

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

In re	)	
	)	
UAL CORPORATION, et al.	)	Chapter 11
	)	
Debtors.	)	Case No. 02-B-48191
	)	(Jointly Administered)
	)	
	)	Hon. Eugene R. Wedoff
	)	
	)	Hearing Date: Jan. 17, 2006
	)	Hearing Time: 10:30 a.m. CST
	)	

**OBJECTION OF THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,  
TO DEBTORS' MOTION IN LIMINE TO BAR THE "EXPERT"  
TESTIMONY OF THOMAS JONES AND OTHER EVIDENCE PURPORTEDLY  
RELATING TO "EMPLOYEE MORALE" OR "SHARED SACRIFICE"**

The Association of Flight Attendants-CWA, AFL-CIO ("AFA") respectfully submits its Objection to Debtors' Motion in Limine to Bar the "Expert" Testimony of Thomas Jones and Other Evidence Purportedly Relating to "Employee Morale" or "Shared Sacrifice" ("Motion"). Over the past three years, Debtors have repeatedly stated that they intend to restructure United in way that is fair and equitable for all stakeholders and that senior executives would share the sacrifice necessary for United to restructure successfully. That the Debtors now seek to preclude the Court from hearing testimony on the fairness and reasonableness of the proposed Management Equity Incentive Plan ("MEIP") casts considerable doubt, to say the least, on Debtors' good faith and their intention to keep their promise to share the sacrifice required to restructure United.

## ARGUMENT

### **I. THERE IS NO BASIS FOR EXCLUDING THE EXPERT TESTIMONY OF PROFESSOR THOMAS JONES.**

Professor Thomas Jones is the Boeing Professor of Business Ethics at the University of Washington Business School. Within the field of business ethics, Professor Jones specializes in the relationship between the ethical practices and financial performance of corporations. Professor Jones's expert testimony is intended to educate the Court, in both theoretical and empirical terms, about the connection between mutual trust and corporate performance. Specifically, Professor Jones will testify, based on his own research and that of other scholars, about how a lack of mutual trust within a firm undermines its efficiency and profitability. His testimony will also apply these principles to the proposed MEIP. In Professor Jones's opinion, the proposed MEIP and Mr. Friske's failure to take into account the sacrifices of represented employees in advising United on the MEIP evidence a breach of trust by senior United executives to share the sacrifices of this restructuring, as they had repeatedly promised to do. That breach "could irrevocably sour important firm/stakeholder relationships and harm the company financially at a time when it desperately needs to operate at peak efficiency." Jones Expert Report ¶ 15. As we demonstrate below, Professor Jones's expert opinions are relevant and admissible.

**1. Debtors Mis-state the Applicable Law.**

Debtors mistakenly claim that Professor Jones's qualifications as an expert should be reviewed under the standards articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), for determining the admissibility of expert scientific opinions. Under Daubert, the trial court, in addition to relevance, looks at a variety of factors to determine the reliability of expert scientific opinion: (1) whether it is testable and has been tested; (2) whether it has undergone peer review; (3) whether the methodology has a known error rate; (4) whether there are standards for using the methodology; and (5) whether the methodology is generally accepted. 509 U.S. at 593-94.

However, where, as here, the expert testimony in question is non-scientific, the Supreme Court made clear in Kumho Tire Co., Ltd. v. Carmichael that the trial court may exercise discretion, limiting its application of the Daubert factors to those that "are reasonable measures of the reliability of [the particular] expert testimony." 526 U.S. 137, 152 (1999). As the Supreme Court explained, such an approach comports with "Daubert's gatekeeping requirement . . . to ensure the reliability and relevancy of expert testimony" by "mak[ing] certain that an expert, whether basing testimony upon professional studies or personal experience, employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id.; see also Bryant v. City of Chicago, 200 F.3d 1092, 1097-98 (7th Cir. 2000). Because the subject matter of Professor Jones's testimony, business

ethics, is unquestionably non-scientific in nature, the Court may limit its application of the Daubert factors to those that measure reliability in the field of business ethics.

**2. Professor Jones's Opinions Are Relevant.**

As set forth fully in AFA's Objection to the Plan of reorganization, United's proposed MEIP must be judged in terms of its inherent fairness and Debtors' good faith. Under Section 363(b)(1) of the Bankruptcy Code, the Court must assess the MEIP as an exercise of Debtors' business judgment under the "rigorous scrutiny" applied to insider compensation. 11 U.S.C. § 363(b)(1); Pepper v. Litton, 308 U.S. 295, 306 (1939); see also AFA's Objection at 16-19. This scrutiny includes assessment of the "inherent fairness" of the proposed compensation package. Pepper, 308 U.S. at 308. The Bankruptcy Code also requires that a plan of reorganization be "proposed in good faith." 11 U.S.C. 1129(a)(3). This good faith inquiry requires assessment of the "fundamental fairness" of the proposed plan. In re WCI Cable, Inc., 282 B.R. 457, 484 (Bankr. D. Or. 2002); see also AFA's Objection at 19-23.

In his expert report, Professor Jones states that "mutual trust is an essential feature of efficient corporate operations" and that senior management's failure to honor its pledge to share the sacrifices of this restructuring "will surely make [United's] economic recovery more difficult." His opinions are highly relevant to whether the MEIP, which will pay 400 senior managers 8% of United's outstanding equity over the next four years, including approximately \$15 million to the CEO, is inherently fair, given

employees' commitment to four years of pay and benefit concessions valued at \$4 billion annually. In addition, Professor Jones's analysis speaks directly to the issue of good faith, given management's repeated pledge to share the financial sacrifice of this restructuring.

In their Motion, Debtors erroneously claim that Professor Jones's testimony is not relevant to the issue of good faith. In support of this claim, Debtors cite three cases, none of which are apposite, where experts on business ethics were excluded. Two of the cases are product liability cases. The third is a defamation case. In none of those cases, however, were the applicable legal standards equitable or ethical in nature.<sup>1/</sup> Here, by contrast, the legal standards that apply to the Debtors' Plan, including the MEIP, whether it is inherently fair, as required by Section 363(b)(1), and whether it is proposed in good faith, as required by Section 1129(a)(3), are fundamentally equitable and ethical in nature.

Further, all three cases relied on by Debtors involved juries. In all three, the court noted possible jury confusion as a

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<sup>1/</sup> DiBella v. Hopkins, 403 F.3d 102, 121 (2d Cir. 2005) (issue in defamation case limited to whether or not alleged defamatory statement was true or not); In re Welding Fume Prods. Liability Litig., No. 1:03-CV-17000, MDL 1535, 2005 WL 1868046, at \*20 (N.D. Ohio Aug. 8, 2005) (issue in products liability case limited to whether defendant breached legal duty); In re Rezulin Prods. Liability Litig. (MDL No. 1348), 309 F. Supp. 2d 531, 544 (S.D.N.Y. 2004) (issue in product liability case limited to breach of legal duty and proximate cause).

consideration.<sup>2/</sup> Here, there is no jury issue. The Court, as the sole fact-finder, is perfectly capable of weighing Professor Jones's testimony, only, however, if the Court has an opportunity to hear the testimony at the hearing.

Not only do Debtors fail to show that Professor Jones's opinions are not relevant, they cherry-pick from his deposition transcript, seriously misrepresenting the substance of his opinions. They attempt to discredit Professor Jones by implying that his opinions are at odds with capitalism, the profit motive and maximizing shareholder value. This is a rank distortion of Professor Jones's views. As Professor Jones testified, he believes that a "company should be extremely mindful of profitability, but that there are limits to what it ought to do in pursuit of that profitability." Jones Dep. Trans. at 14:22-25. This is hardly a radical view, but rather reflects the widely accepted view of American capitalism that there should be limits, legal and internal, on how markets and firms behave. Indeed, it is precisely the legal protection from the free marketplace afforded by Chapter 11 that has enabled United to remain in business. If Debtors are advocating a purely laissez-faire system and truly disputing Professor Jones's opinion that "there are limits to the means by which firms should pursue the profit motive," id. at 14:15-17, then it is the Debtors who hold a view that "contradict[s] key

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<sup>2/</sup> DiBella v. Hopkins, 403 F.3d at 121; In re Welding Fume Prods. Liability Litig., 2005 WL 1868046, at \*20; In re Rezulin Prods. Liability Litig., 309 F. Supp. 2d at 545.

underpinnings of the Bankruptcy Code (and of American capitalism)." Mot. at 4.

**3. Professor Jones's Testimony Is Reliable According to the Standards of Business Ethics.**

Debtors mistakenly claim that Professor Jones's testimony should be excluded because it does not satisfy the Daubert factors. As shown above, however, under Kumho Tire, courts, weighing the admissibility of non-scientific evidence, may limit their application of the Daubert factors to those that "are reasonable measures of the reliability of [the] expert testimony" in question. 526 U.S. at 152 (1999). Clearly, measures of scientific reliability identified in Daubert, such as whether the conclusions are testable or the methodology has a known error rate, are not applicable to a social science field such as business ethics. On the other hand, factors such as whether the opinions have been published and undergone peer review and adhere to an accepted methodology would apply to Professor Jones's testimony on business ethics.

Professor Jones's Expert Report and curriculum vitae establish his credentials as a leading scholar in the field of business ethics. He has published over fifty articles in peer review journals over the past twenty-seven years. He has also received a number of notable awards and distinctions, including, in 2005, the Sumner Marcus Award, a lifetime achievement award for major contributions to the Social Issues in Management Division of the Academy of Management. There can be no doubt, then, that Professor Jones's scholarship meets the highest standards of the field.

Debtors allege that "the primary theoretical work upon which he bases his testimony is not published, not peer reviewed, and not even completed." Mot. at 6. This is simply wrong. As Professor Jones's Expert Report makes clear, he published a paper in the Academy of Management Review ("AMR") in 1995, in which he shows "that corporations that are able to establish mutually trusting and cooperative relationships with stakeholders will have a competitive advantage over firms that cannot or do not." Jones Expert Report ¶ 3. Thus, Professor Jones's expert testimony is based on over ten years of research and peer-reviewed scholarship. Debtors, however, cherry-pick Professor Jones's most recent research linking the concept of "stakeholder culture" to "various corporate behaviors and outcomes," which is scheduled for publication in AMR in 2006, id. ¶ 4, to argue, misleadingly, that his testimony is not based on published, peer-reviewed conclusions.

Debtors fault Professor Jones for not performing empirical market research on the MEIP. See Mot. at 6-7. These criticisms, however, are misplaced, as they have no bearing on the relevance or reliability of Professor Jones's testimony. His expert opinions are relevant to how the MEIP would damage United's competitiveness by breaching management's promise to share the sacrifices of the restructuring and undermining mutual trust within the Company, not how the proposed MEIP compares to other MEIPs. Likewise, the relevance of Professor Jones's opinion of Mr. Friske's Expert Report relates to the fact that Mr. Friske analyzed the MEIP in an ethical vacuum, without regard for either the sacrifices of

represented employees or the commitments contained in Mr. Tilton's 2002 Employment Agreement, not to Mr. Friske's comparative analysis of the MEIP.

Professor Jones's expert testimony clearly "employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire, 526 U.S. at 152. Accordingly, Daubert's gatekeeping requirement is met and Professor Jones's expert testimony is admissible.

## **II. THERE IS NO BASIS FOR EXCLUDING EVIDENCE REGARDING EMPLOYEE MORALE.**

Debtors also erroneously seek to exclude evidence regarding the effect of the MEIP on employee morale as irrelevant and as hearsay. It is neither.

### **1. Evidence Regarding Employee Morale Is Relevant.**

Evidence that the MEIP is having and will continue to have a negative effect on employee morale relates both to the business judgment standard under Section 363(b)(1) and the good faith and reasonableness standards under Section 1129. A debtor-in-possession has a duty to its creditors to conserve goodwill assets, such as employee morale, every bit as much as it has a duty to conserve more tangible assets.<sup>3/</sup> See In re Johns-Manville Corp., 66 B.R. 517, 539-40 (Bankr. S.D.N.Y. 1986) (actions of a company in

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<sup>3/</sup> A debtor-in-possession owes a duty to its creditors "to protect and preserve [its] assets." In re UNR Indus., Inc., 30 B.R. 609, 612 (Bankr. N.D. Ill. 1983); see also In re Ionosphere Clubs, Inc., 113 B.R. 164, 169 (Bankr. S.D.N.Y. 1990) ("A debtor-in-possession has all the duties of a trustee in a Chapter 11 case, including the duty to protect and conserve property in its possession for the benefit of creditors.")

bankruptcy, which negatively "impact on employee morale" and "undermine the confidence [of] employees," result in an "erosion of [the company's] business operations" leading to "less money to distribute to creditors"); see also In re A.H. Robins Co., Inc., 88 B.R. 742, 751 (E.D. Va. 1988). Evidence of deteriorating employee morale is clearly relevant to whether the MEIP reflects sound business judgment as required by Section 363(b)(1). See 11 U.S.C. § 363(b)(1).

United also has consistently asserted that all the concessions it has extracted from its employees satisfied the fair and equitable standard set forth in Section 1113 of the Bankruptcy Code. Further, senior United management has consistently promised to share the sacrifices necessary for successful restructuring. Debtors now claim that their Plan of Reorganization has been proposed in good faith. See Debtors' Mem. at 14. However, many Flight Attendants do not believe that Debtors' Plan was proposed in good faith, because the extremely generous grants senior executives would receive under the MEIP constitute a shameless breach of their promise to treat employees fairly and to share the sacrifices necessary for a successful restructuring. Thus, evidence of the negative effect of the MEIP on employee morale is plainly relevant to whether the Debtors' Plan was proposed in good faith, as required by Section 1129(a)(3). See 11 U.S.C. § 1129(a)(3).

In addition, under Section 1129, a court may only approve payments for services provided for in a plan, if such payments are reasonable. 11 U.S.C. § 1129(a)(4). The payments contemplated in

the MEIP fail this reasonableness standard due to their deleterious impact on employee morale.

**2. Mr. Davidowitch's Testimony Regarding Employee Morale Is Not Hearsay.**

Debtors' claims to the contrary notwithstanding, Mr. Davidowitch's testimony regarding employee morale is obviously not hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." United States v. Linwood, 142 F.3d 418, 424-25 (7th Cir. 1998). Therefore, a "statement . . . offered on a non-assertive basis, i.e., for proof only of the fact that it was said . . . would not be subject to the hearsay objection." United States v. Sanders, 639 F.2d 268, 270 (5th Cir. 1981). Here, Mr. Davidowitch will testify regarding what other Flight Attendants have said about the MEIP "for proof only of the fact that it was said." Id. Accordingly, Mr. Davidowitch's testimony is not subject to the hearsay objection.

**CONCLUSION**

For the foregoing reasons, AFA respectfully requests that the Court deny Debtors' Motion and allow the expert testimony of Professor Jones, as well as the testimony of Mr. Davidowitch.

Respectfully submitted,

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Dated: January 16, 2006

CERTIFICATE OF SERVICE

I, Matthew E. Babcock, hereby certify that on this 16th day of January 2006, true copies of the foregoing **Objection of the Association of Flight Attendants-CWA, AFL-CIO, to Debtors' Motion in Limine to Bar the "Expert" Testimony of Thomas Jones and Other Evidence Purportedly Relating to "Employee Morale" or "Shared Sacrifice"**, were served via overnight delivery on the attached Core Group Service List and via electronic mail or facsimile on the Updated 2002 Service List. Pursuant to Section C.3.i(1) of the Second Amended Notice, Case Management and Administrative Procedures in this proceeding, service lists have been filed with the Court. In accordance with Rules 9014 and 7004, a true copy of the foregoing Objection was served by first-class mail on Frederic Brace, an Officer of United.

/s/ Matthew E. Babcock  
Matthew E. Babcock