

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

Craig S. Primis, P.C.  
KIRKLAND & ELLIS LLP  
655 15th Street N.W.  
Washington, DC 20005  
(202) 879-5921 (telephone)  
(202) 879-5200 (facsimile)

Mark R. Filip  
Michael B. Slade (admitted *pro hac vice*)  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, Illinois 60654  
(312) 862-2000 (telephone)  
(312) 862-2200 (facsimile)

*Counsel for Defendants*

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## INTRODUCTION

Plaintiffs' lengthy response brief asks this Court to pretend that United's four-year bankruptcy, its court-approved settlement with the Pension Benefit Guaranty Corporation ("PBGC"), and its confirmed plan of reorganization (the "Plan"), either did not occur or had no substantive effect. But these events took place, and they end the matters in dispute. United's role in the PBGC termination of the defined benefit pension plan for United pilots (the "Pilot Plan") was litigated over and over again during United's bankruptcy. As Plaintiffs concede, many of them were active participants in that hotly contested litigation. They lost. Plaintiffs are now trying, five years later, to resuscitate the Pilot Plan by making the same arguments through a different mouthpiece and procedural vehicle.

Plaintiffs' gambit cannot plausibly succeed. Indeed, the crux of Plaintiffs' claim—made five times in their response—is that a document filed early in United's bankruptcy case claiming a "book value" for United Loyalty Services ("ULS") of negative \$397 million was "fraudulent." (Pls' Opp. 2, 5, 7, 11-12, 15, 31) But Plaintiffs concede that United told *the truth*—United admitted to all, in writing, that this valuation was of the "book value" of ULS. (Pls' Opp. 12) And in any event, this document is a *bankruptcy schedule*: a document filed in every bankruptcy case to identify a debtor's assets and liabilities for its creditors. Plaintiffs cannot, five years after plan confirmation, claim that a filed bankruptcy schedule was fraudulent and base an ERISA claim upon it—citing information sharing regulations entirely out of context—as if the bankruptcy never happened.

The implications of Plaintiffs' lawsuit are even more troubling. If Plaintiffs are correct, no reorganized company that addressed pension issues during its Chapter 11 case will ever get the "fresh start" envisioned by the Bankruptcy Code. Instead, every company will be looking over its shoulder, five years later, for pension plan participants second-guessing conduct during the reorganization. And if the Plaintiffs here survive dismissal, no company will ever again cut a deal with the PBGC to resolve its pension liability, despite what Plaintiffs themselves characterize as a Congressional policy encouraging such settlements. The reason is simple: here, not only did PBGC and United strike a deal that resolved and released the issues in this complaint, but the settlement was approved by three courts over the objection of the same people who brought this lawsuit. If Plaintiffs can circumvent not only the "fresh start" the Bankruptcy Code grants all debtors, but a court-approved settlement and release that they appealed and lost, merely by alleging "fraud" five years later, no discharge is real and no settlement is ever final.

There is little doubt that Plaintiffs' claims defy the PBGC Settlement Agreement, United's Plan, and the Bankruptcy Code—not to mention the very statute (ERISA) under which Plaintiff's claims are brought. And if this Court has any hesitation about the *déjà vu* here, it should transfer to the Northern District of Illinois, where all of the previous activity took place. But under no circumstances can Plaintiffs evade the "water under the bridge" that "ends any possibility of resurrecting this pension plan." *In re UAL Corp. (Pilots Pension Plan Termination)*, 468 F. 3d 444, 451 (7th Cir. 2006). Plaintiffs' claims must be dismissed.

## ARGUMENT

### I. THE PBGC SETTLEMENT AGREEMENT DEFINED AND LIMITED EXACTLY WHAT THE PILOT PLAN WOULD RECEIVE FROM UNITED'S ASSETS DUE TO PLAN TERMINATION.

Plaintiffs essentially ignore the text of the Court-approved PBGC settlement agreement, a document that defined and limited the controlled group assets that PBGC (on behalf of itself and the Pilot Plan) would receive due to plan termination. The two key terms of the PBGC Settlement Agreement are those that: (1) gave PBGC specific securities in reorganized United, valued in the billions, based on the termination of each United pension plan; and (2) released and waived *any* other claims that either the PBGC or the Pilot Plan might have against United:

Waiver of Other Claims. PBGC shall be deemed to have settled and released any claims against United (other than Unfunded Liability Claims and fiduciary claims not released and settled pursuant to subparagraph 7(b)) on its on behalf and on behalf of the Pension Plans relating in any way to United's Pension Plans, as well as any claims against any other entity, based on "controlled group" liability or any other theory, relating in any way to United's Pension Plan obligations or liabilities.<sup>1</sup>

(Exhibit G to Mem. in Supp. of Mot. to Dismiss, at Exhibit 1, ¶ 7(d)).<sup>2</sup>

Plaintiffs similarly ignore the Bankruptcy Court's final and binding order approving that settlement, which concisely provided that:

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<sup>1</sup> Subparagraph 7(b) gave PBGC the option to back out of the settlement prior to United's plan confirmation based on its investigation into any plausible fiduciary duty claims. It did not do so, and accordingly waived all fiduciary claims on behalf of itself and the Pilot Plan.

<sup>2</sup> Plaintiffs do not dispute that each document attached to Defendant's Memorandum in Support of Their Motion to Dismiss is judicially noticeable and properly before the Court on a Rule 12(b)(6) motion. *See* Memorandum in Support of Defendants' Motion to Dismiss, p. 5 n.2. Nor do Plaintiffs challenge in any material respect the extensive history of United's pension plans during United's four-year bankruptcy case—the "water under the bridge" reflected in the extensive Bankruptcy Court and District Court dockets they seek to circumvent. *Id.* at 4-8.

- (A) Under Section 4042 of ERISA, 29 U.S.C. § 1342, PBGC may terminate a pension plan in order to protect the pension benefit guaranty system with the consent of the plan sponsor without a court hearing even though that overrides the provisions of a collective bargaining agreement;
- (B) Aggrieved 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 (and PBGC reserves its rights in any such action); and
- (C) The Agreement, and United's entry into the Agreement, does not violate the law.

Exhibit G at ¶ 1. This binding court order is clear and concise, finding that: (1) the PBGC Settlement Agreement was legal; (2) United's entry into it was legal; and (3) if aggrieved parties want to challenge it under ERISA, they could sue *the PBGC*. *Id.*, *aff'd*, *Ass'n of Flight Attendants v. United Air Lines*, 333 B.R. 436 (N.D. Ill. 2005), *aff'd* 428 F.3d 677 (7th Cir. 2005); *see United Steelworkers v. United Eng'g*, 52 F.3d 1386, 1932 (6th Cir. 1995) ("PBGC, as the trustee, binds the employees, the trust beneficiaries, thereby discharging the obligations of the employer . . . [I]f the employees think the settlement agreement between the PBGC and the employer is unfair or diminishes their rights, their remedy, as with any trust beneficiary, is to sue the PBGC as trustee, not to sue the employer directly.").<sup>3</sup>

Plaintiffs' suggestion that the PBGC Settlement Agreement has no impact on this litigation makes little sense. Indeed, Plaintiffs themselves concede that ERISA

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<sup>3</sup> Plaintiffs suggest that the fact "plan participants" are not named parties to the release in the PBGC Settlement Agreement is germane to the analysis here. (Pls' Opp. 34.) It is not. Even the statute Plaintiffs rely on does not permit suits to be brought on behalf of plan participants, but only by beneficiaries on behalf of the plan. *Steelworkers*, 52 F.3d at 1390; *Ricke v. Armco, Inc.*, 882 F. Supp. 896, 900 (D. Minn. 1995) ("it is fairly well-settled that direct participant actions for unfunded non-[PBGC]-guaranteed benefits are no longer permissible"). Here the Pilot Plan expressly released United, and it—not plan participants—could recover from United. *Id.*

was written to encourage settlements between PBGC and plan sponsors, and that “a settlement agreements are an approved vehicle through which § 1362 liability can be agreed to under 28 U.S.C. § 1342.” (Pls’ Opp. 13; *see Adams v. PBGC*, 332 F. Supp. 2d 231, 237 (D.D.C. 2004).) The PBGC has the statutory authority to enter into such settlements on behalf of both itself and the affected pension plan. 29 U.S.C. § 1367; *Adams*, 332 F. Supp. 2d at 238. Once such settlements are signed and approved by a court, there is no room for second-guessing by plan participants who claim that the settlements were procured by fraud. Indeed, Plaintiffs nowhere articulate why *any* plan sponsor would ever negotiate a settlement with PBGC if that settlement was subject to challenge not only directly, but then again, five years after the settlement was approved by three courts, through the back-door by beneficiaries claiming that the plan sponsor defrauded PBGC.

Plaintiffs’ only support for the theory that United can enter into a court-approved settlement with PBGC and still somehow have liability to participants under ERISA is to repeatedly cite *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522 (7th Cir. 1985). (Pls’ Opp. 3, 12, 37, 38) But that case bears no factual or legal resemblance to this one. *Angelos* concerned a loan made by a bank to a pension fund. When the bank closed and the loan went bad, the fund beneficiaries and Department of Labor (“DOL”) sued the trustees, claiming that they violated ERISA’s “prudence” standard by failing to properly investigate the bank and the loan. *Id.* at 524. The beneficiaries and DOL won. The trustees

had violated ERISA by performing an inadequate investigation—their “duty entailed investigation of the [bank’s] claims, not blind reliance on them.” *Id.* at 526.

The trustees then sued the bank, claiming that the bank had violated the federal securities laws by failing to disclose financial problems during diligence. *Id.* The question for the Seventh Circuit was whether the fact that the trustees had failed to perform the investigation required by ERISA meant that the trustees could not sue the bank for securities fraud. The Seventh Circuit held that the lawsuit was not barred—even *if* the trustees were in part at fault for the funds’ injuries, “[r]emedies under the securities laws are cumulative with other remedies.” *Id.*

This case is not *Angelos*. *Angelos* addressed the preclusive effect of a court finding that trustees of an ongoing pension fund violated their ERISA duties of prudence in managing the assets of the fund on separate claims under the federal securities laws filed by trustees. This case, by contrast, involves the preclusive effect of a court-approved settlement agreement in which a plan sponsor was expressly released on behalf of PBGC *and* the pension plan for all liability related to the plan and its termination. *Angelos* provides no basis for a back-door challenge to a settlement agreement between the PBGC and a plan sponsor that has already been approved by three courts based on findings that the settlement agreement and United’s entry into it “does not violate the law.” Mem. in Supp. of Mot. to Dismiss, Ex. G, ¶ 1.

**II. IF ANY ERISA CLAIM SURVIVED THE PBGC SETTLEMENT AGREEMENT (WHICH IT DID NOT), UNITED'S PLAN OF REORGANIZATION ELIMINATED IT.**

**A. 11 U.S.C. § 1141 Discharged United From These Claims.**

Plaintiffs concede that “[i]t is true that discharge of a debtor under bankruptcy law is generally very broad.” (Pls’ Opp. 27.) That is an understatement. Section 1141 is among the most important provisions of the Bankruptcy Code; discharge is construed broadly, consistent with Congress’s objective of giving debtors a “fresh start” upon confirmation. *See* 8 COLLIER ON BANKRUPTCY § 1141.05 (“A corporation’s discharge in a Chapter 11 case is generally pervasive. All debts, no matter how incurred, are discharged upon confirmation, except to the limited extent provided in Section 1141(d)(6) of the Bankruptcy Code. . .”).

Plaintiffs first effort to evade 11 U.S.C. § 1141 is to “suggest” a general exception to discharge for ERISA-based claims for “appropriate equitable relief.” (Pls’ Opp. 28-30 (“ERISA controls and the confirmation bar of Bankruptcy Code § 1141 must give way to Plaintiffs’ rights under 29 U.S.C. § 1370.”).) But this alleged exception simply does not exist. Section 1141 lists specific exemptions to discharge for corporate debtors; ERISA is not one of them. And 11 U.S.C. § 523 lists discharge exemptions for individual debtors; they do not apply. Thus, if Congress wanted ERISA claims for equitable relief to survive discharge, it would have said so. It did not. Instead Congress passed a broad discharge statute to give debtors a fresh start, and many courts have enforced it by holding ERISA claims like those raised here to be discharged. *See, e.g., Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82 (2d Cir. 1997) (ERISA claims are barred by the release provisions of the

debtor’s plan); *Bosiger v. US Airways, Inc.*, 510 F.3d 442 (4th Cir. 2007) (claims for misconduct in pension termination barred by discharge); *In re CD Realty Partners*, 205 B.R. 651, 660 (Bankr. D. Mass. 1997) (ERISA claim “was a ‘claim’ within the meaning of 11 U.S.C. § 101(5)” and thus “has been discharged”).

Plaintiffs’ references to *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984), and *PBGC v. LTV Corp.*, 496 U.S. 633 (1990) (Pls’ Opp. 27-31), are (again) entirely inapposite. *Bildisco* merely held that collective bargaining agreements, like any other contracts, can be rejected in bankruptcy. *Bildisco*, 465 U.S. at 522 (“Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.”). And discharge was not an issue in *LTV*—the Supreme Court held there only that PBGC could restore pension plans based on post-termination changes in circumstances under a specific ERISA provision providing for the restoration of pension plans. *LTV*, 496 U.S. at 655.<sup>4</sup> Neither of these cases remotely supports an ERISA-based exception to discharge. What Plaintiffs suggest as a “middle ground”—their theory that “Congress authorized Plaintiffs’ individual ERISA claims to be presented to this Court under ERISA as a court in equity” (Pls’ Opp. 28)—is simply a request that the Court ignore 11 U.S.C. § 1141. There is no basis to do so.

**Second**, Plaintiffs suggest in a footnote that because the order formally terminating the Pilot Plan was not entered until a few months after plan

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<sup>4</sup> In the PBGC Settlement Agreement, the PBGC waived this statutory right. See Mem. In Support of Mot. to Dismiss, Exhibit G at Exhibit 1, ¶6(b).

confirmation, their claims are not discharged. (Pls' Opp. 32 n.51) This argument misunderstands the term "claim" within the Bankruptcy Code. The Bankruptcy Code defines a "claim" as *any* right to payment, including one "unmatured" as of confirmation. 11 U.S.C. § 101(5)(A). This fits the purpose of the Code: "to ensure that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993). Because rights to payment that are have not yet "matured" are still "claims" under the Bankruptcy Code, the only thing that matters for discharge purposes is whether any *conduct* giving rise to Plaintiffs' claim pre-dated confirmation.<sup>5</sup> Here, it clearly did: the allegedly "fraudulent" document was publicly filed in 2003. Second Amended Complaint ("2AC"), Ex. A. Plaintiffs are suing "UAL Corp.'s board of directors in their capacities in 2004-05." 2AC, p. 67. And the thrust of Plaintiffs' claim is that United should have identified the fair market value of its assets "prior to entering a settlement with PBGC," Pls' Opp. 13—which occurred in April 2005. *See* Mem. in Supp. of Mot. to Dismiss, Ex. G. In short, because the Defendants' alleged misconduct pre-dated February 1, 2006, the timing of confirmation confirms rather than rebuts United's discharge.

***Third***, Plaintiffs contend that because the PBGC's complaint seeking plan termination as of December 30, 2004 was determined not to be a "core" proceeding—

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<sup>5</sup> By way of analogy, in the personal injury context, a bankruptcy "claim" exists whenever an individual has been exposed to a hazardous substance, even if he or she has not yet manifested any injury. *See, e.g., In re Placid Oil Co.*, 2011 WL 1107571, at \*5 & n.37 (Bankr. N.D. Tex. Mar. 21, 2011) (courts have "all found that, for purposes of determining whether there is a claim under Section 101 of the Bankruptcy Code, an asbestos claim arises when exposure to asbestos occurs"); *In re Chateaugay Corp.*, 2009 WL 367490, at \*5 (Bankr. S.D.N.Y. Jan. 14, 2009) (same).

and thus the Bankruptcy Court issued proposed findings of fact and conclusions of law for *de novo* consideration by the Northern District of Illinois—discharge does not apply. (Pls’ Opp. 25-26, 28 n.47) But that is simply not correct, for two reasons. The core/non-core distinction is not germane to discharge; Section 1141 bars all “claims” against a debtor based on conduct that pre-dates plan confirmation, irrespective of whether they would be “core” proceedings. *Sure-Snap Corp. v. State St. Bank & Trust*, 948 F.2d 869, 873 (2d Cir. 1991) (“Appellants’ further claim that their unliquidated tort claims did not constitute “core proceedings,” has no bearing on their preclusion.”). But in any event, the claims alleged here—that United fraudulently induced the PBGC into a settlement during its bankruptcy case—would clearly be “core.” *See* 28 U.S.C. § 157(b)(2)(A), (B), (I), (J), (L), (O).

*Finally*, it is not the case, as Plaintiffs suggest throughout their brief, that the Bankruptcy Court was somehow “unable to fully consider” the ERISA issues raised in Plaintiffs’ complaint. (Pls’ Opp. 28-29 & n.47) Plaintiffs nowhere explain why this is so. In fact, some of the Plaintiffs *actually raised* overlapping ERISA issues with the Bankruptcy Court in objecting to United’s motion for approval of the PBGC Settlement Agreement. *See* Mem. in Supp. of Mot. to Dismiss, Exhibit H, p. 6 (Plaintiffs arguing that “**The United/PBGC Agreement May Not Be Approved Because the Agreement Violates ERISA**”) (emphasis in original). After characterizing ERISA’s alleged statutory purpose in ways virtually identical to Plaintiffs’ brief here (*compare id.* at 7 with Pls’ Opp. 29), Plaintiffs claimed that United violated ERISA when signing the PBGC Settlement Agreement:

[Plaintiffs' Brief to the Bankruptcy Court read]: "The other party to this proposed unlawful bargain is United. When United acts in its capacity as a 'plan administrator' it must observe the fiduciary duties it has to the plans it administrates and the beneficiaries of those plans. 29 U.S.C. § 1002(14)(A) makes it clear that plan administrators are fiduciaries of defined benefit plans subject to [sic] the ERISA's fiduciary requirements set forth at 29 U.S.C. § 1104. Sections 1104(a)(1)(A) and (B) state that a fiduciary, under ERISA, must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." *Id.* at 8.

These arguments were rejected, and the Bankruptcy Court held that the agreement "did not violate the law." Mot. to Dismiss, Ex. G, ¶ 1. But there is no basis to suggest that the Bankruptcy Court could not or did not consider the ERISA angle.

More generally, Plaintiffs do not and cannot explain their theory that they were somehow precluded from arguing *during* United's bankruptcy case that United failed to disclose that its Mileage Plus® Plan was worth billions of dollars, making the PBGC's recovery as part of plan termination insufficient. Such an argument easily could have been made. Indeed, were Plaintiffs correct, that information would have come as welcome news to United's tens of thousands of other creditors and employees, who suffered massive losses in the bankruptcy—including *all* of United's employees who lost portions of their pensions. The reality is that the PBGC Settlement Agreement was signed in April 2005, more than 10 months prior to confirmation. Plaintiffs contend that United should have provided allegedly missing information to PBGC "prior to" the settlement, and this information would have been an obvious part of litigation over plan confirmation. (See Pls' Opp. at 13.) There is no rational basis to exempt this claim from discharge.

**B. The Release and Exculpation Provisions of United's Plan Solidifies The Discharge.**

Plaintiffs' response brief does not address the release or exculpation clauses expressly provided in United's Plan and recited verbatim in the Bankruptcy Court's Confirmation Order. Among other things, these provisions provide that:

Except as otherwise specifically provided in the Plan, on and after the Effective Date, Holders of Claims and Interests . . . shall be deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever, released and discharged the Released Parties from any and all Claims, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, including any derivative Claims asserted on behalf of a Debtor, whether known or known, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise . . . in any matter arising from, in whole or part, the Debtors, the Debtors' restructuring, the Debtors' Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor, any Released Party, the restructuring of Claims and Interests prior to or in the Chapter 11 Cases, the negotiation, formulation, or preparation of the Plan and Disclosure Statement, or related agreements, instruments, or other documents, upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date . . . . Mem. in Supp. of Motion to Dismiss, Exhibit A ¶ 4(c) and p. 122; *see also id.* ¶ 4(b) and p. 121 (exculpation clauses).

Plaintiffs nowhere dispute that the plain language of this clearly bars claims that United fraudulently induced PBGC into entering into a settlement agreement during its bankruptcy case to resolve its pension liability. Nor could they.

Instead, Plaintiffs assert that any release or exculpation that might eliminate liability for alleged breaches of fiduciary duty under ERISA are void.

(Pls' Opp. 33-34) But Plaintiffs' ERISA Title IV claims are not fiduciary claims under settled law because plan termination and funding actions are "settlor," not

fiduciary, functions. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990) (“an employer’s decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administration.”); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). Thus, any negotiations with the PBGC over plan termination cannot form the basis for an ERISA fiduciary breach claim. Because the fiduciary provisions of ERISA are not implicated, 29 U.S.C. § 1110 is inapplicable.

While Plaintiffs’ discussion of this issue is confusing at best (Pls’ Opp. 33), the law on this is actually quite clear. Because virtually every business decision a plan sponsor makes can have an adverse impact on a pension plan, courts examine the conduct at issue to determine whether it constitutes administration of the plan, giving rise to ERISA fiduciary duties, or merely a business decision not subject to fiduciary scrutiny. A person acts in a fiduciary capacity under ERISA only when fulfilling certain defined functions, including the exercise of discretionary authority over plan administration or asset management. *See* 29 U.S.C. § 1002(21)(A); *In re Worldcom Inc. ERISA Lit.*, 263 F. Supp. 2d 745, 764 (S.D.N.Y. 2003); *Moench v. Robertson*, 62 F.3d 553, 557 (3d Cir. 1995). Plan termination decisions or negotiations do not qualify; they are settlor functions.

Accordingly, even if Plaintiffs could plead a violation of ERISA § 4062 (and they cannot), that would not be a basis for a non-waivable “fiduciary” claim. The regulations under ERISA § 4062(b)(2) that plaintiffs cite state that it is the “contributing sponsor or member of the contributing sponsor’s controlled group”—

*i.e.*, the settlor and not the “plan administrator” or fiduciary—that has the duty to provide information. These communications to the PBGC are not fiduciary communications. This is entirely different from the cases cited by plaintiffs involving communications from a plan fiduciary in its fiduciary capacity to participants. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011). Because no “fiduciary” conduct (as defined by ERISA) is at issue here, Plaintiffs’ reference to 29 U.S.C. § 1110 is inapposite.

**C. Plaintiffs’ Complaint Would Require Altering United’s Confirmed Plan On Grounds Of Fraud, Despite 11 U.S.C. § 1144 And Basic Principles of Bankruptcy Mootness.**

Plaintiffs’ response essentially begs this Court to re-write United’s Plan, five years after confirmation, under the guise of “equity.” They claim that United committed a wrong when, prior to the PBGC Settlement Agreement and confirmation, United gave PBGC information on the “book value” of ULS. Plaintiffs assert that they have not “had their day in ‘equity court’ to determine limits of the Chapter 11 Confirmation Order as against their rights under 29 U.S.C. § 1370.” (Pls’ Opp. 30) Their theory to alleviate this hardship is that: “[a]s a court in equity, this Court may enter ‘appropriate equitable relief’ to consider and harmonize all federal policies and goals in equity—something the Bankruptcy Court was unable to fully consider in entering its Chapter 11 Confirmation Order.” (Pls’ Opp. 28)

The Bankruptcy Code does not permit this result. For one thing, while the Bankruptcy Code *does* permit post-confirmation efforts to alter a plan due to fraud, those efforts *must* be brought within 180 days of confirmation. 11 U.S.C. § 1144; *In re California Litfunding*, 360 B.R. 310, 321 (Bankr. C.D. Cal. 2007) (granting

motion to dismiss litigation related to a plan brought more than 180 days after confirmation). Congress never contemplated an ERISA claim based on conduct during a bankruptcy case brought five years after confirmation, for obvious reasons: if such a claim exists, then a true discharge does not.

More broadly, there is far too much water under the bridge to reinstate Plaintiffs' pension benefits five years after confirmation. Thousands of creditors voted *billions* of dollars in claims on the assumption that United would not have these obligations. Based on that same assumption, United distributed billions of dollars in securities to the PBGC and to each of its employee groups. And based on the reorganized company's capital structure, many over the past five years have decided to do business with reorganized United—including Continental, which agreed to a merger. Plaintiffs do not even attempt to address the practical impossibility of giving them the relief they seek without unfairly unscrambling the reorganized egg for everyone. *In re UAL Corp.*, 468 F.3d 456, 459 (7th Cir. 2006) (pilots "have made no effort to explore and perhaps dispel the obvious difficulties with granting relief at this stage."); *Retired Pilots Ass'n of U.S. Airways, Inc. v. U.S. Airways Group*, 369 F.3d 806, 811 (4th Cir. 2004) (same). It cannot be done.

### **III. BASIC PRINCIPLES OF PRECLUSION BAR PLAINTIFFS' CLAIMS.**

As Plaintiffs concede, preclusion bars their claims if their arguments were or could have been raised in prior litigation. (Pls' Opp. 37) Plaintiffs do not explain why, if United defrauded the PBGC into accepting too little because Mileage Plus®

was worth billions, they could not have complained about it in litigation over the PBGC settlement, United's Plan, and Pilot Plan termination.<sup>6</sup> Nor could they.

**First**, there is no doubt that the argument here could have been made in litigation over the PBGC Settlement Agreement. Indeed, as shown above, many of the Plaintiffs here **actually did** invoke ERISA in objecting to the agreement. *See supra* p. 10-11. And Plaintiffs' suggestion that they needed to wait until the PBGC issued final determination letters to file ERISA claims (Pls' Opp. 41) because they didn't know they had suffered an injury defies history and reality. Plaintiffs specifically argued to the Bankruptcy Court that the PBGC Settlement would have a "drastic" impact on them by eliminating on average 34% of their pension benefits. *See Mem. in Supp. of Mot. to Dismiss, Exhibit H, p. 2.* There is no doubt that Plaintiffs could have objected to the PBGC Settlement Agreement, claiming that United had defrauded the PBGC into accepting too little. They failed to do so, and three courts held that the agreement, and United's entry into it, "did not violate the law." Those findings of fact and law are now preclusive.

**Second**, Plaintiffs do not address the straightforward point that an alleged multi-billion dollar fraud in its valuation of an asset (here, the Mileage Plus® plan) would have been a key input into litigation over United's Plan of Reorganization. Challenges to valuation are commonplace in bankruptcy; if Mileage Plus® was

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<sup>6</sup> Contrary to Plaintiffs' strawman (Pls' Opp. 39), United never argued that plaintiffs' participation in *In re UAL Corp.*, 443 F.3d 565 (7th Cir. 2006) had preclusive effect. United's arguments focus on the Seventh Circuit's findings in *In re UAL Corp.*, 468 F.3d at 460 (pilots challenge was "too late" because it would disrupt third parties who relied on the capital structure of reorganized United); and *In re UAL Corp.*, 468 F.3d at 451 (confirmation of United's Plan made pension issues "water under the bridge" that "ends any possibility of resurrecting this pension plan").

worth billions, all of United's creditors would have been interested in knowing about it. Plaintiffs offer no rationale, nor could they, for their suggestion that at the time of Plan confirmation they could not have argued that United had defrauded the PBGC (and, by their logic, everyone else) by undervaluing a key asset.<sup>7</sup>

**Third**, Plaintiffs assert that their claims “could not have been raised in the proceedings before Judge Lefkow in connection with PBGC’s action for Plan Termination.” (Pls’ Opp. 41) Why not? Judge Lefkow made clear that “the court acts as a safeguard, thereby ensuring that the termination of a particular plan is required.” *PBGC*, 436 F. Supp. 2d at 917. Key factors in a plan termination inquiry include both the need to terminate the plan (because the sponsor cannot support it), and the need to terminate the plan promptly (because delay would increase PBGC’s exposure *if* it could not recover sufficient compensation to cover plan liabilities). *See id.* The value of ULS would be an issue on both fronts; if United undervalued Mileage Plus®, its alleged “true” value could have saved the Pilot Plan.

#### **IV. PLAINTIFFS HAVE NO ERISA CLAIM IN ANY EVENT.**

Even if Plaintiffs could survive the PBGC settlement, United’s Plan, and hornbook preclusion principles, their claims fail as a matter of ERISA law. This complaint is merely an attempt to manipulate ERISA into something it is not.

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<sup>7</sup> Plaintiffs suggest that they could not have known of Mileage Plus®’s value or PBGC’s investigation until 2010. (Pls’ Opp. 42). That is not accurate. The event Plaintiffs suggest caused them to understand Mileage Plus’s value (Air Canada’s spin-out of its mileage rewards plan) occurred in 2004-05. 2AC ¶ 82(a)-(b). Similarly incorrect is Plaintiffs’ assertion that their 2010 FOIA request of PBGC was their first opportunity to take discovery on this subject. The reality is that in connection with Pilot Plan termination, many of the Plaintiffs here sought from the Bankruptcy Court, and received, discovery from PBGC that went well beyond PBGC’s administrative record. *See PBGC v. United Air Lines*, 436 F. Supp. 2d 909, 912 (N.D. Ill. 2006).

**A. Plaintiffs' ERISA § 4062 Claim Ignores The Language Of The Statute Itself And Its Implementing Regulations.**

Plaintiffs' claim under Section 4062 of ERISA,<sup>8</sup> in a nutshell, is that:

- United was required under ERISA § 4062 (29 U.S.C. § 1362) to provide the “fair market value” of ULS to PBGC. (2AC ¶¶17, 74, 90-92)
- United violated ERISA § 4062 by providing information to the PBGC valuing ULS based on “book value” rather than “fair market value.” (2AC ¶¶ 19, 21, 80-81, 87-88)
- This violation caused PBGC to inappropriately terminate the Pilot Plan and recover fewer assets from United on behalf of the pension plan, resulting in lower payments to participants. (2AC ¶¶14, 45, 89, 93, 95-96)
- Plaintiffs, who were adversely affected by this violation of ERISA § 4062, have standing under ERISA 4070 to seek appropriate equitable relief (here restitution of benefits) to redress such violations. (2AC ¶¶ 97-98)

None of these claims makes sense under ERISA.

*First*, the only regulations that plaintiffs cite for the proposition that the “fair market value” of assets must be provided to PBGC are regulations under ERISA § 4062(b)(2)(B), specifically 29 C.F.R. § 4062.4 and 4062.6. These regulations describe the PBGC’s “net worth” determination. But the “net worth” determination is relevant only for a limited purpose under Section 4062(b)(2)—*i.e.*, this deals with a “special rule” for how liability to PBGC can be paid; it does not relate to the amount of the liability nor does it come into play for purposes of determining whether the plan should be terminated as alleged by the plaintiffs.

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<sup>8</sup> ERISA’s numbering scheme is challenging; its provisions have both ERISA cites (for example, “ERISA § 4062”) and U.S.C. cites (for example, 29 U.S.C. § 1362). ERISA practitioners typically use the “ERISA” cites, but they can be easily converted: to convert Title IV ERISA cites to the U.S.C. cite, merely replace the first two numbers “40” with “13.”

Specifically, ERISA §§ 4062(a) and (b)(1) state that a plan sponsor and controlled group members are liable to the PBGC on termination of a pension plan for the “unfunded benefit liabilities (as of the termination date) . . . calculated from the termination date in accordance with regulations prescribed by the [PBGC].” ERISA § 4062(b)(1)(A). The regulation applicable to determining the “unfunded liability” due the PBGC is 29 C.F.R. § 4062.3, which does not refer to “collective net worth”, does not require any specific information to be provided to the PBGC, and was not cited by plaintiffs. The reason is simple: the unfunded liability calculation addressing *how much* a plan sponsor must pay the PBGC is a straightforward actuarial calculation using actuarial assumptions prescribed by the PBGC.

Thus, plaintiffs are simply incorrect as a matter of law by claiming that United’s liability to PBGC was based on the alleged “net worth” of its controlled group. (*See* Pls’ Opp. at 10 (“Importantly, the liability amount of a plan sponsor to the PBGC on plan termination is defined under 1362(d)(1)(A) [4062(d)(1)(A)] as “[t]he sum of the individual net worths of all persons . . .”).) This statutory provision has nothing to do with the “liability *amount*” to the PBGC, but rather relates to *how* the liability can be paid.<sup>9</sup> The “liability amount” is actuarially determined and has nothing to do with the plan sponsor’s assets or net worth.

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<sup>9</sup> In addition to not having any impact on the amount of unfunded liabilities due to the PBGC, Section 4062 and the regulations relied on by plaintiffs do not govern the PBGC’s *decision to terminate* the plan or whether any of the termination standards are satisfied. Those decisions/standards are set forth in ERISA Section 4041(c) and 4042. With respect to involuntary terminations under ERISA § 4042 (which was at issue here), the applicable regulations have no specific requirement about what information must be provided to PBGC. *See* 29 C.F.R. § 4042.1-4042.5. Rather, PBGC has broad discretion under ERISA to seek and rely on whatever information it chooses to make a determination that a pension plan must be terminated. *See* ERISA §§ 4003(a)-(b). United provided the information requested by the PBGC.

**Second**, the part of ERISA § 4062 that United allegedly violated relates to providing information to enable the PBGC to determine the “collective net worth” of the United controlled group. This is found in ERISA § 4062(b)(2)(B) (with the definition of this phrase contained in ERISA § 4062(d)(1)). It does not apply here.<sup>10</sup>

Once a plan is terminated, the amount of the unfunded liability is determined actuarially, and the plan sponsor and all controlled group members owe that amount to the PBGC *immediately*. See ERISA § 4062(b)(2)(A). But ERISA includes a “special rule” permitting delayed or staggered payment *if* the amount of the liability exceeds 30% of the controlled group’s collective net worth. See ERISA § 4062(b)(2)(B). *If* the plan sponsor is trying to prove to the PBGC that it falls within the “special rule” because liability exceeds 30% of the collective net worth of the controlled group, justifying staggered or deferred payments, PBGC regulations require certain information to be provided to the PBGC so that it can make the necessary net worth determination. **These** are the regulations (29 C.F.R. §§ 4062.4 and 4062.6) cited by plaintiffs which refer to fair market value and form the entire basis of their ERISA claim.

Here, United was **not** providing information to PBGC to show a need to delay payment under the “special rule” of Section 4062(b)(2)(B). The complaint does not and cannot allege that United was trying to avail itself of this “special rule.”

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<sup>10</sup> Plaintiffs inaccurately characterize United’s argument as an assertion that none of provisions of Section 4062 apply to United. This is not what United is saying. Certainly United and its controlled group had liability under Section 4062, which resulted in the PBGC Settlement. The provisions of 4062 that United asserts do not apply are the specific sections of 4062 relied on by plaintiffs as the basis for their claim, namely the “collective net worth regulations.”

Rather, Plaintiffs wrongly assert that these “special rule” regulations apply to *any* information provided to PBGC, which is demonstrably incorrect as a matter of law.

29 C.F.R. § 4062.6 makes clear that it only applies when the plan sponsor is trying to use the special payment rule: “(a) General. (1) A contributing sponsor or member of the contributing sponsor’s controlled group *that believes Section 4062(b) liability exceeds 30% of the collective net worth* of persons subject to liability in connection with plan termination shall . . .” (emphasis added) Similarly, 29 C.F.R. § 4062.4, which specifically refers to fair market value and is quoted in the complaint, only uses these standards in reference to how the PBGC will determine net worth, which again is only used under ERISA § 4062 for the special payment rule. The 4062.4 regulation states at (a)(1) that this fair market value/net worth determination is only relevant when information is submitted to PBGC under 4062.6 quoted above. Thus, these regulations were not at issue here and, simply put, United did not “violate” these provisions because it was not seeking to take advantage of the special rule of ERISA § 4062(b)(2)(B).

#### **B. ERISA § 4069 Cannot Conceivably Apply Here**

Plaintiffs ERISA § 4069 claim, is a nutshell, is that:

- United and ULS engaged in “transactions” such as changing from a corporation to a LLC, entering into engagements with professionals, and taking other actions to conceal the value of ULS (2AC ¶122);
- These “transactions” resulted in improper termination of the Pilot Plan, and reduced recovery by PBGC and benefits to participants (*Id.* ¶123);
- As a result of these “violations” of ERISA § 4069, the plaintiffs are entitled to restitution of benefits (*Id.* ¶125).

These allegations do not and cannot state an ERISA § 4069 claim.

**First**, the alleged transactions are not ERISA “transactions.” The legislative history to ERISA § 4069 demonstrates that what Congress had in mind were corporate transactions that transferred pension plans from a controlled group to undercapitalized legal entities outside the controlled group to shield a plan sponsor from liability. *In re Consol. Litig. Concerning Int’l Harvester’s Disp. of Wis. Steel*, 681 F. Supp. 512, 521 (N.D. Ill. 1988). Plaintiffs focus on the word “any” in the phrase “any transactions”, but ignore the key word “transactions.” (Pls’ Opp. 16.) Plaintiffs interpret this provision as covering any instance of not paying benefits in full. That interpretation would render the word “transaction” meaningless and give no effect to the remedy provision in ERISA § 4069 itself—ignoring the transaction.

Plaintiffs’ response clarifies that their 4069 claim rises and falls with their 4062 claim: “Plaintiffs’ claims in the Third Cause of Action (under 29 U.S.C. 1369) arise in the same context and the same set of transactions as the claims in the First Cause of Action (under 29 U.S.C. 1362).” (Pls’ Opp. 16) But evading an obligation to provide information is clearly not what Section 4069 addresses.

**Second**, ERISA § 4069 does not technically “prohibit” evasive transactions, but just gives them no effect. Here, even if the alleged events were “transactions” within the meaning of ERISA § 4069, they simply did not change the liability of ULS or UAL with respect to the Pilot Plan, and thus are not covered by ERISA § 4069. ULS was a member of the UAL controlled group (and thus liable for the pension liabilities) prior to the alleged transactions and remained a controlled group member (and liable) after the alleged transactions. ULS and UAL were

therefore both always jointly and severally liable for unfunded pension liabilities, which was imposed by ERISA under Section 4062(b)(1) and collected by PBGC from the debtors in accordance with their settlement authority under Section 4062(b)(3).

ERISA § 4069 provides its own remedy for a violation—the transaction is ignored for purposes of determining liability. Restitution of benefits to participants, as sought by plaintiffs, is not contemplated by ERISA § 4069. Although ERISA § 4070 does provide for equitable relief for violations of ERISA § 4069, what this means—when ERISA §§ 4070 and 4069 are read together—is that participants could bring an action against a corporation to impose predecessor pension liability on it when the corporation transferred a pension plan outside its controlled group to evade liability. In United’s situation, what this would mean is that the United *debtor* entities, as predecessors to the Defendants, would have the pension liabilities that are the subject of the PBGC settlement, which of course makes no sense (and further demonstrates why the Bankruptcy Court would have jurisdiction if Plaintiffs’ allegations were correct).

**C. Because Plaintiffs Have No ERISA §§ 4062 and 4069 Claims, They Lack Standing Under ERISA § 4070.**

Despite Plaintiffs’ rhetoric, ERISA § 4070 is not a broad, catch-all provision that allows plaintiffs to recover unfunded pension liabilities. To the contrary, ERISA § 4070 is a narrowly drafted provision that simply does not apply here.

**First**, Congress gave the PBGC, not participants, the power to enforce plan terminations and recover unfunded liabilities.<sup>11</sup> ERISA §§ 4062(a), 4062(b)(1)(A), 4022(c); *United Steelworkers*, 52 F.3d at 1392 (“[T]he PBGC, as the trustee, binds the employees, the trust beneficiaries, thereby discharging the obligations of the employer . . . [I]f the employees think the settlement agreement between the PBGC and the employer is unfair or diminishes their rights, their remedy, as with any trust beneficiary, is to sue the PBGC as trustee, not to sue the employer directly.”).

**Second**, Section 4070 does not by its explicit terms allow plan participants to sue the plan sponsor to recover unfunded benefit liabilities. Rather, it only allows participants to bring a claim for equitable relief for violations by the plan sponsor (or any other party) of enumerated provisions of Title IV of ERISA when such violations have adversely affected the participants. In this case, the only alleged violations of Title IV are of Section 4062 and 4069. As described above, United violated neither statute and Plaintiffs thus cannot invoke Section 4070.

#### **D. Plaintiffs’ ERISA Fiduciary Claims Are Similarly Flawed.**

Plaintiffs’ fiduciary breach claims against United and its former board members are based on the same set of allegations. Plaintiffs claim that:

- United and the board were “carrying out plan termination functions” when complying with ERISA § 4062 (2AC ¶¶ 103-107);

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<sup>11</sup> The statements of Congressional intent that appear frequently in the Plaintiffs’ response (Pls’ Opp. at 19, 29) simply cannot mean that Congress intended to give participants the ability to recover unfunded plan liabilities in cases where the PBGC cannot or did not. On the contrary, Congress stated that changes to the “termination insurance system” (*i.e.*, the system administered by the PBGC) were required to fulfill the purposes quoted in plaintiffs’ response and that “modification of the current termination insurance system and an increase in insurance premiums for single-employer defined benefit pension plans is desirable.” In other words, Congress made changes to help the PBGC enforce these provisions.

- These actions were done in a fiduciary capacity under ERISA, and therefore had to comply with the fiduciary duties set forth in ERISA (2AC ¶¶101-103);
- United and the board members breached these duties by not providing complete, accurate, information; and
- ERISA §502(a)(3) (29 U.S.C. § 1132(a)(3)) provides a cause of action for breaches of such fiduciary duties (2AC ¶¶ 107, 112)

This claim must fail.

*First*, as described above, defendants did not violate ERISA § 4062. They were not required to provide valuation information for ULS on any particular basis. Therefore, this should be the end of these claims. Even if the defendants were ERISA fiduciaries and these actions were undertaken in a fiduciary capacity, there could be no breach simply by providing information requested by PBGC.

*Second*, the law is quite clear that plan termination and funding actions are “settlor,” not fiduciary, functions. *See, e.g., Hozier*, 908 F.2d at 1162 (“an employer’s decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administration”). Any actions that United or its board took with respect to plan termination or negotiations with the PBGC over plan termination cannot form the basis for an ERISA fiduciary breach claim.

## CONCLUSION

For the reasons described in United’s initial memorandum and this reply memorandum, Plaintiffs’ complaint should be dismissed, with prejudice.

Washington, DC  
Dated: July 29, 2011

Respectfully submitted,

/s/ Craig Primis  
Craig S. Primis  
KIRKLAND & ELLIS LLP  
655 15th Street N.W.  
Washington, DC 20005  
(202) 879-5921 (telephone)  
(202) 879-5200 (facsimile)

/s/ Michael B. Slade  
Mark R. Filip  
Michael B. Slade  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, Illinois 60654  
(312) 862-2000 (telephone)  
(312) 862-2200 (facsimile)

*Counsel for Defendants*

**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 July 29, 2011, upon:

Daniel E. Cohen  
Paul D. Cullen, Sr.  
David A. Cohen  
The Cullen Law Firm, PLLC  
1101 30th Street NW, Suite 300  
Washington, DC 20007

Kevin McBride  
McBride Law, PC  
609 Deep Valley Drive, Suite 200  
Rolling Hills Estates, CA 90274

*Counsel for Plaintiffs*

/s/ Craig S. Primis