

**Case No. 06-2780
(Consolidated with Case Nos. 06-2662, 06-2714, and 06-2843)**

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

In re UAL CORPORATION, et al., *Reorganized Debtors*

**UNITED RETIRED PILOTS BENEFITS PROTECTION
ASSOCIATION, et al., *Appellants***

v.

UAL CORPORATION et al., *Appellees*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Appellee.*

**Appeals From The United States District Court
For The Northern District of Illinois, Eastern Division
Case No. 06-00844
Honorable John W. Darrah**

BRIEF OF APPELLEES UAL CORPORATION ET AL.

Marc Kieselstein, P.C.
David R. Seligman
(Counsel of Record)
James J. Mazza, Jr.
Chad J. Husnick
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601
Telephone: (312) 861-2000
Facsimile: (312) 861-2200
dseligman@kirkland.com

*Counsel for Appellees
UAL Corporation, et al.*

Dated: August 21, 2006

CORPORATE DISCLOSURE STATEMENT

Appellees UAL Corporation and of its twenty-seven direct and indirect wholly owned subsidiaries (collectively, “United,” the “Reorganized Debtors,” or the “Company”) are reorganized debtors in the underlying bankruptcy cases. The Reorganized Debtors include the following entities: UAL Corporation, UAL Loyalty Services, LLC, Ameniti Travel Clubs, Inc., Mileage Plus Holdings, Inc., Mileage Plus Marketing, Inc., MyPoints.com, Inc., MyPoints Offline Services, Inc., Cybergold, Inc., iTarget.com, UAL Company Services, Inc., UAL Benefits Management, Inc., United BizJet Holdings, Inc., BizJet Charter, Inc., BizJet Fractional, Inc., BizJet Services, Inc., United Airlines, Inc., Kion Leasing, Inc., Premier Meeting and Travel Services, Inc., United Aviation Fuels Corporation, United Cogen, Inc., Mileage Plus, Inc., United GHS, Inc., United Worldwide Corporation, United Vacations, Inc. UAL Corporation is the publicly traded parent company for United Air Lines, Inc.

The following law firm has participated in this case on United’s behalf: Kirkland & Ellis LLP.

TABLE OF CONTENTS

	<u>Page</u>
Statement of Jurisdiction	1
Statement of the Issues	2
Statement of the Case	3
Statement of the Facts	4
I. United and ALPA Reach A Settlement That Triggers United’s Other Labor Settlements	5
II. Termination of the Pilot Plan	9
III. United’s Global Settlement with PBGC	10
IV. United’s Plan of Reorganization	10
A. The Plan of Reorganization’s Class Structure	11
B. The Plan of Reorganization’s Release, Exculpation, and Injunction Provisions.....	11
V. The Bankruptcy Court Overrules URPBPA’s Plan Objections and Confirms the Plan of Reorganization.....	13
VI. Substantial Consummation of United’s Plan of Reorganization.....	15
VII. The District Court Reverses the Original Pilot Plan Termination Order	17
VIII. The Final Pilot Plan Termination Order	18
IX. The District Court Dismisses URPBPA’s Appeal of the Confirmation Order	19
Summary of Argument	19
Standard of Review	22
Argument	23
I. The District Court Erred In Dismissing URPBPA’s Appeal for Lack of Ripeness	23

TABLE OF CONTENTS (cont'd)

	Page
II. URPBPA’s Appeal Must Be Dismissed Because There is No Feasible Remedy That This Court Could Grant URPBPA.....	24
A. This Court Already Ruled that “Pension Termination Compensation” Is Not a Feasible Remedy	24
B. URPBPA Failed to Request a Stay Pending Appeal and Acquiesced in the Substantial Consummation of the Plan of Reorganization.....	25
C. The Plan of Reorganization Has Been Substantially Consummated.....	26
D. This Court Cannot Grant URPBPA Relief, Even if Warranted, Without Harming Innocent Third Parties	27
1. Requiring Identical Treatment of Active and Retired Pilots Would Impair United’s Post-Consummation Capital Structure	28
2. URPBPA’s Appeal of the Plan’s Release, Exculpation, and Injunction Provisions is Moot.....	30
3. This Court Cannot “Blue Pencil” the Plan of Reorganization.....	31
III. The Bankruptcy Court’s Confirmation Order Should Be Affirmed	35
A. URPBPA Cannot Collaterally Attack the ALPA Agreement.....	36
B. URPBPA is Collaterally Estopped from Arguing that Retired Pilots are Entitled to the Same Treatment as Active Pilots.....	37
C. The Plan of Reorganization’s Separate Treatment of Retired and Active Pilots Complies With the Bankruptcy Code.....	38
1. The Plan of Reorganization’s Different Classification of Active and Retired Pilots Is Appropriate and Necessary	40

TABLE OF CONTENTS (cont'd)

	Page
2. United's Plan Complies with Section 1123(a)(4).....	43
3. The Plan of Reorganization Does Not Discriminate Unfairly Against Retired Pilots' Claims.....	44
4. Providing Retired Pilots with Similar Treatment Would Allow a Double-Recovery and Dilute PBGC's Claim.....	45
D. The Plan of Reorganization's Release, Exculpation and Injunction Provisions are Lawful.....	47
1. The Plan of Reorganization's Consensual Releases Comply with Seventh Circuit Law.....	47
2. The Plan of Reorganization's Exculpation Provisions Are Appropriate	49
Conclusion.....	53

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Creek v. Village of Westhaven</i> , 144 F.3d 441 (7th Cir. 1998)	38
<i>Ernst & Young LLP v. Baker O'Neal Holdings, Inc.</i> , 304 F.3d 753 (7th Cir. 2002)	29
<i>In re 203 N. LaSalle Street P'ship</i> , 126 F.3d 955 (7th Cir. 1997)	34
<i>In re Adams Hard Facing Co.</i> , 129 B.R. 662 (W.D. Okla. 1991).....	47
<i>In re Andreuccetti</i> , 975 F.2d 413 (7th Cir. 1992)	24, 25
<i>In re Bryson Props., XVIII</i> , 961 F.2d 496 (4th Cir. 1992)	44
<i>In re Continental Airlines Corp.</i> , 907 F.2d 1500 (5th Cir. 1990)	35
<i>In re Genesis Health Ventures, Inc.</i> , 324 B.R. 510 (Bankr. D. Del. 2005)	52
<i>In re Greate Bay Hotel & Casino, Inc.</i> , 251 B.R. 213 (Bankr. D.N.J. 2000)	44
<i>In re Greystone III Joint Venture</i> , 948 F.2d 134 (5th Cir. 1991)	44
<i>In re Greystone III Joint Venture</i> , 995 F.2d 1274 (5th Cir. 1992)	44
<i>In re Heartland Steel, Inc.</i> , 389 F.3d 741 (7th Cir. 2004)	23
<i>In re Kliegl Bros. Universal Elec. Stage Lighting Co., Inc.</i> , 149 B.R. 306 (Bankr. E.D.N.Y. 1992).....	47
<i>In re Lineal Group, Inc.</i> , 226 B.R. 608 (Bankr. M.D. Tenn. 1998)	47

TABLE OF AUTHORITIES (cont'd)

	Page(s)
<i>In re Lowenschuss</i> , 67 F.3d 1394 (9th Cir. 1995)	50
<i>In re Master Mortgage Inv. Fund, Inc.</i> , 168 B.R. 930 (Bankr. W.D. Mo. 1994)	53
<i>In re Metromedia Fiber Network, Inc.</i> , 416 F.3d 136 (2d Cir. 2005)	31
<i>In re Midway Airlines, Inc.</i> , 383 F.3d 663 (7th Cir. 2004)	23
<i>In re Ormet Corp.</i> , 2005 WL 2000704 (S.D. Ohio Aug. 19, 2005)	33, 36
<i>In re PWS Holding Corp.</i> , 228 F.3d 224 (3d Cir. 2000)	51, 52
<i>In re Richard Buick, Inc.</i> , 126 B.R. 840 (Bankr. E.D. Pa. 1991)	47
<i>In re Spiers Graff Spiers</i> , 190 B.R. 1001 (N.D. Ill. 1996)	50
<i>In re Sybaris Clubs Int'l, Inc.</i> , 189 B.R. 152 (Bankr. N.D. Ill. 1991)	50
<i>In re Trico Marine Services, Inc.</i> , 337 B.R. 811 (Bankr. S.D.N.Y. 2006)	29, 30, 36
<i>In re Trism, Inc.</i> , 282 B.R. 662 (8th Cir. BAP 2002)	35
<i>In re UAL Corp.</i> , 408 F.3d 847 (7th Cir. 2005)	24, 26
<i>In re UAL Corp.</i> , 428 F.3d 677 (7th Cir. 2005)	10
<i>In re UAL Corp.</i> , 443 F.3d 565 (7th Cir. 2006)	passim
<i>In re US Airways Group</i> , 369 F.3d 806 (4th Cir. 2004)	35

TABLE OF AUTHORITIES (cont'd)

	Page(s)
<i>In re Weinstein</i> , 227 B.R. 284 (B.A.P. 9th Cir. 1998)	34
<i>In re Western Real Estate Fund, Inc.</i> , 922 F.2d 592 (10th Cir. 1991)	50, 53
<i>In re Zenith Electronics Corp.</i> , 250 B.R. 207 (D. Del. 2000)	26
<i>Lumber Exch. Ltd. P'ship v. Mutual Life Ins. Co.</i> , 968 F.2d 647 (8th Cir. 1992)	44
Matter of Jersey City Med. Ctr., 817 F.2d 1055 (3d Cir. 1987)	42
Matter of UNR Indus., Inc., 20 F.3d 766 (7th Cir. 1994)	24
Matter of Woodbrook Assocs., 19 F.3d 312 (7th Cir. 1994)	41, 45
<i>Osmar Sylvania, Inc. v. SLI, Inc.</i> , 2004 WL 2346021 (D. Del. Oct. 5, 2004)	36
<i>Pension Benefit Guaranty Corp. v. United Air Lines, Inc.</i> , 2006 WL 1697131 (N.D. Ill. June 13, 2006)	19
<i>Union Carbide v. Newboles</i> , 686 F.2d 593 (7th Cir. 1982)	50, 51
<i>United Steelworkers of America v. United Engineering, Inc.</i> , 52 F.3d 1386 (6th Cir. 1995)	8, 10, 47
<i>Washington Group Intern., Inc. v. Bell, Boyd & Lloyd LLC</i> , 383 F.3d 633 (7th Cir. 2004)	38
 Statutes	
11 U.S.C. § 1113	passim
11 U.S.C. § 1113(f)	41
11 U.S.C. § 1122	41, 42, 43, 45

TABLE OF AUTHORITIES (cont'd)

	Page(s)
11 U.S.C. § 1122(a)	45
11 U.S.C. § 1123(a)(1)	42
11 U.S.C. § 1123(a)(4)	40, 45
11 U.S.C. § 1129(a)(3)	51
11 U.S.C. § 1129(a)(9)(A)	42, 47
11 U.S.C. § 1129(b)(2)(A)	46
11 U.S.C. § 365	41, 42
11 U.S.C. § 365(b)(1)	47
11 U.S.C. § 503	42
11 U.S.C. § 503(b)	47
28 U.S.C. § 1291	1
28 U.S.C. § 1334	1
28 U.S.C. § 157	1
28 U.S.C. § 158	1
28 U.S.C. § 158(d)	1, 2
29 U.S.C. § 1362(b)	47
 Rules	
Fed. R. App. P. 4(a)(1)(A)	2
Fed. R. App. P. 6(b)(1)	2
Federal Rule of Bankruptcy Procedure 8001(a)	1
Federal Rule of Bankruptcy Procedure 8002(a)	1

STATEMENT OF JURISDICTION

The Appellant's statement of jurisdiction is neither complete nor correct. United and twenty-seven of its affiliates filed voluntary petitions for relief pursuant to Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court") on December 9, 2002 (the "Chapter 11 Cases"). On January 20, 2006, the Bankruptcy Court entered a final order (the "Confirmation Order") confirming the *Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code* (the "Plan of Reorganization").

1. Bankruptcy Court Jurisdiction: The Bankruptcy Court has jurisdiction over the Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334. Confirmation of the Plan of Reorganization is a core proceeding under 28 U.S.C. § 157(b)(2)(L). On January 20, 2006, the Bankruptcy Court entered the Confirmation Order over the objections of the United Retired Pilots Benefit Protection Association ("URPBPA").

2. District Court Jurisdiction: Pursuant to 28 U.S.C. § 158(a) and Rules 8001(a) and 8002(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), URPBPA timely filed its appeal of the Confirmation Order on January 26, 2006. The District Court had jurisdiction over URPBPA's appeal pursuant to 28 U.S.C. § 158(a)(1), but dismissed URPBPA's appeal for lack of ripeness on June 22, 2006.

3. Circuit Court Jurisdiction: The District Court's order dismissing URPBPA's appeal of the Confirmation Order for lack of ripeness is final and appealable under 28 U.S.C. §§ 158(d) and 1291. URPBPA filed a notice of appeal from the District

Court's order on June 23, 2006. URPBPA's appeal is timely pursuant to 28 U.S.C. § 158(d) and Rules 4(a)(1)(A) and 6(b)(1) of the Federal Rules of Appellate Procedure. However, this Court should dismiss URPBPA's appeal because there is no longer any feasible remedy that this Court can order. To unwind, or even to modify (as URPBPA suggests), United's substantially consummated Plan would harm tens if not hundreds of thousands of innocent third parties who have relied upon the finality of the Confirmation Order, the implementation of the Plan, and United's labor settlement with ALPA (its pilots union) upon which the Plan was based.

STATEMENT OF THE ISSUES

1. Whether the District Court erred on June 22, 2006, when it dismissed URPBPA's appeal of the Confirmation Order for lack of ripeness, where the basis for the District Court's decision was its mistaken believe that the Pilot Plan had not been terminated.

2. Whether URPBPA's appeal of the Confirmation Order should be dismissed where: (a) URPBPA failed to request a stay of the Confirmation Order pending appeal; (b) United's Plan of Reorganization has been substantially consummated; and (c) there is no longer any feasible remedy that this court could order.

3. Whether the separate treatment of retired pilots' unsecured claims and active pilots' rights to receive consideration under the ALPA Agreement under United's Plan of Reorganization violated the Bankruptcy Code's plan confirmation requirements.

4. Whether the Plan of Reorganization's release, exculpation, and injunction provisions regarding litigation against ALPA violated the Bankruptcy Code.

STATEMENT OF THE CASE

This is an appeal from the District Court's order dismissing for lack of ripeness URPBPA's appeal from the Confirmation Order. On January 20, 2006, the Bankruptcy Court entered the Confirmation Order. On January 26, 2006, URPBPA appealed the Confirmation Order, but did not seek a stay pending appeal. On February 1, 2006, United emerged from over three years in Chapter 11 and United's Plan of Reorganization went effective, triggering a cascade of literally thousands of transactions and other events that cannot be unwound, thereby resulting in substantial consummation of the Plan.

On June 22, 2006, the District Court (Darrah, J.) dismissed URPBPA's appeal of the Confirmation Order for lack of ripeness because the District Court was under the mistaken impression that the Pilot Plan was not terminated. However, the District Court (Lefkow, J.) in fact had entered an order re-terminating the Pilot Plan nine days earlier on June 13, 2006. The very next day (June 23, 2006) URPBPA appealed the District Court's order.

URPBPA's appeal should be dismissed because there is no feasible remedy that this Court could order. Moreover, even if a feasible remedy was available, the Confirmation Order should be affirmed because it fully complies with the Bankruptcy Code.

STATEMENT OF THE FACTS

United's Plan of Reorganization is a comprehensive, monolithic settlement agreement between United and its stakeholders that represents the culmination of United's thirty-six months in Chapter 11. The Plan of Reorganization memorializes the sacrifices that United's employees, retirees, management, creditors, lenders, vendors, airline-partners, and other stakeholders made to complete the monumental task of reorganizing one of the world's largest airlines amidst all of the well-publicized obstacles facing the airline industry today, including record-high fuel costs, high legacy labor costs, terrorism threats, competition from low-cost carriers, and a severely depressed revenue environment.

One of the principal goals of United's reorganization was to restructure its labor and pension costs. (DR.77 at 46.)¹ For the first 18 months of its Chapter 11 Cases, and with the support of its Creditors' Committee, unions, and other stakeholders, United focused on obtaining a loan to finance its exit from Chapter 11 guaranteed by the United States Air Transportation Stabilization Board (the "ATSB") with its pension plans intact. (*Id.* at 46-47.) During this time, United made tremendous strides in reducing its overall cost structure and making its business more competitive, including a "first round" of labor, pension, and other retiree medical cost restructuring in 2003 and 2004, soon after United entered Chapter 11. (*Id.*)

¹ The record on appeal consists of documents listed in URPBPA's Statement of Issues on Appeal and Designation of Items to be Included in the Record on Appeal [Docket No. 3] ("UR. at ___") and the Appellee's Designation of Additional Items for the Record of the United Retired Pilots Benefit Protection Association's Appeal of Order Confirming Debtors' Second Amended Joint Plan of Reorganization [Docket No. ____] ("DR. at ___").

This “first round” of restructuring saved United approximately \$6.4 billion in labor costs, \$200 million in retiree medical benefit costs, and \$1.2 billion in pension costs. (*Id.* at 48-49.) Nevertheless, in June 2004, the ATSB still denied United’s federal loan guarantee application. (*Id.* at 50.)

I. UNITED AND ALPA REACH A SETTLEMENT THAT TRIGGERS UNITED’S OTHER LABOR SETTLEMENTS

After the ATSB denial, United soberly determined, in consultation with its stakeholders, that its future sustainability required, among other things, additional labor cost savings from its employee groups plus termination of its four pension plans. (*Id.* at 52.) To achieve these necessary labor cost savings, United needed to modify its collective bargaining agreements (each a “CBA”) with its unions, including the Air Line Pilots Association, International (“ALPA”). (*Id.*) In the late Summer and Fall of 2004, United embarked on a “second round” of labor and pension cost restructuring initiatives. (*Id.*)

In December 2004, after months of bargaining, United and ALPA reached an agreement (the “ALPA Agreement”) to modify their collective bargaining agreement (the “ALPA CBA”), which had just been modified about a year earlier, to provide United with the necessary wage and pension savings from active pilots. (*Id.* at 53.) In addition to making wage and work-rule concessions, ALPA agreed that if United sought a “voluntarily termination” of the United Airlines Pilot Defined Benefit Pension Plan (the “Pilot Plan”) under ERISA § 4041, then under certain circumstances ALPA would waive any argument that such termination violated the “contract bar” contained in the ALPA CBA which otherwise would prohibit such a

voluntary termination. (*Id.*) This Court has termed this provision the “no fight clause.” *In re UAL Corp.*, 443 F.3d 565, 572 (7th Cir. 2006). ALPA also agreed that if the Pilot Plan was terminated, then, no later than United’s exit from Chapter 11, United’s obligation to maintain the Pilot Plan and certain non-qualified pension benefits would cease. (DR.83 at 5, ¶13.) In return, United would provide active pilots with consideration upon United’s exit from Chapter 11. (DR.77 at 53.) First, pilots would receive a distribution of reorganized United common stock based on a particular formula, which ultimately resulted in active pilots receiving roughly 10% of all the reorganized United stock distributed to general unsecured creditors under the Plan of Reorganization. (*Id.*) Second, if the Pilot Plan ultimately was terminated, active pilots would receive \$550 million of convertible notes and participate in an incremental 6% defined contribution plan that would start accruing on June 1, 2005. (*Id.*) Third, pilots could participate in revised profit sharing and success sharing programs. (*Id.*) Fourth, United agreed to indemnify ALPA and its agents from most liability in connection with United’s Chapter 11 Cases and to include express “release” and “exculpation” provisions in the Plan of Reorganization. (*Id.*) Fifth, and very importantly, United agreed to obtain proportional labor savings from its other union and non-union represented employees; otherwise, ALPA could terminate the Agreement. (*Id.*)

On December 16, 2004, United filed a motion to approve the ALPA Agreement, but on January 7, 2005, the Bankruptcy Court declined to approve it, expressing concern with some of the Agreement’s other provisions not relevant here. (*Id.* at

54.) On January 21, 2005, the Bankruptcy Court approved a reconstituted ALPA Agreement, and on January 31, 2005, the active pilots ratified the ALPA Agreement. (*Id.* at 55.)

URPBPA and others objected to the ALPA Agreement. URPBPA argued that the ALPA Agreement could not be approved without the consent of a so-called authorized representative of retirees under Section 1113 of the Bankruptcy Code. (UR.17 at 9-10; UR.20 at 5.) Also, both URPBPA and Pension Benefit Guaranty Corporation (“PBGC”) argued that the \$550 million in convertible notes payable to active pilots was direct compensation for the termination of the Pilot Plan and thus should not be paid entirely to those pilots. (UR.62 at 77:10-78:1; UR.17 at 9-10; UR.20 at 5.) On one hand, URPBPA argued that a portion of the convertible notes should go to retired pilots. (UR.17 at 9-10; UR.20 at 5.) On the other hand, PBGC argued that the convertible notes should go to PBGC, because under well-settled law only PBGC has standing to assert an “unfunded benefits liability” claim against the bankruptcy estate based on termination of a pension plan. (UR.62 at 77:10-78:1 (discussing the Sixth Circuit’s decision in *United Steelworkers of America v. United Engineering, Inc.*, 52 F.3d 1386, 1391 (6th Cir. 1995)); UR.64 at 28:10-29:8.) The Bankruptcy Court overruled both objections, finding that the ALPA Agreement was a comprehensive new CBA, involving significant wage, work-rule, and other labor concessions by active pilots (that could never be made by retirees because they were by definition already retired) in addition to the “no fight clause,” and that one piece

of consideration (*i.e.*, the convertible notes) could not be separated out and allocated solely to a particular concession (*i.e.*, the “no fight clause”). (UR.64 at 29:24-30:12.) Thus, the Bankruptcy Court held that convertible notes would be paid to active pilots on account of a package deal, not based solely on lost pension benefits.

On February 7, 2005, URPBPA appealed the order approving the ALPA Agreement. (UR.25.) URPBPA’s appeal centered on whether United and ALPA could amend the ALPA CBA without negotiating with a so-called “Section 1113 retiree representative.” But, URPBPA did not challenge the Bankruptcy Court’s finding that the \$550 million in convertible notes was part of a comprehensive package not allocable to lost pension benefits. On March 31, 2006, this Court affirmed the ALPA Agreement, holding that there was no feasible remedy, including pension termination compensation, that a court can now provide retired pilots. *United Retired Pilots Benefit Protection Association v. United Airlines, Inc. (In re UAL Corporation)*, 443 F.3d 565, 572 (7th Cir. 2006). Additionally, this Court concluded that even if there was a feasible remedy that could have been ordered, United had no obligation to negotiate with or provide consideration to retired pilots for termination of the Pilot Plan. *Id.* In reaching this conclusion, the Seventh Circuit held that:

the already daunting complexity of major corporate bankruptcies would be multiplied if anyone with some potential blocking power, yet whom the trustee or debtor in possession had not thought it worthwhile trying to pay to buy peace with, could insist on negotiating rights as a condition of the bankruptcy judge’s approving a transaction out of the ordinary course. *Id.*

Moreover, the Seventh Circuit noted that the interests of retired pilots are fundamentally different from those of active pilots:

The retired employees were bound to receive less. They lost less; a retired pilot will have enjoyed the benefit of full pension payments since his retirement, while an active pilot who is near retirement will have been contributing to the pension plan for many years without receiving any benefits. More important, the active pilots had a stick to use against United—the threat of a strike—that the retirees didn't have. *Id.* (emphasis added).

Thus, while United could have “bought out” retired pilots’ right to contest termination of the Pilot Plan, United simply was not obliged to do so.

As United had hoped, the ALPA Agreement acted as a catalyst for the second round of labor cost restructuring with United’s other employee groups, who made similar wage, work-rule, and other labor concessions and also agreed to the termination of their respective defined benefit pension plans. (UR.49 at 105-106.) Presently, all four of United’s pension plan are terminated.

II. TERMINATION OF THE PILOT PLAN

Meanwhile, on December 30, 2004, PBGC initiated an involuntary termination action under ERISA §4042 to terminate the Pilot Plan as of December 30, 2004. (DR.77 at 56.) PBGC’s action was referred to the Bankruptcy Court. (*Id.*) On October 28, 2005, after several months of discovery and pre-trial matters and a two-day trial, the Bankruptcy Court entered an order terminating the Pilot Plan pursuant to ERISA § 4042 effective December 30, 2004. (UR.36.) ALPA, URPBPA, and PBGC appealed the Bankruptcy Court’s ruling. (UR.37-38.)

III. UNITED'S GLOBAL SETTLEMENT WITH PBGC

Meanwhile, in the Spring of 2005, after arm's-length, good faith negotiations, United and PBGC reached a global settlement resolving substantially all of their disputes concerning United's pension plans (the "PBGC Settlement Agreement"). (DR.77 at 57-58.) Among other things, under the PBGC Settlement Agreement, United settled the amount of PBGC's unsecured "unfunded benefits liability" claim against United's estate resulting from the termination of United's pension plans, which, according to well-settled law, is a claim belonging exclusively to PBGC and not retirees. *See United Steelworkers of America v. United Engineering, Inc.*, 52 F.3d 1386, 1391 (6th Cir. 1995) (retirees' claims against debtor for non-guaranteed benefits under terminated pension plan preempted by ERISA); (DR.77 at 57-58.)

On May 10, 2005, the Bankruptcy Court approved the PBGC Settlement Agreement, over the objections of URPBPA and the flight attendants' union, the Association of Flight Attendants-CWA ("AFA"). (*Id.* at 59.) On November 1, 2005, this Court affirmed the Bankruptcy Court's order approving the PBGC Settlement Agreement. *In re UAL Corp.*, 428 F.3d 677 (7th Cir. 2005).

IV. UNITED'S PLAN OF REORGANIZATION

In all, United's "second round" of labor restructuring initiatives in 2005 resulted in approximately \$685 million of average annual labor savings to United and set the stage for United's exit from Chapter 11. (*Id.* at 61-62.) Thus, during the Fall of 2005, United formulated and proposed its Plan of Reorganization, which was based on, and incorporated the terms of, the ALPA Agreement, United's new labor

agreements with its other unions, similar concessions by United's non-union workforce, and the PBGC Settlement Agreement. (UR.58 at 94.)

A. The Plan of Reorganization's Class Structure

United's Plan placed the claims of United's creditors into multiple classes depending on the nature of those claims. (*Id.* at 35-65.) Retired pilots' claims included non-qualified pension benefits claims and retiree medical claims. The Plan classified retired pilots' non-qualified pension benefits claims and retiree medical claims in Class 2D-2—the Unsecured Retiree Convenience Class—a “convenience class” typical in Chapter 11 plans in mega-cases. (UR.58 at 37.) As is typical, the Plan provides that United would monetize new UAL common stock for the convenience of members of this Retiree Convenience Class and distribute the net cash sale proceeds to the members. Members of this convenience class also could opt-into Class 2E-6—Other Unsecured Claims—if they chose to receive new UAL common stock in lieu of cash or if they sought to contest the amount of their claims as reflected on United's books. (*Id.*)

B. The Plan's Release, Exculpation, and Injunction Provisions

The Plan of Reorganization also included standard release, exculpation, and injunction provisions applicable to certain non-debtor parties whose efforts were critical to United's reorganization. (*Id.* at 121-123.) First, the Plan provided that only those creditors entitled to vote on the Plan who either (i) voted to accept the Plan or (ii) abstained from voting and did not opt-out of the Plan's release provisions, would release certain “Released Parties.” (*Id.* at 122.)

To this end, the ballots sent to retired pilots clearly stated that retirees could vote for or against the Plan, or abstain from voting and opt-out of the Plan's third-party releases. (UR.34 at Exhibit 3, Item 3.) The ballots also made clear that if a retiree voted against the Plan, that retiree would not be bound by the Plan's release provisions. (*Id.* at Exhibit 3, Item 2.) Thus, a "no" vote meant no release. Meanwhile, a retiree who voted in favor of the Plan, or who abstained but did not opt out of the releases, would be bound by the Plan's release provisions. (*Id.*)

United even shared sample retiree ballots with URPBPA's counsel for their input and comment prior to United's solicitation of votes on the Plan of Reorganization. In fact, URPBPA sent a letter to its members advising them to vote against the Plan of Reorganization and to opt-out of the third-party releases. In total, some 252 creditors (including many retired pilots) authorized to vote on the Plan of Reorganization abstained from voting but still opted-out of the third party releases, illustrating creditors' understanding of the Plan's release mechanics. (UR.47 at Exhibit D.) And all retired pilots who voted against the Plan of Reorganization did not give any releases. (UR.58 at 122.)

Second, the Plan's "exculpation" provisions set the standard of care applicable if a non-releasing creditor sued certain defined "Exculpated Parties" in connection with United's restructuring. (*Id.* at 121.) In particular, Article X.G of the Plan states that Exculpated Parties, including ALPA, have no liability on account of Exculpated Claims (*e.g.*, claims arising out of United's restructuring) except to the extent based on gross negligence or willful misconduct (*Id.*)

Third, the Plan’s injunction provision implemented the consensual releases and exculpation provisions by enjoining third parties from pursuing any “released claims” against the “Released Parties” and any “Exculpated Claims” against the “Exculpated Parties.” (*Id.* at 123.)

V. THE BANKRUPTCY COURT OVERRULES URPBPA’S PLAN OBJECTIONS AND CONFIRMS THE PLAN OF REORGANIZATION

At the confirmation hearing, United presented a largely consensual Plan of Reorganization to the Bankruptcy Court. (UR.49 at 1-2.) In a ringing endorsement of United’s future, United’s creditors voted overwhelmingly in favor of the Plan of Reorganization. (*Id.*) On an aggregate basis, approximately 16,000 creditors voting more than \$17 billion in claims—almost 90% of the eligible voting creditors and 98% of the total dollar amount of claims—accepted the Plan of Reorganization. (*Id.*) The percentage of accepting voting creditors in each class, on a consolidated basis, ranged from 64% to 100%, easily exceeding the necessary 50% per class required under Bankruptcy Code Section 1126(c). (*Id.*) The accepting dollar value of votes per class on a consolidated basis ranged from 84% to 100%, well above the two-thirds threshold required in Bankruptcy Code Section 1126(c). (*Id.*)

However, while the Retiree Convenience Class had approved the Plan of Reorganization, Class 2E-6—a class of more than 10,000 general, unsecured creditors, including those retired pilots who had opted out of the Retiree Convenience Class, rejected the Plan. (UR.54 at 2.) Although approximately 72% of Class 2E-6 Claims approved the Plan, only 49% of the creditors in that class approved the Plan, which was approximately 200 votes short of the 50%

requirement under Bankruptcy Code Section 1126(c). (UR.49 at 31.) United thus was forced to satisfy the “cram down” requirements of Bankruptcy Code Section 1129(b) with respect to Class 2E-6. (*Id.* at 28-34.)

URPBPA objected to confirmation of United’s Plan of Reorganization on multiple grounds, only two of which are relevant here. (UR.40.) First, URPBPA asserted that United’s Plan of Reorganization violated the Bankruptcy Code’s classification and “cramdown” rules by not providing retired pilots with the same consideration as active pilots. (*Id.*) Second, URPBPA argued that the Plan’s release, exculpation, and injunction provisions were unlawful, because URPBPA wanted to preserve retired pilots’ rights to sue ALPA for allegedly “negotiating away” pension benefits under the ALPA Agreement. (*Id.*; UR.67 at 193:19-25.)

On January 18, 2006, the Bankruptcy Court conducted a hearing on confirmation of the Plan of Reorganization and rejected URPBPA’s confirmation objections. (UR.67.) First, the Bankruptcy Court rejected URPBPA’s classification and cramdown objections and ruled, consistent with earlier rulings, that retired pilots have fundamentally different rights than do active pilots, and thus “a disparity of treatment [between retired and active pilots] is entirely appropriate and there is no need to engage in an unfair discrimination analysis” under Section 1129(b) of the Bankruptcy Code. (UR.67 at 121:6-8.) Second, the Bankruptcy Court held that the Plan of Reorganization’s release, exculpation, and injunction provisions were proper because URPBPA already had litigated fully, yet unsuccessfully, its alleged right to prevent the implementation of the ALPA

Agreement, and retired pilots could not preserve any rights to re-litigate that Agreement. (*Id.* at 193:19-25.) On January 20, 2006, the Bankruptcy Court confirmed the Plan of Reorganization. (UR.58.) On January 26, URPBPA filed a notice of appeal of the Confirmation Order. (UR.59.) However, URPBPA did not seek a stay pending appeal in Bankruptcy Court, the District Court, or this Court.

VI. SUBSTANTIAL CONSUMMATION OF UNITED'S PLAN OF REORGANIZATION

Because URPBPA failed to seek a stay pending appeal, on February 1, 2006, United emerged from Chapter 11 and the Plan of Reorganization became effective, triggering a cascade of literally thousands of transactions and other events that cannot be unwound at this time, resulting in substantial consummation of the Plan of Reorganization. Among other things:

- The Plan of Reorganization discharged more than \$20 billion of United's debt—held by over 100,000 creditors—and permanently enjoined those creditors from asserting those claims against United. (DR.77 at 43.)
- The Plan of Reorganization cancelled approximately 116 million shares of common stock in UAL Corporation (United's parent corporation) held by at least 66,000 shareholders. (*Id.* at 26.)
- United assumed literally thousands of executory contracts and unexpired leases, including the ALPA CBA (with reduced wages and changed work rules and without the Pilot Plan or other pension benefits), and CBAs with United's other unions. (*Id.* at 89-100.)
- United has distributed almost all of the 115 million shares in reorganized UAL Corporation to be distributed to United's employees and creditors. As of July 17, 2006, United has authorized the issuance of approximately 97.9 million shares (85.1% of the 115 million shares) to thousands of creditors and employees, some if not many of whom have subsequently sold their shares to third parties.
- On March 24, 2006, the Plan Oversight Committee—a committee of former members of the Creditors' Committee charged with overseeing distributions

under the Plan of Reorganization—was dissolved under the terms of the Plan of Reorganization.

- In addition, United has monetized approximately 3.6 million shares of new UAL common stock on account of \$813 million of allowed claims in the unsecured convenience and retiree convenience classes to facilitate cash distributions to creditors and retirees.
- For those with retiree convenience class claims under the Plan of Reorganization that opted out of the convenience class and elected instead to receive reorganized UAL shares, United has sold approximately 130,000 shares to cover taxes, and distributed an additional 300,000 shares directly to retirees, some if not many of whom subsequently have sold their shares to third parties.
- Within the past several weeks, United has sold 500,000 reorganized UAL shares to cover the taxes on distributions to retired pilots on account of their approximately \$400 million (collectively) in general unsecured claims for non-qualified pension benefits, and then on August 1, 2006, United distributed an additional 1.2 million shares to those retired pilots.
- As of July 28, 2006, approximately 90,000 shares (of 175,000 shares available) have been distributed under the Director Equity Incentive Plan, and approximately 3.7 million shares (of 9.825 million shares available) have been distributed under the Management Equity Incentive Plan.
- As of July 24, 2006, United has distributed approximately 24.0 million shares of new UAL common stock to its employees' 401(k) plans. Additionally, after monetizing 1.7 million shares to satisfy tax withholding obligations, employees and former employees will have received 3.2 million shares directly through the employee equity distribution.
- As of the close of business on July 27, 2006, approximately 235.5 million shares in reorganized UAL Corporation have been traded, presumably most of which are now held by the investing public who had nothing to do with United's bankruptcy.
- Based on United's business plan—which assumed the wage, work rule, and pension savings obtained through the first and second rounds of labor cost restructuring initiatives—United entered into a \$3 billion exit financing facility, \$1.2 billion of which went to pay off United's debtor in possession financing facility.
- Even before United distributed any new UAL securities to pilots, active pilots surrendered approximately \$722 million of their approximately \$3 billion claim under the ALPA Agreement to United who then sold the claim to Deutsche Bank for approximately \$171 million, which was in turn deposited in active pilots'

retirement accounts to the extent possible. Deutsche Bank subsequently sold the claim to 17 purchasers, who under the Plan of Reorganization received approximately 2.6 million shares in the initial distribution (which likely now have subsequently transferred multiple times to other third parties).

- Active pilots who did not sell their claims already have received significant distributions of new UAL stock. Specifically, on February 8, United distributed approximately 7.3 million shares to active pilots (5.6 million of which went into those pilots' retirement accounts) after monetizing an additional approximately 1 million shares to pay taxes incurred due to the distribution. United suspects that many of these shares are now held by the investing public.
- United issued \$500 million in convertible preferred stock and \$500 million in senior subordinated notes to PBGC under the PBGC Settlement Agreement. United already has issued approximately 20 million shares of new UAL common stock to PBGC (at least 8.9 million shares of which have been sold by PBGC to third parties) on account of PBGC's \$10 billion unfunded benefits liability claim based on the termination of United's pension plans.
- Under the Plan of Reorganization, United and almost 15,000 creditors released claims against ALPA and its agents, who also were included in the Plan's exculpation provisions.
- In July 2006, to implement the final piece of United's global deals with its labor groups, including the ALPA Agreement, United issued \$726 million in convertible notes to certain irrevocable trusts established for the benefit of its employees. In the coming weeks, many current and former employees will receive cash proceeds from the sale of these convertible notes. Simultaneously, United reached agreement with two of its smaller labor groups to pay their union members cash totaling approximately \$400,000 rather than issuing additional notes of similar value.²

VII. THE DISTRICT COURT REVERSES THE ORIGINAL PILOT PLAN TERMINATION ORDER

Meanwhile on February 2, 2006—literally the day after United emerged from Chapter 11—the District Court *sua sponte* reversed the Bankruptcy Court's

² Unless otherwise noted herein, the facts relating to substantial consummation of the Plan of Reorganization have been attested to in the *Declaration of Frances DeBlasio In Support of Brief of Appellee United Air Lines, Inc.* (August 7, 2006), which was filed with the Court in lead case number 06-2662.

Original Pilot Plan Termination Order based on a determination that the Bankruptcy Court lacked “core” jurisdiction over PBGC’s ERISA § 4042 termination proceeding. *United*, 337 B.R. at 911. The District Court (Darrah, J.) remanded the involuntary termination proceeding back to the Bankruptcy Court and directed the Bankruptcy Court to submit proposed findings of fact and conclusions of law to the District Court (Lefkow, J.). *Id.* On February 13, 2006, the Bankruptcy Court subsequently submitted its proposed findings of fact and conclusions of law that the Pilot Plan must be terminated under ERISA § 4042 with a December 30 termination date.

VIII. THE FINAL PILOT PLAN TERMINATION ORDER

On May 3, 2006, Judge Lefkow conducted oral argument on PBGC’s involuntary termination of the Pilot Plan and considered Judge Wedoff’s proposed findings and conclusions and the additional briefing by the parties. On June 13, 2006, Judge Lefkow issued an order adopting, as modified, the Bankruptcy Court’s findings of fact and conclusions of law that the Pilot Plan should be terminated effective December 30, 2004 (the “Final Pilot Plan Termination Order”). *Pension Benefit Guaranty Corp. v. United Air Lines, Inc.*, 2006 WL 1697131 (N.D. Ill. June 13, 2006). URPBPA, ALPA, and PBGC appealed the Final Pilot Plan Termination Order to this Court (the “Termination Appeals”). Those three appeals are docketed as case numbers 06-2662, 06-2714, and 06-2843, and have been consolidated into lead case number 06-2662.

IX. THE DISTRICT COURT DISMISSES URPBPA'S APPEAL OF THE CONFIRMATION ORDER

On June 22, 2006, nine days after Judge Lefkow entered the Final Pilot Plan Termination Order, the District Court (Darrah, J.) dismissed URPBPA's appeal of the Confirmation Order for lack of ripeness, based on the mistaken believe that the Pilot Plan no longer was terminated. Rather than simply informing Judge Darrah of his mistake in fact so that he could consider the appeal with an accurate understanding of the current status of the Pilot Plan, the very next day (June 23, 2006) URPBPA appealed the District Court's order to this Court. URPBPA's appeal was docketed as case number 06-2780 (the "Confirmation Appeal").

On July 7, 2006, United filed a motion to consolidate the Confirmation Appeal with the Termination Appeals, because all such appeals involve substantial overlapping issues, particularly the issue of whether there remains any feasible remedy that could be ordered at this late date. On July 11, 2006, this Court granted United's motion and consolidated all such appeals under lead case number 06-2662.

SUMMARY OF ARGUMENT

United's Plan of Reorganization, which went effective more than six months ago, is a comprehensive, monolithic contract between United and its many stakeholders that resolved all issues in one of the most complex Chapter 11 reorganizations in history. Yet URPBPA, which never sought a stay pending appeal, now asks this Court to set aside that Plan of Reorganization, unscramble United's entire restructuring, and send United back into bankruptcy to renegotiate a new

restructuring with its stakeholders, all on the mistaken belief that (1) URPBPA's members are entitled to the same treatment as active pilots, who, as this Court noted, gave up more than retired pilots, and who, as the Bankruptcy Court noted, have fundamentally different rights than retired pilots; and (2) the Plan's release, exculpation, and injunction provisions are unlawful.

However, there simply is no feasible remedy that this Court can order without seriously harming tens if not hundreds of thousands of innocent third parties. See *UAL*, 443 F.3d at 572 (affirming bankruptcy court order after concluding that there was no feasible remedy that could be ordered on appeal). But granting retired pilots equal treatment with active pilots could require United to distribute to retired pilots hundreds of millions of (if not more than a billion) dollars of additional securities—securities that United does not have. Here, thousands of creditors voted billions of dollars of claims in favor of United's Plan of Reorganization, thereby consenting to the discharge of those claims and the receipt of billions of dollars of reorganized UAL securities—now held by the investing public—in lieu of such claims, based on the expectation that reorganized United would emerge from Chapter 11 with a healthy balance sheet and capital structure, and the ability to achieve revenues forecasted in the Plan of Reorganization. Simply put, a ruling in URPBPA's favor at this late stage would erase United's successful emergence from Chapter 11, and completely upset the rights and expectations of, and causing harm to, hundreds of thousands of innocent third parties.

Neither is there a feasible remedy with respect to the Plan's release, exculpation, and injunction provisions, which were integral to the ALPA Agreement (and incorporated into the Plan of Reorganization), and part of ALPA's bargained for consideration in agreeing to significant labor concessions to United to foster its emergence from Chapter 11.

Recognizing the difficulties in "unscrambling the egg," URPBPA flippantly suggests that this Court can simply "blue-pencil" the substantially consummated Plan of Reorganization to provide retired pilots with hundreds of millions of, if not more than a billion, dollars of additional consideration, and to excise the Plan's release, exculpation, and injunction provisions. However, URPBPA's requested "modifications"—even if required, which clearly they are not—would mandate a wholesale recalibration of United's capital structure, sending United back to the drawing board to formulate a new Plan of Reorganization.

URPBPA's appeal also should be rejected because it raises arguments previously raised to, and rejected by, this Court. URPBPA's improper classification and unfair discrimination arguments rest on the mistaken assumption that retired pilots should receive the same compensation package as active pilots did under the ALPA Agreement. Now that this Court has upheld the Bankruptcy Court's approval of the ALPA Agreement, see *UAL*, 443 F.3d 565, URPBPA is prohibited from collaterally attacking that Agreement through the guise of a plan confirmation objection. URPBPA is also collaterally estopped from arguing that active and retired pilots

should be treated the same because this Court already held that active and retired pilots' rights are fundamentally different.

In any event, URPBPA's appeal on the merits should be rejected. The Plan of Reorganization neither classifies retired pilots' claims inappropriately nor unfairly discriminates against them by failing to provide them with the same consideration as active pilots received under the ALPA Agreement. As this Court and the Bankruptcy Court repeatedly have stated, URPBPA's rights are fundamentally different than those of active pilots, which actually mandates separate classification and treatment.

URPBPA's objection to the Plan's consensual release, exculpation, and injunction provisions also lacks merit. This Court already has approved the concept of consensual releases in Chapter 11 plans. *See In re Specialty Equipment Co.*, 3 F.3d 1043 (7th Cir. 1993). Meanwhile, the Plan's exculpation provisions, which are routine in Chapter 11 plans, simply set the standard of care in future litigation by a non-releasing party against ALPA related to United's restructuring. And as the Bankruptcy Court held, the Plan's exculpation provisions are necessary to prevent retired pilots from continually re-litigating a request for additional pension termination compensation.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's order dismissing URPBPA's appeal of the Confirmation Order. *See In re Heartland Steel, Inc.*, 389 F.3d 741, 743-744 (7th Cir. 2004). Similarly, this Court reviews *de novo* the Bankruptcy Court's order confirming the Plan of Reorganization. *Heartland Steel*, 389 F.3d at

743-744. The Bankruptcy Court’s factual findings related to confirmation of the Plan of Reorganization are reviewed for clear error. *Heartland Steel*, 389 F.3d at 743-744.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING URPBPA’S APPEAL FOR LACK OF RIPENESS

United acknowledges that the District Court erred when it dismissed URPBPA’s appeal of the Confirmation Order for lack of ripeness. The District Court’s ruling rested on the mistaken premise that the Pilot Plan was not terminated when, in fact, the Pilot Plan had been terminated nine days earlier on June 13, 2006. The proper remedy normally would be to remand the case to the District Court for further proceedings. However, URPBPA’s appeal from the Final Pilot Plan Termination Order is also pending before this Court. Thus, United believes that it would be most efficient in this case for this Court to consider both URPBPA’s Confirmation Appeal and URPBPA’s Termination Appeal together.³

³ Immediate appellate review of the merits is not always the best outcome. For example, in United’s appeal from the District Court’s order dismissing United’s appeal of the Bankruptcy Court’s order compelling payment of certain non-qualified pension benefits for the month of October 2005 (7th Cir. Case No. 06-1867), United has argued that the more appropriate remedy is to remand the case to the District Court. In that situation, unlike here, the District Court still is considering a separate appeal regarding the similar issue of United’s non-qualified pension benefit obligations for the months of November 2005 through January 2006, and a decision from the Seventh Circuit would not fully and finally resolve the parties’ disputes.

II. URPBPA'S APPEAL MUST BE DISMISSED BECAUSE THERE IS NO FEASIBLE REMEDY THAT THIS COURT COULD GRANT URPBPA

This court repeatedly has held that an order confirming a plan of reorganization should not be upset where subsequent events have made reversal of that order imprudent and inequitable to those parties who have relied upon the finality of the order. *See, e.g., UAL*, 443 F.3d at 572; *Matter of UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (*en banc*); *Matter of Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994); *Specialty Equipment*, 3 F.3d at 1047-1048; *In re Andreuccetti*, 975 F.2d 413, 417-419 (7th Cir. 1992); *see also In re UAL Corp. ("IFS")*, 408 F.3d 847 (7th Cir. 2005). "The mere availability of a mechanism for granting relief does not mean the court cannot determine that in light of all the circumstances it should not even try to unscramble the eggs." *In re Continental Airlines*, 91 F.3d 553, 566 (3d Cir. 1996). In considering whether an appeal should be dismissed on equitable grounds, this Court considers, among other things, (i) whether the appellant obtained a stay pending appeal, (ii) whether the order appealed from has been substantially consummated, and (iii) whether the relief requested on appeal would harm innocent third parties. *See Andreuccetti*, 975 F.2d at 417-419. Applying these factors here, URPBPA's appeal must be dismissed.

A. This Court Already Ruled that "Pension Termination Compensation" Is Not a Feasible Remedy

URPBPA essentially argues that its members should have been treated the same as active pilots under the Plan of Reorganization and thus should have received the same "pension termination compensation" that active pilots received under the ALPA Agreement. As a preliminary matter, however, in March 2006,

this Court already ruled that to require United to pay “pension termination compensation” to retired pilots, even if appropriate (which it is not), is simply not a feasible remedy at this late stage. See *UAL*, 443 F.3d at 571-572 (“there is no longer any feasible remedy that a court could order”). Specifically, the Court stated:

To avoid the unraveling of the [ERISA § 4042] proceeding and perhaps the entire bankruptcy (though that seems unlikely), we would not order the [ALPA Agreement] vacated. That would be a ‘logical’ remedy but unnecessarily disruptive. All we could do would be to direct the bankruptcy judge on remand to determine what he would have insisted that the retired pilots receive in the agreement, as a condition of his approving it, had he realized they had the same kind of interest as the active pilots, namely the interest conferred by a right to mount an opposition to the termination of the pilot plans. But there would be no objective basis for calculating the value that such a right would command in a hypothetical negotiation. *Id.*

URPBPA’s request for “pension termination compensation” here once again invites this Court to speculate as to the outcome of hypothetical negotiations between United, ALPA, and retired pilots under either the ALPA Agreement or under the Plan of Reorganization. This Court rejected this invitation before and must reject it again.

B. URPBPA Failed to Request a Stay Pending Appeal and Acquiesced in the Substantial Consummation of the Plan of Reorganization

In any event, this Court should dismiss URPBPA’s appeal because there is no feasible remedy that can be ordered at this late stage, even assuming that the Bankruptcy Court erred in confirming the Plan of Reorganization, which it did not. The first element of this inquiry is whether URPBPA sought a stay pending appeal. “As a practical matter review of a confirmed plan is possible only if it has been stayed pending appeal, and a stay is possible only if supported by a bond.” *IFS*, 408

F.3d at 850 (emphasis added). Here, URPBPA never even sought a stay of the Confirmation Order pending appeal from any court, even though URPBPA was aware that upon the Plan of Reorganization's effective date, a series of irreversible transactions would be triggered making it impossible for an appellate court to reverse the Confirmation Order without seriously disrupting United's restructuring and harming innocent third parties relying on the substantial consummation of the Plan of Reorganization. *See Specialty Equipment*, 3 F.3d at 1047 ("a party that elects not to pursue a stay subsequent to confirmation risks that a speedy implementation of the reorganization will moot an appeal"). Thus, URPBPA's mere failure to seek or obtain a stay pending appeal in and of itself mandates dismissal. *See In re Zenith Electronics Corp.*, 250 B.R. 207, 215 (D. Del. 2000), *aff'd*, 258 F.3d 180 (3d Cir. 2001) (failure to obtain a stay carries greater significance when appellant never even sought a stay).

C. The Plan of Reorganization Has Been Substantially Consummated

The second consideration in determining whether to dismiss an appeal of an order confirming a Chapter 11 plan of reorganization is whether the plan has been substantially consummated. Here, there is no doubt—and URPBPA has not and cannot challenge—that United's Plan of Reorganization has been substantially consummated.

As discussed in detail in United's Statement of Facts, since the Plan of Reorganization went effective on February 1, 2006, among other things: all old shares of UAL stock have been cancelled; billions of dollars of unsecured claims

have been discharged; United has distributed approximately 85% of the 115 million shares of new UAL common stock available to United's employees and creditors—representing billions of dollars of value—and, many (if not most) of these shares likely have been sold to third parties; parties have relied on a number of settlements implemented through the Plan of Reorganization, including the ALPA Agreement, the PBGC Settlement Agreement, new CBAs with other unions, the Plan's release and exculpation provisions, and scores of other settlements; United has assumed and rejected thousands of executory contracts and leases, including the ALPA CBA and other CBAs; United has entered into a \$3 billion exit facility; under the PBGC Settlement Agreement, United issued \$500 million in convertible preferred stock, \$500 million in senior subordinated notes, and approximately 20 million shares of new UAL common stock to PBGC; the Plan Oversight Committee, the body charged with overseeing distributions under the Plan of Reorganization has been disbanded; and United has taken the last step to implement its labor restructuring agreements by issuing \$726 million in aggregate principal amount of convertible notes to certain irrevocable trusts established for the benefit of employees. These events represent just a small sampling of the literally thousands of transactions that have taken place as required by, or in reliance on, the Plan of Reorganization.

D. This Court Cannot Grant URPBPA Relief, Even if Warranted, Without Harming Innocent Third Parties

The third consideration in determining whether to dismiss an appeal of an order confirming a plan of reorganization is whether reversing the confirmation order,

even if warranted, will harm innocent third-parties. *See Envirodyne*, 29 F.3d at 304 (court should consider “whether modification of the plan of reorganization would bear unduly on the innocent”); *Specialty Equipment*, 3 F.3d at 1048 (same).

1. Requiring Identical Treatment of Active and Retired Pilots Would Impair United’s Post-Consummation Capital Structure

Let there be no mistake in what URPBPA seeks. URPBPA wants retired pilots to be treated identically to active pilots. But this could require United to distribute hundreds of millions of (if not more than a billion) dollars of additional securities to retired pilots. United does not have such securities—nor does the Plan of Reorganization contemplate such securities. Therefore to provide retired pilots with such securities, United likely would have no choice but to try to completely retool the Plan of Reorganization, for example, by issuing additional common stock, thereby diluting existing shareholders, or issuing new debt, thereby dramatically altering the capital structure on which the Plan of Reorganization and its financial projections were based. Either scenario would harm tens if not hundreds of thousands of innocent third parties and the investing public. *See In re Trico Marine Servs., Inc.*, 337 B.R. 811, 815-16 (Bankr. S.D.N.Y. 2006) (dismissing appeal where reversal would convert shareholders—some of whom were not involved in the debtor’s bankruptcy and, therefore, traded shares solely based on available public information—into noteholders).

Here, tens of thousands of creditors voted billions of dollars of claims in favor of United’s Plan of Reorganization, thereby consenting to the discharge of those claims and the receipt of billions of dollars of reorganized UAL securities in lieu of such

claims, based on the expectation that reorganized United would emerge from Chapter 11 with a healthy balance sheet and capital structure, and the ability to achieve revenues forecasted in the Plan of Reorganization. Most importantly, every labor group at United contributed to the second round of labor and pension concessions in 2005 for the good of the entire enterprise, based on the very important condition that each labor group made proportional concessions. These sacrifices for a successful future formed the basis of a contract between United and its stakeholders embodied in the Plan of Reorganization. *See Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 755-756 (7th Cir. 2002) (“A confirmed plan of reorganization is in effect a contract between the parties...”).

Then a syndicate of lenders lent United \$3 billion based on those same expectations. And for the past six months, the investing public has bought and sold those very same reorganized UAL securities also based on the same expectations. Indeed, since United's emergence from Chapter 11, over 235.5 million shares of new UAL common stock have changed hands and are now held by people having nothing to do with United's Chapter 11 Cases. *See Trico Marine*, 337 B.R. at 815 (“The purchasers were never involved in the [debtor's] bankruptcy, and did not receive notice of these proceedings...”).

And because United's Plan of Reorganization was based on a significantly deleveraged post-consummation capital structure, any material changes to that capital structure at this juncture, either by diluting existing shareholders' interests or increasing United's debt obligations, would unduly prejudice the rights of

thousands of third parties—parties not participating in this appeal—who legitimately relied on the interwoven events triggered on the Plan of Reorganization’s effective date. See *US Airways*, 369 F.3d at 811 (dismissing retired pilots’ appeal of distress termination of pension plan because “other parts of the plan would have to be reconfigured: approval by [the debtors’] lenders and the bankruptcy court would have to be obtained, distributions under the plan would have to be reworked, and a variety of completed transactions...would have to be undone”). Simply put, if United was sent back to the drawing board, then the work of United’s stakeholders, who made significant concessions in United’s reorganization, would have been for naught, while hundreds of thousands of third parties, who have relied on the substantially consummated Plan of Reorganization, will be significantly harmed.

2. URPBPA’s Appeal of the Plan’s Release, Exculpation, and Injunction Provisions is Moot

Similarly, URPBPA’s appeal of the Plan of Reorganization’s release, exculpation, and injunction provisions also should be dismissed. Indeed, as URPBPA acknowledged in its opening brief, in *Specialty Equipment* this Court dismissed an appeal challenging a plan of reorganization’s release provisions, holding that to nullify the releases after parties had relied on them in substantially consummating the plan “would amount to imposing a different plan of reorganization on the parties.” *Id.* at 1049; see *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 145 (2d Cir. 2005) (“Even if we could carve out appellants’ claims from the nondebtor releases, we would not do so. If appellants’ claims are substantial (as they urge), it

is as likely as not that the bargain struck by the debtor and the released parties might have been different without the releases.”); *Osmar Sylvania*, 2004 WL 2346021, at *3 (same).

Like the releases in *Specialty Equipment*, the releases at issue here are integral to the overall bargain embodied in the Plan of Reorganization. *Id.* at 1049.⁴ United’s tireless negotiations with ALPA and its other unions resulted in significant labor and pension cost savings for the benefit of United and its stakeholders. Recognizing the value of a consensual resolution and the significance of ALPA’s concessions, United agreed in the ALPA Agreement to include ALPA in the Plan of Reorganization’s release and exculpation provisions. If now the release and exculpation provisions are stricken, then the entire ALPA Agreement, including all of its critical benefits to United’s estate, could be undone, triggering the unwinding of United’s 2005 settlements with its other employee groups. This is untenable. Thus, just as in *Specialty Equipment*, this Court must reject URPBPA’s invitation to abrogate the substantially consummated Plan’s release, exculpation, and injunction provisions and dismiss URPBPA’s appeal.

3. This Court Cannot “Blue Pencil” the Plan of Reorganization

URPBPA recognizes, as it must, the incredible harm to tens if not hundreds of thousands of innocent third parties if the Confirmation Order were reversed at this late stage and United’s restructuring unwound. Therefore, URPBPA flippantly

⁴ Article XV.L of the POR contains a non-severability provision providing that “all provisions of the POR are integral thereto and no provision may be deleted or modified without the Debtors’ consent.”

suggests that this Court can simply “blue pencil” the Plan of Reorganization and impose a different deal on United’s stakeholders, rather than reversing the Confirmation Order, as though this will impose any less harm on innocent third parties.

URPBPA first argues that “United could easily afford to pay retired pilots benefits that are similar to the ones it has paid or will pay the active pilots.” (URPBPA Br. at 20.) But URPBPA misses the point. Because each provision of United’s substantially consummated Plan is integral to the overall bargain struck between and among United and its stakeholders, United cannot simply change the terms of that bargain at the whim of a single party. United’s Plan of Reorganization was premised on a business plan that did not treat retired pilots the same as active pilots. And rightfully so, given that active pilots’ rights are fundamentally different than those of retirees. Changing this integral component of the Plan of Reorganization now would “knock the props out” from under United’s Plan and undermine its success. *See In re Ormet Corp.*, 2005 WL 2000704, at *8-10 (S.D. Ohio Aug. 19, 2005).

And URPBPA’s flippant statements regarding United’s ability to afford the issuance of hundreds of millions (if not in excess of a billion dollars) of additional securities are grossly misleading, irresponsible, and find no support in the record. For instance, URPBPA references United’s “Gershwin 4.1” business plan as proof that United has sufficient cushion to pay URPBPA members “pension termination compensation.” But the Gershwin 4.1 business plan was developed in April 2004—

almost two years before United's exit from Chapter 11—before the ATSB's denial of United's federal loan guarantee request and United had to tighten its belt significantly. Indeed, since April 2004, United and its creditor constituents crafted at least six additional iterations of the Gershwin business model to account for, among other things, the need to obtain non-government backed exit financing with oil costing double what it did when United filed for bankruptcy. In fact, the financial projections upon which United's confirmed Plan was based contains no such cushion to cover the issuance of the additional securities URPBPA seeks. In sum, URPBPA's argument knowingly relies on stale, superseded data that hardly proves the affordability of the relief sought by URPBPA.⁵

Next, URPBPA makes much of the Ninth Circuit Bankruptcy Appellate Panel's remark in *In re Weinstein*, 227 B.R. 284, 289 (B.A.P. 9th Cir. 1998), that “[i]f the court can fashion relief by simply ordering additional disbursements of money by one of the parties on appeal, the appeal is not moot.” However, *Weinstein* involved a husband and wife's reorganization of their consumer debts, where reversing the confirmation order had little, if any, negative effect on innocent third parties who

⁵ Likewise, URPBPA misconstrues the quote of United's spokeswoman Jean Medina. Ms. Medina's statement that United's business plan assumed a worst case scenario has nothing to do with whether the Plan itself can—or possibly could be—unwound. Instead, Ms. Medina was merely commenting on the mechanics of United's conditional assumption of certain leases involved in recharacterization litigation that was pending before this Court when United confirmed its Plan of Reorganization.

have relied upon the finality of a heavily negotiated capping one of the most complex restructurings in U.S. history.⁶

Finally, URPBPA's suggestion that this Court modify the Plan of Reorganization demonstrates a thorough misunderstanding of the role of federal appellate courts. Appellate courts do not "modify" or "excise" particular terms of Chapter 11 plans of reorganization, but instead must decide whether, as a whole, the plan complies with the Bankruptcy Code. Thus, if an appellate court concludes that a debtor's plan was not properly confirmed, the court cannot rewrite, modify, or delete particular provisions of the plan, but instead must reverse confirmation of the entire plan. *See, e.g., In re Continental Airlines Corp.*, 907 F.2d 1500, 1510 (5th Cir. 1990) (bankruptcy court cannot change settlement terms between employer and its union); *In re Trism, Inc.*, 282 B.R. 662, 667-668 (8th Cir. BAP 2002) ("[A court] must accept or reject the settlement as proposed. ... It cannot bind [the debtor] to the obligations of its bargain by approving [a settlement] while eviscerating the benefits negotiated by [the debtor] by sustaining an objection thereto."). Thus, United's alleged ability, now that it has exited bankruptcy, to "afford" the relief requested in URPBPA's appeal is irrelevant.

Simply put, URPBPA cannot dispute the clear-cut precedent of this Court and virtually every other jurisdiction that mandates dismissal of this appeal. *See*

⁶ Likewise, URPBPA's citation to *In re 203 N. LaSalle Street P'ship*, 126 F.3d 955, 961 (7th Cir. 1997), *rev'd on other grounds*, 526 U.S. 434 (1999), is not helpful because there "many of the transactions that have occurred [since plan confirmation] easily [could] be reversed without significant harm to third parties." (emphasis added).

Specialty Equip., 3 F.3d at 1049; *see also In re US Airways Group*, 369 F.3d 806, 811 (4th Cir. 2004) (dismissing pension termination appeal where reversal would “unsatisfy a necessary condition to [the debtors’] confirmation order and [their] entitlement to \$1.24 billion in equity investment and exit loans”); *Trico Marine*, 337 B.R. at 815-16 (dismissing confirmation appeal where reversal would convert unsuspecting shareholders into noteholders); *Ormet*, 2005 WL 2000704, at *10 (dismissing union’s appeal from an order rejecting a CBA where debtor substantially consummated plan relying on savings generated from the rejection); *Osmar Sylvania, Inc. v. SLI, Inc.*, 2004 WL 2346021, at *3 (D. Del. Oct. 5, 2004) (dismissing appeal of substantially consummated plan because removal of release and exculpation provisions would affect the success of the plan).

III. THE BANKRUPTCY COURT’S CONFIRMATION ORDER SHOULD BE AFFIRMED

Even if this Court considers the merits of URPBPA’s appeal, it still fails. First, URPBPA is bound by this Court’s decision to affirm the ALPA Agreement when it ruled that it was no longer feasible, even if appropriate, to allow URPBPA an opportunity to negotiate with United and ALPA for any “pension termination consideration.” *UAL*, 443 F.3d 565. Thus, URPBPA cannot collaterally attack the ALPA Agreement through the guise of an appeal of the Plan. Second, URPBPA is collaterally estopped from re-litigating here the fundamental issue of whether retired pilots’ rights are the same as active pilots, which this Court already decided when it affirmed the ALPA Agreement. *See UAL*, 443 F.3d at 572. Third, the Plan’s classification and treatment of retired pilots’ claims are entirely

appropriate—indeed necessary—because retired pilots’ rights are fundamentally different from active pilots’ rights. Fourth, the Plan’s release, exculpation, and injunction provisions conform with applicable law, and URPBPA cannot circumvent these provisions to litigate, yet again, the ALPA Agreement.

A. URPBPA Cannot Collaterally Attack the ALPA Agreement

In March 2006, this Court affirmed the ALPA Agreement. *UAL*, 443 F.3d at 572. In that appeal, URPBPA argued that the ALPA Agreement violated the Bankruptcy Code because it provided United’s active pilots with \$550 million in convertible notes but did not provide retired pilots with comparable consideration or have the consent of a so-called Section 1113 authorized representative for retirees. Here, URPBPA once again challenges the terms of the ALPA Agreement, this time through the guise of an appeal from the Confirmation Order. In particular, URPBPA argues that the consideration provided to active pilots under the ALPA Agreement, as incorporated in the Plan, violates the Bankruptcy Code because retired pilots did not receive the same consideration. But this is the exact same objection URPBPA raised in opposition to the ALPA Agreement. URPBPA already prosecuted and lost its appeal of the ALPA Agreement, and this Court’s decision is the law of the case and cannot be collaterally attacked through a separate appeal. *See Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998) (discussing law of the case doctrine).

Similarly, as the Bankruptcy Court noted, URPBPA’s objection to the Plan’s release and exculpation provisions was entirely premised on URPBPA’s desire to litigate, yet again, retired pilots’ purported right to the same treatment as active

pilots though the Plan of Reorganization's implementation of the ALPA Agreement. See R.67 at 192:8-12 ("For you to now be able to pursue ALPA on the basis that payment to ALPA without payment to your clients would be precisely to re-litigate matters that have already been determined."). URPBPA simply cannot re-litigate the ALPA Agreement through the guise of its Plan confirmation objection.

B. URPBPA is Collaterally Estopped from Arguing that Retired Pilots are Entitled to the Same Treatment as Active Pilots

Collateral estoppel, particularly in the form of issue preclusion, also bars URPBPA from arguing that retired pilots are entitled to the same treatment as active pilots. For issue preclusion to apply: (i) the issue sought to be precluded must be the same as in the prior action; (ii) the issue must have been actually litigated; (iii) the determination of the issue must have been essential to the final judgment; and (iv) the party against whom estoppel is invoked must be fully represented in the prior action. *Washington Group Intern., Inc. v. Bell, Boyd & Lloyd LLC*, 383 F.3d 633, 636 (7th Cir. 2004). There is no question that these elements are present here.

In this appeal, URPBPA argues that United's Plan of Reorganization discriminates unfairly between retired and active pilots because United paid allegedly as "pension termination compensation" \$550 million in convertible notes to its active pilots, but not to retired pilots. The foundation for URPBPA's classification and treatment argument—*i.e.*, that active and retired pilots have the same interests and therefore should be treated identically—has been rejected by this Court. See *UAL*, 443 F.3d 565 (determining that rights of active and retired

pilots are fundamentally different because active pilots gave up more, are parties to a CBA, and had a right to strike). While URPBPA certainly could have objected to the treatment of retired pilots' unsecured claims vis-à-vis other creditors' unsecured claims (for example, the unsecured claims of bondholders), URPBPA has not made such an objection. Instead, URPBPA focuses on the propriety of classifying and treating active pilots differently from retired pilots, which is a non-issue where, as this Court recognized in *UAL*, the interests of active pilots are fundamentally different from those of retired pilots.

C. The Plan of Reorganization's Separate Treatment of Retired and Active Pilots Complies With the Bankruptcy Code

Even if URPBPA could re-litigate the merits of its “disparate treatment” argument, URPBPA would fare no better here. Specifically, URPBPA argues that the Plan of Reorganization: (i) wrongfully classified retired pilots' unsecured claims separately from active pilot claims in violation of Bankruptcy Code Section 1122; (ii) failed to treat active and retired pilots equally even though they purportedly have similarly situated claims in violation of Bankruptcy Code Section 1123(a)(4); and (iii) violated the “cramdown” requirements under of Bankruptcy Code Section 1129(b). But URPBPA's argument fails for one simple reason: active and retired pilots' rights are fundamentally different. Thus, the Bankruptcy Court properly held that different treatment of active and retired pilots under the Plan of Reorganization “is not only appropriate, it is necessary.” (R.67 at 120-18-20.)

As an initial matter, to determine whether the Plan of Reorganization even treated active and retired pilots disparately requires an understanding of those

pilots' rights under the Plan. As discussed above, the Plan provides, retired pilots with two types of claims against United's estate: (1) a general unsecured claim for lost non-qualified pension benefits; and (2) a general unsecured claim for retiree medical benefits negotiated away through an unrelated settlement under Bankruptcy Code Section 1114. Both types of claims were classified as "Retiree Convenience Claims" (Class 2D-2), or if the claimant opted out of such class, as "Other Unsecured Claims" (Class 2E-6). In either event, the Plan treated these claims the same as the thousands of other holders of unsecured claims against United, *i.e.*, they would receive a *pro rata* distribution of new UAL common stock distributed to unsecured creditors (although in the case of the Convenience Class United would monetize the stock for the creditors and distribute cash to them).

In contrast, active pilots did not have any classified claims. Instead, the Plan separately provided that upon emergence from Chapter 11, United would assume the ALPA CBA and the ALPA Agreement and make payments and distributions as required by those agreements, which included the \$550 million in convertible notes, distributions of new UAL common stock based on a particular formula, and contributions to a new defined contribution plan, among other things. Indeed, United had to comply with the ALPA CBA (and ALPA Agreement) pursuant to Section 1113(f) of the Bankruptcy Code (requiring compliance with a CBA absent rejection of that CBA) and Section 365 of the Bankruptcy Code (requiring compliance with a contract and curing of any outstanding defaults upon assumption of that contract). Notably, the ALPA CBA (and ALPA Agreement) did not provide

for any distributions to active pilots on account of non-qualified pension benefits or retiree medical benefits—the bases for retired pilots’ claims—because these benefits had been waived as part of the collective bargaining process with ALPA. Thus, not only did active pilots lack classified claims under the Plan of Reorganization, but their distribution rights under the ALPA CBA (and ALPA Agreement) in no way mirrored the bases for retired pilots’ classified claims.

1. The Plan of Reorganization’s Different Classification of Active and Retired Pilots Is Appropriate and Necessary

URPBPA’s first argument in support of its “disparate treatment” theory is that the Plan of Reorganization violated Bankruptcy Code Section 1122 by classifying active and retired pilots’ claims differently (resulting in different treatment of each pilot group). *See Matter of Woodbrook Assocs.*, 19 F.3d 312, 319 (7th Cir. 1994) (holding that under 11 U.S.C. §1122 similar claims “may” be placed in the same class, but dissimilar claims cannot be placed in the same class). URPBPA is wrong for several reasons.

First, Section 1122 only applies to claims classified under a plan, and active pilots simply did not have classified claims under the Plan. Instead, active pilots had distribution rights under the ALPA CBA (and ALPA Agreement), which were assumed under the Plan and had to be paid pursuant to Bankruptcy Code Section 1113 and 365. Thus, active pilots’ rights are no different than a landlord’s right under Section 365 of the Bankruptcy Code to be paid in full for any past due rent outstanding upon a debtor’s assumption of a lease upon emergence from Chapter 11. Active pilots’ rights are also no different than a creditor holding an

administrative claim allowable under Section 503 of the Bankruptcy Code, which also cannot be classified under a plan of reorganization, *see* 11 U.S.C. § 1123(a)(1), but which must be paid in full on the effective date of a plan of reorganization. *See* 11 U.S.C. § 1129(a)(9)(A). Accordingly, because active pilots' rights under the ALPA CBA (and ALPA Agreement) are not classified claims, Section 1122 is simply inapplicable.

Second, Section 1122, even if applicable, simply does not require similarly-situated claims to be placed in the same class. *See* 11 U.S.C. § 1122. Instead, Section 1122 merely prohibits placing dissimilar claims in the same class. *See Matter of Jersey City Med. Ctr.*, 817 F.2d 1055, 1060 (3d. Cir. 1987) (“[t]he express language of [Section 1122] explicitly forbids a plan from placing dissimilar claims in the same class; it does not, though, address the presence of similar claims in different classes”). Thus, even if URPBPA and ALPA had similarly-situated claims, which they do not, United was under no obligation to classify them together.

Third, even if Section 1122 required similar classification of similar claims, which it does not, here retired pilots and active pilots have very different claims. In fact, because retired pilots claims are for lost non-qualified pension benefits and retiree medical benefits, and active pilots relinquished such claims as part of the collective bargaining process but made other much more considerable concessions (*i.e.*, wage concessions and the “no fight clause,” among others), retired pilots' claims and active pilots' distributions rights are apples and oranges.

Indeed, the Bankruptcy Court recognized these different rights and concluded that United had to treat the active and retired pilots differently:

The active pilots were agreeing to take less in wages and were agreeing to the termination of their [pension] plan, and were agreeing to certain compensation to be received from the debtor, but all in the context of providing ongoing services to the debtor. The retired pilots are in a completely different situation. Their situation is the holder of an unsecured claim. Treating the retired pilots in the same way as other holders of unsecured claims is not only appropriate, it is necessary. Had that not been done, one would have expected objections from the creditors committee saying why is this group of unsecured creditors being favored over other unsecured creditors. The fact is that they [retired pilots] are not providing ongoing services to the debtor that required a collective bargaining agreement that resulted in a whole series of arrangements being put into place. (R.67 at 120:10-25, 121:1-4.)

And the Seventh Circuit reiterated these salient differences in upholding the ALPA Agreement:

the active pilots...received...sizable compensation for surrendering their right to fight for their pension rights. The retired employees were bound to receive less. They lost less; a retired pilot will have enjoyed the benefit of full pension payments since his retirement, while an active pilot who is near retirement will have been contributing to the pension plan for many years without receiving any benefits. More important, the active pilots had a stick to use against United-the threat of a strike-that the retirees didn't have. *UAL*, 443 F.3d at 572.

Thus, even if there was a rule requiring similar claims to be placed in the same class, which there is not, here the rights of active and retired pilots are so different that the Plan of Reorganization necessarily treated them differently.

Indeed, courts routinely have allowed debtors to treat similarly-situated claims differently if the debtor has a legitimate business justification for doing so. *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 224 (Bankr. D.N.J. 2000) (citing *In re Greystone III Joint Venture*, 948 F.2d 134, 141 n.7 (5th Cir. 1991)). Here,

there certainly is a legitimate business reason for treating active pilots, who made wage concessions, agreed to the “no fight clause,” are still employed and may allege a right to strike, different from retired pilots, who did not (and could not) make any wage concessions, did not have any rights under Section 1113, and who have no power to strike.

For its part, URPBPA relies on *In re Greystone III Joint Venture*, 995 F.2d 1274 (5th Cir. 1992), *Lumber Exch. Ltd. P’ship v. Mutual Life Ins. Co.*, 968 F.2d 647 (8th Cir. 1992), and *In re Bryson Props.*, XVIII, 961 F.2d 496 (4th Cir. 1992), for the sweeping proposition that a debtor cannot classify similarly situated claims differently. But in each of these cases, the court denied separate classification of similarly-situated claims to prevent the debtors from gerrymandering voting results to manufacture accepting impaired classes for confirmation purposes. That simply is not the case here, nor have there been any such allegations. Moreover, as the Bankruptcy Court had found, United had an obligation not to place retired pilots’ claims in a class with active pilots, based on their fundamentally distinct claims and rights. *See also Woodbrook Assocs.*, 19 F.3d at 319 (separate classification of unsecured creditors with unsecured deficiency claims and Section 1111(b) rights is not only proper but required under Section 1122(a)). Accordingly, URPBPA’s Bankruptcy Code Section 1122 argument must be rejected.

2. United’s Plan Complies with Section 1123(a)(4)

This Court also must reject URPBPA’s argument that the disparate treatment of active and retired pilots violates Bankruptcy Code Section 1123(a)(4), which requires that claims in the same class receive the same treatment. 11 U.S.C.

§ 1123(a)(4). Here, not only are active pilots' rights under the ALPA CBA (and ALPA Agreement) not classified as "claims," but they are certainly not contained in the same class as retired pilots' claims, *i.e.*, Class 2D-2 (Retiree Convenience Claims) or 2E-6 (Other Unsecured Claims). Therefore, Section 1123(a)(4) is inapplicable on its face.

Moreover, URPBPA's Section 1123(a)(4) argument is also based on the false premise that active and retired pilots have similarly situated claims that must be classified together. But, as discussed above, they do not.

3. The Plan of Reorganization Does Not Discriminate Unfairly Against Retired Pilots' Claims

URPBPA also alleges that the Plan violates Bankruptcy Code Section 1129(b)'s cramdown requirements because it unfairly discriminates against retired pilots by treating them differently from active pilots. Again, URPBPA misses the point. United had an affirmative obligation to treat retired pilots differently than active pilots because while retired pilots were holders of unsecured claims, active pilots had completely distinct rights. Indeed, as the Bankruptcy Court noted, had United treated retired pilots' unsecured claims more favorably, then other similarly-situated unsecured creditors could legitimately complain that they were the subject of unfair discrimination. (UR.67.) This is why the Plan of Reorganization provided retired pilots with the same *pro rata* distribution rights as other unsecured creditors.

Moreover, as the Bankruptcy Court recognized, because active pilots and retired pilots are not similarly situated, an "unfair discrimination" analysis is unnecessary.

(R.67 at 121:4-8 (“[S]ince they are not at all similarly situated, since they are dealing with entirely different legal relationships to the debtor, a disparity in treatment is entirely appropriate and there is no need to engage in an unfair discrimination analysis.”).) In contrast, by URPBPA’s logic, a non-accepting class of unsecured creditors could always block confirmation by simply asserting an unfair discrimination objection whenever creditors with completely different rights (e.g., rights under a CBA protected by Section 1113, rights as an administrative expense claimant under Sections 503(b) and 1129(a)(9)(A), etc.) receive more favorable treatment under a plan of reorganization, even though the Bankruptcy Code itself dictates such disparate treatment. Such an illogical result would make any plan unconfirmable, for example, that pays administrative claims in full, but only pays unsecured claims a *pro rata* distribution. Obviously, this is not the law.⁷

4. Providing Retired Pilots with Similar Treatment Would Allow a Double-Recovery and Dilute PBGC’s Claim

Courts universally have held that when a pension plan is terminated, PBGC, not plan participants, have the exclusive right to assert a claim for unfunded qualified pension benefits liabilities. See *United Engineering*, 52 F.3d at 1391 (holding retirees’ claims against debtor for qualified benefits under terminated pension plan

⁷ In any event, it is entirely appropriate for Chapter 11 plans to discriminate among holders of similarly-situated claims, if the discrimination is not unfair. See, e.g., *In re Kliegl Bros. Universal Elec. Stage Lighting Co., Inc.*, 149 B.R. 306, 309 (Bankr. E.D.N.Y. 1992) (approving plan under which union’s unsecured claims were treated more favorably than other unsecured claims); *In re Richard Buick, Inc.*, 126 B.R. 840 (Bankr. E.D. Pa. 1991) (approving discriminatory treatment under plan in favor of trade creditors whose future relationships with debtor were essential to its successful reorganization).

are preempted by ERISA); *In re Lineal Group, Inc.*, 226 B.R. 608 (Bankr. M.D. Tenn. 1998) (same); *In re Adams Hard Facing Co.*, 129 B.R. 662 (W.D. Okla. 1991) (same); *see also* 29 U.S.C. § 1362(b). Indeed, it is well-settled that plan participants have no cause of action against a plan sponsor for qualified benefits upon termination of a pension plan. *United Engineering*, 52 F.3d at 1391. Even the Bankruptcy Court dismissed URPBPA's independent claims for lost qualified pension benefits on this very basis. *See In re UAL, Corp.*, Case No. 02-48191, Docket No. 13602 (Nov. 17, 2005). Moreover, under the PBGC Settlement Agreement, which this Court affirmed in November 2005, *see UAL*, 428 F.3d 677, PBGC was awarded a \$10.3 billion unsecured claim for unfunded qualified pension benefits liabilities arising from the termination of United's four pension plans.

URPBPA's request for "pension termination compensation," which request relates solely to retired pilots' purported claims for lost qualified pension benefits, directly contradicts this well-settled rule. In contrast, the \$550 million in convertible notes paid to active pilots was in consideration for a global deal which included, among other things, wage and work-rule concessions, promises to continue flying United's planes, and the "no fight clause," and thus was not solely on account of lost pension benefits. Thus, URPBPA's request for "pension termination compensation" would necessarily be on account of lost qualified pension benefits thereby duplicating PBGC's \$10.3 billion claim and diluting PBGC's and other creditors' recoveries, in violation of the Bankruptcy Code and ERISA.

D. The Plan of Reorganization's Release, Exculpation and Injunction Provisions are Lawful

URPBPA also argues that the Plan of Reorganization's release, exculpation, and injunction provisions are improper because the Bankruptcy Court lacked the authority to permanently enjoin litigation between retired pilots and ALPA. As discussed above, this Court should reject URPBPA's impermissible attempt to re-litigate the propriety of the ALPA Agreement. But even considering the merits of URPBPA's objection, this Court should still reject it for URPBPA fundamentally misunderstands the Plan of Reorganization's release, exculpation, and injunction provisions and applicable law.⁸

1. The Plan of Reorganization's Consensual Releases Comply with Seventh Circuit Law

As a preliminary matter, the Plan only enjoins litigation of consensually released claims against ALPA. In the *Specialty Equipment* case, this Court approved consensual releases in Chapter 11 plans, stating "courts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code," and, "a *per se* rule disfavoring all releases in a reorganization plan...would be unwarranted" and thus approved the use of consensual releases in Chapter 11 plans. 3 F.3d at 1047. The Plan's releases are no doubt consensual complying with *Specialty Equipment*.

⁸ URPBPA also objects to the Plan's injunction provisions, which merely enforce, and thus rise and fall with, the Plan's release and exculpation provisions.

Here, the Plan ballots sent to retired pilots clearly stated that retirees could vote for or against the Plan of Reorganization, or abstain from voting and opt-out of the Plan's third party releases. (R.34 at Exhibit 3, Item 3.) The ballots also stated that retirees voting against the Plan would not be bound by the Plan's release provisions, but retirees voting in favor of the Plan, or abstaining but not opting-out of the releases, would be bound by the Plan's release provisions. (*Id.* at Exhibit 3, Item 2.)

Moreover, URPBPA fails to mention that United shared sample ballots with URPBPA's counsel for their input and comment before mailing the ballots to retired pilots. In fact, URPBPA sent a letter to its members advising them to vote against the Plan of Reorganization and to opt-out of the third-party releases. In total, some 252 creditors (including many retired pilots) authorized to vote on the Plan of Reorganization abstained from voting but still opted-out of the third party releases. (UR.47 at Exhibit D.) Thus, creditors understood their opt-out rights and took advantage of them. Accordingly, the third-party release provisions in United's Plan are entirely consistent with the rule of *Specialty Equipment*.

In the face of clear authority against it, URPBPA seemingly argues that consensual releases in plans are inappropriate, even though they are, by definition, consensual. But URPBPA relies on cases in United's favor, that have been overruled, or that directly contradict *Specialty Equipment*. For instance, URPBPA cites *In re Sybaris Clubs Int'l, Inc.*, 189 B.R. 152, 154 (Bankr. N.D. Ill. 1991), and *In re Spiers Graff Spiers*, 190 B.R. 1001, 1013 (N.D. Ill. 1996), even though both

cases noted that *Specialty Equipment* has sanctioned consensual non-debtor releases. URPBPA also cites *Union Carbide v. Newboles*, 686 F.2d 593 (7th Cir. 1982), which prohibited a gratuitous non-consensual release of a non-debtor who made no contribution to the reorganization, even though *Union Carbide* pre-dated *Specialty Equipment* by over a decade. See *Spiers*, 190 B.R. at 1013 n.10 (“By finding that bankruptcy courts can confirm plans including consensual releases, *Specialty Equipment* partly overruled *Union Carbide’s* blanket prohibition on non-debtor releases.”). URPBPA’s citations to in *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), and *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1991), should be ignored because those case adopted a *per se* rule against non-debtor releases that was specifically rejected in *Specialty Equipment*. See *Specialty Equipment*, 3 F.3d at 1047 (“a *per se* rule disfavoring all releases in a reorganization plan would be similarly unwarranted, if not a misreading of the statute.”).

2. The Plan of Reorganization’s Exculpation Provisions Are Appropriate

Next, URPBPA challenges the Plan of Reorganization’s exculpation provisions. In contrast to the Plan’s release provisions, the exculpation provisions do not affect the liability of third parties *per se*, but rather set a standard of care of gross negligence and willful misconduct in future litigation by a non-releasing party against an “Exculpated Party” for acts arising out of United’s restructuring. The propriety of exculpation clauses in Chapter 11 plans is discussed at length in *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000), which holds that an exculpation provision “is apparently a commonplace provision in Chapter 11 plans,

[and] does not affect the liability of these parties, but rather states the standard of liability under the Code.” An exculpation clause in a Chapter 11 plan is appropriate because a bankruptcy court cannot confirm the plan unless it finds that the plan has been proposed in good faith. See 11 U.S.C. §1129(a)(3). Once a good faith finding is made, it then becomes appropriate to set the standard of care of those involved in the formulation of that plan of reorganization for liability arising from the Chapter 11 case. See *PWS*, 228 F.3d at 246-247 (observing that creditors providing services to the debtors are entitled to a “limited grant of immunity...for actions within the scope of their duties...”).⁹

URPBPA does not challenge *PWS*'s holding, but argues that the rule should be limited to the exculpation of an official Chapter 11 creditors' committee and its professionals. However, URPBPA provides no basis for distinguishing, for purposes of exculpation, between a creditors' committee involved in the formulation of a plan of reorganization, and a union whose labor settlement with the debtor formed one of the central building blocks of the plan of reorganization. And here it is clear that ALPA made a substantial contribution to United's restructuring. In fact, ALPA, as the first union to agree not to contest a Section 1113 proceeding to eliminate United's collectively bargained obligation to maintain a defined benefit pension plan, helped pave the way for United's emergence from Chapter 11. Exculpation clauses, therefore, appropriately prevent future collateral attacks against parties

⁹ Courts upholding similar exculpation provisions have allowed exculpated parties to raise the exculpation as a *res judicata* defense. See *In re Genesis Health Ventures, Inc.*, 324 B.R. 510, 525 (Bankr. D. Del. 2005).

that have made substantial contributions to the reorganization by entering into settlements with a debtor.¹⁰

The Plan's exculpation provisions also are appropriate because United agreed to indemnify ALPA for liability in connection with the ALPA Agreement. (DR. at 83:4 ¶ 11, Ex. F.) As the court held in *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994), exculpation clauses are appropriate when "[t]here is an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate." (emphasis added).¹¹

The record makes clear that URPBPA's motive in objecting to the Plan of Reorganization's exculpation provision is to sue ALPA for allegedly "bargaining away" retirees' pension benefits under the ALPA Agreement. At the confirmation hearing, the Bankruptcy Court questioned URPBPA's counsel to determine exactly what URPBPA had found objectionable about the Plan's exculpation provisions. (R.67 at 181:5-9.) After an extended colloquy, the Bankruptcy Court uncovered that URPBPA's real complaint was with ALPA's agreement to enter into the ALPA

¹⁰ Moreover, ALPA was a member of United's Creditors' Committee and therefore was exculpated independently for its Committee work in United's restructuring, including negotiating and formulating the Plan of Reorganization.

¹¹ URPBPA, citing *Western Real Estate*, 922 F.2d 592, argues that United's indemnification obligation to ALPA does not justify an exculpation clause, because Bankruptcy Code Section 524(a) discharges United from indemnification claims. *Western Real Estate*, however, is inapposite, because it concerned prepetition dischargeable indemnification claims. In contrast, here United specifically agreed in a post-petition, court-approved settlement to indemnify ALPA, which obligation was incorporated into the Plan of Reorganization.

Agreement, which the Bankruptcy Court already had approved over URPBPA's objection and which now has been upheld by the Seventh Circuit. (R.67 at 192:8-12.) Thus, the Bankruptcy Court appropriately noted that URPBPA already litigated—and lost—its objection to the ALPA Agreement, and could not re-litigate that objection against:

[That] the retired pilots who were in litigation with ALPA regarding the [ALPA Agreement] would be able to argue in another proceeding that ALPA ought to give that money to them...is entirely contradictory to the process that we've gone through here. It contradicts the settlement process that they participated in, and contradicts the approval that this court gave of that settlement. (R.67 at 193:13-25.)

The Bankruptcy Court thus found that the Plan's exculpation provisions are necessary and appropriate to prevent URPBPA from continually litigating with ALPA over the same issue—its request for “pension termination compensation”—that was resolved against it in the context of United's restructuring. On that basis, URPBPA's challenge to the exculpation provisions must be rejected.

* * * * *

CONCLUSION

WHEREFORE, United respectfully requests that the Court: (i) dismiss URPBPA's appeal; or (ii) affirm the Confirmation Order on the merits.

Date: August 21, 2006

Respectfully submitted,

/s/ Chad J. Husnick

Marc Kieselstein, P.C. (ARDC No. 6199255)

David R. Seligman (ARDC No. 6238064)

(Counsel of Record)

James J. Mazza, Jr. (ARDC No. 6275474)

Chad J. Husnick (ARDC No. 6283129)

KIRKLAND & ELLIS LLP

200 East Randolph Drive

Chicago, Illinois 60601

Telephone: (312) 861-2000

Facsimile: (312) 861-2200

Counsel for Appellees

UAL Corporation, et al.

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,961 words, excluding the parts of the brief exempted by Fed. R. app. P. 32(a)(7)(B)(iii).

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 proportionally spaced typeface using Microsoft Office Word 2000 in 12-point Century Schoolbook.

CIRCUIT RULE 31(E) CERTIFICATION

Pursuant to Circuit Rule 31(e), I hereby certify that this Brief was produced in digital format and I have served upon each party represented by separate counsel and the Court one copy of the text of the brief in Portable Document Format on a virus-free CD-ROM. I further certify that not all of the material included in the supplemental appendix is available electronically.

/s/ Chad J. Husnick
Chad J. Husnick

PROOF OF SERVICE

I, Chad J. Husnick, an attorney, hereby certify that the foregoing Brief of Appellees UAL Corporation, et al. was served upon the following individuals by e-mail and overnight mail on August 21, 2006.

Jack J. Carriglio
Eric E. Newman
James G. Argionis
Jennifer J. Pomaranski
Meckler Bulger & Tilson, LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-7898 – facsimile
jack.carriglio@mbtlaw.com
eric.newman@mbtlaw.com
james.argionis@mbtlaw.com

Frank Cummings
LeBoeuf, Lamb, Greene & MacRae,
L.L.P.
1875 Connecticut Avenue N.W.
Washington, DC 20009-5728
(202) 986-8102 – facsimile
fcummings@llgm.com

Babette Ceccotti
Zachary N. Leeds
Thomas N. Ciantra
Cohen Weiss & Simon LLP
330 W. 42nd Street
New York, NY 10036
(212) 695-5436 – facsimile
bceccotti@cwsny.com
zleeds@cwsny.com
tciantra@cwsny.com

Stanley Eisenstein
Katz, Freidman, Eagle, Eisenstein &
Johnson
77 W. Washington Street, 20th Floor
Chicago, IL 60602
(312) 372-5555 – facsimile
seisenstein@kfeej.com

Jeffrey B. Cohen
John A. Menke
Shannon L. Novey
Pension Benefit Guaranty Corporation
1200 K Street N.W., Suite 340
Washington DC 20005-4026
(202) 326-4020 x3059
(202) 326-4112 – facsimile
ualattorneys@pbgc.gov
efile@pbgc.gov

Matt Luzadder
Kelley Drye & Warren LLP
333 W. Wacker Drive, Suite 2600
Chicago IL 60606
(312) 857-7070
(312) 857-7095 – facsimile
mluzadder@kelleydrye.com

/s/ Chad J. Husnick

Chad J. Husnick