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

In Re:	)	Chapter 11
	)	
UAL CORPORATION, *et al.*,	)	Case No. 02 B 48191
	)	(Jointly Administered)
Reorganized Debtor.	)	
	)	Honorable Eugene R. Wedoff

RESPONSE IN OPPOSITION TO MOTION FOR ORDER HOLDING PLAINTIFFS IN CONTEMPT OF COURT FOR PROCEEDING WITH LITIGATION IN VIOLATION OF THE 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 for Order Holding Plaintiffs in Contempt of Court for Proceeding with Litigation in Violation of the Discharge Injunction ("Motion for Contempt") states that Plaintiffs and their counsel should not be held in contempt for the following reasons:

- There exist, at minimum, good faith arguments that this Court's Confirmation Order does not reach the claims of Plaintiffs' D.C. Case in that (a) the Plaintiffs' claims arguably did not exist at the time the Confirmation Order was entered; or at least, an issue of fact exists on that question and (b) exclusive subject matter jurisdiction over the D.C. Case is vested in the district courts by statute;
- Because a good-faith basis exists for Plaintiffs' arguments, the scope and reach of this Court's Confirmation Order with respect to the Plaintiffs' D.C. Case is not unambiguous and,

in any event, proof of alleged non-compliance does not meet the "clear and convincing" standard required for entry of a contempt order;

- UPFJ reasonably believed at all times that it was in compliance with this Court's previous orders, including the Confirmation Order; and
- United did not give Plaintiffs or their counsel any advance notice of the intent to seek sanctions and a contempt order before filing and serving the Motion to Reopen on June 7, 2011—the same day United filed its Motion to Dismiss and Motion to Transfer in the D.C. Case. United therefore did not comply with the procedural requirements of F.R.Bankr.P. Rule 9011in advance of seeking sanctions.

I. BACKGROUND

1. This Court entered its Confirmation Order in the above captioned cases (the "Chapter 11 Cases") on January 20, 2006, (EOD 14829).
2. The Confirmation Order did *not* specifically include a class of individual claims of participants in the United Airlines, Inc. Pilot Fixed Benefit Income Plan (the "Pension Plan");[1] rather, insofar as the Pension Plan is concerned, the Confirmation Order only identifies claims of Pension Benefit Guaranty Corporation ("PBGC"), not claims of the individual Pension Plan participants.
3. On information and belief, Plaintiffs did not receive ballots to vote on Debtors' Plan of Reorganization related to their claims with respect to the Pension Plan.

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[1] Nowhere in the Reorganization 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.

4. On June 13, 2006, the US District Court, Northern District of Illinois, Lefkow, J. presiding, entered its order terminating the Pension Plan.[2]

5. Commencing on or about April 30, 2010, Plaintiffs began receiving their individual notification from the PBGC regarding reduced retirement benefits to be paid under the Pension Plan, as modified by PBGC rules and regulations related to pension plan termination. Notably, not all plan participants in the Pension Plan suffered equal benefit cuts—in fact, some Plan Participants, based on age, retirement date and other factors, received full payment of PBGC guaranteed benefits.

6. Believing that the injunction provisions of this Court's Confirmation Order pertain to claims in existence prior to the December 9, 2002 Chapter 11 filings and the subsequent Confirmation Order, Plaintiffs commenced an ERISA proceeding in the United States District Court for the District of Columbia ("the D.C. Case") [3] 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"). The Second Amended Complaint in the D.C. Case alleges that United violated ERISA in connection with Pension Plan termination by disclosing its Mileage Plus asset at an internally assigned "book

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[2] *Pension Ben. Guar. Corp. v. United Air Lines, Inc.*, 436 F.Supp.2d 909 (N.D. Ill., 2006)

[3] 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.

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.[4]

7. Plaintiffs were adversely affected by United's ERISA violation in connection with Pension Plan termination within the meaning of 29 USC §1370(a). The adverse effect on plaintiffs occurred—and plaintiffs each suffered "actual harm"—when 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 ("Board Determination Letters") to each individual plaintiff. This process occurred on and after April 30, 2010, with the bulk of such determination letters issued by PBGC to individual plaintiffs during September – November, 2010.[5] Thus, the individual claims alleged in the D.C. Case did not exist prior to receipt by individual Plaintiffs of the Board Determination Letter from PBGC.
8. On August 17, 2011, this Court issued its order reopening the Chapter 11 Cases.

II. A CONTEMPT ORDER IS NOT JUSTIFIED IN THIS CASE

9. A bankruptcy court's power to hold a party in contempt for violation of a discharge order is exercised "only when (i) the party failed to comply with a clear and unambiguous order; (ii) proof of noncompliance is clear and convincing, and (iii) the party has not diligently attempted to comply in a reasonable manner." *In re: UAL Corp*. (*Nazir*), 398 B.R. 243, 246

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[4] 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.

[5] Declaration of Kevin McBride dated August 26, 2011 ¶ 6.

(N.D. Ill. 2008), *citing In re Chief Executive Officers Club, Inc.*, 359 B.R. 527, 535 (S.D.N.Y. 2007). The facts in this case do not justify entry of a contempt order.

A. Plaintiffs have Good Faith Arguments that this Court's Confirmation Order does not Preclude Claims in the D.C. Case

10. Plaintiff's position that this Court's Confirmation Order does not preclude Plaintiffs' claims in the D.C. Case has good faith bases, and arises from the following facts and law:

a. The final order terminating the Pension Plan was entered by Judge Lefkow on June 13, 2006, whereas the Confirmation Order was entered by this Court 5 ½ months earlier, on January 20, 2006. Plaintiffs' Claims in the D.C. Case relate to termination of the Pension Plan. Because Pension Plan termination *followed* Bankruptcy Plan Confirmation by 5 ½ months, it is (at the very least) arguable that claims related to Pension Plan termination are post-confirmation claims not covered by the Confirmation Order. *See*, *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).[6]

b. Plaintiffs did not receive individual Board Determination Letters from the PBGC regarding reduced retirement benefits to be paid to those individuals under the Pension Plan until on and after April 10, 2010, approximately 4 years and 3 months post-confirmation. Plaintiffs could not have filed their ERISA claims in the D.C. Case until

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[6] Even if the Confirmation Order covers pre-confirmation conduct by United, it is at least an issue of fact as to whether United's ERISA violations occurred before or after the Confirmation Order, inasmuch as its ERISA disclosure obligations are set by the PBGC, not the Bankruptcy Court. *See*, 29 U.S.C. §1362(d)(1)(C) ("For purposes of this paragraph, determinations of net worth shall be made as of a day chosen by the corporation (during the 120-day period ending with the termination date) and shall be computed without regard to any liability under this section.") Because the date chosen by PBGC for net worth disclosure is not known, and because United arguably had a continuing duty of disclosure until June 13, 2006, an issue of fact remains as to the actual disclosure date.

final determination by PBGC under 29 C.F.R. §4022 of the pension benefit amount actually payable because "actual harm" to plaintiffs under ERISA §1370(a) could not have been determined until receipt of Board Determination Letters. In *Fogel v. Zell*, 221 F.3d 955 (7th Cir. 2000) the Seventh Circuit Court of Appeals ruled that where a plaintiff has "no actual legal right, contingent or otherwise," no bankruptcy claim exists. *Id.*, 221 F.3d at 960. *Fogel v. Zell* (at the very least) supports the good-faith argument that Plaintiffs' claims in the D.C. Case are solely *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.

c. Jurisdiction to hear Plaintiffs' ERISA claims in the D.C. Case rests exclusively with the district courts. 29 USC §1370(c) ("The district courts of the United States shall have exclusive jurisdiction of civil actions under this section.") Further, district courts have broad equitable powers to enter "appropriate equitable relief" in ERISA cases. *See CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011). It thus falls to the district courts to hear Plaintiffs' D.C. Case—a court that can balance all equities between ERISA and bankruptcy law – respectfully, something that is beyond the jurisdiction of this Court.

11. For the above reasons, Plaintiffs' claims in the D.C. Case arguably did not exist at the time the Confirmation Order was entered; or at least, issues of fact exist on that question. Plaintiffs therefore had, and continue to have, good-faith arguments that this Court's Confirmation Order does not preclude Plaintiffs claims in the D.C. Case.

B. <u>The Scope and Reach of this Court's Confirmation Order With Respect to the D.C. Case is Not Unambiguous</u>

12. For the purposes of a civil contempt order, the term "'[c]lear and unambiguous' means that the clarity of the order must be such that it enables the enjoined party "to ascertain from the four corners of the order precisely what acts are forbidden." *In re Chief Executive Officers Club, Inc.*, *supra*, 359 B.R. at 535. Further, "In the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate `reasonable certainty' that a violation occurred." *Id.* Neither standard is met in the present case for the following reasons:

   a. The Confirmation Order became effective 5 ½ months before Pension Plan termination became effective. It is therefore not clear from the four corners of the Confirmation Order that the D.C. Case is necessarily covered. Further, Because of this time differential between Pension Plan termination and the Bankruptcy Confirmation Order, it cannot be shown to "a reasonable certainty" that a violation of this Court's Confirmation Order occurred—particularly where United's ERISA disclosure obligations were set by PBGC, that date is unknown, and United had or may have had continuing duties to disclose to PBGC after the Confirmation Order. *See*, fn. 8, *supra*.

   b. The Confirmation Order does *not* specifically include a class of individual claims of participants relating to termination of the Pension Plan. Insofar as Pension Plan termination is concerned, the Confirmation Order only identifies claims of Pension Benefit Guaranty Corporation ("PBGC"), not claims of the individual Pension Plan participants. Plaintiffs' individual claims arise under 29 USC §1370. A plain reading of this statute in the context of ERISA Title IV allows (at the very least) an argument that

individual ERISA claims are not dependent on, or subject to corresponding bankruptcy proceedings—particularly where no class of claims is specifically addressed in bankruptcy and where individual pension plan participants had no right to vote on bankruptcy reorganization plan confirmation. In fact, 29 U.S.C. §1110 provides that "[e]xcept 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." This provision also supports the argument that any agreement between PBGC and United that purports to relieve United from responsibility to Plaintiffs as alleged in the D.C. Case would be void, in any event, as against public policy. Therefore, (i) it is again not clear from the four corners of the Confirmation Order that the D.C. Case is necessarily barred by the Confirmation Order, and (ii) it cannot be shown to "a reasonable certainty" that a violation of this Court's Confirmation Order occurred.

c. The controlling case holding of *Fogel v. Zell*, which holds that no bankruptcy claim exists in situations where a plaintiff has "no actual legal right, contingent or otherwise,"[7] supports the good-faith argument that Plaintiffs' claims in the D.C. Case fall outside the four corners of the Confirmation Order because Plaintiffs did not have an actual legal right, contingent or otherwise, until PBGC made a formal determination of their

[7] *Fogel v. Zell, supra*, 221 F.3d at 960.

respective pension benefit rights, and informed each plaintiff of those rights pursuant to the Board Determination Letters issued on and after April 30, 2010.

d. The exclusive jurisdiction provisions of 29 U.S.C. §1370(c), vesting jurisdiction in the district courts of the United States, supports the good-faith argument that Plaintiffs' claims in the D.C. Case fall outside the four corners of the Confirmation Order because, respectfully, this Court does not have jurisdiction to hear the ERISA claims presented in the D.C. Case in any event.

13. For these reasons, this Court's Confirmation Order does not allow the Plaintiffs to ascertain from the "four corners of the Confirmation Order" that the D.C. Case is an act in violation of the order that is "precisely forbidden." *In re Chief Executive Officers Club, Inc.*, *supra*, 359 B.R. at 535. Further, it cannot be shown by clear and convincing proof with "reasonable certainty" that a violation occurred. *Id*.

C. <u>UPFJ Reasonably Believed at all Times that it was in Compliance With this Court's Previous Orders, including the Confirmation Order</u>

14. For the reasons outlined above, UPFJ's lead counsel Kevin McBride believed at all times that there was compliance with this Court's previous orders, including the Confirmation Order. [8] Nevertheless, UFPJ and its lead counsel expected that United would likely raise bankruptcy proceedings and the PBGC-United Settlement Agreement as affirmative defenses in a motion to dismiss in the D.C. Case. Indeed, following two landmark cases interpreting F.R.Civ.P. Rule 12(b), *Bell Atlantic Corp v. Twombly*[9] and *Ashcroft v. Iqbal*,[10] it has become almost

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[8] Affidavit of Kevin McBride dated September 29, 2011, ¶3

[9] *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007)

standard fare for defendants to test the boundaries of a complaint filed in federal district court by filing a Rule 12(b) motion.[11] What was not known or expected is that United would also file the Motion to Reopen and seek sanctions and a contempt order for the very act of having filed and served the Second Amended Complaint. This came entirely as a surprise to counsel.[12] With competing legal positions staked out in conversations between counsel Plaintiffs counsel believed these positions would be resolved by the Court in the D.C. Case. Counsel never expected, or had advance notice, that United would take the position the filing of the D.C. Case was somehow so egregious that *just filing* the case was an act "precisely forbidden" by this Court's Confirmation Order. *See*, *In re Chief Executive Officers Club, Inc.*, *supra*, 359 B.R. at 535.

15. Furthermore, nothing in United's interactions with counsel prior to filing its Motion to Reopen suggested that United intended to seek a contempt charge and sanctions. Plaintiffs' original complaint in the D.C. Case was filed on December 28, 2010, but was not served until over 4 months later, on April 7, 2011. Numerous communications with United and its counsel occurred in that time span, but United never made a demand that the D.C. Case must

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[10] *Ashcroft v. Iqbal*, __U.S.__, 129 S.Ct. 1937 (2009)

[11] Plaintiffs' acknowledge that United has an *arguable* position that this Court's Confirmation Order would preclude the D.C. Case. But it is equally true, for the reasons set forth above, that Plaintiffs also have an arguable position that this Court's Confirmation order does *not* preclude the D.C. Case. What is more, because of the jurisdictional limitations of a bankrutpcy court under 28 U.S.C. §157 and the exclusive jurisdiction clause under ERISA Title IV that directly relates to Plaintiffs ERISA claims, it is (at least) reasonably arguable that the district courts are the *only* venue in which Plaintiffs claims under ERISA 29 U.S.C. §1370 can be heard.

[12] Affidavit of Kevin McBride dated September 29, 2011, ¶5

be dismissed or a contempt order would be sought against Plaintiffs and its counsel.[13] As such, United did not comply with the "safe harbor" requirements of F.R.Bankr.P. Rule 9011(c)(1)(A) in advance of seeking sanctions. *See*, *e.g.*, *In re Kitchin*, 327 B.R. 337, 359 (Bankr. N.D. Ill., 2005).

16. On the *day of filing* the original complaint, December 28, 2010, UPFJ lead counsel Kevin McBride contacted United's general counsel, Brett Hart, informing him that the case was on file. A copy of the complaint was also forwarded by email to Mr. Hart on the original date of filing.[14]

17. The email from McBride to Mr. Hart reads as follows:

> *Brett,*
>
> *I am legal counsel for United Pilots for Justice, Inc. and its individual members. We filed earlier today a complaint in the US District Court, District of Columbia, in behalf of UPFJ and its members, alleging ERISA violations against UAL Corp and its board of directors as constituted in 2004-05.*
>
> *A courtesy copy of the complaint is attached. This is not an effort to effect service—only a copy to you as general counsel so you are aware of this case and can get on top of it, as you see fit. We have not yet sent the complaint out for service.*
>
> *FYI, we are also sending today via FedEx a copy of the complaint to Mr. Israel Goldstein, Chief Counsel of PBGC, with a hard copy of the letter and complaint to you—also via FedEx.*
>
> *I realize complaints like this are contentious for all parties involved. Nevertheless, after reviewing and deciding how you wish to handle this matter, if you would like to try to sit down and discuss in*

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[13] Affidavit of Kevin McBride dated September 29, 2011, ¶¶5 and 9

[14] Affidavit of Kevin McBride dated September 29, 2011, ¶6

person, and/or with your outside counsel, I am happy to do so. I believe it is always worth trying to resolve a case early, if at all possible, before launching into full-scale adversarial proceedings.

I can be reached at my office during office hours: 310/265-4427; or on my cell phone at any time: 310/714-1933.

Yours truly,

Kevin McBride

18. Two days later, on December 30, 2010, Mr. Hart replied as follows:[15]

Kevin -- thank you for providing a courtesy copy of the complaint. We will review and be in touch. I ask that you refrain from personally serving board members -- we can discuss an appropriate accommodation. You, your colleagues and your families have a safe New Year.

Best regards,

Brett

19. At the request of United's general counsel, UPFJ refrained from serving United's board members, as a professional courtesy, and waited to hear from United about a possible meeting for settlement discussions proposed in McBride's December 28, 2010 email to Mr. Hart. Thereafter, on or about February 21, 2011, Plaintiffs' counsel were contacted by outside counsel for United. Several conversations took place among counsel, with numerous follow-on emails. None of these emails or conversations put Plaintiffs on notice that United intended to seek sanctions or a contempt order.[16] By email dated May 4, 2011, counsel for United agreed to accept service of the Second Amended Complaint on all defendants,

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[15] Affidavit of Kevin McBride dated September 29, 2011, ¶7

[16] Affidavit of Kevin McBride dated September 29, 2011, ¶9

provided defenses were not waived. In exchange, Plaintiffs agreed to a 60-day extension of time for United's counsel to answer or otherwise respond to the Second Amended Complaint. On June 3, 2011, United's counsel notified Plaintiffs' counsel that United intended to file a motion to dismiss and a motion to transfer in the D.C. Case. Plaintiffs still were not put on notice that United intended to file the Motion to Reopen in this Court. On the date United's response was due, June 7, 2011, United filed its moving briefs in the DC Case, but *also* filed its Motion to Reopen with this Court. To the best of counsel for Plaintiffs' knowledge, this is the first time UPFJ or its counsel became aware that United intended to argue that the Chapter 11 Cases should be reopened and that the *act of filing* the D.C. Case violated this Court's Confirmation Order.[17]

20. F.R.Bankr.P. Rule 9011(c)(1)(A) provides a 21-day "safe harbor" provision before sanctions can be sought, giving the non-movant the opportunity to withdraw or corrected the "challenged paper, claim, defense, contention, allegation, or denial." In this case, no such notice was given by United at any time from the date the original Complaint was filed (December 28, 2010) to the date the Motion to Reopen was filed (June 7, 2011). In the interim, United had agreed to accept service of the Second Amended Complaint —the very document United now challenges in its Motion for Contempt. [18]

21. Sixty days *after* accepting service of the Second Amended Complaint, United filed a Motion to Dismiss and Motion to Transfer in the D.C. Case, and also filed its Motion to Reopen in

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[17] Affidavit of Kevin McBride dated September 29, 2011, ¶12

[18] The Second Amended Complaint was the first complaint in the D.C. Case actually served. The original Complaint and the First Amended Complaint were filed, but not served.

this Court. This was the first time Plaintiffs or their counsel had any idea that United intended to pursue a claim for sanctions and contempt for the act of filing the Second Amended Complaint.

22. United had more than three months from the time it received the original Complaint until service of process occurred. United thereafter had an additional 60 days to prepare and file any responsive motions. This amounts to over five months of time within which United could have filed the Motion to Reopen. Instead, United waited to file its Motion to Reopen until the same day it was required to file responsive pleadings in the D.C. Case—and no advance notice was given to Plaintiffs about United's intent to seek sanctions and a contempt order. Had United first filed its Motion to Reopen *before* Plaintiffs served their complaint in the D.C. Case, the arguments for contempt might be different. Indeed, United could have preempted service of the Second Amended Complaint by simply filing its Motion to Reopen sometime within the three months after the original Complaint was filed and the Second Amended Complaint was served, or within the two additional months it had to respond to the Second Amended Complaint in the D.C. Case. But United did not do this. UPFJ therefore respectfully submits that Plaintiffs were not put on notice of United's intent to seek sanctions or a contempt order; Plaintiffs never had the safe harbor opportunity required by F.R.Bankr.P. Rule 9011(c)(1)(A); and that therefore sanctions are not proper in this case.[19]

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[19] UPFJ acknowledges this Court's initial comments from the bench at the August 17, 2011 hearing on the Motion to Reopen that this Court viewed the preferred protocol to have been for UPFJ to have sought bankruptcy court authorization to file the D.C. Case prior to its filing. Had UPFJ been notified of the United's contempt position, it would have had the option of following this protocol.

23. Further, United's agreement to accept service of process of the Second Amended Complaint, the first pleading in the D.C. Case actually served on United, should act as an estoppel of any sanction motion related to filing of the Second Amended Complaint.
24. UPFJ and its counsel therefore believed at all times that it was in compliance with this Court's previous orders, including the Confirmation Order, and nothing was demanded by United that would suggest anything to the contrary.

II. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that a contempt order in this case is not appropriate or that, alternatively, United is estopped from seeking sanctions and a contempt order by failing to comply with F.R.Bankr.P. Rule 9011(c)(1)(A) and by agreeing to accept service of the Second Amended Complaint.

Dated: September 29, 2011

Respectfully submitted,

UNITED PILOTS FOR JUSTICE, INC.

By: *<u>/s/ Kevin McBride</u>*
One of Its Attorneys

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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

AFFIDAVIT OF KEVIN McBRIDE DATED SEPTEMBER 29, 2011

1. I am lead counsel for United Pilots for Justice, Inc. and 703 named plaintiffs in the case pending in the United States District Court, District of Columbia, D.C. 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 (the "D.C. Case").
2. I am responsible for putting together the legal theories and claims in the D.C. Case.
3. In preparing the pleadings and briefs in the D.C. Case, I believed at all times that there was compliance with this Court's previous orders, including the Confirmation Order, for the legal and factual reasons set forth in UPFJ's Response in Opposition to Motion for Order Holding Plaintiffs in Contempt of Court for Proceeding with Litigation in Violation of the Discharge Injunction, the document filed with this Court on even date herewith.
4. I did believe it was likely that United would raise in some fashion the existence of bankruptcy proceedings and the PBGC-United Settlement Agreement as affirmative defenses in a motion to dismiss in the D.C. Case. Indeed, following two landmark cases interpreting

F.R.Civ.P. Rule 12(b), *Bell Atlantic Corp v. Twombly*[1] and *Ashcroft v. Iqbal*,[2] it been my experience that most, if not all, defendants wish to test the boundaries of a complaint filed in federal district court by filing a Rule 12(b) motion.

5. What was not known or expected is that United would also file the Motion to Reopen and seek sanctions and a contempt order for the very act of having filed and served the Second Amended Complaint. This came entirely as a surprise to me, as I expressed in a telephone call to United's counsel on the date the Motion to Reopen was served, June 7, 2011.

6. On the day of filing the original complaint, December 28, 2010, I contacted United's general counsel, Brett Hart, by email informing him that the case was on file. A copy of the complaint was also forwarded by email to Mr. Hart on the original date of filing. My email to Mr. Hart (attached hereto as Exhibit A) read as follows:

> *Brett,*
>
> *I am legal counsel for United Pilots for Justice, Inc. and its individual members. We filed earlier today a complaint in the US District Court, District of Columbia, in behalf of UPFJ and its members, alleging ERISA violations against UAL Corp and its board of directors as constituted in 2004-05.*
>
> *A courtesy copy of the complaint is attached. This is not an effort to effect service—only a copy to you as general counsel so you are aware of this case and can get on top of it, as you see fit. We have not yet sent the complaint out for service.*

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[1] *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007)

[2] *Ashcroft v. Iqbal*, __U.S.__, 129 S.Ct. 1937 (2009)

> *FYI, we are also sending today via FedEx a copy of the complaint to Mr. Israel Goldstein, Chief Counsel of PBGC, with a hard copy of the letter and complaint to you—also via FedEx.*
>
> *I realize complaints like this are contentious for all parties involved. Nevertheless, after reviewing and deciding how you wish to handle this matter, if you would like to try to sit down and discuss in person, and/or with your outside counsel, I am happy to do so. I believe it is always worth trying to resolve a case early, if at all possible, before launching into full-scale adversarial proceedings.*
>
> *I can be reached at my office during office hours: 310/265-4427; or on my cell phone at any time: 310/714-1933.*
>
> *Yours truly,*
>
> *Kevin McBride*

7. Two days later, on December 30, 2010, Mr. Hart replied by email to me (attached hereto as Exhibit B) as follows:

> *Kevin -- thank you for providing a courtesy copy of the complaint. We will review and be in touch. I ask that you refrain from personally serving board members -- we can discuss an appropriate accommodation. You, your colleagues and your families have a safe New Year.*
>
> *Best regards,*
>
> *Brett*

8. At the request of United's general counsel, UPFJ refrained from serving United's board members, as a professional courtesy, and waited to hear from United about a possible meeting for settlement discussions proposed in McBride's December 28, 2010 email to Mr. Hart. Thereafter, on or about February 21, 2011, Plaintiffs' counsel were contacted by

outside counsel for United. Several conversations took place among counsel, with numerous follow-on emails.

9. I have reviewed each of the emails mails received by United's counsel and have reflected on each conversation with opposing counsel. There is no email or conversation in which counsel for United put me on notice that United intended to seek sanctions or a contempt order prior to filing the actual Motion to Reopen on June 7, 2011.

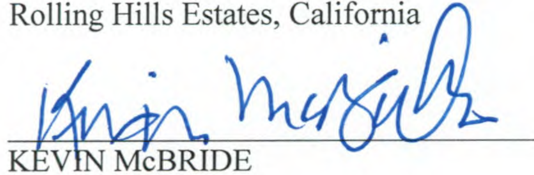
10. By email dated May 4, 2011, counsel for United agreed to accept service of the Second Amended Complaint on all defendants, provided defenses were not waived. In exchange, Plaintiffs agreed to a 60-day extension of time for United's counsel to answer or otherwise respond to the Second Amended Complaint.

11. On June 3, 2011, United's counsel notified me that United intended to file a motion to dismiss and a motion to transfer in the D.C. Case. Plaintiffs still were not put on notice that United intended to file the Motion to Reopen in this Court.

12. On the date United's response was due, June 7, 2011, United filed its moving briefs in the DC Case, but *also* filed its Motion to Reopen with this Court. To the best my knowledge, this is the first time that I or UPFJ or any of its counsel became aware that United intended to argue that the Chapter 11 Cases should be reopened and that the *act of filing* the D.C. Case violated this Court's Confirmation Order.

DATED: September 29, 2011

Rolling Hills Estates, California



KEVIN McBRIDE

State of California

County of Los Angeles

On September 29, 2011 before me, Disporn Wanthivanond-Bailey, Notary Public,

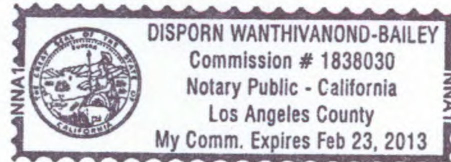
personally appeared **Kevin McBride**, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public

(Notary Seal)



Kevin McBride

From:	Kevin McBride <km@mcbride-law.com>
Sent:	12/29/2010 12:56 PM
To:	'brett.hart@united.com'
Cc:	David A. Cohen; Daniel E. Cohen (DEC@cullenlaw.com)
Subject:	new complaint filed against UAL
Attachments:	Final Complaint 12-29-10, Ct Stamped.pdf

Brett,

I am legal counsel for United Pilots for Justice, Inc. and its individual members. We filed earlier today a complaint in the US District Court, District of Columbia, in behalf of UPFJ and its members, alleging ERISA violations against UAL Corp and its board of directors as constituted in 2004-05.

A courtesy copy of the complaint is attached. This is not an effort to effect service—only a copy to you as general counsel so you are aware of this case and can get on top of it, as you see fit. We have not yet sent the complaint out for service.

FYI, we are also sending today via FedEx a copy of the complaint to Mr. Israel Goldstein, Chief Counsel of PBGC, with a hard copy of the letter and complaint to you—also via FedEx.

I realize complaints like this are contentious for all parties involved. Nevertheless, after reviewing and deciding how you wish to handle this matter, if you would like to try to sit down and discuss in person, and/or with your outside counsel, I am happy to do so. I believe it is always worth trying to resolve a case early, if at all possible, before launching into full-scale adversarial proceedings.

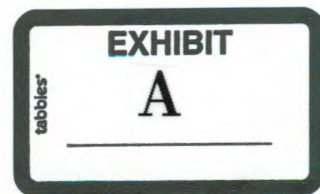
I can be reached at my office during office hours: 310/265-4427; or on my cell phone at any time: 310/714-1933.

Yours truly,

Kevin McBride
www.mcbride-law.com
(310) 714-1933 (cell)

McBride Law
609 Deep Valley Drive Suite 200
Rolling Hills Estates, CA 90274
(310) 265-4427 (tel)
(310) 265-4431 (fax)

This message and all attachments hereto may contain confidential information that is protected from disclosure by the attorney-client or other applicable privilege. If you believe that you have received this message in error, please notify the sender immediately and delete the message. Thank you.



Kevin McBride

From: Hart, Brett [HDQLD] <brett.hart@united.com>
Sent: 12/30/2010 3:43 PM
To: km@mcbride-law.com
Cc: dac@cullenlaw.com; DEC@cullenlaw.com
Subject: Re: new complaint filed against UAL

Kevin -- thank you for providing a courtesy copy of the complaint. We will review and be in touch. I ask that you refrain from personally serving board members -- we can discuss an appropriate accommodation. You, your colleagues and your families have a safe New Year.

Best regards,

Brett

From: Kevin McBride [mailto:km@mcbride-law.com]
Sent: Wednesday, December 29, 2010 01:55 PM
To: Hart, Brett [HDQLD]
Cc: David A. Cohen <dac@cullenlaw.com>; Daniel E. Cohen <DEC@cullenlaw.com>
Subject: new complaint filed against UAL

Brett,

I am legal counsel for United Pilots for Justice, Inc. and its individual members. We filed earlier today a complaint in the US District Court, District of Columbia, in behalf of UPFJ and its members, alleging ERISA violations against UAL Corp and its board of directors as constituted in 2004-05.

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

In re:	)	**Chapter 11**
UAL CORPORATION, et al.,	)	**Case No. 02 B 48191** **(Jointly Administered)** **Hon. Eugene R. Wedoff**

AFFIDAVIT OF DANIEL E. COHEN IN RESPONSE TO REORGANIZED DEBTORS' MOTION FOR ORDER HOLDING PLAINTIFFS IN CONTEMPT FOR PROCEEDING WITH LITIGATION AGAINST UNITED IN VIOLATION OF DISCHARGE INJUNCTION

WASHINGTON, D.C.) ss.

I, Daniel E. Cohen, being duly sworn, hereby affirm under penalty of perjury that the following is true and correct.

1. I am an attorney employed by The Cullen Law Firm, PLLC ("TCLF"), with offices in Washington D.C..

2. TCLF was engaged to serve as local counsel by Kevin McBride, Esq., General Counsel for the Plaintiffs in the matter captioned *United Pilots for Justice, et al., v. UAL Corporation et al.*, Case No. 1:10-cv-02324-JEB ("*UPFJ Action*"), filed in the United States District Court for the District of Columbia. Mr. McBride maintains his law offices in the State of California. At the time of the engagement, Mr. McBride was not admitted to the bar of the United States District Court for the District of Columbia. Subsequently however, Mr. McBride was granted pro hac vice admission to the case pursuant to LCvR 83.2(d). Mr. McBride is unable to serve as counsel to plaintiffs, without the assistance of TCLF, until such time as he has

been granted full-time admission, or a new local counsel for plaintiffs, if any, can make an entry of appearance.

3. TCLF relied on the representations of Mr. McBride prior to filing the *UPFJ Action* and were satisfied that Mr. McBride had fully researched the factual and legal bases for causes of action asserted therein. TCLF thereafter relied on Mr. McBride to take the lead role in researching and drafting of pleadings and papers in the *UPFJ Action.* TCLF submits that it has, at all times, acted in good faith in filing pleadings and papers in the *UPFJ Action* given Mr. McBride's extensive experience and personal credentials, as well as his representations to TCLF that such filings were comprehensively researched and determined by him to be well grounded in fact and law.

4. At no time prior to filing the *UPFJ Action* was TCLF aware that the filing would be contrary to any order[s] by this or any other Court.

5. After TCLF became aware of UAL Corporation's allegation that the filing of the *UPFJ Action* was contrary to an order[s] by this Honorable Court, TCLF immediately took all available steps to mitigate any alleged contempt, including but not limited to, notifying plaintiffs of TCLF's intention to withdraw as local counsel to the plaintiffs in the *UPFJ Action* once plaintiffs engaged substitute counsel, if any; or alternatively, by leave of the court.

6. TCLF is prepared to take all additional measures necessary and/or as ordered by this Honorable Court to mitigate the alleged contempt.

Executed on September 28, 2011

Daniel E. Cohen

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 28th day of September, 2011

Albina R. Ballali, Notary Public, D.C.
My commission expires September 30, 2013.