashion. Therefore, all such objections to the timing of the Administrative Claims Bar Date should be overruled.

(c) The Plan's Priority Tax Claim Rate Is Appropriate

Third, the Illinois Department of Revenue and the Texas Comptroller of Public Accounts have objected to the Plan because it "does not provide an adequate rate of interest on priority claims."[233] Section II.B. of the Plan provides that, to the extent the Debtors choose to pay a priority tax claim in deferred cash payments, the interest rate will be "calculated at the interest rate available on five-year United States Treasury Notes on the Effective Date." At the December 15, 2005 Treasury Note auction (the last auction held before the filing of this pleading) the interest rate for these securities was 4.375%.

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[232] *See In re Centurion Health of Carrollwood, Inc.*, 177 B.R. 371, 373 (Bankr. M.D. Fla. 1994) ("the bar date set by the court is set as an administrative aid designed to assist to conclude the administration of the Chapter 11 case").

[233] Texas Comptroller Objection, ¶ 2, p. 1.

"Typically, the interest rate allowed on priority tax claims is the market rate of interest."[234] More specifically, the prevailing judicial view is that the proper rate of interest on deferred priority tax claims is the current market rate equivalent to the rate the debtor would have to pay to borrow the same amount in the commercial loan market."[235] However, that does not necessarily mean that—as asserted by Illinois, for example—that the Debtors' rate on their exit financing (LIBOR+4.5%, or currently about 9%) should automatically be applied. In this case, the type of loan equivalent to the size and risk profile of these claims would be much different. If necessary. the Debtors will offer evidence at the confirmation hearing that will show the interest rate called for in Section II.B. of the Plan is the appropriate market rate for payment of the priority claims of Illinois and the Texas Comptroller. Thus, the objections of Illinois and the Texas Comptroller should be overruled.[236]

(d) The Texas Taxing Authorities' Liens Cannot Be Reinstated

Fourth, the Texas Taxing Authorities object to the Plan because "it fails to specify that the Taxing Authorities retain their liens on the Debtors' property until their claims are paid in full."[237] Earlier in these Chapter 11 cases, the Debtors brought adversary proceedings against three of the Texas Taxing Authorities—Bexar County, Harris County/City of Houston and

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[234] *In re Dow Corning Corp.*, 244 B.R. 718, 721 (Bankr. E.D. Mich. 1999).

[235] *In re Lambert*, 194 F.3d 679, 684 (5th Cir. 1999).

[236] In contrast to the Debtor's $3 billion exit facility, the priority claims of Illinois and the Texas Comptroller are only $8 million and $130,000, respectively, must be paid in 2008, and are not dischargeable in a second bankruptcy. *In re Sprouse-Retiz Stores, Inc.* 177 B.R. 679 (Bankr. D. Or. 1994) (unpaid priority tax claims that were allowed in a first case retain their priority in a second chapter 11 cases even through the underlying claim was discharged in a confirmed plan in the first case); 11 U.S.C. § 1129(a)(9)(C) ("priority tax claims must be paid six years from the date of assessment").

Tarrant County—to avoid the counties' statutory liens pursuant to § 545(2) of the Bankruptcy Code, and each was resolved by a settlement and approved by this Court.[238] The settlements were identical except for applicable tax amounts. The operative paragraphs of the motions seeking approval of the settlement read as follows:

> County of [___] will have an allowed claim in the amount of $[___], such claim to be paid by United in cash over a period not to exceed three (3) years from the effective date of United's plan of reorganization ("POR"). Such payments will be paid in twice-yearly installments at the same time that United customarily pays its taxes to County of Tarrant, the first installment to be paid on the first applicable installment date after the effective date of the POR. Pursuant to Section 1129(a)(9)(C) of the Bankruptcy Code, postconfirmation interest will be paid on such claim at the rate approved by the Court in the POR. The Settlement resolves Claim No. [___].[239]

As can be seen, these settlements do not provide for the continuance or survival of any liens (indeed, the actions were filed specifically to avoid the Counties' liens). Moreover, the settlement merely calls the claims "allowed claims," not "allowed secured claims." Finally, the settlement structure treats the allowed claims as if they were priority tax claims (specifically citing Section 1129(a)(9)(C) of the Bankruptcy Code). Therefore, these settlements were not meant to perpetuate any liens, and the Authorities cannot now seek to reinstate liens that they bargained away in settlements. Therefore, their objection on this point should be overruled.[240]

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[237] Texas Taxing Authorities Objection, ¶ 11, p. 4.

[238] United Air Lines, Inc. v. County of Bexar, Adv. Proc. 04-4357; United Air Lines, Inc. v. Harris County/City of Houston, Adv. Proc. 04-4347; United Air Lines, Inc. v. County of Tarrant, Adv. Proc. 04-4336.

[239] *See, e.g.,* Motion for Entry of an Order Approving Settlement of Adversary Proceeding Between United Air Lines, Inc. and Tarrant County [Adv. Docket No. 16].

[240] Two of the Authorities, Houston Independent School District and Dallas County, were not subject to lien avoidance actions. However, these Authorities' claims are in the amounts of

(Continued…)

(e) No Additional Default Provisions Are Required

Fifth, the Texas Taxing Authorities have objected to the Plan "due to the exclusion of adequate provisions in the event of default."[241] These default terms are unnecessary. Upon confirmation the plan becomes a contractual obligation of the Reorganized Debtors.[242] If the Reorganized Debtors breach their obligations under this contract, parties can seek to enforce the terms of the Plan.[243] The Debtors have been duly paying their postpetition ad valorem taxes in a timely fashion to the Texas Authorities, and the Authorities have not offered any evidence to the contrary. To the extent the Debtors have an obligation to pay taxes that accrues through the Effective Date, the Authorities will have an Administrative Claim, which

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$163.00 and $142.00, respectively. United, as part of the Plan, has simply agreed to pay these claims in full in cash within 30 days of the Effective Date. Because these two claims are *de minimis*, United respectfully suggests that the issue of whether their liens do or do not survive is simply not worth arguing.

[241] The Authorities propose certain language, which can be broken down into two separate requests: (i) reinstating the Authorities' rights to assess taxes, file Notices of Liens and the right to levy, seize and sell the Debtors' property, such rights to spring back "as they existed prior to the filing of the bankruptcy petition in this case," and (ii) providing that failure to pay postpetition secured ad valorem taxes in the ordinary course of business "shall result in a default under the terms of the confirmed plan." Texas Taxing Authorities, ¶ 12, p. 4.

[242] *See Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association*, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract"); *Williston on Contracts* § 7:32 (4th Ed. 2005) (plan of reorganization "in the nature of a contract").

[243] Section § 1142(b) of the Bankruptcy Code authorizes the bankruptcy court to "direct the debtor and any other necessary party . . . to perform any other act . . . that is necessary for the consummation of the plan," and Bankruptcy Rule 3020(d) provides that "[n]otwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." *See also In re Resorts Int'l, Inc.*, 372 F.3d 154, 168-69 (3d Cir. 2004) ("[W]here there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan . . . retention of post-confirmation bankruptcy court jurisdiction is normally appropriate").

must be paid in full. Moreover, the Plan does not apply to taxes accruing after the Effective Date which are simply ongoing business obligations of United.

(f) The United States Will Be Paid In Full

Sixth, the United States objects to United's Plan on the grounds that the Plan impairs its joint and several claims before it has received full payment. United submits that the United States' objection is misplaced. In 2003, United and the United States entered, and this Court approved, an agreed stipulation and order to allow United to recover certain refunds from the United States (the "Setoff Stipulation").[244] Pursuant to the Setoff Stipulation, United essentially agreed that the United States would have a setoff claim (secured by $25 million) and an administrative claim for all other prepetition claims up to $366 million. Thus, United States' joint and several claims are at least administrative or secured, but in any event must be paid in full on or as soon as reasonably practicable after the Effective Date under United's Plan. And if United breaches its obligations under the Plan, the United States will undoubtedly have the right to pursue its secured/administrative claims against any Reorganized Debtor. As such, the United States' objections to the Debtors' Plan are unfounded.

(g) The Debtors Have Discretion To Set the Effective Date

Seventh, the United States objects to United's Plan on the grounds that the Plan permits the Debtors to unilaterally set the Effective Date and Distribution Date. However, the

[244] Stipulation and Agreed Order Under Fed. R. Bankr. P. 9019 Approving the Settlement of Controversy Between the Debtors and the United States of America [Adv. Proc. 03-00652, Docket No. 7].

Bankruptcy Code is silent as to the timing of the "effective date,"[245] and thus, the terms of the Plan set the Effective Date.[246] "Most often, the effective date of the plan will be tied to the absence of any successful appeals from the order of confirmation, or the satisfaction of conditions contained in the plan."[247] "Indeed, it is not uncommon for a plan to fix the effective date to a time after the confirmation order is final in recognition of a prospective lender's reluctance to advance funds until the appeal period has passed."[248]

Here, United proposes to set the Effective Date on any business day after the conditions precedent to consummation (including, *inter alia*, the entry of a final Confirmation Order) have either been satisfied or waived.[249] As the Courts noted in *Wonderland* and *Continental Securities*, debtors such as United must have the flexibility to choose an appropriate effective date to satisfy their exit lenders.[250] Thus, this provision of United's Plan is entirely consistent with the Bankruptcy Code and the relevant case law. And, as a practical matter United has absolutely no interest in delaying indefinitely its exit from bankruptcy. Indeed, over

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[245] *In re Lisanti Foods, Inc.*, 329 B.R. 491, 501 (D. N.J. 2005); *Cont'l Securities Corp. v. Shenandoah Nursing Home P'Ship*, 188 B.R. 205, 217 (W.D. Va. 1995); *See* 7-1129 COLLIER ON BANKRUPTCY ¶ 1129.06[1][e] ("The Code does not define "effective date.").

[246] *Lisanti Foods, Inc.*, 329 B.R. at 501 (citing 7-1129 COLLIER ON BANKRUPTCY ¶ 1129.06[1][e]).

[247] 7-1129 COLLIER ON BANKRUPTCY ¶ 1129.06[1][e].

[248] *Cont'l Securities*, 188 B.R. at 217-218 (quoting *In re Wonder Corp. of Am.*, 70 B.R. 1018, 1020-1021 (Bankr. D. Conn. 1987)).

[249] *See* Plan, Section I.D.80 ("Effective Date": The date to be selected by the Debtors which is any Business Day after the Confirmation Date on which: (a) no stay of the Confirmation Order is in effect, and (b) all conditions specified in ARTICLE XII of the Plan have been (i) satisfied or (ii) waived pursuant to ARTICLE XII.C. of the Plan…").

[250] *See Cont'l Securities*, 188 B.R. at 501 (quoting *In re Wonder Corp. of Am.*, 70 B.R. at 1020-1021).

the last several months, United has aggressively pursued resolution of certain large open issues including resolution of more than $4 billion in tax indemnification agreement claims to set the stage for maximizing distributions on exit. Thus, the United States' apparent belief that United is somehow dragging its feet by not setting a precise Effective Date is wrong. Accordingly, the United States' objection should be overruled.

(h) New York's and Philadelpia's Should Be Disregarded

Finally, New York State Department of Taxation ("New York") and the City of Philadelphia filed "objections" that simply joined in the objection of the Illinois Department of Revenue to Confirmation.[251] As this Court has stated previously, and as set forth in the Case Management Procedures approved in these cases, these two joinders cannot be treated as independent objections but merely are statements in support of the Illinois Department of Revenue's objection.[252]

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[251] Philadelphia does include a second paragraph in its Objection, stating that it is "re-assert[ing] the rights in the [Philadelphia] Claim with respect to setoff and recoupment" and "reserve[ing] its right to file a motion asserting such rights. Philadelphia Objection, ¶ 4, p. 2. This is not an Objection to the Plan, but simply a statement of reservation of rights. The Debtors do not respond, other than to state that they reserve their rights to object to the Philadelphia Claim and to oppose a motion asserting recoupment rights with respect to the Philadelphia Claim.

[252] *See* Case Management Procedures, C.4 [Docket No. 8388]; Tr. Hr. Sept. 19, 2004 at 8:3-9:13 ("A joinder in another party's motion does not make the joining party someone entitled to present the motion or someone entitled to settle the motion with the responding parties. To be a proponent, one must present one's own motion, not merely join in another party's. … Joinders are simply expressions of support for another party's position with much the same effect as if an attorney announced in open court that that attorney's client supported the position of the proponent of a motion. Thus, … joinders … will not … be considered as matters that require separate ruling by the court.").

(12) Independence Air's Objection Should Be Overruled

Independence Air's ("Independence") objection to the Plan raises three issues. First, Independence contends that the Court cannot retain jurisdiction over Independence's purported post-petition antitrust claim against United. Second, Independence argues that the Plan's disputed claims reserve is discriminatory. Third, Independence takes issue with the particular drafting of certain Plan provisions. As discussed below, none of Independence Air's objections can stand.

(a) Vesting Of This Court With Jurisdiction To Allow Independence Air's Potential Administrative Claim Against United Is Proper

Independence states that it is investigating whether it may have an Administrative Claim against United based on antitrust grounds, and objects to Sections XI.D, XIV.1 and X.J. of the Plan because these sections grant exclusive jurisdiction to this Court to determine and allow Administrative Claims against United. Independence filed a petition under Chapter 11 of the Bankruptcy Code on November 7, 2005 in the U.S. Bankruptcy Court for the District of Delaware (Case No. 05-20011), and therefore believes that any Administrative Claim against United must be heard in its bankruptcy court in Delaware. Therefore, there are potentially "dueling bankruptcy courts." The law is clear that United wins this "duel."

(i) United's Bankruptcy Is a Collective Claims Proceeding, and all Claims Against the Debtors Must Be Resolved Here

As the Seventh Circuit has stated, "[t]he principal function of bankruptcy law is to determine and implement in a single collective proceeding the entitlements of all concerned."[253] A bankruptcy case not only provides a collective forum to resolve claims against a debtor's estate, but also to allow litigation concerning the debtor's bankruptcy to be heard and decided in one court.[254] Moreover, the allowance of an Administrative Claim by Independence against the Debtors falls squarely within this Court's core jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(B) (allowance or disallowance of claims), § 157(b)(2)(O) (adjustment of the debtor-creditor relationship), and § 157(b)(2)(A) (the administration of United's estate). The potential antitrust claim of Independence, if it is ever brought, would be a postpetition Administrative Claim against the Debtors, which must be heard in this Court. If the Debtors had a prepetition claim or postpetition administrative claim against Independence, the Debtors would expect to bring those claims in Independence's bankruptcy court.

(ii) This Court Retains Jurisdiction Over Independence's Claim

"The purpose of the Bankruptcy Law…is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors…This

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[253] *Matter of American Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988); *accord In re FIRSTPLUS Financial, Inc.*, 248 B.R. 60, 73 (Bankr. N.D. Tex. 2000) ("Bankruptcy is unique in that it provides a forum for a collective claims resolution process").

[254] *In re Standard Metals Corp.*, 817 F.2d 625, 632 (10th Cir. 1987); 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1754 (2005).

jurisdiction is exclusive within the field defined by the law…."[255] This concept is embodied in 28 U.S.C. § 1334(e), which provides:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.[256]

The Supreme Court stated the rule for conflict of jurisdictions in *Princess Lida of Thurn and Taxis v. Thompson*:

> [W]here the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed…On the other hand, if the two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other.[257]

Therefore, "the necessity that the *res* not be subject to conflicting judgments and orders dictates that the *res* go into *custodia legis* upon the filing of the first action, and that authority be withdrawn from all other courts,"[258] and the first court to gain jurisdiction over the *res* has precedence over other courts who may attempt to exercise jurisdiction over the same *res*:

> Where a court of competent jurisdiction has…taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. Possession of the *res* disables other courts of coordinate jurisdiction from exercising any power over it. The court which first acquires jurisdiction through possession of the property is

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[255] *Straton v. New*, 283 U.S. 318, 321 (1930).

[256] 11 U.S.C. § 1334(e) (emphasis added); *see also* Richard H. Gibson, *Home Court, Outpost Court: Reconciling Bankruptcy Case Control With Venue Flexibility in Proceedings*, 62 AM. BANKR. L .J. 37, 62-4 (1988) ("Gibson").

[257] 305 U.S. 456, 466 (1938).

[258] Gibson, 62 AM. BANKR. L .J. at 49 (1988).

vested, while it holds possession, with the power to hear and determine all controversies related thereto.[259]

In the case of United and Independence, wherever Independence brings an action to adjudicate its antitrust claim, Independence would be attempting to collect against property of United's estate. This Court—United's bankruptcy court—took jurisdiction of this property on December 9, 2002 and is "first in time"; therefore, Independence's "second in time" bankruptcy court in Delaware cannot gain jurisdiction over this *res*. Case law supports this interpretation.[260] For example, in *Duggan v. Sansberry*, a corporation filed a petition in a Missouri bankruptcy court; subsequently certain creditors filed an involuntary petition against one of the corporation's subsidiaries in an Indiana bankruptcy court.[261] The Indiana court ordered a sale of the subsidiary's assets, and the Missouri court enjoined the sale. The Indiana court went ahead with the sale. The Supreme Court held that the Indiana court should have respected the Missouri court's injunction.[262]

Perhaps the most illustrative case is *Warren v. Palmer*.[263] There, the Boston and Providence Railroad leased a line to the Old Colony Railroad. Old Colony filed a bankruptcy petition in a Connecticut bankruptcy court. Old Colony rejected the lease, but continued to run the line for Boston and Providence. Then Boston and Providence filed a bankruptcy petition in a

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259 *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 75, 88 (1922).

260 *See, e.g.*, *Gross v. Irving Trust Co.*, 289 U.S. 342, 344 (1933) (*in custodia legis* governs between courts of concurrent jurisdiction); *In re Jacobs*, 7 F. Supp. 749 (M.D. Ill. 1934) (same).

261 327 U.S. 499, 511 (1945).

262 *Id.*; *see also In re Macon Uplands Venture*, 624 F.2d 26, 28 (5th Cir. 1980).

263 310 U.S. 132, 138-41 (1940).

Massachusetts bankruptcy court. The trustee in Connecticut asked that court to impose a lien on the line to secure a related debt from the line to the Old Colony estate. Boston and Providence's trustee objected on the ground that the line was an asset of the Boston and Providence bankruptcy estate and thus was under the jurisdiction of the Massachusetts court. The Supreme Court held that the Connecticut bankruptcy court's jurisdiction should prevail, because it obtained jurisdiction over the line first.[264] Therefore, it is clear that Independence's bankruptcy court cannot take jurisdiction of property over which this Court has already taken custody, and Independence will not be railroaded for bringing its claim here.

(iii) Independence Air's Jurisdictional Objection Must Be Overruled

With that as background, Independence's objection must be overruled. First, Independence argues that by forcing Independence to bring its action here, the Plan violates Independence's automatic stay because it attempts to "exercise control over property of [Independence's] estate" under Section § 362(a)(3) of the Bankruptcy Code.[265] This would only be true, of course, if Independence's bankruptcy court had jurisdiction over the *res*, which as demonstrated above it does not.

Second, Independence argues that the Plan violates 28 U.S.C. § 959(a), which, it says, allows Independence to sue United outside of the bankruptcy court.[266] However, Section 959(a) is not a jurisdictional statute, but rather a "capacity" statute—its purpose is to make clear

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[264] *Id.* at 138-141; *see also New Haven Inclusion Cases*, 399 U.S. 392, 426 (1970).

[265] Independence Objection, ¶ 9, p. 5.

[266] Independence Objection, ¶¶ 10-11, p. 6.

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that a trustee or debtor in possession is a suable entity.[267] This section cannot and does not purport to confer Independence's bankruptcy court with jurisdiction over United as debtor in possession.

Third, Independence argues that it has an administrative claim that "cannot be impaired," but the Plan impairs Independence's claim "by limiting the jurisdiction in which Independence is permitted to prosecute such claims."[268] Taken to its logical conclusion, Independence's argument would mean that no plan could consolidate the claims allowance process in the debtor's bankruptcy court, because (according to Independence) any restriction on where a claimant could assert its claim "impairs" it—which of course is not true.

Fourth, Independence complains that the Plan would act to prevent the removal to the district court of an antitrust action brought in the bankruptcy court. On the contrary, the preamble to Article XIV of the Plan ("Retention of Jurisdiction") limits the exclusive jurisdiction of this Court to matters "as legally permissible." Therefore, if it is not "legally permissible" for this Court to retain jurisdiction due to the requirements of 28 U.S.C. § 157(d), the district court may withdraw the reference notwithstanding the terms of the Plan. A similar response can be made to Independence's fifth argument, that the Plan would impair its rights to a jury trial—but there would be no such impairment if such is not "legally permissible."

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[267] *See e.g. Moore's Federal Practice - Civil* § 17.24 (2005) (discussing the capacity of receivers to litigate on behalf of another -- 28 U.S.C. § 959(a) authorizes trustees, receivers, or managers of any property to defend suits).

[268] Independence Objection, ¶¶ 12-13, pp. 6-7.

(b) The Disputed Claims Reserve is Appropriate

Independence points out that it has a rejection damages claim, which has been ruled on by this Court and allowed at the amount of $500 million. Therefore, at some point Independence will receive New UAL Common Stock on account of its claim. This Court's allowance of Independence's claim has been appealed by Independence and cross-appealed by the OCUC and the Debtors. Independence correctly points out that if ultimately an appellate court rules in its favor, and the allowed amount of its claim is larger, Independence may receive "materially less" than other creditors on account of its claim.

However, it does not make practical sense for the Debtors to reserve for the full amount of an allowed claim during an appeal—given the number of potential appeals in a case of this size. That the Debtors' have no obligation to reserve any more than an allowed amount of a Claim, even where an appeal is pending, is well-supported by case law.[269] Moreover, in analogous situations there is no requirement that a debtor should create an additional reserve. For instance, a claimant can ask for reconsideration of a claim under Section 502(j) of the Bankruptcy Code, and no additional reserve is required; parties may seek to amend claims post-confirmation, and no additional reserve required. United must begin making distributions, and should not delay because there may be future additional claims. United desires to maximize distributions to creditors and to attain satisfactory float of its stock. This would be impossible if United had to wait until all appeals were resolved.

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[269] *See, e.g., In re Bicoastal Corp.*, 146 B.R. 492, 494 (Bankr. M.D. Fla. 1992) (holding that debtor did not need to reserve for claim that was disallowed even though order disallowing claim was being appealed); *see also Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294 (7th Cir. 1997) (discussing confirmed plan that gave trustee discretion whether to set aside reserves for initially disallowed claims).

Independence's remedy to seek a stay pending appeal pursuant to Bankruptcy Rule 8005.[270] Independence's failure to do so is fatal. Therefore, the Debtors have the right to treat Independence's claim as Allowed, and need not establish a reserve.[271]

(13) Wells Fargo's Objection Should Be Overruled

In its objection, as Pass Through Trustee of the 1997-1 EETC transaction, Wells Fargo raises five points: (a) the Plan does not specify that Wells Fargo has an unimpaired secured claim, how Wells Fargo's claim will be treated, and violates Section 1123(a)(4) of the Bankruptcy Code by not treating all Secured Aircraft Claims the same; (b) the Plan does not explain whether or how the Debtors will pay the purchase price, including the source of funds (the "Purchase Price") for the 1997-A Class A EETC Certificates (the "Class A Certificates"); (c) the Plan should note the disparate views of the Debtors and Wells Fargo on the proper amount of the Purchase Price; (d) the Plan should provide for a deposit for the Purchase Price; and (e) the Plan violates Section 1110 of the Bankruptcy Code by enjoining Wells Fargo from exercising remedies as to the aircraft financed through 1997-1 EETC transaction (the "1997-1 Aircraft").

Other than Wells Fargo's objection relating to section 1110, all of its arguments relate to the same issue: an alleged lack of clarity regarding treatment of Wells Fargo's 1997-1 EETC claim under the Plan. In their Disclosure Statement, the Debtors include an extensive discussion of the 1997-1 EETC Transaction and the treatment of Wells Fargo's claims, along

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[270] *See Bicoastal Corp.*, 146 B.R. at 494 (noting that party whose claim had been initially disallowed could have moved for stay pending appeal).

with other aircraft-related claims.[272] The Disclosure Statement specifically notes that the 1997-1 Aircraft secure the Class A Certificates, that the Debtors intend to buy out the Class A Certificates at par, through financing obtained from Tranche C of the DIP Facility, and the Disclosure Statement discusses the parties' dispute, including a paragraph on Wells Fargo's perspective, and that the Debtors will pay the court-determined Purchase Price. The Disclosure Statement thus addresses, in detail, every point raised by Wells Fargo in its objection, and Wells Fargo cites no authority for its proposition that the Debtors must repeat that discussion in the Plan.[273]

In any event, the Debtors will stipulate that Wells Fargo holds a Class 2B-1 Secured Aircraft Claim under the Plan that will be rendered Unimpaired by United's tender of the Purchase Price (in the amount determined by Final Order by a court of competent jurisdiction or as otherwise agreed by the parties).

Wells Fargo nonetheless seems to argue that because the Debtors classify Wells Fargo's claim together with other Secured Aircraft Claims, the Plan cannot be confirmed under

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271 *See, e.g., In re Lomagno,* 320 B.R. 473,481 (1st Cir. BAP 2005) (if no stay is in effect, the prevailing party may treat the judgment of the bankruptcy court as final, notwithstanding that an appeal is pending).

272 Disclosure Statement Art. III.C.5.d.iv, pp. 71-73.

273 For most aircraft retained in the United fleet, United and the relevant aircraft financing parties reached written agreements during the Chapter 11 Cases that explicitly set forth the treatment of such parties' claims under the Plan. The Plan reaffirms those agreements, as well as United's obligations. *See* Plan Arts. III.D.2.b.ii (Class 2B-1—Secured Aircraft Claims receiving agreed upon treatment), VI.U (Postpetition Aircraft Obligations become obligations of Reorganized Debtors), and VII.G (Postpetition Aircraft Agreements honored by Reorganized Debtors). While United has not entered into a final agreement with Wells Fargo as to the treatment of the Class A Certificates, the Debtors specifically set forth in the Disclosure Statement how they will satisfy Wells Fargo's 1997-1 EETC claims: by tender of the Purchase Price for the Class A Certificates.

Section 1123(a)(4) of the Bankruptcy Code (providing for the same treatment of claims classified together unless otherwise agreed by a claimholder). In fact, the Plan fully complies with Section 1123(a)(4) and treats all Secured Aircraft Claims in Class 2B-1 equally. The Plan specifically provides that all Secured Aircraft Claims in Class 2B-1 are Unimpaired.[274] Mostly, this means that Holders of Secured Aircraft Claims will obtain the treatment specified in Postpetition Aircraft Agreements executed with the Debtors. For Wells Fargo, this means that United will purchase the Class A Certificates at whatever price is judicially determined. The Debtors thus have set forth fully Wells Fargo's treatment in the Plan and Disclosure Statement and complied with Section 1123(a)(4).[275]

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[274] For administrative convenience and simplicity, United classified Secured Aircraft Claims together in one class, as creating a separate class for each of the 450-plus financed aircraft retained in United's fleet would have greatly extended the length of the Plan for no good reason. To further identify their treatment under the Plan, the Plan Supplement provides aircraft financiers with a schedule (Exh. 36 – Aircraft Financing Summary) that identifies the Debtors aircraft-related obligations. By this design, the Debtors followed precedent from other plans of reorganization confirmed in large chapter 11 cases. *See, e.g., In re US Airways Group, Inc., et al.*, Case No. 02-83984-SSM, First Amended Joint Plan of Reorganization of US Airways Group, Inc. and its Affiliated Debtors and Debtors-in-Possession, Docket No. 2062 (Bankr. E.D. Va. Jan. 17, 2003); *In re Kmart Corp., et al.*, Case No. 02-02474, Joint Plan of Reorganization of Kmart Corporation and its Affiliated Debtors and Debtors-In-Possession, Docket No. 8068 (Bankr. N.D. Ill. Jan. 24, 2003).

[275] Wells Fargo alternatively argues that the Plan violates 1123(a)(4)'s equality of treatment rule because if United returns the 1997-1 Aircraft, a deficiency claim may result that would impair Wells Fargo's claims. However, if United returns the 1997-1 Aircraft, Wells Fargo no longer would have a secured claim, as it will have recovered its collateral. The Plan would classify any resulting deficiency claims as Class 2E-2 Unsecured Rejected Aircraft Claims, which, along with other Class 2E-2 claims, would be impaired under the Plan and would receive a pro rata share of the Unsecured Distribution, in compliance with Section 1123(a)(4).

In its objection, Wells Fargo also indicates that the Plan should provide for a deposit of the Purchase Price. Wells Fargo does not cite to a provision of the Bankruptcy Code requiring United to make such deposit. In any event, Wells Fargo should not suffer from insecurity that United will not pay the Purchase Price—United already has obtained court-approved funding earmarked for the 1997-1 Aircraft and anticipates its exit facility will be able to accommodate any such payment. United also continues to make payments for its use of the 1997-1 Aircraft under that certain Stipulation and Order Approving Interim Adequate Protection for 1997-1 EETC Aircraft dated April 16, 2003 (the "Adequate Protection Stipulation").[276] It is also anticipated that the exit facility will be sufficiently flexible to refinance the Purchase Price should a deal be reached or a judicial decision rendered post-emergence. Thus, while the Purchase Price litigation is being adjudicated, United effectively continues to make payments on the Class A Certificates and, upon final resolution of the litigation, adequate funds will be available for the Purchase Price.

The Adequate Protection Stipulation also provides for Wells Fargo's remedies in the event United ceases making such payments. Nothing the Plan overrides, enjoins, or discharges these rights, which shall continue until United purchases the Class A Certificates. Likewise, contrary to Wells Fargo's arguments, the Plan does not purport to override Wells Fargo's rights under Section 1110 of the Bankruptcy Code. Thus, under the Plan, Wells Fargo retains the rights and remedies it negotiated during the Chapter 11 Cases, as memorialized in the Adequate Protection Stipulation.

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[276] [Docket No. 2141].

(14) Stark's Limited Objection Should Be Overruled

Stark Investments, L.P. and Shepherd Investments International, Ltd. (collectively, "Stark") filed a limited objection to the Plan because the Chicago Municipal Settlement indenture documents "are not yet in a form acceptable to Stark as required by the Settlement Agreement, the Municipal Bond Settlement Order and the Plan." Stark is wrong. In any event, this is not a confirmation issue.

It is true that the Chicago Municipal Bond Settlement Agreement requires that indenture documents be reasonably acceptable to Stark. United submits that they are. But even if the indenture documents are not reasonably acceptable, this is not a confirmation issue. The Stark Objection offers no basis for delaying confirmation. The Chicago Municipal Bond Settlement Agreement does not state that Stark's reasonable acceptance is a condition precedent to confirmation. The Plan itself only requires Stark's reasonable acceptance <u>prior to Consummation</u>.

(15) The Objection of the Osband Parties Should be Overruled

The Osband Parties and the Covia Parties (collectively referred to as the Osband-Covia Parties) object that the Plan is unconfirmable because the Plan seeks to discharge travel benefits to which the Osband-Covia Parties claim they are entitled. For two reasons, these objections to Plan Confirmation should be overruled.

(a) The Osband Parties Have Dischargeable Monetary Claims

In 1998, the Osband Parties sued United in Colorado state court seeking to restore travel benefits that United had reduced after selling a division in which the Osband Parties were

employed.[277] The Osband Parties asserted claims for breach of contract, breach of an express duty of good faith and fair dealing, and promissory estoppel.

In this litigation, both the Osband Parties and the Debtors submitted voluminous expert reports and reached conclusions as to the monetary value of the Osband Parties' lifetime travel benefits. Ultimately, the jury in the case awarded the Osband Parties approximately $2.5 million in the aggregate, and the Colorado court entered a judgment against United which was subsequently appealed. While United's appeal was pending, the parties negotiated a settlement (the "Osband Settlement Agreement"). Pursuant to the Osband Settlement Agreement, United agreed to provide lifetime non-revenue space available flight benefits to the Osband Parties.[278]

Now the Osband Parties argue that their right to flight benefits is equitable in nature and therefore not a "claim" that can be discharged under the Plan.[279] This position is untenable. "Claim" is broadly defined in the Bankruptcy Code:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

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[277] *Osband v. United Airlines Inc.*, 981 P.2d 616 (Colo. App. 1998).

[278] The six test Osband Parties plus four other similarly situated parties obtained the verdict. United, however, ultimately reached the Settlement Agreement with all of the Osband Parties which are listed in the Osband Parties' objection.

[279] The Covia Parties brought a similar action to the Osband Parties in November 2002, which was automatically stayed by the Debtors' Chapter 11 filing. The Covia Parties reason that because they were similarly situated to the Osband Parties that they too are entitled to lifetime travel benefits. The argument set forth below focuses primarily on the Osband Parties, but the logic is equally applicable to the Covia Parties.

Congress purposefully broadly defined "claim" to further the overriding goal of providing a fresh start for a debtor.[280] An essential element of the Bankruptcy Code's broad discharge is its expansive definition of "claim."[281] Moreover, Congress intended the Bankruptcy Code's definition of "claim" to include a right to equitable remedy for breach of performance that gives rise to right of payment.[282]

Here, both the Osband Parties and the Debtors retained experts in the state court litigation to ascertain the value of lost flight benefits, and the court entered a judgment in the Osband Parties' favor based on those expert reports. While it may have been difficult to determine with absolute certainty the value of lifetime flight benefits, <u>the state court was able to do so for six test plaintiffs</u>.

The Third Circuit was faced with a nearly identical circumstance in *In re Trans World Airlines, Inc*.[283] There, the debtors had a prepetition settlement agreement with an EEOC-represented class that required the debtor to provide individual class members with ten lifetime travel vouchers for certain individuals and provides that each such individual or his or her family member could use the vouchers. The debtor sold its assets in a Section 363 sale, free and clear of claims. The EEOC objected and argued that the travel voucher claims were not "claims" under Section 363(f), because the travel voucher claims could not be reduced to money damages. The bankruptcy

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280 *In re Jensen*, 995 F.2d 925 (9th Cir. 1993); *In re Morgan*, 197 B.R. 892 (Bankr. N.D. Cal. 1996), *aff'd,* 131 F.3d 147 (9th Cir.).

281 *In re Kewanee Boiler Corp.*, 297 B.R. 720, 732 (Bankr. N.D. Ill. 2003) (Schmetterer, J.) (citing *In re Johns-Manville*, 57 B.R. 680, 686-687 (Bankr. S.D.N.Y. 1986)).

282 *In re Kings Terrace Nursing Home and Health Related Facility*, 184 B.R. 200 (S.D.N.Y. 1995).

court disagreed, holding that the travel voucher claims could be reduced to monetary damages, and approved the sale free and clear of such claims. The Third Circuit ultimately affirmed saying:

> Had TWA liquidated its assets under Chapter 7 of the Bankruptcy Code, the claims at issue would have been converted to dollar amounts and the claimants would have received the distribution provided to other general unsecured creditors on account of their claims. A travel voucher represents a seat on an airplane, a travel benefit that can be reduced to a specific monetary value.[284]

In sum, the Osband Parties' travel benefit claims are subject to the discharge contained in the Plan.[285]

(16) Public Debt Trustees' Reservation of Rights with Respect to Debtors' Plan of Reorganization

U.S. Bank National Association, The Bank of New York, and Wells Fargo Bank, N.A., as trustees under the Public Debt Group financings, filed a "Reservation of Rights" in connection with the Plan. This reservation does not set forth an objection to the Plan. The

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[283] 322 F.3d 283 (3d Cir. 2003).

[284] *Id.* at 291.

[285] *See also Romasanta v. United Air Lines, Inc.*, 70 C 1157, slip op. (N.D. Ill. Sept. 12 1984) (in Title VII case where former flight attendants were discharged for violating United's requirement that flight attendants remain unmarried, court awarded the plaintiffs $37,972,500, 15.8% of which was for lost travel benefits plus interest); *In re Domestic Air Trans. Antitrust Litigation*, 148 F.R.D. 297, 323 (N.D. Ga. 1993) (the court approved an antitrust settlement which included an award of travel vouchers and concluded from proffered expert testimony that a reliable range of dollar value could be assigned to the vouchers at issue). Courts also have held that when a party breaches a contract to provide lifetime benefits, the proper remedy is monetary damages. *See, e.g., Robitaille v. Robitaille*, 613 N.E.2d 933 (Mass. App. Ct. 1993) (where defendants breached contract to provide lifetime room and board benefits to their father, and where the damages could be determined based upon the expected life of the person, the proper remedy was the monetary value of room and board for life). If the Court determines that the Osband-Covia Parties do not have "claims" but instead are entitled to equitable remedies not reducible to monetary damages, then the discharge provision of the Plan would be inapplicable. But this is not necessarily a confirmation issue.

reservation suggests that the definition of Public Debt Aircraft Settlement Agreement be expanded to include certain Public Debt Group financing arrangements that were not restructured but that had claims settled under the global settlement with the Public Debt Group. The Debtors have made this modification to the Plan.

(17) Limited Objection and Reservation of Rights of U.S. Bank National Association and U.S. Bank Trust National Association, as Trustees, et al., to Confirmation of Debtors' Joint Plan of Reorganization

U.S. Bank filed its "Limited Objection and Reservation" in connection with several private leveraged lease transactions that were restructured during the Debtors' Chapter 11 Cases. This "Limited Objection and Reservation" does not set forth any specific objection to the Plan. The Debtors have confirmed with counsel for U.S. Bank that they are not objecting to the Plan at this time. Also, U.S. Bank has not requested that the Debtors modify the Plan in any respect. Rather, U.S. Bank filed the "Limited Objection and Reservation" solely to reserve its rights as set forth therein.

(18) The Pro Se Objections Should Be Overruled

The Debtors received twenty-two pro se objections to the Plan (the "Pro Se Objectors"). In general, the Pro Se Objectors argue that the Plan should not be confirmed because: (i) the Debtors are discharging existing stock and securities (the "Stock Discharge Objections")[286]; (ii) the Debtors' proposed payment on account of general unsecured claims is

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[286] Objection of Robert Gibson (docket # 12997), Objection of H. Benjamin Hardy, Jr. (docket # 13946), Objection of William F. Walquist (docket # N/A), Objection of Julian Hamburger (docket # 13848), Objection of Nicholas L. Hyland (docket # 12930), Objection of Pamela L. Jennings (docket #N/A), Objection of Francesca J. DeFrancesca (docket # 12979), Objection of Frank Karsnak (docket # 12982), Objection of Mark Shapiro (docket # 13642); and Objection of Morris R. Wiegand (docket # 13874).

too low (the "Unsecured Distribution Objections"); and (iii) the Debtors' settlement with various parties, previously approved by the Court, are improper (the "Settlement Objections").[287] These objections should be rejected. [288]

(a) The Stock Discharge Objections Are Wrong.

With respect to the Stock Discharge Objections, the Debtors respectfully submit that the Plan's discharge of equity interests (with no distributions on account of such interests) is not only proper, but necessary. The "absolute priority rule" mandates that if a class of creditors is not paid in full, no junior creditor can receive anything under the plan.[289] Here, Unsecured Creditors will not be paid in full. Therefore, no Holders of Equity Interests can receive anything under the Plan. Similarly, the Stock Discharge Objections must be denied because the Plan satisfies the "best interests test" with respect to Holders of Equity Interests. Here, Holders of Equity Interests would receive nothing in a Chapter 7 liquidation.

(b) The Unsecured Distribution Objections Must Be Rejected.

The Unsecured Distribution Objections should be rejected because any distributions to Unsecured Creditors under the Plan already satisfies the "best interests test." As discussed in detail above, creditors will receive more under the Plan than they would in the

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[287] Objection of Morris R. Wiegand (docket # 13874).

[288] In addition, some of the Pro Se Objectors do not actually request denial of confirmation of the Plan. *See* Objection of Kay Parra (docket # N/A) (seeking clarification of future payments under pension obligation); Objection of Gail Chinn (docket # N/A) (requesting information regarding ballot); Objection of Carolyn Walker (docket # N/A) (unintelligible, purportedly reciting various notices and Lexis Nexis references)

[289] *See Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street P'ship*, 526 U.S. 434, 441-42 (1999)

under a Chapter 7 liquidation. Consequently, it is not a valid objection that the Plan should distribute more to Unsecured Creditors.

(c) The Settlement Objections Are Not A Basis To Deny Confirmation Of The Plan.

William Mullen, Robert Neil Gilbert, and Bruce Wilkins object to the Plan based upon its implementation of the Debtors' settlements with the PBGC and ALPA.[290] Simply, the Debtors' settlement agreements with ALPA were previously approved by the Court as in the best interests of the Debtors' estates. These objectors provide no basis why this Court's previous approval of these settlements should be overruled, or how the implementation of these settlements violates any of the requirements under either Section 1123 or 1129 of the Bankruptcy Code. As such, the Debtors respectfully request that the Settlement Objections be denied.

(d) The Objections Of Barnita Vann, Joseph And Christine Riggio, Forrest Smith Jr., Jack McGahey, And Jimella Harris-Martin Should Be Denied

Barnita Vann, a *pro se* party who previously exercised her Section § 1111(b) rights to limit her claim to her collateral (i.e., an alleged $4,000 setoff right), objects to the treatment of her claim under the Plan.[291] Similarly, Ms. Vann argues that: the Debtors do not properly identify contracts they intend to assume or reject under the Plan; the Debtors cannot reject Personnel Regulations Series 15 because it is not an executory contract; and the Debtors should not be entitled to reject other regulations. However, the Plan Supplement in fact expressly

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[290] Bruce Wilkins also objects to the Management Equity Incentive Plan (the "MEIP"). The appropriateness of the MEIP is addressed above.

[291] To the extent that her objection relates to proper classification of her claim, that is a claims objections which should and will be handled in connection with the Debtors' ongoing claims resolution process.

identifies contracts to be assumed or rejected—Ms. Vann has none. Moreover, because Ms. Vann is no longer employed by the Debtors' she lacks standing to object to the Plan regarding Personnel Regulations Series 15. Finally, Ms. Vann provides no reason why the Debtors should not be entitled to reject other regulations, to the extent that such regulations are executory contracts. As such, Ms. Vann's objection should be overruled.

Joseph and Christine Riggio object that the Plan should be denied because the Debtors appealed the Los Angeles municipal bond decisions. There is simply no legal basis why the pendency of the Los Angeles municipal bond appeal requires denial of confirmation of the Plan. The objections of Joseph and Christine Riggio should be denied.

Forrest Smith, Jr.'s lengthy objection provides no basis to deny confirmation of the Plan. Though not clear, Mr. Smith appears to argue that the Debtors have failed to identify a feasible business plan. However, as discussed above, the Plan is feasible and the Debtors have provided adequate means for its implementation. As such, Mr. Smith's objection should be overruled.

Jack McGahey appears to object to the treatment of his claim as a Class 2D-2 Claim rather than a Class 2C Other Priority Unsecured Claim. This objection is not a proper plan objection, but instead, a claim classification objection that can and will be handled in the Debtors' claim resolution process.

Finally, Jimella Harris-Martin objects to the Plan's setoff and recoupment provisions. Simply, the objection provides no basis to deny confirmation.

CONCLUSION

For the reasons set forth herein, the Debtors submit that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and respectfully request that this Court confirm the Plan. With Chapter 11's fresh start waiting in the wings, United is now primed to lead the way among air carriers for years to come.

Dated: Chicago, Illinois
January 10, 2006

Respectfully submitted,

By: /s/ Chad J. Husnick

James H.M. Sprayregen, P.C. (ARDC No. 6190206)
Marc Kieselstein, P.C. (ARDC No. 6199255)
David R. Seligman (ARDC No. 6238064)
James J. Mazza, Jr. (ARDC No. 6275474)
Chad J. Husnick (ARDC No. 6283129)
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000 (telephone)
(312) 861-2200 (facsimile)

Counsel for the Debtors and Debtors in Possession

EXHIBIT A

PLAN OBJECTION STATUS CHART

	Objecting Party	Docket Number	Status of Objection
1.	Airbus Leasing VI, Inc.	13914	**Resolved** per agreement
2.	California Statewide Communities Development Authority	13958	**Resolved** per agreement
3.	City of Des Moines	13888	**Resolved** per agreement
4.	City of Phoenix	13923	**Resolved** per agreement
5.	Sky King Inc.	13947	**Resolved** per agreement
6.	Best Western International, Inc.	13935	**Resolved** per agreement
7.	Veritas Software Global Corporation	13908	**Resolved** per agreement
8.	New Jersey Self-Insurers Guaranty Association	13904	**Resolved** per agreement
9.	Pension Benefit Guarantee Corporation	13125	**Resolved** per agreement
10.	U.S. Bank National Association and U.S. Bank Trust National Association	13913	**Resolved** per agreement
11.	SABRE Inc.	13963	**Resolved** per agreement
12.	Travelers Casualty & Surety Company of America	13394	**Resolved** per agreement
13.	City of Chicago	13916	**Resolved** per agreement
14.	Beacon Chemical Company	13953	**Resolved:** party removed from the Retained Causes of Action Exhibit
15.	First Source Bank	14013	**Resolved:** party removed from the Retained Causes of Action Exhibit
16.	Dow Chemical Company and Union Carbide Corporation	14016	**Resolved:** party removed from the Retained Causes of Action Exhibit
17.	U.S. Bank National Association, the Bank of New York and Wells Fargo Bank, N.A. (Public Debt Group Trustees)	13907	**Uncontested** (only a reservation of rights)
18.	International Association of Machinists and Aerospace Workers	13962	**Contested**
19.	Air Line Pilots Association, International	13893	**Contested**
20.	Independence Air, Inc.	13892	**Contested**
21.	Texas Taxing Authorities	13931	**Contested**
22.	Texas Comptroller of Public Accounts	13980	**Contested**
23.	Creditors' Committee	13767 13970	**Contested**
24.	Association of Flight Attendants-CWA AFL-CIO	13918	**Contested**

	Objecting Party	Docket Number	Status of Objection
25.	United Retired Pilots Benefit Protection Association	13890	**Contested**
26.	Wells Fargo Bank, N.A.	13903	**Contested**
27.	Stark Investments, L.P. and Shepherd Investments International, Ltd.	13900	**Contested**
28.	City of Philadelphia	13965	**Contested**
29.	Osband Parties	13944	**Contested**
30.	Dorothy Abercrombie, et al. (Covia Parties)	13938	**Contested**
31.	United States	13912	**Contested**
32.	California Department of Toxic Substances Control	13982	**Contested**
33.	Illinois Department of Revenue	13875	**Contested**
34.	New York State Department of Taxation and Finance	13902	**Contested**
35.	Harris-Martin, Jimella (pro se)	13992	**Contested**
36.	Parra, Kay (pro se)	13878	**Contested**
37.	Chinn, Gail (pro se)	N/A	**Contested**
38.	Gibson, Robert M. (pro se)	13267 13730	**Contested**
39.	Riggio, Joseph and Christine (pro se)	13881	**Contested**
40.	Mullen, William A. (pro se)	12995	**Contested**
41.	Gilbert, Robert Neil (pro se)	12997	**Contested**
42.	Wilkins, Bruce G. (pro se)	13064	**Contested**
43.	Hardy Jr., H. Benjamin (pro se)	13946	**Contested**
44.	Walquist, William (pro se)	N/A	**Contested**
45.	Hamburger, Julian (pro se)	13848	**Contested**
46.	Hyland, Nicholas L. (pro se)	12930	**Contested**
47.	Weigand, Morris (pro se)	13874	**Contested**
48.	Jennings, Pamela L. (pro se)	13074	**Contested**
49.	DeFrancesca, Francis J. (pro se)	12979	**Contested**
50.	Karsnak, Frank (pro se)	12982	**Contested**

IN RE UAL CORPORATION, ET AL., CASE NO. 02-48191, ET AL.

	Objecting Party	Docket Number	Status of Objection
51.	Shapiro, Mark (pro se)	13642	**Contested**
52.	Vann, Barnita (pro se)	13936	**Contested**
53.	McGahey, Jack M. (pro se)	13984	**Contested**
54.	Walker, Carolyn B.	N/A	**Contested**
55.	Smith, Forrest P. Jr.	N/A	**Contested**
56.	Geyer, Jacques	N/A	**Contested**