

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

United Pilots for Justice, Inc., et al.,)	
)	
Plaintiffs,)	Civil Case No. 10-2324 (JEB)
)	
v.)	ORAL ARGUMENT REQUESTED
)	
United Airlines Corporation, et al.,)	
)	
Defendants.)	
)	

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants move to dismiss this action on the grounds that the plaintiffs have failed to state a claim on which relief can be granted. In support, the Court is respectfully referred to the memorandum of points and authorities filed concurrently with this motion.

Dated: June 7, 2011

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 12(b)(6)**

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INTRODUCTION

Five years ago, the U.S. Court of Appeals for the Seventh Circuit held that termination of the defined benefit pension plan for United pilots (the “Pilot Plan”) was “water under the bridge” because the 2006 confirmation of United’s Chapter 11 Plan of Reorganization “ends any possibility of resurrecting this pension plan.” *In re UAL Corp. (Pilots’ Pension Plan Termination)*, 468 F. 3d 444, 451 (7th Cir. 2006). This stale, baseless lawsuit challenges that and many other long-settled conclusions. In asking this Court to reinstate the full benefits that would have been provided under the Pilot Plan, Plaintiffs seek to undo not only the four-year restructuring culminating in United’s emergence from Chapter 11, but numerous agreements among thousands of creditors that were critical to United’s exit and upon which many have based their marketplace behavior since 2006. In the process, Plaintiffs also ask the Court to ignore—if not overturn—a series of fully litigated judicial decisions in which the majority of these same Plaintiffs participated, lost, and unsuccessfully appealed multiple times.

In the complaint, more than 700 pilots and their newest litigation vehicle assert that the PBGC did not recover enough money from United as a result of the Pilot Plan’s termination. PBGC’s recovery was too low, Plaintiffs contend, because United duped PBGC (along with all of United’s other creditors, unions, employees, the Bankruptcy Court, District Court, and the Seventh Circuit) into believing that United’s Mileage Plus® plan had no stand-alone value. Had PBGC been told the “true” value of Mileage Plus®, Plaintiffs’ story continues, PBGC would not have

terminated the Pilot Plan, or would have gotten more from United in the parties' settlement agreement and would now be paying more to Pilot Plan participants.

Plaintiffs' complaint is completely and utterly frivolous and, for a number of reasons, it must be dismissed under Federal Rule of Civil Procedure 12(b)(6).

First, this lawsuit is a collateral challenge to several court orders, including: (1) a May 11, 2005 Bankruptcy Court order approving a settlement between United and the PBGC (the "PBGC Settlement Agreement," *see* Compl. ¶ 31),¹ which defined what PBGC would get from United due to Pilot Plan termination and rendered irrelevant the PBGC disclosure regulations upon which Plaintiffs rely; (2) a January 20, 2006 Bankruptcy Court order confirming United's Plan of Reorganization (the "Confirmation Order," *see* 2AC ¶ 54); and (3) a separate District Court order confirming the PBGC's termination of the Pilot Plan (*see* 2AC ¶¶ 39-40). The relief sought here cannot be entered without overturning these decisions and, in the process, defying the long-settled expectations of thousands of third parties.

Second, Plaintiffs' claims are barred by well-settled principles of claim preclusion. Indeed, many of the Plaintiffs here disputed (or certainly could have disputed) the need for termination of the Pilot Plan under multiple theories in at least three prior proceedings—(1) challenges to the PBGC Settlement Agreement; (2) challenges to United's Plan of Reorganization; and (3) challenges to the PBGC's termination of the Pilot Plan. Most of these Plaintiffs previously brought these challenges through a different group—then called the United Pilots Benefit

¹ Plaintiffs' initial complaint is cited in this memorandum of points and authorities as the "Compl." The Second Amended Complaint is cited as the "2AC."

Protection Association (“UPBRPA”). But regardless of how creative a new, self-serving title (such as “United Pilots for Justice”) may be, a party cannot relitigate settled issues or claims merely by changing the name of the litigation vehicle that lost the first time around.

Third, Plaintiffs’ claims were discharged, released, and exculpated by the confirmation of United’s Plan of Reorganization. Indeed, because United and the PBGC agreed on *exactly* what PBGC would receive due to Pilot Plan termination prior to confirmation, United did not provide PBGC with *any* information post-confirmation about the value of its controlled group’s assets and had no obligation to do so under the regulations upon which Plaintiffs base this lawsuit. More generally, every one of United’s alleged acts or omission predated United’s January 20, 2006 confirmation from bankruptcy, and “the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation.” 11 U.S.C. § 1141(d)(1)(A).

Fourth, even if the Court were to ignore the prior litigation and United’s reorganization, Plaintiffs’ claims have no merit under ERISA—indeed they make no sense in the context of the statutory scheme governing pension plan termination. At its core, the Plaintiffs are claiming that United defrauded the PBGC, which made the decision to involuntarily terminate the Pilot Plan. *PBGC v. United Air Lines, Inc.*, 436 F. Supp. 2d 909 (N.D. Ill. 2006). But the ERISA regulations on which Plaintiffs base their claims never applied to United or the Pilot Plan because the amount and source of PBGC’s recovery was set by court-approved agreement

prior to Pilot Plan termination and was incorporated into United's Plan of Reorganization. Plaintiffs have no standing or basis under ERISA to sue United for allegedly fraudulently inducing PBGC into entering into a settlement agreement that preceded United's confirmation and was been blessed by multiple courts.

To be sure, the factual underpinnings of the Plaintiffs' complaint are absurd. Plaintiffs' assertion that United had from 2002 a secret intent to destroy its employees' pensions is spurious. Even worse, the theory that all of United's creditors—many of whom lost substantial fortunes in United's Chapter 11 case—were tricked into accepting 4-8 cents on the dollar by United "concealing" the value of an asset as public and obvious as its Mileage Plus® program is preposterous. Defendants understand and appreciate Plaintiffs' disappointment and anger over the termination of the Pilot Plan. But scandalous allegations, anti-management invective, and strident rhetoric cannot change the fact that the termination of the Pilot Plan was entirely lawful, free of any fraud or wrongdoing and, ultimately, water under the bridge. This case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

BACKGROUND²

I. UNITED AND ITS DEFINED BENEFIT PENSION PLANS

United filed a Chapter 11 petition on December 9, 2002 (the “Petition Date”). See Exhibit A (United Confirmation Order), Attachment 1 (Plan of Reorganization (the “Plan”)) at 25. As of June 30, 2005, United had approximately 58,000 employees, about 80 percent of whom were represented by unions.³ See Exhibit B (Disclosure Statement for United Plan of Reorganization) at 24.

United’s employees were covered by one of four defined benefit pension plans: the Pilot Plan, the Flight Attendant Plan, the Ground Plan and the Management, Administrative and Public Contact Employee Plan. *Id.* at 46. While United had made all required contributions to the plans prior to filing for bankruptcy, they had nonetheless become significantly underfunded. *Id.* Thus, “[a] major impediment to United exiting bankruptcy [was] its pension liability, which total[ed] \$4.5 billion for the next four years.” *In re UAL Corp.*, 428 F.3d 677, 679 (7th Cir. 2005).

² The facts cited herein are taken from Plaintiffs’ Original and Second Amended Complaint, from various materials cited in and attached thereto, and other publicly available and judicially noticeable materials such as United’s Plan of Reorganization, Disclosure Statement, and the Order confirming United’s Chapter 11 Plan. These materials are all properly before the Court on a motion to dismiss pursuant to Federal Rule 12. *E.g.*, 520 S. Mich. Ave. Assoc. v. Shannon, 549 F.3d 1119, 1137 n. 14 (7th Cir. 2008) (appropriate to consider historical documents, documents in the public record, and state court decisions in evaluating 12(b)(6) motion); *Myers v. Heffernan*, No. 10-212, 2010 WL 3786203, at *1 n.4 (D. Del. Sept. 24, 2010) (“The court may take judicial notice of documents from the docket of a bankruptcy proceeding in considering a motion to dismiss under Rule 12(b)(6).”); *Abbey v. Modern Africa One, LLC*, 305 B.R. 594, 605 n. 14 (D.D.C. 2004) (appropriate to consider bankruptcy court pleadings in deciding Rule 12(b)(6) motion).

³ United’s pilots were represented by the Air Line Pilots Association (ALPA), flight attendants by the Association of Flight Attendants (AFA), ramp & stores workers by the International Association of Machinists and Aerospace Workers (IAM), mechanics by the Aircraft Mechanics Fraternal Association (AMFA), engineers by the International Federation of Professional and Technical Engineers (IFPTE) meteorologists by the Transport Workers Union (TWU) and dispatchers by the Professional Airline Flight Control Association (PAFCA). See Exhibit A at 24.

II. UNITED'S PENSION PLAN COSTS WERE A PRINCIPAL REASON WHY THE AIR TRANSPORTATION STABILIZATION BOARD DENIED UNITED'S APPLICATION FOR A LOAN GUARANTEE.

In an attempt to stave off bankruptcy, United had applied to the Air Transportation Stabilization Board (the "ATSB") on June 21, 2002 for a federal loan guarantee.⁴ *See* Exhibit B at 34. The ATSB denied United's application on December 4, 2002, leading the Company to file for Chapter 11 relief days later. *Id.* As part of its December 2002 denial, the ATSB noted its "concern[] about United's ability to generate sufficient cash flows to meet its pension funding obligations concurrent with other obligations, including repayment of the guaranteed loan." *See* Exhibit C (December 2002 ATSB Denial). But the ATSB left open the possibility of an updated application in the future after United restructured. *Id.*

After fundamentally restructuring the Company, United again sought loan guarantees from the ATSB in December 2003 based on a business plan that would have preserved each of United's pension plans, including the Pilot Plan. *See* Exhibit B at 46-47. But the ATSB again rejected United's loan guarantee application because it did not believe its cost reductions were sufficient—in large part because of the looming pension overhang. *See* Exhibit D (June 2004 ATSB Denial); *see also* Exhibit B at 50. United thus began to reexamine every aspect of its cost structure, including its pension obligations, and began to engage its employees on addressing the future of its employees' defined benefit pension plans.

⁴ Congress created the ATSB in the wake of September 11, 2001. Among other powers, the ATSB had the authority to issue \$10 billion in loan guarantees to U.S. airlines. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 101-02, 115 Stat. 230, 230-32 (2001).

III. UNITED AND ALPA AGREED ON A SETTLEMENT THAT IS CHALLENGED AND APPROVED OVER PLAINTIFFS' OBJECTION.

In December 2004, United and ALPA reached an agreement (the "ALPA Agreement") to modify their collective bargaining agreement (the "ALPA CBA"). In addition to making wage and work-rule concessions, ALPA agreed that it would waive any argument that termination of the Pilot Plan violated the parties' collective bargaining agreement. *See United Retired Pilots Benefit Protection Ass'n v. United Airlines, Inc. (In re UAL Corp.)*, 443 F.3d 565, 572 (7th Cir. 2006). In exchange, United agreed that if the Pilot Plan was ultimately terminated, United would provide active pilots with, among other things, \$550 million of convertible notes and a defined contribution plan. *Id.* at 568.

United's settlement with ALPA required Bankruptcy Court approval, and was challenged by multiple parties. Among the objectors was a group of retired pilots who had coalesced as the United Retired Pilots Benefit Protection Association ("URPBPA"), and had hired the Meckler Bulger, & Tilson law firm to represent retired pilots in United's Chapter 11 case and oppose any reduction in retirement benefits. URPBPA included approximately 60% of the individual plaintiffs in this lawsuit.⁵ On behalf of retired pilots, URPBPA filed an objection to the ALPA Agreement. The Bankruptcy Court rejected those challenges and approved the ALPA Agreement. *See Exhibit F (Order Approving ALPA Agreement).*

⁵ Attached as Exhibit E are a series of statements filed by Meckler, Bulger pursuant to Federal Rule of Bankruptcy Procedure 2019, which requires counsel to multiple creditors in bankruptcy cases to identify their clients. For ease of reference, Defendants have highlighted in yellow the creditors represented by URPBPA and Meckler, Bulger in United's Chapter 11 case who are also Plaintiffs in this lawsuit.

The Bankruptcy Court's approval of the ALPA Agreement was affirmed by the United States District Court for the Northern District of Illinois, and was again appealed by URPBPA. On March 31, 2006, the Seventh Circuit rejected URPBPA's appeal because of the confirmation and implementation of United's Plan of Reorganization. Because United's Plan had been confirmed, the Seventh Circuit determined, there was no feasible remedy, including additional compensation for the termination of the Pilot Plan, that a court could now provide these individuals even if the ALPA Agreement was reversed. *In re UAL*, 443 F. 3d at 572. In other words, the Seventh Circuit specifically rejected the argument that pilots could obtain compensation for the termination of the Pilot Plan or for any reduction in benefits that would occur as a consequence of Pilot Plan termination. *Id.*

IV. UNITED AND THE PBGC AGREED ON A SETTLEMENT RELATED TO THE PILOT PLAN WHICH WAS ALSO APPROVED OVER THE PLAINTIFFS' OBJECTION.

While negotiating its settlement with ALPA, United was also discussing the future of its pension plans with the PBGC. *See* Exhibit B at 57-58. The PBGC recognized that the Pilot Plan, the most expensive of United's pension plans, could not be maintained if United were to emerge from Chapter 11 as a going concern. But the parties could not agree on an effective date for plan termination. Thus, on December 30, 2004, the PBGC filed a complaint seeking to terminate the Pilot Plan effective December 30, 2004. *PBGC*, 436 F. Supp. 2d at 913.

After PBGC had filed its complaint seeking involuntarily termination of the Pilot Plan, United and PBGC entered into a global settlement (the "PBGC Settlement Agreement"). *See* Compl. ¶ 31 ("UAL Corp. and PBGC agreed to

distress termination of the Pilot Plan by Agreement dated April 22, 2005 . . .); Exhibit G (Bankruptcy Court Order Approving PBGC Settlement Agreement referred to at Compl. ¶ 31); Exhibit B at 58-59. The PBGC Settlement Agreement resolved all of the issues between the parties and provided significant momentum for United's emergence from Chapter 11.

The PBGC Settlement Agreement contemplated the termination of United's pension plans—including the Pilot Plan. And the PBGC—which had received massive volumes of data from United over a several-year period prior to the agreement—negotiated *precisely* the assets it would receive from United as a result of plan termination. *See* Exhibit G, Attachment 1. Those assets included a \$10.3 billion pre-petition pension benefit liability claim against United's estate, \$500 million in senior notes, \$500 million in contingent notes, and \$500 million of preferred stock. Exhibit G, Attachment 1 (PBGC Settlement Agreement), ¶¶ 2, 7.

On May 10, 2005, the Bankruptcy Court approved the PBGC Settlement Agreement over the objections of many, including URPBPA, which expressly argued that United had sufficient assets to maintain the Pilot Plan in full or part. *See* Exhibit H (URPBPA Objection to PBGC Settlement Agreement). And approval of the PBGC Settlement Agreement released United from *any* additional obligations, providing that the compensation PBGC obtained in that agreement would fulfill any remaining obligation that United and any of its affiliates might have either to PBGC or the Pilot Plan under any circumstances. *See* Exhibit G, Attachment 1 (PBGC Settlement Agreement), ¶ 7(d).

Plaintiffs explicitly concede in some places, and imply in others, that the Defendants' role with respect to the Pilot Plan ended with the approval of the PBGC Settlement Agreement in May 2005. *See* Compl. ¶¶ 31, 45-46, 51-52, 61. It did; no conduct on behalf of United or its Board post-dating 2005 is pled in the Complaint, nor could it be pled.⁶ And the PBGC Settlement Agreement was approved by the Bankruptcy Court, the District Court, and the Seventh Circuit. *See* Exhibit F; *aff'd Ass'n of Flight Attendants v. United Air Lines, Inc.*, 333 B.R. 436 (N.D. Ill. 2005), *aff'd* 428 F.3d 677 (7th Cir. 2005). With its pension issues resolved, United then sought to emerge from Chapter 11 protection as a new company unencumbered by its longstanding pension overhang.

V. UNITED'S PLAN OF REORGANIZATION WAS PREMISED ON THE TERMINATION OF THE PILOT PLAN AND WAS CONFIRMED OVER PLAINTIFFS' OBJECTION.

On January 20, 2006, the Bankruptcy Court entered an order confirming United's Plan of Reorganization. *See* 2AC ¶ 54; Exhibit A (Confirmation Order). Among other things, United's Plan of Reorganization was premised on the PBGC Settlement Agreement and on the termination of all of United's pension plans—including the Pilot Plan. *E.g.*, *UAL*, 468 F.3d at 449; *UAL*, 468 F.3d at 459.

United's Plan of Reorganization went effective February 1, 2006, resulting in the discharge of more than \$20 billion of debt—held by over 100,000 creditors,

⁶ Plaintiffs claim that they served a FOIA request on PBGC seeking any post-confirmation information provided PBGC by United. 2AC, Exhibits B-C. Plaintiffs' (unpled) theory is that United must have provided some unidentified data and it must have been false. The reality is that United provide no information on controlled group assets to PBGC post-confirmation and had no obligation to provide any information under the terms of the PBGC Settlement Agreement.

including the Plaintiffs—and triggering a cascade of literally thousands of transactions and other events that cannot now be unwound. Among other things:

- The Plan of Reorganization cancelled approximately 116 million shares of common stock in UAL Corporation (United’s parent corporation) held by at least 66,000 shareholders. *See* Exhibit A at 73-74; 2AC ¶¶ 3-4, 65-66.
- United assumed literally thousands of executory contracts and unexpired leases, including the ALPA CBA (with reduced wages and changed work rules and without the Pilot Plan or other pension benefits), and CBAs with United’s other unions (without pension benefits). *See* Exhibit A at 89-100.
- United entered into a \$3 billion exit financing facility. *See* Exhibit A at 76.
- United issued \$500 million in convertible preferred stock and \$500 million in senior subordinated notes to PBGC under the PBGC Settlement Agreement. *See* Exhibit A at 25, 77-78.
- To implement the final piece of United’s global deals with its labor groups, including the ALPA Agreement, United issued \$726 million in convertible notes to certain irrevocable trusts established for the benefit of its employees.

Between January 20, 2006 and December 30, 2010 (the date the initial complaint was filed), United took no action, with respect to the Pilot Plan. Instead, after some procedural maneuvering by URPBPA and ALPA, the United States District Court for the Northern District of Illinois confirmed the termination of the Pilot Plan effective December 30, 2004, *see PBGC*, 436 F. Supp. 2d at 921, and its decision was affirmed by the Seventh Circuit. The Seventh Circuit then held in two separate but related opinions that because the PBGC Settlement Agreement and United’s Plan of Reorganization had been confirmed and implemented, no further recovery was possible against United on behalf of those whose retirement benefits were reduced due to termination of the Pilot Plan. *In re UAL Corp.*, 486 F.3d 456, 459 (7th Cir. 2006) *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006).

ARGUMENT

I. THIS LAWSUIT MUST BE DISMISSED AS A COLLATERAL CHALLENGE TO THE PBGC SETTLEMENT AGREEMENT, UNITED'S PLAN, AND THE PBGC TERMINATION ORDER.

Plaintiffs' lawsuit (if successful) would fundamentally undermine three court orders, all of which were uniformly upheld by the Bankruptcy Court, District Court, and Seventh Circuit. ERISA does not permit back-door challenges to PBGC settlements or confirmed Chapter 11 plans of reorganization that are based upon such settlements. Nor does ERISA permit lawsuits against a former plan sponsor for the PBGC's decision to initiate an involuntary termination of a pension plan. For these reasons alone, even if ERISA afforded Plaintiffs the power to bring this suit (which, as described below, it does not), dismissal is appropriate.

First, the PBGC has the authority and discretion to enter into settlements governing pension termination and associated liabilities. *See* 29 U.S.C. § 1367; *Allied Pilots Ass'n v. PBGC*, 334 F.3d 93, 99 (D.C. Cir. 2003). Indeed, both this district court and the Seventh Circuit have confirmed that the PBGC had authority to enter into the PBGC Settlement Agreement with United. *See Ass'n of Flight Attendants v. PBGC*, 372 F. Supp. 2d 91, 99 (D.D.C. 2005); *In re UAL Corp.*, 428 F.3d 677, 681 (7th Cir. 2005). When the PBGC enters into a settlement agreement with a plan sponsor governing the termination of that plan, any future dealings between the PBGC and the plan sponsor are (and must be) addressed solely with reference to that settlement agreement. Post-settlement, a plan sponsor is released from all legal obligations to the PBGC or to plan participants other than those expressly provided in the settlement agreement. *See* Exhibit G, Attachment § 7(d).

Here, the 2005 PBGC Settlement Agreement defined and limited what PBGC would receive for the termination of United’s pension plans. *See* Exhibit G. Accordingly, the diligence process described in the Plaintiffs’ complaint—which might govern a process following a pension plan termination *without* an agreement between PBGC and the plan sponsor—did not apply. *See* 2AC ¶ 71. Indeed, it could not sensibly apply: the PBGC had already agreed with United on what it would receive from United due to the termination of United’s pension plans (including the Pilot Plan), and thus there was no need for a valuation of United’s control group. Even *if* a control group valuation had been provided post-settlement, and even *if* it told PBGC that United’s control group was far more valuable than initially believed, that information would be irrelevant—PBGC had already executed the settlement and released United of any further exposure from PBGC or the Pilot Plan. *See* Exhibit G, Attachment 1, at § 7(d).

As previous courts to address the PBGC Settlement Agreement have held, this negotiated resolution did not leave plan participants without a remedy. Rather, “[a]ggrieved parties have their rights under Section 4003(f) of ERISA, 29 U.S.C. § 1303(f), to bring actions *against PBGC* to challenge the propriety of its actions under ERISA.” Ex. G, Order Approving PBGC Settlement, ¶ 1(b) (emphasis added); *see also UAL*, 428 F.3d at 681. But there is no basis for Plaintiffs, under ERISA or any other provision of law, to file the equivalent of a fraudulent inducement claim suggesting United defrauded the PBGC into executing a settlement agreement. The appropriateness of United’s conduct in negotiating and

executing the PBGC Settlement Agreement was already confirmed by the Bankruptcy Court, District Court, and Seventh Circuit. There is no basis for a court to now, six years later, hold that the agreement was not good enough and United should have paid the PBGC and/or plan participants more.

Second, Plaintiffs' Complaint is a collateral attack on United's Plan of Reorganization and a blatant attempt to redivide the pie from United's bankruptcy. United's confirmed Plan assumed that no further payments would be made with respect to the Pilot Plan, and that United's liability on account of termination would be limited to the provisions of the PBGC Settlement Agreement. Even if there was fraud (there was not), and even if this action was a timely effort to alter United's Plan based on fraud (which it was not)⁷, there is simply no way to reinstate full pension benefits to the Plaintiffs and still protect all of the third parties who acquired rights in United based on its emergence from bankruptcy—the exit lenders who invested, the employees who made concessions, the creditors who took United's stock, the public shareholders who subsequently bought United's stock, and Continental and its stakeholders who recently merged with United, to name just a few constituents. *See In re UAL Corp.*, 468 F.3d at 459.

The reality is that tens of thousands of creditors voted billions of dollars of claims in favor of United's Plan of Reorganization, consenting to the discharge of those claims and the receipt of billions of dollars of reorganized UAL securities,

⁷ The Bankruptcy Code requires any challenges to confirmed plans based on fraud to be brought within 180 days of confirmation. *See* 11 U.S.C. § 1144. This case was brought almost five years after confirmation and is thus not even close to timely.

based on the expectation that reorganized United would emerge from Chapter 11 with a healthy balance sheet and capital structure, and the ability to achieve revenues forecasted in the Plan of Reorganization. Every labor group at United contributed, for the good of the entire enterprise, based on the very important condition that each labor group made proportional concessions. These sacrifices for a successful future formed the basis of a contract between United and its stakeholders embodied in the Plan of Reorganization. *See Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 755-756 (7th Cir. 2002) (“A confirmed plan of reorganization is in effect a contract between the parties...”).

A syndicate of lenders lent United \$3 billion based on those same expectations. And for the past four years, the investing public has bought and sold those very same reorganized UAL securities also based on the same expectations. Continental merged with United under the premise that any Pilot Plan participation was over. Because United’s Plan of Reorganization was based on the assumption that it would not make any further pension payments, any material change in that assumption would unduly prejudice the rights of thousands of third parties who legitimately relied on the interwoven events triggered on the Plan of Reorganization’s effective date. This back-door effort to undo United’s Plan and reframe the results of United’s reorganization cannot stand. *In re UAL Corp.*, 468 F.3d at 459 (“Despite the size of the retired pilots’ claim, they have made no effort to explore and perhaps dispel the obvious difficulties with granting relief at this stage.”); *see also Retired Pilots Ass’n of U.S. Airways, Inc. v. U.S. Airways Group (In*

re US Airways, Inc.), 369 F.3d 806, 811 (4th Cir. 2004) (dismissing pilots’ appeal of pension plan termination because “other parts of the plan would have to be reconfigured” and “a variety of completed transactions...would have to be undone”).⁸

Third, and finally, Plaintiffs’ claims here are back-door challenges to the order terminating the Pilot Plan. Before entering that order, the District Court confirmed that it was acting as a “safeguard” for plan participants to “ensur[e] that the termination of a pension plan is required.” *PBGC*, 436 F. Supp. 2d at 909. While the objectors to plan confirmation had argued United could continue the Pilot Plan, “neither ALPA nor UR[PB]PA offered any evidence contradicting the inference that the Pilot Plan would terminate.” *Id.* at 922 (holding that the evidence that the Pilot Plan would terminate was “credible” and “uncontradicted”). Given that the Pilot Plan needed to be terminated, the District Court held that even a delay of six months—increasing the PBGC’s ultimate liability to plan participants by \$84 million—was “unreasonable.” *Id.* at 924.

If United’s Mileage Plus® program had sufficient value to fund Pilot Plan benefits in full, it could not be the case that “termination of the Pilot Plan is necessary to avoid an unreasonable increase in PBGC’s liability.” *Id.* at 925. Thus, to accept Plaintiffs’ theory here is to nullify the settled decisions that have guided United, its employees and all of its constituencies for the past five years.

⁸ See also *In re California Litfunding*, 360 B.R. 310, 321 (Bankr. C.D. Cal. 2007) (granting motion to dismiss litigation that was a collateral attack upon the order of confirmation more than 180 days after confirmation); *In re Genesis Health Ventures, Inc.*, 324 B.R. 510, 516-17 (Bankr. D. Del. 2005) (dismissing causes of action brought more than 180 days after confirmation because a significant damages award would effectively “redivide the pie” and disturb the confirmed plan).

II. CLAIM AND ISSUE PRECLUSION BAR PLAINTIFFS' LAWSUIT.

“The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts.” *Katchen v. Landy*, 382 U.S. 323, 334 (1966). Thus, the preclusion issue here is whether the arguments made by Plaintiffs were or could have been made during prior proceedings on, among other things: (1) the PBGC Settlement Agreement; (2) United’s Plan of Reorganization; or (3) the termination of the Pilot Plan. The value of United’s assets was a core component of each prior matter, and there is no doubt that Plaintiffs’ arguments here could have been made (and for all practical purposes actually were made) during those proceedings.

The thrust of Plaintiffs’ theory is that United’s Mileage Plus® plan was sufficiently valuable to fund full benefits under the Pilot Plan, and the PBGC should have obtained those assets during United’s bankruptcy. But URPBPA already argued that United had sufficient assets to maintain the Pilot Plan (in whole or part) in unsuccessful efforts to derail the PBGC Settlement Agreement, to undermine United’s Plan, and to fight Pilot Plan termination. Indeed, URPBPA characterized United’s claim that it could not emerge from bankruptcy without termination of the Pilot Plan as “contrived.” *See* Exhibit H (URPBPA Opposition to PBGC Settlement) at 3. And URPBPA argued that the PBGC Settlement should be rejected ***precisely because*** it waived the claim for “control group liability” that the Plaintiffs here are asserting. *Id.* at 10 (“paragraph 7(a) of the agreement waives the PBGC’s joint and several claim, thereby releasing each and every one of United’s affiliates from all liability . . .”). While Plaintiffs now ask the Court to ignore the PBGC’s “waiver,” the prior court decisions approving it preclude such an approach.

In any event, even if Plaintiffs here had not made the precise argument raised here before, they clearly could have done so on numerous occasions. If United defrauded the PBGC into accepting too little because the Mileage Plus® program was worth billions, that argument could have been raised in prior litigation over the PBGC Settlement Agreement, United's Plan, and Pilot Plan termination. The financial viability of United, and the value of its assets, were central components of each of these decisions. *E.g., In re Park Forest Dev. Corp.*, 197 B.R. 388, 396 (Bankr. N.D. Ga. 1996) ("the valuation of assets" is "an integral part of the confirmation process under Chapter 11"). Each of the Plaintiffs was a United creditor and they—along with United's other creditors—would have benefitted significantly from an increase in the value of the estate.

The prior litigation described above produced final, binding decisions that, among other things: (1) United acted appropriately and well within the law in entering into the PBGC Settlement Agreement; (2) United's Plan of Reorganization was proffered in good faith and gave creditors appropriate recoveries based on reasonable valuations of United's assets; (3) the Pilot Plan needed to be terminated; and (3) the PBGC acted appropriately by terminating the Pension Plan as of December 30, 2004 and waiving all rights to any United assets other than those in the PBGC Settlement Agreement. *See Exhibit F; Exhibit G; Exhibit A; see also PBGC*, 436 F. Supp. 2d at 921-22. This Court is bound by those fully litigated issues, which are entirely inconsistent with the relief Plaintiffs seek here.

III. PLAINTIFFS' CLAIMS HAVE BEEN DISCHARGED, RELEASED, AND EXCULPATED BY UNITED'S CONFIRMED PLAN OF REORGANIZATION.

In addition to being a collateral challenge to several binding court orders, Plaintiffs' claims are already addressed by the Plan and its associated discharge. Indeed, there is no dispute that PBGC's decision to terminate the Pilot Plan, negotiations of the consideration PBGC would receive from United due to the termination of its pension plans, and the PBGC Settlement Agreement itself, *all* took place prior to confirmation. Because all of United's conduct with respect to the PBGC and the Pilot Plan occurred prior to confirmation of United's Plan, all of Plaintiffs' claims are discharged pursuant to 11 U.S.C. § 1141(d)(1).

The Bankruptcy Code defines a "claim" broadly and includes any:

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.

11 U.S.C. § 101(5)(A). This definition is "designed to ensure that 'all legal obligation of the debtor,' no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." *Cal. Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 929 (9th Cir. 1993). This broad definition:

performs a vital role in the reorganization process by requiring, in conjunction with the bar date, that all those with a potential call on the debtor's assets, provided the call in at least some circumstances could give rise to a suit for payment, come before the reorganization court so that those demands can be allowed or disallowed and their priority and dischargeability determined.

Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp., 266 B.R. 575, 580 (S.D.N.Y. 2001).

Here, United’s Plan clearly discharged *all* claims based on events prior to Confirmation. Article X.B of the Plan (Exhibit A, Attachment 1) states that:

Pursuant to Section 1141(d) of the Bankruptcy Code ... the distributions, rights, and treatment that are provided in the Plan shall be ***in complete satisfaction, discharge, and release ... of Claims and Causes of Action of any nature whatsoever***, including any interest accrued on Claims from and after the Petition Date, whether known or unknown, against, liabilities of, liens on, obligations of, rights against, and Interests in, the Debtors or any of their assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such Claims, rights, and Interests, including, without limitation, demands, liabilities, and Causes of Action that arose before the Confirmation Date ... whether or not (i) a Proof of Claim or Interest based upon such debt, right, or Interest is Filed or deemed Filed pursuant to Section 501 of the Bankruptcy Code, (ii) a Claim or Interest based upon such debt, right, or Interest is allowed pursuant to Section 502 of the Bankruptcy Code, or (iii) the Holder of such a Claim, right, or Interest has accepted the Plan ...

See id., Article X.B. The breadth of this provision is not surprising, since Section 1141 of the Bankruptcy Code gives debtors a discharge for all pre-confirmation conduct in an effort to assure a fresh start for such debtors. *In re Benjamin Coal Co.*, 978 F.2d 823, 827 (3rd Cir. 1992) (“discharge of all existing claims . . . upon confirmation of a Chapter 11 plan is unambiguous . . . in the Bankruptcy Code.”);

The discharge injunction in both United’s Plan and the Confirmation Order—guided by Section 1141 of the Bankruptcy Code—is equally unambiguous:

Except as otherwise expressly provided in the Plan or for obligations issued pursuant to the Plan, ***all Entities who have held, hold, or may hold Claims against or Interests in the Debtors or against the Released Parties and Exculpated Parties are permanently enjoined***, from and after the Effective Date, from: (i) ***commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claim against or Interest in the Reorganized Debtors***, the Exculpated Parties, the Released Parties, any statutory committee or

members thereof, and the employees, agents, and professionals of each of the foregoing (acting in such capacity); ... and (v) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claim against or Interest in the Reorganized Debtors, the Released Parties, the Exculpated Parties any statutory committee or members thereof, and the employees, agents, and professionals of each of the foregoing (acting in such capacity) released or settled pursuant to the Plan.

See Plan, Article X.J; Exhibit A, Confirmation Order, ¶ 4(e) (emphasis added).

Plaintiffs' complaint repeatedly emphasizes that the termination of the Pilot Plan and United's bankruptcy took place at the same time. *E.g.*, 2AC ¶¶ 3, 5 (stock was "rendered valueless in UAL Corp's bankruptcy that occurred coincident with termination of the Pilot Plan"), ¶ 66 (bankruptcy "coincided with termination of the Pilot Plan"). Indeed, when Plaintiffs submitted a FOIA request to PBGC, the only responsive documents produced were pleadings filed in United's bankruptcy case. *Id.* ¶ 78. And what Plaintiffs claim should have been disclosed to PBGC was allegedly known in 2004 and 2005, at the latest during the hearings before the Northern District of Illinois in "May 2005." *Id.* ¶ 82. There is no doubt that even *if* United committed fraud by failing to inform PBGC of the alleged value of Mileage Plus® (and there was no such fraud), that took place prior to the PBGC Settlement Agreement and clearly prior to confirmation. Any such claims are therefore clearly discharged by United's plan and by 11 U.S.C. § 1141(d).

In addition to discharge, United, ULS, and United's former board members are absolutely protected by the release and exculpation provisions in United's Plan. See Exhibit A, Attachment 1 (Plan) 121-22. Third party releases and exculpation clauses are commonplace in Chapter 11 plans; both are enforceable and binding.

E.g., In re Specialty Equip., 3 F.3d 1043 (7th Cir. 1993); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 145 (2d Cir. 2005); *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000). The release provisions are sufficient alone to defeat the claim of most Plaintiffs but, even if they were not, Plaintiffs do not plead any facts even remotely approaching the gross negligence or willful misconduct that is necessary to circumvent exculpation as to any individual officer or director. *See PWS*, 228 F. 3d at 246-247 (discussing exculpation’s “limited grant of immunity . . . for actions within the scope of their duties . . .”).⁹

The bottom line is that Plaintiffs cannot raise claims against United or ULS (two debtors), or the board members of United “in 2004-05” (2AC ¶ 1), based on activities that “coincided with United’s bankruptcy” (2AC ¶ 66). All such claims were treated in United’s Plan of Reorganization, and every single one of the Plaintiffs received notice and an opportunity to be heard (which many of the Plaintiffs took advantage of and were heard). The confirmation of a plan of reorganization in general, and United’s particular Plan (which incorporated the terms of the PBGC Settlement Agreement) bars Plaintiffs from raising these claims now. 11 U.S.C. § 1141(d); *see also Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82 (2d Cir. 1997) (claims for withdrawal liability against non-debtor are barred by the release provisions of the debtor’s plan); *Bosigner v. US Airways*, 510 F.3d 442 (4th Cir. 2007) (claims for misconduct in pension termination barred by discharge).

⁹ Given the focus on the debtor’s finances during United’s bankruptcy (and every bankruptcy), Plaintiffs’ theory of ‘fraud’ based on one alleged misrepresentation about the company’s assets is itself implausible on its face, warranting dismissal. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

IV. PLAINTIFFS' CLAIMS ARE BASELESS UNDER ERISA.

In addition to the infirmities addressed above, Plaintiffs' claims defy the language and spirit of the statute under which Plaintiffs purport to bring them. Plaintiffs' attempt to turn a "fraud on the PBGC" suit into an ERISA-based claim is putting a square peg into a round hole.

The provision Plaintiffs invoke for standing, ERISA § 4070 (29 USC § 1370), gives a participant standing to redress an "act or practice" of a party "in violation of any provision of [ERISA] section[s] 4041, 4042, 4062, 4063, 4064, [or] 4069...." Here, Plaintiffs allege violations of ERISA §§ 4062 and 4069. Thus, to have standing under ERISA § 4070, Plaintiffs must identify: (1) an "act or practice"; (2) by the defendants; that (3) violated ERISA §§ 4062 and 4069. They do not.

First, ERISA §4062 imposes liability on plan sponsors and controlled group members for unfunded liabilities. Most of Section 4062's requirements apply only to the PBGC, and the only portions of Section 4062 that impose obligations on the plan sponsor do not apply here. For example, ERISA Section 4062(b)(2) states that any unfunded liability is due and payable to PBGC as of the plan termination date, but if the liability exceeds 30% of the net worth of the sponsor's controlled group, then the sponsor and the PBGC "shall make a reasonable effort to reach agreement" on payment terms and "may agree to alternative arrangements for satisfaction of the liability." This did not apply here because United was *not* negotiating over payment terms of liability in excess of 30% of the controlled group (and Plaintiffs do not suggest that it was). Thus, there was no act in violation of ERISA Section 4062.

The regulations under Section 4062 cited by Plaintiffs require a sponsor to provide financial information to enable PBGC to make a net worth determination for purposes of Section 4062, which was not in play because PBGC had settled with the plan sponsor.¹⁰ Specifically, 29 CFR § 4062 states: “When a contributing sponsor . . . notifies and submits information to the PBGC in accordance with 4062.6, the PBGC shall determine the net worth. . . . In making such determinations, the PBGC will consider information submitted pursuant to 4062.6.” 29 CFR § 4062.6, in turn, states: “A contributing sponsor...that believes section 4062(b) liability exceeds 30% of the collective net worth of persons subject to liability in connection with a plan termination shall . . . submit to the PBGC the information requested in paragraph (b) of this section [which lists the information listed in the complaint].” But United was not submitting information to PBGC to show that it needed a special payment plan for the unfunded termination liability in excess of 30% of its net worth, and therefore, these regulations do not apply.¹¹

¹⁰ Plaintiffs’ “fiduciary breach” claims (the Second and Fourth Causes of Action) fail for similar and additional reasons. Because none of the PBGC regulations regarding the provision of net worth information apply, they cannot form the basis of an ERISA fiduciary violation. In any event, it is well-settled that pension plan termination is not a fiduciary function. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *System Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1380 (D.C. Cir. 1998). Thus, any negotiations or conduct related to Pilot Plan termination were undertaken in the alleged fiduciaries’ “settlor” capacities and cannot give rise to ERISA liability even if applicable provisions were violated (none were). *Lockheed*, 517 U.S. at 890.

¹¹ Even if these regulations did apply (which they do not), United would not have violated them by failing to provide the information listed. This is because 29 CFR § 4062 states: “If a contributing sponsor and/or members of the contributing sponsor’s controlled group do not submit all of the information required . . . the PBGC may base determinations of net worth and the collective net worth of persons subject to liability in connection with a plan termination on any such information that such person(s) did submit, as well as any other pertinent information that the PBGC may have.”

Second, ERISA Section 4069 is even more off-point. It provides that if a principal purpose of entering into a transaction is to evade ERISA liability, then the person is subject to liability as if the transaction did not occur. Section 4069 does not technically ‘prohibit’ evasive transactions—it merely gives them no effect.

Plaintiffs’ allegations of allegedly evasive transactions relate to the ULS entity. 2AC ¶ 122. These are not “transactions” under ERISA § 4069—they are not transactions that transferred assets from a plan’s controlled group or transferred plans to undercapitalized legal entities to shield the plan sponsor. But even if the alleged events were “transactions,” they did not change the liability of ULS or United with respect to the pension plans and thus are not covered by Section 4069. The reason is simple. ULS was a member of the United’s controlled group prior to the alleged “transactions” and remained a controlled group member after the alleged transactions. United and ULS were therefore both always (prior to the PBGC Settlement Agreement) jointly and severally liable for unfunded pension liabilities; thus ignoring the transactions under Section 4069 would have no effect.

Indeed, at the end of the day, Plaintiffs’ case would turn ERISA on its head. The only real “transaction” here is the PBGC Settlement Agreement. But ERISA expressly permits such agreements—even encourages them:

[T]he Supreme Court has made clear that Congress “granted the PBGC discretion to arrange reasonable terms for the payment of [ERISA] liability.” *See Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 367, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980) (interpreting ERISA § 4067, 29 U.S.C. § 1367). Having concluded that the CSA constitutes a statutorily authorized arrangement to settle unfunded liability, this court rejects plaintiffs’ claim that the CSA violates section 1369.

Adams v. PBGC, 332 F. Supp. 2d 231, 237 (D.D.C. 2004). So too here. United and the PBGC entered into a court-approved settlement agreement that defined and limited exactly what the PBGC would receive as a result of Pilot Plan termination and—on behalf of both PBGC and the Pilot Plan—gave United and all entities associated with United a full and complete release. Plaintiffs cannot use ERISA to overturn a settlement authorized by ERISA.¹²

CONCLUSION

For the reasons described above, Plaintiffs' complaint should be dismissed, with prejudice.

Washington, DC
Dated: June 7, 2011

Respectfully submitted,

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¹² Plaintiffs' Complaint also appears to be untimely under ERISA's statute of limitations. 29 U.S.C. § 1370(f). Entry into the PBGC Settlement Agreement should have triggered the existence of this claim—to the extent it exists (and no viable claim does). None of the Plaintiffs here sued until more than 6 years after the PBGC Settlement Agreement was executed, and some Plaintiffs even waited until more than 6 years after the effective date of Pilot Plan termination.

CERTIFICATE OF SERVICE

I certify that the foregoing document and its attachments were served through the Court's electronic filing system and by overnight mail on June 7, 2011, upon:

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