

**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
Reorganized Debtor	)	(Jointly Administered)
	)	
	)	Honorable Eugene R. Wedoff

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
UNITED PILOTS FOR JUSTICE, INC.'S MOTION TO CORRECT THE  
CONFIRMATION ORDER BY CLARIFYING THAT §4(e) OF THE CONFIRMATION  
ORDER DOES NOT ENJOIN PLAINTIFFS POST-CONFIRMATION  
CLAIMS ON FILE IN THE DISTRICT COURT, DISTRICT OF COLUMBIA**

NOW COMES United Pilots for Justice, Inc., (“UPFJ”) by and through its attorneys Kevin McBride of McBride Law, PC and Bruce L. Wald and Alexander D. Kerr, Jr. of Tishler & Wald, Ltd., and submits this Memorandum of Points and Authorities in support of United Pilots for Justice, Inc.’s Motion to Correct the Confirmation Order by Clarifying that §4(e) of this Court’s Confirmation Order does not Enjoin Plaintiffs’ Post-Confirmation Claims on File in the United States District Court, District of Columbia:

**I. BACKGROUND**

1. On December 9, 2002, the Reorganized Debtors filed their Petition.
2. On January 20, 2006, this Court entered its Confirmation Order (EOD 14829).
3. On June 13, 2006, the Pension Benefit Guaranty Corporation (“PBGC”) terminated the United Airlines, Inc. Pilot Fixed Benefit Insurance Plan (“Plan”) pursuant to District Court Order.

4. Commencing on or about April 30, 2010, individual retired pilots began receiving final pension determination letters from the PBGC which advised either that the retirement income benefits were being increased, continued unchanged, or that the retirement income benefits were being reduced.

5. UPFJ and 705 individual plaintiffs subsequently filed suit against United in the United States District Court, District of Columbia (the "District Court Complaint"), alleging violation of ERISA §4070 (29 USC §1370) by UAL Corp, United Loyalty Services, LLC and other named defendants (collectively, "United") by failing to properly disclose the fair market value of the Mileage Plus asset owned by United Loyalty Services in ERISA filings made with the PBGC at the time of termination of the United Pilot Pension Plan (the "Pension Plan").<sup>1</sup> The District Court Complaint alleges that United violated ERISA in connection with Pension Plan termination by disclosing its Mileage Plus asset at an internally assigned "book value," having a negative net worth of \$397 million, instead of at its *fair market value*, having a positive net worth of approximately \$7.5 billion.<sup>2</sup> Plaintiffs were adversely affected by United's ERISA violation in connection with Pension Plan termination within the meaning of 29 USC §1370(a).<sup>3</sup> The adverse effect on plaintiffs occurred—and plaintiffs each suffered "actual harm"—when

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<sup>1</sup> DC District Court Case 1:10-cv-02324-JEB, *United Pilots for Justice, Inc., et al. v. United Airlines Corporation, Inc., et al.*, Hon. James E. Boasberg, presiding.

<sup>2</sup> A true and correct copy of the Second Amended Complaint, as served on defendants, is attached as Exhibit C to United's Motion to Reopen filed with this Court on June 7, 2011.

<sup>3</sup> Plaintiffs learned of this ERISA violation on February 11, 2011 in discovery in a related administrative matter pending before PBGC: ER-2011-104, Stanley M. Anderson, *et al.*, Case No. 199627, United Airlines, Inc. Pilots Fixed Benefit Income Plan. Declaration of Kevin McBride, ¶¶ 4, 5.

PBGC calculated final pension benefits for each individual participant pursuant to the benefit payment rules under 29 C.F.R. §4022, and then issued final pension determination letters to each individual plaintiff, determining that each of the named plaintiffs would be distributed less than their respective non-forfeitable pension benefits that had accrued and vested before Pension Plan termination. This occurred on and after April 30, 2010, with the bulk of such determination letters issued by PBGC to individual plaintiffs during September – November, 2010.<sup>4</sup>

6. In response to plaintiffs' District Court Complaint, United moved this Court to reopen its chapter 11 cases (the "Chapter 11 Cases"), seeking the following relief:

United seeks entry of an order reopening the chapter 11 cases of UAL Corporation and UAL Loyalty Services, Inc. for the limited purpose of enforcing the discharge injunction in the Plan, the Confirmation Order and the Bankruptcy Code in connection with the Complaint. Reopening these chapter 11 cases would permit the Plaintiffs' complaint, upon its transfer to the Northern District of Illinois, to be referred to this Court pursuant to 28 USC §157(a) and Internal Operating Procedure 15(a) of the US District Court for the Northern District of Illinois. United would then ask this Court to rule on its Motion to Dismiss, and for any other applicable relief. (emphasis added)

7. In a hearing on August 17, 2011 on United's Motion to Reopen, this Court ruled from the bench as follows:

I don't suppose you want to argue the merits of the motion now. But I will simply make an observation here, and that is, if there is a court order that specifically prohibits a particular course of conduct, the appropriate action of a party that wants to engage in that conduct and believes that the court order was erroneously entered would be to go to the court that entered the order and ask that the order be vacated, rather than taking the action that's prohibited by the order and asking another court not to enforce it. I'll leave it at that, and you can come back at an appropriate time to deal with the merits. But the motion to reopen that's before me today will be granted.

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<sup>4</sup> McBride Declaration ¶ 6.

Hearing Transcript, p. 2, lines 18-25 – p. 3, lines 1-6.<sup>5</sup>

8. Plaintiffs now file this motion for a declaratory judgment, on the merits, that the District Court Complaint is not subject to this Court's confirmation order and discharge injunction for the following independent reasons:

- a. The ERISA claims alleged in the District Court Complaint are post-confirmation claims not subject to the confirmation order or discharge injunction.
- b. The District Court Complaint is not a core proceeding in bankruptcy and this Court lacks subject matter jurisdiction to enter a final order disposing of the District Court Complaint; and

For these reasons, this Court should grant UPFJ's Motion to Correct the Confirmation Order by Clarifying that §4(e) of this Court's Confirmation Order does not Enjoin Plaintiffs' Post-Confirmation Claims on File in the District Court Case.

**II. THE INJUNCTION PROVISIONS OF THE CONFIRMATION ORDER DO NOT APPLY TO POST CONFIRMATION ORDER ERISA CLAIMS BECAUSE (A) THE CLAIMS OF THE PILOTS BEING ASSERTED DID NOT EXIST WHEN THE ORDER WAS ENTERED AND (B) EXCLUSIVE JURISDICTION OVER THE INVOLVED CLAIMS IS VESTED IN THE DISTRICT COURTS**

**A. The ERISA Claims Alleged in the Complaint are not Subject to the Discharge Order.**

9. In *Holywell Corporation v. Smith, et al.*, 503 U.S. 47 (1992), the Supreme Court stated in clear terms that "... [e]ven if ... [the Bankruptcy Code] binds creditors of the corporate and individual debtors with respect to claims that arose before

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<sup>5</sup> McBride Declaration, ¶ 7, Attach. 3.

confirmation, we do not see how it can bind the United States or any other creditor with respect to postconfirmation claims ...” Id. At 58-59.

10. The claims which the plaintiff group of retired pilots submit are postconfirmation claims. Not all retired pilots received notification of reduction of benefits. These latter Pilots are not members of the Plaintiff Group. This dichotomy demonstrates that the Pilots here did not have and could not have had a claim in the proceedings until final determination by PBGC under 29 C.F.R. §4022 of the pension benefit amount actually payable, and notice to each plaintiff of that amount. Indeed, nowhere in the Plan’s litany of classes of claims is there a class for any retired pilots ERISA Qualified Benefit (retirement income) claims, See e.g., Plan ¶ EOD 14829 at pg. 49 of 50.

11. Further, “actual harm” to plaintiffs under ERISA §1370(a) was not, and could not, be determined until a formal determination of ERISA Title IV non-forfeitable benefits was made with respect to each plaintiff—*i.e.*, benefits that had accrued and vested before Pension Plan termination. This “formal determination” event occurred for each individual plaintiff on receipt on issuance by PBGC of “Board Determination Letters.” All of these determination letters were issued by PBGC on and after April 30, 2010, with the vast majority having been issued in September, October and November, 2010—more than four years *after* this Court’s confirmation order in United’s Chapter 11 Cases. *Fogel v. Zell*, 221 F.3d 955 (7<sup>th</sup> Cir. 2000) requires a finding in this case that plaintiffs’ claims in the District Court Complaint arose post-confirmation.

12. In *Fogel v. Zell*, the City and County of Denver Colorado had purchased pipe from a company subsequently purchased by Sam Zell. Once widespread failure in the pipes sold to various customers began to appear, Mr. Zell placed his company under protection of this Bankruptcy Court. A claims bar date was set, and numerous plaintiffs filed claims. But Denver, not having yet experienced a pipe failure, did not file a claim by the bar date. Notwithstanding, Denver attended (even hosted) meetings of various other pipe purchasers where the topic of the widespread pipe failure was discussed. *Id.*, 221 F.3d at 959. After the bar date, Denver also experienced a pipe failure, and belatedly filed a claim. Denver's claim was denied by the bankruptcy court. The District Court then ruled that Denver knew of the pipe defects before the claims bar date, failed to file a claim, and was therefore too late. *Id.*, 221 F.3d at 959. The Seventh Circuit Court of Appeals reversed and remanded, finding that if plaintiff has "no actual legal right, contingent or otherwise," no bankruptcy claim exists. *Id.*, 221 F.3d at 960. The Seventh Circuit Court explained:

"Claim" is broadly defined to include equitable as well as legal rights to payment, and even "contingent" such rights. 11 U.S.C. sec.101(5)(A); [citation omitted]. A claim implies a legal right, however, and before a tort occurs the potential victim has no legal right, "contingent" or otherwise..." *Id.*

13. *Fogel v. Zell* requires a determination that plaintiffs' claims in the District Court Case are post-confirmation claims because plaintiffs did not have an actual legal right, contingent or otherwise, until PBGC made a formal determination of their respective pension benefit rights, and informed each plaintiff of those rights pursuant to the Board Determination Letters issued on and after April 30, 2010. *Bovin v. US Airways*, 446 F.3d 148 (D.C. Cir. 2006) identifies a two-step PBGC administrative process under

which claimants have no actual rights, and have suffered no actual harm, until PBGC has determined under 29 C.F.R. §4022 with respect to *each individual plan participant* whether such rights actually exist or not. The D.C. Circuit Court explains in *Bovin*:

The administrative process requires plaintiffs to wait until the PBGC completes its work and issues formal benefit determinations, at which point the plaintiffs must complete internal PBGC appeals before filing an action in federal court.

14. The PBGC claims process involves two steps: (1) the pension plan participant must wait for PBGC to “complete its work and issue formal benefit determinations” under 29 C.F.R. §4022 to see if they even *have* a legal claim that can be pursued administratively (if non-forfeitable pension benefits are paid by PBGC in full, then no claim exists) and then (2) if a claim actually exists, the claimant (in a case against PBGC) then completes the internal PBGC appeal process.<sup>6</sup> Under this two-step process, it is *not known* if an actual harm exists with respect to each individual plaintiff—and there is “no legal right, contingent or otherwise”—until the pension determination process under 29 C.F.R. §4022 is concluded. The ERISA two-step PBGC process for claim determination is distinguished from typical employment claims such as those presented in *McSherry v. TWA*, 81 F.3d 739 (8<sup>th</sup> Cir. 1996). In a typical employment case, the wrong has occurred *and* the plaintiff’s “actual harm” is known—but a claim cannot be brought until an administrative hearing is held. Thus, this is effectively just a “one-step” process under which the existence of plaintiff’s claim is *already determined*, but he or she is just waiting for an administrative process before having the formal right to sue. As the Eighth Circuit

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<sup>6</sup> Critically, not all plan participants under the United Airlines, Inc. Pilots Fixed Benefit Income Plan have “claim” or right to appeal. Many such plan participants received the full amount of their non-forfeitable benefits; hence, a “claim” to appeal did not arise for those participants.

Court explained in *McSherry*:

It is clear that the definition of "claim," as stated in the Code, is broad enough to encompass an obligation on which a civil action would be premature because jurisdictional prerequisites have not been met. ***Both the allegedly unlawful actions and the harm occurred on the date of termination, and McSherry's right to redress that wrong existed on that date.*** While lack of a right to sue letter may have left his claim unmaturing or contingent on that date, § 105(A) specifically includes such claims within its definition.

15. *Id.*, 81 F.3d at 740, emphasis added. So in the typical employment case, such as *McSherry*, *both* the harm and the right to redress that harm existed on the bar date. The technicality that the employee has not yet received a right to sue letter does not change the fact that the conduct has occurred and the actual harm exists—even though the right to sue is delayed for procedural reasons. The situation is very different in the present case. The first plaintiff named in the District Court Complaint received his benefit determination letter on April 30, 2010<sup>7</sup>—with the bulk of such letters received by other named plaintiffs during September through November, 2010. Since plaintiffs did not have a known PBGC claim until very recently, *Fogel v. Zell* controls here and the claims are post-petition claims that were not subject to the discharge injunction of this Court because no legal right, “contingent” or otherwise, existed as of January 20, 2006, the date of this Court’s Order of Plan Confirmation.

16. Further, the Pension Plan termination did not occur until June 13, 2006 on order of the District Court—about 5 ½ months after this Court’s Order of Plan Confirmation.

17. In summary of the post-petition claim issue, plaintiffs’ claims in the District

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<sup>7</sup> Plaintiff David Dryer received his final benefit determination letter on April 30, 2010. McBride Declaration, ¶ 6.

Court Complaint are post-confirmation claims for at least three reasons: (1) the PBGC Settlement Agreement became a final order post-confirmation; (2) the discharge injunction can only apply to claims that existed at the time of plan confirmation, not to claims where “actual harm” has not yet occurred<sup>8</sup> and (3) plaintiffs in the District Court Case had no actual legal right, contingent or otherwise, until after the confirmation order on January 20, 2006.

**B. The District Court Complaint is Not a Core Bankruptcy Proceeding and Therefore This Court Lacks Jurisdiction Over the Subject Matter**

18. This Court lacks subject matter jurisdiction over the District Court Complaint because the Complaint is not a core proceeding within the meaning of 11 USC §157. Plaintiffs’ claims arise under 29 USC §1370 and 29 USC §1132. Both statutes grant *exclusive jurisdiction* over these claims to the United States district courts—not the bankruptcy courts. 29 USC §1370(c) provides, in part, as follows:

The district courts of the United States shall have *exclusive jurisdiction* of civil actions under this section.

Emphasis added. Similarly, 29 USC §1132(e) provides as follows:

Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have *exclusive jurisdiction* of civil actions under this subchapter brought by the Secretary or *by a participant, beneficiary*, fiduciary, or any person referred to in section 1021(f)(1) of this title. Emphasis added.

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<sup>8</sup> See *Holywell v. Smith, et al.*, 503 U.S. 47 (1992), pp. 58-59, which states “Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect to postconfirmation claims. Cf. [\*59] 11 U.S.C. § 101(10) (1988 ed., Supp. II) (defining “creditor” as used in § 1141(a) as an entity with various kinds of preconfirmation claims).

For these reasons, the statutory language of ERISA's exclusive jurisdiction provisions prevents this Court from exercising subject matter jurisdiction over the District Court Complaint.

19. 29 USC §1370 is part of ERISA Title IV—a set of statutes interwoven with references to bankruptcy proceedings.<sup>9</sup> If Congress had intended that §1370 be an available remedy to plan participants only in the event the ERISA defendant was not in bankruptcy, it could have so provided in Title IV. But Congress did not do this. Instead, Congress provided a 6-year statute of limitations—29 USC §1370(f)(1)—and a 3-year statute of limitations in the event of fraud or concealment—29 USC §1370(f)(3), without any limitation because of related bankruptcy proceedings. Congress then granted exclusive jurisdiction over such claims to the district courts. At the time §1370 was adopted, Congress also adopted specific findings to assure full pension payment by pension sponsors and to protect individual plan participants from ERISA violations. 29 USC §1001b (“It is hereby declared to be the policy of this title [Title IV]-- (3) to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits.”) For these reasons, it is clear that Congress did not intend bankruptcy courts to exercise core jurisdiction over proceedings arising under ERISA Title IV.

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<sup>9</sup> See, e.g., 29 USC §1342(e) (“An application by the corporation under this section may be filed notwithstanding the pendency ... of any bankruptcy...”); 29 USC §1342(f) (“Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11.”).

20. Further, because plaintiffs' ERISA Title IV claims *neither* arise in the Chapter 11 proceedings *nor* under title 11, the ERISA claims are not core proceedings in this Court. The recent case of *Stern v. Marshall*, 131 S. Ct. 2594 (2011) is on point. In *Stern v. Marshall*, the bankruptcy court had exercised jurisdiction over a state-court counterclaim on the rationale that the counterclaim was "related to" the bankruptcy proceedings. The United States Supreme Court reversed, holding:

"The terms 'non-core' and 'related' are synonymous"...The phraseology of section 157 leads to the conclusion that there is no such thing as a core matter that is 'related to' a case under title 11. ...[T]he statute simply does not provide for a proceeding that is simultaneously core and yet only related to the bankruptcy case.

*Stern v. Marshall, supra*, 131 S.Ct at 2605. The Supreme Court in *Stern* concluded that the bankruptcy court's exercise of jurisdiction in excess of §157 was a violation of Article III of the United States Constitution. *Id.* at 2608. This is precisely the situation we would have in the present case if this Court exercises jurisdiction over the District Court Complaint. Exclusive jurisdiction over ERISA Title IV claims rest only in Article III courts. Therefore the United States Constitution also prohibits this Court from exercising core jurisdiction over plaintiffs' claims in the District Court Case—claims arising exclusively under ERISA Title IV.

21. Finally, this Court has already exercised "related to" jurisdiction over a different ERISA Title IV case—the case brought by PBGC under 29 USC §1342 for Pension Plan termination. *In re United Airlines, Inc.*, 337 B.R. 904 (N.D.Ill. 2006). Even though 29 USC §1342 provides for exclusive jurisdiction in the district courts, this Court extended "related to" jurisdiction over plan termination and purported to enter a number

of final orders that required the exercise of core jurisdiction. This Court was thereupon reversed by the District Court. The District Court held that exercise over plan termination was not a core proceeding, and that this Court should not have exercised core jurisdiction over Pension Plan termination proceedings. The case here is governed by the ruling in *In re United Airlines, Inc., supra*, under principles of res judicata. The question of the subject matter jurisdiction under ERISA Title IV has already been litigated against United. Here, as in the previous case, the claims are brought under ERISA Title IV. The applicable statutes in both cases provide for “exclusive jurisdiction” over such claims. Here, as in the previous case, United argues that the proceeding to reopen the Chapter 11 Cases in order to dismiss the District Court Complaint is a “core proceeding within the meaning of 28 USC §157(b)(2)” United’s Opening Brief, p.2, §1.<sup>10</sup> *In re United Airlines, Inc., supra*, is therefore a res judicata determination for the principle that that ERISA Title IV claims related to Pension Plan termination of the Pension Plan in this case are not core bankruptcy proceedings.

22. In summary of the jurisdiction question, at least four different sources of legal authority prevent this Court from exercising core jurisdiction over plaintiffs’ District Court Claims: (1) the language of 29 USC §1370(e) which provides for exclusive jurisdiction over §1370(a) claims in the district courts of the United States; (2) the 6-year statute of limitations of 29 USC §1370(f)(1) and the 3-year statute of limitations for fraud or concealment of 29 USC §1370(f)(3); (3) the United States Constitution which requires

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<sup>10</sup> This argument is flatly rejected by *Stern v. Marshall, supra*.

final orders related to non-core bankruptcy proceedings to be made by an Article III court, not a bankruptcy court; and (4) *In re: United Airlines, Inc., supra*, which was a res judicata determination that claims and proceedings under ERISA Title IV are not core proceedings in bankruptcy. For all these reasons, this Court lacks subject matter jurisdiction to enter any order that would limit the D.C. District Court Complaint.

C. **A Balance of Equities under Bankruptcy Law and ERISA Can Only be Made by the District Courts**

23. Undoubtedly, bankruptcy law is designed to provide protection for debtors to the fullest extent allowable under law. However, this does not mean that confirmation orders under bankruptcy law are without limits. Indeed, the very process of defining “claims” and rights in bankruptcy involve a complex balancing process. See, e.g., *Fogel v. Zell, supra*, 221 F.3d at 960-61. The United States Supreme Court has also stated that PBGC in restoring a terminated pension plan to a bankrupt plan sponsor could do so under ERISA Title IV without consideration of bankruptcy law or policy. *PBGC v. LTV Corp.*, 496 U.S. 633, 645-46 (US 1990). These cases instruct that a “claim” in bankruptcy cannot be defined by rote and applied without consideration of other relevant law—particularly where claims are raised under ERISA Title IV. In such cases, this Court, as a court of limited jurisdiction in bankruptcy, is not the proper forum to balance such interests. The Supreme Court has already made it clear that the district courts have broad equitable powers to balance equities in ERISA cases. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011). (The term ““appropriate equitable relief” under ERISA broadly refers to those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity.”) It thus falls to the district court, upon hearing

the plaintiffs' District Court Complaint, to balance these equities between ERISA and bankruptcy law – respectfully that is something beyond the jurisdiction of this Court.

24. Because the District Court Complaint is not a core proceeding that could be properly brought to this Court, and because plaintiffs' claims in the District Court Complaint arise post-confirmation, this Court should grant UPFJ's Motion for Declaratory Judgment that §4(e) of this Court's Confirmation Order does not Enjoin Plaintiffs' Post-Confirmation Claims on File in the District Court Case. Under the prevailing statutory scheme and interpretive case law, this Court should leave the balance of equities between ERISA and bankruptcy law to the district court hearing the District Court Complaint.

Respectfully submitted,

UNITED PILOTS FOR JUSTICE, INC.

Dated: August 26, 2011

By:           /s/ Kevin McBride            
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