No. 06-2780
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED RETIRED PILOTS BENEFIT PROTECTION
ASSOCIATION,

Appellant,

v.

UNITED AIR LINES, INC., et al.

Appellees.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division

No. 06 CV 00844

The Honorable Judge John W. Darrah

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT
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CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellate Court No. 06-2780

Short Caption: In re: United Airlines, Inc. - - Debtor. Appeal of United Retired Pilots Benefit Protection Association.

(1) The full name of every party that the attorney represents in the case:

United Retired Pilots Benefit Protection Association.

(2) The names of all law firms whose partners or associates that have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Meckler Bulger & Tilson LLP and LeBoeuf, Lamb, Greene & MacRae, LLP

(3) If the party or amicus is a corporation:

a. Identify all its parent corporations, if any; and

N/A

b. List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes _X__ No___

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STATEMENT OF JURISDICTION

This appeal involves a January 20, 2006 order entered by the Honorable Judge Eugene R. Wedoff of the United States Bankruptcy Court for the Northern District of Illinois confirming Debtor's Second Amended Joint Plan of Reorganization ("POR"). On January 26, 2006, within the ten day period afforded by Federal Rules of Bankruptcy Procedure 8001(a) and 8002(a), appellant, the United Retired Pilot Benefit Protection Association ("URPBPA"), timely filed its notice of appeal to the District Court. The United States District Court for the Northern District of Illinois had jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. § 158(a) and Rules 8001(a) and 8002(a) of the Federal Rules of Bankruptcy Procedure.

On June 22, 2006, the Honorable Judge John W. Darrah of the United States District Court for the Northern District of Illinois, Eastern Division issued an order dismissing URPBPA's appeal for lack of ripeness. On June 23, 2006, within thirty days of the entry of the District Court's order, URPBPA timely filed its notice of appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

(1) Did the District Court err in entering its June 22, 2006 order dismissing for lack of ripeness URPBPA's appeal of the Bankruptcy Court's order confirming Debtor's Second Amended Joint Plan of Reorganization?

(2) Did the Bankruptcy Court err by confirming United Air Lines, Inc.'s ("United's") Second Amended Joint Plan of Reorganization even though the plan gives Air Line Pilots Association, International ("ALPA") and United's active pilots $550,000,000 in convertible notes and other compensation for the termination of the United Airlines Pilot Defined Benefit

Pension Plan (the "Pilot Plan") while failing to give similar compensation to the retired pilots who are participants in the Pilot Plan?

(3) Did the Bankruptcy Court err by confirming United's Second Amended Joint Plan of Reorganization even though the plan contains release, exculpation and injunction provisions that are contrary to the law and purport to shield ALPA, a non-debtor, from claims URPBPA and/or the retired pilots may otherwise be entitled to assert?

STATEMENT OF THE CASE

United's POR is the product of the three years United and its related debtors spent in bankruptcy. Unfortunately, United's reorganization plan is also the product of unfair negotiations that took place between United and ALPA, the union that represents United's active pilots but does not represent retired pilots. Now that the Honorable District Court Judge Joan H. Lefkow has entered a June 13, 2006 order terminating the Pilot Plan, unless that order is overturned on appeal, United's active pilots will be handsomely compensated under United's POR for the termination of the Pilot Plan. United's retired pilots will not receive similar compensation.

Even though the retired pilots own the greatest share of the assets held by, and the benefits owed under, the defined benefit plan that provides pension benefits to retired pilots (retired pilots are entitled to at least 2/3 of the Pilot Plan's assets), United and ALPA negotiated over the manner in which the Pilot Plan could be terminated by United while wrongfully excluding United's retired pilots from these negotiations. As a result, United and ALPA reached a bargain, referred to as Letter Agreement 05-01, whereby United agreed that, in the event the Pilot Plan was terminated, ALPA and the active pilots would receive $550,000,000 in convertible notes, increased additional monthly contributions to the pilots' directed account plan

and other compensation. United's retired pilots, on the other hand, receive nothing under Letter Agreement 05-01 in the event of such a termination.

United's POR fails to include provisions that would give United's retired pilots compensation for the termination of the Pilot Plan similar to the compensation it gives the active pilots. As a result, United's active and retired pilots, who are similarly-situated creditors, are not treated equally.

Although URPBPA has no interest in hindering the financial recovery of United, the POR, as it is currently written, violates a fundamental principle of bankruptcy law – similarly situated creditors should be treated equally. While URPBPA does not seek to have the entire POR overturned, the plan should be modified to ensure that retired pilots receive compensation that is similar to the compensation that will be received by United's active pilots in the event the Pilot Plan is terminated. Despite United's arguments in the courts below, where United sought to create the impression that granting the retired pilots relief in this appeal would create some type of unreasonable harm to third parties, United has admitted that, when it constructed its POR, it made sure the plan had sufficient flexibility to allow for future contingencies, including United losing all of the appeals that arose out of its reorganization proceedings. As a result, if United was ordered to provide equal termination compensation to both active and retired pilots, United would have sufficient assets to provide the retired pilots with the same types of compensation it has provided, or will provide, to ALPA and the active pilots.

In addition, United's POR includes release, exculpation and injunction provisions that purport to shield ALPA from certain forms of liability to third-parties. To the extent United's retired pilots may have rights or claims against ALPA, it is inappropriate for the POR to interfere

with those rights and claims. As a result, the plan should be modified to ensure that the retired pilot's rights remain unimpaired.

Although District Court Judge Darrah dismissed URPBPA's appeal below on June 22, 2006 "for lack of ripeness," the District Court's opinion is misguided and wrong on the facts. The Pilot Plan was terminated on June 13, 2006, nine days before Judge Darrah issued his opinion. Now that this matter is before this Court, judicial efficiency will be promoted if this Court follows past Seventh Circuit decisions generated from the United bankruptcy by resolving this appeal on the merits rather than remanding it to the District Court for further proceedings.

STATEMENT OF THE FACTS

A. The Relevant Parties and The Pilot Plan

United Air Lines, Inc. ("United"), a commercial airline that recently reorganized under Chapter 11 of the Bankruptcy Code, is the former plan sponsor and administrator of the United Air Lines Pilot Defined Benefit Pension Plan ("Pilot Plan"). [R.3, Tab 5, p. 7.][1] Before the order terminating the Pilot Plan was entered, United was obligated, under the terms of the plan, to provide tax-qualified and non-qualified pension benefit payments to United's retired pilots on a monthly basis. [Id. at 4.]

The United Retired Pilots Benefit Protection Association ("URPBPA") is an Illinois not-for-profit corporation that was formed to protect the retirement benefits of pilot retirees,

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1 The District Court forwarded the docket from the underlying appeal in District Court Case No. 06-844 to this Court as the record on appeal. URPBPA's references to the record cite to the docket number from Case No. 06-844 and the appropriate page number as "R.__, p.__". Docket No. 3 from Case No. 06-844 (the document entitled Statement of Issues on Appeal and Designation of Items to be Included in the Record on Appeal by Appellants, the United Retired Pilots Benefit Protection Association or "URPBPA's District Court Designations") contains a list of the documents and transcripts that constituted the record on appeal before Judge Darrah. Each document listed in URPBPA's District Court Designations has been assigned a Tab No. As a result, a citation to "R.3, Tab No. 5, p. 1-5" refers to the first five pages of the document designated as Tab 5 under URPBPA's District Court Designations.

survivors and dependents (referred to generally as "retired pilots"). [R. 3, Tab 2, pp. 2-3.] The Air Lines Pilot Association, International ("ALPA") is the union that represents United's active pilots, but not retired pilots. [Id.]

On December 9, 2002, United filed a voluntary petition under Chapter 11 of the Bankruptcy Code. [Id. at 4.] In November 2004, United stated it would seek the termination of the Pilot Plan and its other defined benefit pension plans by going through a two-step process. [Id. at 1-2.] In step one, United would attempt to satisfy the requirements of 11 U.S.C. § 1113 and remove any contractual obligations that required United to maintain the Pilot Plan. [Id.] In step two, United would attempt to satisfy ERISA's distress termination provisions. *See* 29 U.S.C. § 1341(c)(2)(B)(ii)(IV). [Id.]

B. United's Section 1113 Negotiations With ALPA and Letter Agreement 05-01

After United filed its § 1113 motion on November 24, 2004, it initiated negotiations with ALPA regarding the Pilot Plan (as well as issues related to wages and working conditions). [Id. at 6.] When URPBPA asked to participate in negotiations related to the Pilot Plan, United refused to include URPBPA in these discussions and, as a result, URPBPA filed a motion with the Bankruptcy Court requesting the appointment of an authorized representative to represent United's retired pilots and their pension benefits. [R. 3, Tab 5.] The Bankruptcy Court entered an order denying URPBPA's motion. [R. 3, Tab 8.]

As a result of their § 1113 negotiations, United and ALPA reached an agreement and, on December 17, 2004, United filed its Motion to Approve Letter of Agreement Modifying Their Collective Bargaining Agreement with the Air Line Pilots Association. [R. 3, Tab 12.] The

Bankruptcy Court approved a modified version of the agreement (which is labeled Letter Agreement 05-01) on January 31, 2005. [R. 3, Tab 24.][2]

Paragraph 4 of Letter Agreement 05-01 stated that ALPA would not "oppose the Company's efforts to terminate the A Plan under 29 U.S.C. § 1341(c)" as long United did not seek to terminate the Pilot Plan before May 2005. [R. 3, Tab 19, Ex. A-1, pp. 2-3.] The agreement also stated, though, that the Pilot Plan would "remain in full force and effect" until United met the requirements for a distress termination under 29 U.S.C. § 1341. [Id.] In addition, paragraphs 5 through 7 of the agreement state that, in the event the Pilot Plan is terminated, ALPA and the active pilots will receive $550 million of UAL convertible notes, an additional monthly contribution to the United Airlines Directed Account Plan and other compensation. [Id.]

C. The PBGC's Attempt To Terminate the Pilot Plan

On December 29, 2004, the Pension Benefit Guaranty Corporation ("PBGC") issued a Notice of Determination informing United that the PBGC had decided to seek the termination of the Pilot Plan and, on December 30, 2004, the PBGC filed a complaint in the United States District Court for the Northern District of Illinois seeking the "involuntary termination" of the Pilot Plan under 29 U.S.C. § 1342(c). [R. 3, Tab 16.] This complaint was referred to the Bankruptcy Court and, after a two-day trial in September 2005, the Bankruptcy Court entered an order on October 26, 2005 which purported to terminate the Pilot Plan. [R. 3, Tab 36.] Responsibility for administering the tax-qualified component of the Pilot Plan was transferred to

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[2] After the Seventh Circuit affirmed the Bankruptcy Court's December 14, 2004 and January 31, 2005 orders, *see* United Retired Pilots Benefit Protection Association v. United Air Lines, Inc., 443 F.3d 565 (7th Cir. 2006), URPBPA filed a petition for a writ of certiorari with the United States Supreme Court on June 29, 2006 asking the Supreme Court to review this Court's decision. The Supreme Court has not yet issued a ruling on URPBPA's petition.

the PBGC, which is the part of the Pilot Plan that is insured under ERISA and is subject to PBGC's jurisdiction, and United unilaterally discontinued the non-tax-qualified payments to the retired pilots. [*see* www.pbgc.gov/workers-retirees/find-your-pension-plan/PlanPage.] URPBPA appealed the Bankruptcy Court's October 26, 2005 termination order. [R. 3, Tab 38.]

On February 2, 2006, District Court Judge Darrah reversed the Bankruptcy Court's October 26, 2005 termination order. Judge Darrah held that, because the Bankruptcy Court did not have "core jurisdiction" over the PBGC's termination case, the Bankruptcy Court exceeded its jurisdiction when it purported to enter a final judgment order terminating the Pilot Plan. *See* In re United Air Lines, Inc., 337 B.R. 904 (N.D. Ill. 2006). The case was remanded to the Bankruptcy Court for proceedings consistent with 28 U.S.C. § 157(c) and, on February 15, 2006, Bankruptcy Court Judge Wedoff issued his proposed findings of fact and conclusions of law. On June 13, 2006, District Court Judge Lefkow issued a memorandum opinion and order accepting the Bankruptcy Court's recommendations as modified and entered an order terminating the Pilot Plan. *See* Pension Benefit Guaranty Corp. v. United Air Lines, Inc., Case No. 06 C 1222, 2006 WL 1697131 (N.D. Ill. June 13, 2006). URPBPA immediately filed its notice of appeal and that appeal is also pending before this Court.

D. The Introduction, Solicitation and Confirmation of United's Plan of Reorganization

United and its affiliated debtors filed their original plan of reorganization on September 7, 2005 [R. 3, Tab 28.] and their first amended plan of reorganization on October 20, 2005. [R. 3, Tab 33.] On October 21, 2005, the Bankruptcy Court entered an order approving United's Disclosure Statement and its Solicitation Procedures and approving United's selection of Poorman-Douglas Corporation ("Poorman-Douglas") as United's Solicitation Agent. [R. 3, Tab 34.] In addition, the Court also approved the form of the ballots and other solicitation documents

United intended to distribute to its creditors seeking votes with respect to United's proposed plan of reorganization. [Id.]

Included among the solicitation documents approved by the Court was the "Unsecured Retiree Convenience Class Claims" ballot, which is the ballot United mailed to the retired pilots. [R. 3, Tab 34, Ex. 3.] This ballot provided a number of voting options. [Id.] First, a retired pilot could vote to accept or reject the debtors' plan. [Id.] Next, the retired pilot could vote to accept or reject the release provisions contained in United's plan. [Id.]

Finally, the retired pilot was instructed that he or she could elect to stay in the "Unsecured Retiree Convenience Class" (Class 2D-2) and have his or her vote counted in that class if the retired pilot was willing to suffer the consequences of being in this "convenience class" (retirees in this class could not challenge the value of their claims, which had been calculated by United using valuation assumptions selected by United, and would not be able to control the timing of the sale of the newly-issued stock to which they would be entitled under United's plan or the timing of their receipt of cash from the sale). [R. 3, Tab 34.] In the alternative, a retired pilot could "opt out" of the "Unsecured Retiree Convenience Class", which would give him or her the option of challenging United's claim calculations and give the retiree the ability to sell or keep his or her own stock. [Id.] Many of United's retired pilots, who believed United had undervalued their claims, opted out of Class 2D-2 so that they could challenge United's claim calculations and, as a result, they were placed in Class 2E-2. [R. 3, Tab 47, pp. 5-7.]

Under United's plan, retirees who "opted out" of the "Retiree Convenience Class" were placed in the "Other Unsecured Claims" class (Class 2E-2), where his or her vote would then be counted separately from the votes of other retired pilots. [R. 3, Tab 34, Ex. 3, p. 5.] The claims

of United's active pilots were placed in a separate class and dealt with in other sections of United's plan. [R. 3, Tab 44, pp. 3-5.] This separate classification system gave United the ability to give ALPA and the active pilots generous compensation for the termination of the entire Pilot Plan while giving the retired pilots cents on the dollar (a 4 to 8 cent recovery) for nothing more than their potential loss of non-qualified benefits. [Id.]

After the voting deadline passed for United's plan on December 19, 2005, United filed the Declaration of Poorman-Douglas Certifying Ballots Accepting and Rejecting the Debtors' First Amended Joint Plan of Reorganization and Setting Forth Other Ballot Related Information (the "Voting Report"). [R. 3, Tab 47.] Because United failed to count the votes of more than 1500 retired pilots who opted out of the "Retiree Convenience Class", URPBPA and United engaged in litigation until votes of many of these retired pilots were counted. [R. 3, Tabs 48, 50, 51, 52.] After these votes were counted, Poorman-Douglas filed an amendment to its Voting Report which showed that, under United's jointly-proposed plan, "Class E" (which included Class 2E-2) had voted to reject United's plan. [R. 3, Tab 54, p. 3.]

On January 11, 2006, United filed its Second Amended Plan of Reorganization ("POR"). [R. 3, Tab 49.] The POR calls for implementation of Letter Agreement 05-01. [A-3, p. 7.][3] Specifically, Article I of the POR includes the following definitions:

> 18. **ALPA Distribution**: That certain distribution of shares of New UAL Common Stock distributed to ALPA-represented employees under the Plan on account of the $3,042,574,581 distribution amount under the ALPA Restructuring Agreement and that certain Distribution Agreement attached thereto and as amended and modified.
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> 19. **ALPA Released Party**: Each of: ALPA, the United Master Executive Council of ALPA, and each of their current or former (a) members, (b) officers, (c) committee members, (d) employees, (e) advisors, (t) attorneys, (g) accountants, (h) investment bankers, (i) consultants, (j) agents, and (k) other representatives with respect to any liability such

[3] References to the Appendix are cited "A-___".

person or entity may have in connection with or related to the Chapter 11 Cases, the formulation, preparation, negotiation, dissemination, implementation, administration, confirmation or consummation of any of the Plan, the Disclosure Statement, the ALPA Restructuring Agreement or any contract, employee benefit plan, instrument, release or other agreement or document created, modified, amended or entered into in connection with either the Plan or any agreement between United, UAL and ALPA, or any other act taken or omitted to be taken in connection with the Chapter 11 Cases.

20. **ALPA Restructuring Agreement**: That certain ALPA/UAL Restructuring Agreement effective as of May 1, 2003, including all attachments and exhibits thereto and any agreements in connection therewith, by and between UAL, United, and ALPA, as amended and modified by that certain Letter Agreement effective as of January 1, 2005, including all attachments and exhibits thereto and any agreements in connection therewith, which ALP A Restructuring Agreement is contained in the Plan Supplement as Exhibits 18 and 19 and incorporated herein by reference.

[A-3, p. 7.]

Article VII(F)(1) of the POR provides for the assumption of United's restructuring agreements, including the ALPA Restructuring Agreement. [A-3, pp. 94-95.] Article VIII(F)(3) states that all employee distributions, which would include distributions to ALPA, "shall be made as though these distributions were on account of Claims or Interests." [A-3, p. 95.] There are no similar provisions for distributions to be made to United's retired pilots.

Additionally, Article VI(L)(4) provides:

4. **New UAL Convertible Employee Notes**: Reorganized UAL shall issue New UAL Convertible Employee Notes for distribution to the trusts or other entities designated by ALPA…in the following amounts and pursuant to the terms set forth in the ALPA Restructuring Agreement…(a) $550,000,000 in principal amount shall be distributed to the ALPA designee…

[A-3, p. 77.] There is no similar provision allowing for a distribution of convertible notes to United's retired pilots.

The POR, therefore, provides that ALPA and the active pilots will receive extraordinary compensation in consideration for the termination of the Pilot Plan. [R. 3, Tab 41, p. 3.] Despite the fact that at least two-thirds of the Pilot Plan benefits belong to the retired pilots, the POR does not provide the retired pilots with pension-loss compensation similar to that provided to the active pilots. [Id.] The POR only provides for the payment of general unsecured claims, paid at four to eight cents on the dollar, to certain retired pilots who are entitled to receive non-qualified pension payments. [Id.]

Additionally, the POR includes release, exculpation and injunction provisions for the benefit of ALPA, a non-debtor. [A-3, pp. 121-122.] Article I(A)(17) defines the scope of the term "ALPA Released Party" broadly to include ALPA's current and former members, its officers, professionals and agents. [Id. at 7.] The term "Exculpated Party" is defined, at Article I(A)(89), to include "ALPA Released Parties." [Id. at 90-91.] Article X ("Effect of Confirmation of the Plan") of the POR contains several subsections, including Article X(F) ("Releases by the Debtors"), Article X(G) ("Exculpation") and X(J) ("Injunction"), that purport to enjoin third-parties from asserting claims against any non-debtors defined to be an "Exculpated Party" (Art. I(90)), a "Released Party" (Art. I(202)) or both. These provisions may serve to unjustly preclude URPBPA and/or retired pilots from pursuing legal claims against ALPA. [R. 3, Tab 40, p. 4.]

At the January 18, 2006 confirmation hearing on the POR, URPBPA objected to the provisions of the plan which discriminate against United's retired pilots by failing to give retired pilots consideration for the termination of the Pilot Plan that is similar or equal to the consideration the plan provides for ALPA and the active pilots. [A-4, p. 13.] URPBPA also objected to the release, exculpation and injunction provisions to the extent these provisions

purport to release ALPA from any liability it may have to third-parties. [Id. at 13-34.] The Bankruptcy Court overruled URPBPA's objections and, on January 20, 2005, it entered an order confirming United's POR. [A-2.] URPBPA timely appealed the Bankruptcy Court's order to the District Court.

E. The District Court Dismisses URPBPA's Appeal

On June 22, 2006, after the parties extensively briefed the same issues that are being presented to this Court, the District Court entered a short ruling dismissing URPBPA's appeal. [A-1.] The full opinion of the District Court's opinion is as follows:

> On February 2, 2006, this Court, in a Memorandum Opinion and Order in case number 05-C-6955, reversed the Bankruptcy Court's October 26, 2005 order terminating the United Air Lines Pilot Defined Benefit Pension Plan ("Pilot's Plan"). The termination of the Pilot's Plan underlies this appeal. Thus, this appeal of the January 20, 2006 Order confirming the Debtor's Second Amended Plan of Reorganization is, therefore, dismissed for lack of ripeness.

Contrary to this opinion, Judge Lefkow's order terminating the Pilot Plan was entered nine days earlier on June 13, 2006.

SUMMARY OF THE ARGUMENT

The District Court incorrectly dismissed URPBPA's appeal for lack of ripeness. The District Court's opinion was wrong because an order terminating the Pilot Plan had already been entered and, in any event, URPBPA's appeal was not unripe and should have been addressed on the merits. Regardless of the District Court's opinion, this Court should decide the issues raised by URPBPA on the merits in order to resolve this appeal as economically as possible.

United's Plan of Reorganization improperly treats active and retired pilots differently by giving active pilots generous compensation in the event the Pilot Plan is terminated without giving retired pilots similar benefits. The plan also improperly purports to release ALPA from any liability it may have to retired pilots even though ALPA was never a Chapter 11 debtor.

Although URPBPA does not seek to overturn United's entire Plan of Reorganization, URPBPA does ask this Court to modify United's plan so that the retired pilots are treated fairly and their rights are protected. Although United will argue that the plan cannot be modified because it has made distributions under its plan, as the court stated in In re Weinstein, 227 B.R. 284, 289 (B.A.P. 9th Cir. 1998), even when a plan of reorganization has been substantially consummated, an appellate court should still seek to grant effective relief to appellants, and if "the court can fashion relief by simply ordering additional disbursements of money by one of the parties on appeal, the appeal is not moot." The Seventh Circuit has held that when there is a possible remedy that can be awarded to a party, the availability of this possible remedy is sufficient to prevent a case from being moot. In re Envirodyne Industries, 29 F.3d 301, 303-044 (7th Cir. 1994); *see also* In re 203 N. LaSalle Street Partnership, 126 F.3d 955, 961 (7th Cir. 1997) (Seventh Circuit reversed the district court and held that, because certain transactions could be "reversed without significant harm to third parties" and because "the bankruptcy court could fashion some relief that would not unduly burden innocent third parties," the appeal at issue in that case was not "moot.")

This Court has the authority to modify the Plan of Reorganization so that United's retired pilots receive "termination compensation" that is equivalent to the consideration being provided to ALPA and the active pilots. In addition, this Court has the authority to excise the portions of the release, exculpation and injunction provisions of the Plan of Reorganization that purport to release the ALPA Released Parties from any liability they may have to United's retired pilots.

STANDARD OF REVIEW

The District Court's order dismissing URPBPA's appeal of Debtor's Second Amended Joint Plan of Reorganization for lack of ripeness is reviewed under a *de novo* standard. Lehn v.

Holmes, 364 F.3d 862, 866 (7th Cir. 2004). *See also*, Metropolitan Milwaukee Association of Commerce v. Milwaukee County, 325 F.3d 879, 881 (7th Cir. 2003). The Bankruptcy Court's rulings regarding URPBPA's objections to United's Plan of Reorganization are premised upon conclusions of law which are also subject to *de novo* review. In re Newman, 903 F.2d 1150, 1152 (7th Cir. 1990); Calder v. Camp Grove State Bank, 892 F.2d 629, 631 (7th Cir. 1990).

ARGUMENT

I. Although The District Court Erred In Dismissing For Lack Of Ripeness URPBPA's Appeal Of The Bankruptcy Court's Order Confirming United's Plan Of Reorganization, And Should Have Decided URPBPA's Appeal On The Merits, This Court Should Review The Merits Of This Appeal.

A. The District Court's Order Dismissing URPBPA's Appeal Was Entered In Error.

In its June 22, 2006 order, Judge Darrah ruled that URPBPA's appeal was not ripe because the Pilot Plan had not been terminated. [A-1.] As stated in the Lehn case (cited above) "[c]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." Lehn, 364 F.3d at 867 *citing* Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992). There are two factors that determine whether an issue is ripe for judicial consideration. Id. First, the issue on which review is sought must be fit for judicial decision. Id. Second, courts must take into account any hardship to the parties of withholding court consideration. Id.

The District Court's June 22, 2006 ruling that this appeal was not ripe was obviously incorrect. Judge Darrah stated that the appeal was not ripe because the Pilot Plan had not been terminated when, in fact, Judge Lefkow entered an order terminating the Pilot Plan nine days before Judge Darrah entered his ruling. As a result, Judge Darrah's ruling was clearly made in error and the appeal was "fit for a judicial decision."

The District Court could have ruled on the issues presented in URPBPA's appeal regardless of whether the Pilot Plan litigation had been completed. Under Letter Agreement 05-01, ALPA and the active pilots only receive certain forms of compensation in the event the Pilot Plan is terminated. This contingency didn't stop the Bankruptcy Court from approving the POR on January 20, 2006. Likewise, the fact the Pilot Plan had not yet been terminated should not have prevented the District Court from deciding whether the retired pilots were entitled to receive similar compensation if the Pilot Plan terminated. If URPBPA would have waited until after the June 13, 2006 termination order was entered to appeal the January 20, 2006 order confirming United's POR, URPBPA's appeal would not have been timely. Furthermore, the separate issue regarding the legality of the release, exculpation, and injunction provisions in United's POR has absolutely nothing to do with whether the Pilot Plan is terminated.

The appellate issues raised by URPBPA did not involve "hypothetical, speculative, or illusory disputes." Rather, the appeal raised important issues related to the rights of United's retired pilots. As a result, the District Court erred when it dismissed URPBPA's appeal for lack of ripeness.

B. This Court Should Decide URPBPA's Appeal On The Merits Because It Promotes Judicial Economy And Follows Precedent.

Although this Court could reverse and remand this case to the District Court and order the District Court to issue a ruling regarding the merits of URPBPA's appeal, the fact that this Court has issued an expedited briefing schedule in this appeal (at United's request) indicates that this Court and the parties believe an expeditious resolution of this appeal by this Court will be in the best interest of all parties. Reviewing this case on the merits would also be consistent with this Court's past rulings in other appeals that have arisen out of United's Chapter 11 restructuring proceedings. For instance, in In re UAL Corp., 411 F.3d 818 (7th Cir. 2005), the

district court entered an order dismissing an appeal filed by U.S Bank and, rather than remanding the case back to the district court, the Seventh Circuit ruled as follows:

> If the bank is right about appealability, we still could duck the merits of the appeal by remanding the case to the district court for that court to determine them. But that would create unnecessary delay in resolving the controversy, since the merits have been fully briefed.

Id. at 821. It is likely that all parties would agree that, by resolving this appeal on the merits, this Court will be making the most efficient and expeditious use of court and party resources.

II. The Bankruptcy Court Erred In Confirming United's Second Amended Joint Plan Of Reorganization Because The Plan Unfairly Discriminates Against Retired Pilots.

The classification scheme set forth under United's POR violates Sections 1122(a) and 1123(a)(4) of the Code by (1) not classifying retired pilot claims related to the termination of the Pilot Plan with the claims of ALPA and the active pilots and (2) not treating these similar claims in a similar manner. United also failed to meet the requirements of a cramdown under Section 1129(b).

A. United's Plan Of Reorganization Fails To Classify Substantially Similar Claims In A Similar Manner.

The Bankruptcy Code is designed to ensure equality of distribution from the time the bankruptcy petition is filed. Section 1122(a) provides that "substantially similar" claims may be classified together under a plan of reorganization. United improperly classified the claims of the active pilots separately than the retired pilots.

The case law throughout the circuits makes it clear that a debtor does not have unfettered discretion when it classifies unsecured claims. As the Fifth Circuit has held, substantially similar claims should ordinarily be placed in the same class. In re Greystone III Joint Venture, 995 F.2d 1274, 1278-79 (5th Cir. 1992). In Greystone, the court found that the debtor's plan of

reorganization impermissibly classified like creditors in different ways and held that under Section 1122 "substantially similar claims", those which share common priority and rights against the debtor's estate, should be placed in the same class. Id. at 1279. The court went on to say that if "substantially similar" claims are in different classes, a debtor must produce evidence that such classification is for a good business reason and not for the purpose of gerrymandering an affirmative vote on a reorganization plan. Id. at 1279-81.

United has argued that because the retired pilots are not parties to Letter Agreement 05-01, the collective bargaining agreement between United and ALPA, their claims cannot be place in the same category as the claims of ALPA and the active pilots. However, the manner in which creditors achieved their status as a creditor does not alter the legal character of their claims and thus does not warrant separate classification. Lumber Exchange Limited Partnership v. Mutual Life Insurance Co., 698 F.2d 647, 649 (8th Cir. 1992). In Lumber Exchange the court ruled that the debtor could not classify creditors' claims differently just because one creditor's claim arose from operation of law and another creditor bargained for recourse debt. Id. The court held that both were unsecured claims and could not be classified separately. Id. Here, the active and retired pilots' claims arise from the termination of the Pilot Plan. These are identical claims that should be treated similarly. The fact that Letter Agreement 05-01 attempts to provide an improper, favored status to active pilots does not change the fact that the claims of active and retired pilots for the termination of the Pilot Plan are similar claims that should be treated in a similar fashion.

United has cited In re Bryson Properties, 961 F.2d 496 (4th Cir. 1992) for the proposition that even if the active and retired pilots have substantially similar claims, Sections 1122 and 1123 do not prohibit separate classification. However, in Bryson the court reversed the

confirmation order holding that, although the Bankruptcy Code grants flexibility in classification of unsecured claims, there is a limit on the debtor's power to classify creditors. Id. at 502. In Bryson, the debtor separately classified an unsecured claim arising from a non-recourse loan and unsecured claims arising from recourse loans. Id. at 501. The court found the debtor's separate classification of the unsecured claims to be impermissible because the debtor failed to offer any basis for such distinction. Id. at 502.

Here, United failed to offer any reasonable basis for placing the generously-compensated claims of active pilots in a category different from the claims of the retired pilots. This is nothing more, or less, than unfair, improper discrimination against the retired pilots. The Bankruptcy Code does not give United the right to place substantially similar claims in separate classes in order to favor a one particular set of creditors over another. The Bankruptcy Court erred in permitting United to classify the claims of active and retired pilots separately.

B. United's Plan Of Reorganization Fails To Treat United's Active And Retired Pilots Equally Even Though They Have Similarly Situated Claims.

United's POR not only fails to classify the claims of United's active and retired pilots together, the plan also fails to treat the active and retired pilots equally. 11 U.S.C § 1123(a)(4) requires that a plan of reorganization "provide the same treatment for each claim or interest of a particular class." Because the retired and active pilots are similarly situated, their claims must be treated similarly.

Equality of distribution to similarly situated creditors is a bedrock bankruptcy policy. In re St. Francis Physician Network, Inc., 213 B.R. 710, 714 (Bankr. N.D. Ill. 1997). Embodied in numerous provisions of the Bankruptcy Code is the principle that creditors of the same class have a right to equality of treatment. In re Stoecker, 179 F.3d 546, 551 (7th Cir. 1999); In re CSC Industries, Inc. 232 F.3d 505, 508 (6th Cir. 2001) (fundamental objective of the Bankruptcy

Code is to treat similarly situated creditors equally). Under Section 1123(a)(4) debtors are prohibited from discriminating unfairly between similarly situated creditors and a plan of reorganization must provide the same treatment for each claim or interest of a particular class. Thus, absent specific Bankruptcy Code authority, debtors may not prefer one unsecured creditor over another. In re Kmart Corp., 359 F.3d 866, 872 (7th Cir. 2004).

As discussed above, the POR provides that ALPA and the active pilots will receive a distribution in the amount of $550 million in convertible notes and other benefits as compensation for the termination of the Pilot Plan. Retired pilots do not receive equivalent benefits.

Although United admits in its response to objections to its POR that “the Plan provides for different treatment of the rights and claims of active and retired pilots” [R. 3, Tab 49, p. 85.], United also argues that the separate classification is proper because the retired pilots are not similarly situated. United argues that the active pilots’ claims and rights are different than the claims of the retired pilots because the active pilots are entitled to convertible notes and stock distributions under Letter Agreement 05-01 while the retired pilots are not entitled to any benefits under Letter Agreement 05-01. However, the fact that ALPA agreed to the termination of the Pilot Plan under certain circumstances does not mean the active pilots should receive a distribution related to the termination of the plan while retired pilots do not. The active and retired pilots are still going to suffer from the loss of the Pilot Plan and, in fact, the termination of the plan will have a greater impact on the retired pilots, who had a right to 2/3 of the benefits from the Pilot Plan. Because active and retired pilots are similarly situated, if the active pilots have an allowed claim for plan termination, so should the retired pilots.

The fact that the POR distributes $550 million in convertible notes and other benefits to ALPA and the active pilots as a result of the termination of the Pilot Plan without providing similar benefits to the retired pilots is discriminatory and contrary to bankruptcy policy. This Court should modify United's Plan of Reorganization in order to ensure that the retired pilots are also paid similar termination benefits.

Despite arguments that United has made to the courts below, United could easily afford to pay retired pilots benefits that are similar to the ones it has paid or will pay the active pilots. United and its financial advisors have developed a number of business models referred to as "Gershwin models." These are the financial models upon which United's plan of reorganization is based. All of these Gershwin models provide for a yearly financial "cushion," or margin of error, that United relies on to absorb unexpected costs. For instance, in the Gershwin 4.1 version of United's business model, United factored in a $1.35 billion cushion for unexpected costs. [R. 23, Exhibit A, p. 47.] United will attempt to convince this Court that United's POR has no margin for error when, in fact, the cushion in United's plan could be used to provide relief to the retired pilots.

United's own admissions reveal that United's survival does not depend on the result of this appeal. United's POR has more than enough flexibility and financial "cushion" to provide United's retired pilots with the relief to which they are entitled. As United's spokeswoman Jean Medina told the Chicago Tribune, United's plan of reorganization assumes that United loses all of its pending appeals. (see Mark Skertic, *Claims Put United on Standby: Despite Exit From Bankruptcy, Unresolved Matters Keep Carrier in Court For Months*, Chi. Trib., Feb. 1, 2006 ("'Our plan assumes we lose all of those [disputes regarding unresolved claims]…Those things are going, appeals are going on, but the plan assumes it doesn't go in our favor"). [R. 23, Ex. B.]

United's Jean Medina, United's spokeswoman, is quoted as stating that United's POR assumes a "worst-case scenario" where United loses all of its appeals and all of the litigation regarding unresolved claims. Ms. Medina stated that unresolved claims and appellate issues should not have any impact on United's recovery or the investment community.

Neither URPBPA nor the retired pilots seek to interfere with United's financial recovery. In fact, United's retired pilots have assisted with United's recovery by negotiating and reaching a settlement with United over the termination of the retired pilots' life insurance plan and significant reductions to their medical benefits in connection with proceedings United initiated pursuant to 11 U.S.C. § 1114. However, URPBPA does seek to ensure that its rights are protected and that it receives what it is due under the law.

United's reorganization process is still ongoing and all issues related to the claims made against United's bankruptcy estate have not been settled. As a result, there is nothing unique about the fact that United and its retired pilots are still engaged in litigation over United's obligations and it is not too late to provide relief to URPBPA. As established in other cases, even when a plan of reorganization has been substantially consummated, an appellate court should still seek to grant effective relief to appellants, and if "the court can fashion relief by simply ordering additional disbursements of money by one of the parties on appeal, the appeal is not moot." In re Weinstein, 227 B.R. at 289; In re 203 N. LaSalle Street Partnership, 126 F.3d at 961 (holding that certain transactions could be "reversed without significant harm to third parties" and because "the bankruptcy court could fashion some relief that would not unduly burden innocent third parties," the appeal at issue in that case was not "moot."). This Court can still award URPBPA the relief it is entitled to under the law and thus this appeal can and should be heard on its merits.

C. United Failed To Cramdown Its Plan Of Reorganization.

As stated below, Class E voted to reject United's Plan of Reorganization. As a result, United should have been required to satisfy the "cramdown" requirements of 11 U.S.C. § 1129(b), which is the procedure for approving a reorganization plan in the face of creditor resistance. In re Wabash Valley Power Association, Inc., 72 F.3d 1305, 1313 (7th Cir. 1995).

Section 1129(b) requires that at least one class of impaired creditors approve a proposed Chapter 11 plan and that the plan satisfy the absolute priority rule, which precludes the payment of junior claims as long as senior claims remain unsatisfied. Id. In order for a plan to be crammed down over the dissenting class of creditors, the plan may not unfairly discriminate against the dissenting class and, in addition, the plan must be fair and equitable with respect to the rights of the dissenting class. 11 U.S.C. § 1129(b); 4 Norton Bankr. L & Prac. 2d § 93:2. A debtor has the burden of demonstrating that a proposed plan satisfies § 1129(b)'s cramdown requirements. 4 Norton Bankr. L & Prac. 2d § 93:2.

United's Plan of Reorganization discriminates unfairly against the retired pilots who are dissenting Class 2E-6 creditors, and is not fair and equitable, because it provides active pilots with extraordinary benefits to be paid in the event of plan termination without providing similar benefits to United's retired pilots. As a result, United failed to properly cramdown its plan over the dissenting vote of Class E. This Court should remedy the unfair discrimination by requiring United to pay retired pilots benefits that are similar to the benefits that have been or will be paid to ALPA and the active pilots now that the Pilot Plan has been terminated.

III. The Bankruptcy Court Erred In Confirming United's Second Amended Joint Plan Of Reorganization Because The Plan Contains Release, Exculpation And Injunction Provisions That Are Contrary To The Law.

The Bankruptcy Court erred in allowing the third party release provisions to stand in United's Plan of Reorganization. Contained within Article X ("Effect of Confirmation of the

Plan") of United's Plan of Reorganization are several subsections, including Article X(F) ("Releases by the Debtors"), Article X(G) ("Exculpation") and X(J) ("Injunction"), that purport to enjoin third-parties from asserting claims against any non-debtors defined to be an "Exculpated Party" (Art. I(90)), a "Released Party" (Art. I(202)) or both. URPBPA generally objected to these third-party release provisions and specifically objected to any provision in the Plan of Reorganization that would purport to enjoin litigation between an "ALPA Released Party" (Art. I(19)), which is defined to include the Air Line Pilots Association, International ("ALPA") and various individuals and entities associated with ALPA, and United's retired pilots.

Bankruptcy courts do not have the jurisdictional or statutory authority to enter orders permanently enjoining litigation between non-debtor parties. *See* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959 (1997) (providing a comprehensive analysis of the jurisdictional, statutory and policy reasons why non-debtor releases contained in plans of reorganization should not be approved and a critique of cases approving non-debtor releases). Non-debtor releases improperly create new substantive rights that parties do not enjoy under non-bankruptcy law, give released non-debtors benefits similar to a bankruptcy discharge even though the released parties have not filed for bankruptcy, disrupt the Bankruptcy Code's mechanisms for providing equitable distributions to creditors and violate other bankruptcy policies. Id; *see also* In re Western Real Estate Fund, Inc., 922 F.2d 592, 600 (10th Cir. 1991) ("Obviously, it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections; Congress did not intend to extend such benefits to third-party bystanders.")

Because bankruptcy courts do not have the authority to adjudicate non-core claims between two non-debtor parties, bankruptcy courts do not have the authority to enter injunctions that prevent the adjudication of such claims outside of bankruptcy court. Brubaker, supra, at 1070 ("By using their section 105 powers to release non-debtor actions they could not adjudicate directly, bankruptcy courts violate the cardinal principle that a court's 'in aid of jurisdiction' powers cannot be used to expand the court's jurisdictional reach.") The fact that Congress enacted § 524(g) of the Code, which provides specific authority for injunctions in favor of third-parties in asbestos-related reorganizations only, "reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos, cases." In re Lowenschuss, 67 F.3d 1394, 1402 n. 6 (9th Cir. 1995).

URPBPA argued to the Bankruptcy Court that at a minimum, it should not have approved any provision in United's POR that purported to enjoin persons who voted against the plan, or abstained from voting, from pursuing litigation against ALPA. Neither § 105(a) of the Bankruptcy Code, which is "merely a vehicle to carry out otherwise provided powers of the bankruptcy court" and may not be used to create new substantive law, In re Lloyd, 37 F.3d 271, 275 (7th Cir. 1994); *see also* Norwest Bank v. Worthington Ahlers, 485 U.S. 197, 206, 108 S.Ct. 963, 968 (1988), nor any other provision of the Code provides a bankruptcy court with the authority to enter nonconsensual, permanent injunctions prohibiting non-debtor litigation. In re Sybaris Clubs International, Inc., 189 B.R. 152, 159 (Bankr. N.D. Ill. 1995). The Seventh Circuit has stated that "a creditor who votes to reject the Plan or abstains from voting may still pursue a claim against third-party nondebtors." In re Specialty Equipment Companies, Inc., 3 F.3d 1043, 1047 (7th Cir. 1993).

URPBPA also argued to the Bankruptcy Court that it should have ruled that the POR provisions which purport to release ALPA and other non-debtor parties from litigation that may occur outside these proceedings can not be enforced against persons who voted in favor of United's proposed plan. Although the Specialty Equipment court observed that Bankruptcy Code § 524(e) "does not by its specific words preclude all releases that are accepted and confirmed as an integral part of a reorganization," Specialty Equipment, 3 F.3d at 1047, the court was not asked to address whether bankruptcy courts have any statutory authority to enjoin third-party litigation with respect to parties who have voted in favor of a plan of reorganization. The court did not need to reach this issue because the appeal was dismissed as moot. But a previous Seventh Circuit case, Union Carbide v. Newboles, 686 F.2d 593 (7th Cir. 1982), held that a bankruptcy court cannot enjoin a creditor from recovering the balance of its loss from a non-debtor even if the creditor votes in favor of the debtor's plan because "[a] creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceeding."

Further, the Sybaris Clubs court observed that it could not locate any statutory authority that would authorize a bankruptcy court to permanently enjoin a lawsuit against a non-debtor. Sybaris Clubs, 189 B.R. at 159; *see also* In re Spiers, 190 B.R. 1001, 1012 (Bankr. N.D. Ill. 1996) ("...injunctions should not be used to give permanent relief to non-debtors from their possible liability to creditors"). As a result, the plan provisions which purport to permanently release non-debtors from liability with respect to claims asserted by United's other creditors should have been rejected in their entirety.

In opposition to URPBPA's objection, United relied on In re PWS Holding Corp., 228 F.3d 224 (3d Cir. 2000) arguing that exculpation is commonplace and is appropriate for debtors

and other parties who have participated in a debtor's reorganization. The PWS case however contained a release, with the exception of willful misconduct and gross negligence, with respect to a creditor committee and its professionals performing functions as an arm of the court. In the instant case APLA does not stand in the same position as the creditor committee in the PWS case. There was no appropriate authority for the Bankruptcy Court to allow the third party release and exculpation provisions of ALPA to stand.

United also argued that the third-party release provisions set forth in its Plan of Reorganization was properly approved because United has assumed indemnification obligations to some of the "Exculpated" and "Released" parties. This argument should be rejected because a permanent injunction against non-debtor litigation is "improper, regardless of who has agreed to indemnify [the released party]" and because "the discharge injunction provided for in section 524(a) already frees the debtor from potential derivative claims, such as indemnification or subrogation, that might arise from the creditor's post-confirmation attempts to recover the discharged debt from others." Western Real Estate, 922 F.2d at 600-02. To the extent United has voluntarily entered into indemnification agreements, these agreements should have no effect on the rights of United's retired pilots to assert claims and seek recoveries from ALPA or other non-debtor parties.

CONCLUSION

URPBPA respectfully requests that this Court exise the portions of the release, exculpation and injunction provisions from the POR that purport to release the ALPA Released Parties from any liability they may have to United's retired pilots. In addition, URPBPA respectfully requests that this Court remand this case to the Bankruptcy Court for future hearings regarding the compensation that will be paid to active and retired pilots for the termination of the

Pilot Plan. The Bankruptcy Court should be instructed to order United to pay compensation to the retired pilots that is similar to the compensation United has paid or will pay to ALPA and the active pilots.

Dated: July 21, 2006

Respectfully Submitted,

UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. RULE 32(a)(7)

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,359 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word in 12 font size in Times New Roman type style.

Dated: July 21, 2006

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned, counsel for the Plaintiff-Appellant, United Retired Pilots Benefits Protection Association, hereby certifies that on July 21, 2006, two copies of the Brief and Required Short Appendix of Appellant as well as a digital version containing the brief, to be served upon each of the following parties by e-mail and overnight mail upon:

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

Dated: July 21, 2006

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CIRCUIT RULE 31(e)(1) CERTIFICATION

Pursuant to Rule 31(e)(1) counsel certifies that all the material in the Appendix labeled A-1 through A-5 is not electronically available and are therefore not included in the digital version of the Appellant's Brief.

Dated: July 21, 2006

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SHORT APPENDIX

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