

**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

NOTICE OF FILING

To:	James H.M. Sprayregen	Daniel E. Cohen
	Michael B. Slade	Paul D. Cullen, Dr.
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PLEASE TAKE NOTICE that on July 15, 2011, we caused to be filed electronically with the United States Bankruptcy Court, Northern District of Illinois, **United Pilots for Justice, Inc.'s Response in Opposition to Motion to Reopen Chapter 11 Cases of UAL Corporation and UAL Loyalty Services, Inc. for the Limited Purpose of Enforcing this Court's Prior Orders, Including the Confirmed Plan, Confirmation Order and Discharge Injunction**, a copy of which is attached and herewith served upon you.

Respectfully submitted,

UNITED PILOTS FOR JUSTICE, INC.

By: /s/ Bruce L. Wald
One of its Attorneys

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he caused the foregoing **Notice of Filing and United Pilots for Justice, Inc.'s Response in Opposition to Motion to Reopen Chapter 11 Cases of UAL Corporation and UAL Loyalty Services, Inc. for the Limited Purpose of Enforcing this Court's Prior Orders, Including the Confirmed Plan, Confirmation Order and Discharge Injunction** to be served upon the aforementioned parties via Federal Express and upon all parties indicated on the electronic filing receipt via operation of the Court's electronic filing system this 15th day of July, 2011.

/s/ Bruce L. Wald
One of its Attorneys

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**RESPONSE IN OPPOSITION TO MOTION TO REOPEN
CHAPTER 11 CASES OF UAL CORPORATION AND
UAL LOYALTY SERVICES, INC. FOR THE LIMITED PURPOSE
OF ENFORCING THIS COURT’S PRIOR ORDERS, INCLUDING THE
CONFIRMED PLAN, CONFIRMATION ORDER AND DISCHARGE INJUNCTION**

NOW COMES United Pilots for Justice, Inc., 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 for its Response in Opposition to Motion to Reopen Chapter 11 Cases of UAL Corporation and UAL Loyalty Services, Inc. for the Limited Purpose of Enforcing this Court’s Prior Orders, Including the Confirmed Plan, Confirmation Order and Discharge Injunction (“Response”), states as follows:

Seven Hundred and Five (705) individual participants and beneficiaries in the United Airlines, Inc. Pilot Fixed Benefit Income Plan (the “Pension Plan”) and their designated agent, United Pilots for Justice, Inc. (“UPFJ”), have brought an action against UAL Corporation and other defendants (“United”) in the US District Court, District of Columbia,¹ seeking “appropriate equitable relief” under 29 USC §1370 for violation of ERISA’s Fair Market Value

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

disclosure requirements by United in Pension Benefit Guaranty Corporation (“PBGC”) filings related to the Pension Plan at the time of plan termination.

United subsequently filed this Motion to Reopen Chapter 11 Cases of UAL Corporation and UAL Loyalty Services, Inc. for the Limited Purpose of Enforcing this Court’s Prior Orders, Including the Confirmed Plan, Confirmation Order and Discharge Injunction (“Motion to Reopen”) in response to plaintiffs’ ERISA case currently pending in the District of Columbia.² In addition to the Motion to Reopen pending before this Court, United has also filed a Motion to Dismiss and a Motion to Transfer in the District of Columbia case. Those motions are pending before Hon. James E. Boasberg, United States District Judge for the District of Columbia. Opposition briefs have been filed against both motions by plaintiffs. United has until July 29, 2011 to file its reply briefs. Oral argument has been requested on both motions but has not yet been scheduled by Judge Boasberg. Hereafter, all references to the Motion to Dismiss and the Motion to Transfer are to these pending motions before Judge Boasberg in the United States District Court, District of Columbia.

BACKGROUND

PBGC regulation 29 CFR §4062.4 requires that the net worth of a plan sponsor and each of its controlled group be disclosed to PBGC at fair market value in connection with pension plan termination proceedings under ERISA Title IV. 29 CFR §4062.4(c) states, in part: “A person's *net worth is equal to its fair market value* and fair market value shall be determined *on*

² Defendants have also filed in the ERISA case a Motion to Dismiss and a Motion to Transfer. Those matters are pending before Hon. James E. Boasberg, United States District Judge for the District of Columbia. The deadline for plaintiffs to file opposition briefs is July 15. Defendants then have to July 29 to file reply briefs. Oral argument has been requested on both motions, but has not yet been scheduled.

the basis of the factors set forth below, to the extent relevant; different factors may be considered with respect to different portions of the person's operations.” (emphasis added).

29 CFR §4062.4(c) sets forth the fair market value standard:

(c) Factors for determining net worth. A person's *net worth is equal to its fair market value* and fair market value shall be determined *on the basis of the factors set forth below*, to the extent relevant; different factors may be considered with respect to different portions of the person's operations.

(1) A bona fide sale of, agreement to sell, or offer to purchase or sell the business of the person made on or about the net worth record date.

(2) A bona fide sale of, agreement to sell, or offer to purchase or sell stock or a partnership interest in the person, made on or about the net worth record date.

(3) If stock in the person is publicly traded, the price of such stock on or about the net worth record date.

(4) The price/earnings ratios and prices of stocks of similar trades or businesses on or about the net worth record date.

(5) The person's economic outlook, as reflected by its earnings and dividend projections, current financial condition, and business history.

(6) The economic outlook for the person's industry and the market it serves.

(7) The appraised value, including the liquidating value, of the person's tangible and intangible assets.

(8) The value of the equity assumed in a plan of reorganization of a person in a case under title 11, United States Code, or any similar law of a state or political subdivision thereof. (emphasis added).

Notably, only one such factor, 29 CFR §4062.4(c)(8), relates to valuation disclosures that a plan sponsor may make in bankruptcy court. The remaining factors outline the familiar fair market value factors typically used for valuing assets in commercial transactions.

A member of United's controlled group, United Loyalty Services, LLC, held an asset whose value was grossly misrepresented by United during Plan Termination proceedings—the United frequent flyer Mileage Plus program (hereafter, the “Mileage Plus Asset”). United failed to disclose the Mileage Plus Asset at its Fair Market Value, instead disclosing only its “book value”—an internal value assigned by United for its own accounting purposes. While the evidence will show that United Loyalty Services (and the Mileage Plus Asset) was worth upwards of \$7.5 billion at fair market value, United stated this asset had a negative \$397 million net worth, at “book value.” This is the information originally filed by United in its bankruptcy proceedings before this Court,³ and United apparently never sought to correct the value standard when it disclosed these asset values to PBGC in connection with its Pension Plan Termination. United thus completely violated its statutory duty to give PBGC proper market valuations, when the Pension Plan was terminated by the District Court over five months after the Chapter 11 Confirmation Order. United's violation of ERISA disclosure law (the disclosure of valuable assets at “book value” instead of required “fair market value”) is the core of plaintiffs' case pending in the District of Columbia. Plaintiffs only discovered and confirmed this

³ Plaintiffs do not contest that “book value” for United Loyalty Services may have been appropriate in Bankruptcy Court—only that book value was not proper the proper required statutory valuation standard in pension plan termination proceedings.

misrepresentation recently. In connection with a companion administrative proceeding currently pending before PBGC, plaintiffs first made verbal inquiries, and then followed with written discovery to PBGC regarding the documents filed by United regarding the value of the United Loyalty Services. On February 11, 2011, plaintiffs received back written responses from PBGC that revealed, for the first time to plaintiffs' knowledge, that United made its PBGC filings by disclosing only "book value" for the Mileage Plus Asset. At the bottom of page 108 of the bankruptcy court document filed with PBGC by United regarding the value of Mileage Plus Asset is the following boilerplate disclaimer language:

Current Market Value. It would be prohibitively expensive, unduly burdensome and an inefficient use of estate assets for the Debtors to obtain current market valuations of all of their assets. Accordingly, unless otherwise indicated, *net book values* are reflected on the Debtors' Schedules and Statements. *For this reason, amounts ultimately realized will vary from net book value and such variance may be material.* (emphasis added).

Plaintiffs allege in the Second Amended Complaint, based on this document, that United misrepresented the value of United Loyalty Services—including the Mileage Plus Asset—to PBGC (and plaintiffs) at "book value" instead of "fair market value", and thereby violated 29 USC §1362 and other ERISA provisions. Plaintiffs seek "appropriate equitable relief" under ERISA law for these violations by United.

United has defended, in part, by claiming it did not need to file complete fair market value documents with PBGC because PBGC may, under 29 CFR §4062.6(c), proceed with plan termination even if incomplete information has been filed. United argues that this somehow excused it from full compliance with PBGC disclosure requirements. Plaintiffs oppose United's

explanation by arguing, in part, that just because PBGC *may* proceed with plan termination based on incomplete net worth information, the regulation *does not excuse* United from full compliance in the first instance. Plaintiffs cite a ruling of the Seventh Circuit Court of Appeals, *Teamster Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 525 (7th Cir.1985) in a closely analogous ERISA case. In denying the preclusive effect of an earlier New York judgment excusing a trustee from making certain investigative inquiries that would have benefited the pension plan, the Seventh Circuit Court explained: “The parties have cited no case--and we have found none--in which the failure of a trustee to investigate on behalf of the beneficiaries excused some other party from complying with a legal obligation to tell the truth.” *Id.*, 762 F.2d at 526. And as the Seventh Circuit Court did in *Teamster Local 282*, plaintiffs argue in opposition to United’s Motion to Dismiss that the District of Columbia Court should reject United’s res judicata arguments in favor of a sound, underlying policy that “the failure of one legal safeguard”—a regulation allowing PBGC to make net worth determinations based on partial information—“is not a very good reason to extinguish another legal safeguard ([United’s] duty to tell the whole truth” (i.e., provide complete and accurate information) under 29 USC §1362 and 29 CFR §4062.4,6. *See id.*, 762 F.2d at 527.

ARGUMENT

United’s Motion to Dismiss and Motion to Transfer are pending in the District of Columbia, and thus United’s Motion to Reopen these proceedings is, at best, premature. This Court should deny the Motion to Reopen on that basis, as well as for the other reasons set out in this memorandum.

1. United argues in its Motion to Reopen that “[r]eopening these chapter 11 cases would permit the Plaintiffs complaint, upon its transfer to the Northern District of Illinois, to be referred to

this Court...United would then ask this Court to rule on its Motion to Dismiss, and for any other applicable relief.” Motion to Reopen, p.7, ¶15. This argument simply assumes that United’s Motion to Transfer, currently pending before Judge Boasberg, will be granted. In its hurry to reopen these bankruptcy proceedings and its attempt to side step an over seven billion dollar reporting error, United puts the proverbial “cart before the horse.” Unless and until Judge Boasberg transfers plaintiffs’ case to the Northern District of Illinois, United’s Motion to Reopen is premature and should be denied on that independent basis.

2. United asks this Court “to reopen the chapter 11 case 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 [District of Columbia] Complaint.” Motion to Reopen, p.7, ¶15. The Seventh Circuit Court of Appeals has explained the procedural order of resolving claims of res judicata, as follows:

At least in federal litigation, though, the first court does not decide the preclusive effect of its judgments. The second court must decide for itself what matters were settled in the first case. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

Teamster Local 282 Pension Trust Fund v. Angelos, supra, 762 F.22 at 525. Plaintiffs recognize that equitable application of res judicata is more narrow than a bankruptcy court’s evaluation of the scope of a Chapter 11 confirmation order. However, United has already asked the District of Columbia Court to evaluate this Court’s Chapter 11 Confirmation Order, and under the principle of comity articulated in *Teamster Local 282*, this Court should defer to the District of Columbia’s equitable evaluation.

3. The US Supreme Court has recently addressed the scope of an ERISA equitable remedy in *Cigna Corp. v. Amara, supra*, finding that “appropriate equitable relief” includes “those categories of relief” that, traditionally speaking (i.e., prior to the merger of law and equity) ‘were typically available in equity. *Id.*, slip op. at 17. In making its determination in equity, the District Court may, of course, considering *all* equitable concerns including, no doubt, bankruptcy policy or goals, as well as the equitable interests of United with respect to this Court’s Chapter 11 Confirmation Order.
4. By contrast, equitable evaluation of plaintiffs’ ERISA claims as against the Chapter 11 Confirmation Order by this Court would be more limited, since this Court’s core bankruptcy jurisdiction does not extend to adjudication of Plan Termination issues. Therefore this Court should logically defer to the United States District Court that has full authority to evaluate ERISA claims, and may also properly consider bankruptcy policies and goals, and United’s bankruptcy interests. See *PBGC v. LTV Corp.*, 496 U.S. 633, 645 (1990), for how PBGC can restore a pension plan, notwithstanding a bankruptcy and even if such restoration conflicts with bankruptcy law.
5. In asking this Court to reopen and, effectively, bar plaintiffs’ ERISA claims, United fails to account for specific Congressional findings and policy declarations that favor plaintiffs’ ERISA claims to be heard on the merits—something that has never yet happened in bankruptcy proceedings before this Court (or any other bankruptcy court, for that matter). Plaintiffs’ core claims are brought under 29 USC §1370(a). Congress added §1370 to ERISA Title IV as part of the Single-Employer Pension Plan Amendments Act of 1986, P.L. 99-272 (“SEPPAA”). To summarize 29 USC §1001b, Congress found, *inter alia*, that--

(2) the *continued well-being and retirement income security* of millions of workers, retirees, and their dependents are directly affected by such plans; and

(4) the current termination insurance system in some instances *encourages employers to terminate pension plans, evade their obligations* to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

29 USC §1001b(a); (emphasis added).

Congress then declared its policy—

(3) *to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits*; [and]

(4) to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship.

29 USC §1101b(c); (emphasis added).

In addition, one year after Congress gave individual plan participants the right to bring direct action against a plan sponsor related to plan termination violations, it also enhanced expanded the §1362 Pension Liability definition. The 1987 Pension Protection Act (“PPA”) enacting these changes, made employers liable, for the first time, to PBGC for the *full amount of unfunded benefit liabilities* to all participants and beneficiaries under the plan. *See*

29 U.S.C. § 1362. It also applied the reorganization test to "[t]he plan sponsor or *any* member of its controlled group," whereas SEPPAA applied it only to each "substantial member" of the control group. This expansion of the scope of §1362 Pension Liability adds an additional layer of Congressional intent that employers should not be able to "terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers." 29 USC §1001b(b).

6. It is difficult to overstate how seriously United's offense violated the spirit and specific statutory provisions of the Congressional findings and purpose authorizing ERISA claims by plan participants, as set out in 29 USC §1101b. According to §1001b(a), the 1986 amendments were adopted to cure the old ERISA system which "in some instances *encourage[d] employers to terminate pension plans [and] evade their obligations to pay benefits.*" (emphasis added).

United, the Pension Plan sponsor, completely ignored the ERISA requirement that the net worth determination for determining its 29 USC §1362 liability must be based a fair market value standard. Instead it disclosed one of its most valuable assets, the Mileage Plus Asset at "book value"—an arbitrary value established by United for its own accounting purposes. United's stated justification for using book value was the assertion that it would be "...prohibitively expensive, unduly burdensome and inefficient..." to obtain current market values of its assets. Based on public information, United apparently paid in excess of \$325 million in legal and professional fees in bankruptcy and pension termination proceedings. United has never explained how it was that it would have been "prohibitively expensive" to obtain Fair Market Value valuations for the Mileage Plus Asset. A value opinion for Mileage Plus would, in all probability, been obtainable at a cost of anywhere from \$30,000 to

\$300,000. Even at the high end, this cost would have been .1% (one-tenth of one percent) of the overall legal and professional fees paid by United—hardly a rounding error. Plaintiffs argue in the District of Columbia case that this was a violation of 29 USC §1362 which did not arise under the Bankruptcy Code, and for which plaintiffs are entitled to relief under 29 USC §1370. Because of the ERISA statutory scheme, the District of Columbia Court is best situated to evaluate plaintiffs’ claims, and will presumably take into account bankruptcy policy and goals.

7. United also argues in this Motion to Reopen that plaintiffs’ complaint in the District of Columbia is precluded by two agreements: one agreement between United and PBGC, and a second agreement between United and ALPA, which were approved by court order in the Northern District of Illinois. Again, these arguments that Plaintiffs were denied standing and their particular claims were never litigated or decided on the merits, are already almost fully briefed before Judge Boasberg in the Motion to Dismiss. Plaintiffs have argued in opposition to the Motion to Dismiss, *inter alia*, that the PBGC Settlement Agreement purports to release the “plan” but not plan participants, and that the exculpatory clauses of that agreement is void as a matter of public policy under ERISA. See §29 USC §1110.⁴ Again, these are ERISA determinations that the District Court of Columbia is fully empowered to evaluate, and this Court should defer for that reason.
8. As superficially compelling as United’s Motion to Reopen may appear at first blush, it is not a proper motion since this Court does not have and has never had jurisdiction over the Pension Plan post-termination exclusively ERISA issues being presented by Plaintiffs.

⁴ 29 USC §1110 provides: “Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.”

Further, the subject matter of United's post-confirmation conduct at the time of Plan Termination is not a core proceeding properly before this Court. See *In re United Air Lines, Inc.*, 337 B.R. 904, 910 (N.D.Ill.,2006).

For all these reasons, this Court should deny United's Motion to Reopen Chapter 11 Cases of UAL Corporation and UAL Loyalty Services, Inc. for the Limited Purpose of Enforcing this Court's Prior Orders, Including the Confirmed Plan, Confirmation Order and Discharge Injunction.

Respectfully submitted,

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