

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

In re:)	Chapter 11
)	
UAL CORPORATION, et al.,)	Case No. 02-B-48141
)	(Jointly Administered)
Debtors.)	
)	Honorable Eugene R. Wedoff
)	
)	Hearing Date: January 18, 2006, 9:30 a.m.
)	Prevailing Central Time

**DEBTORS' RESPONSE TO (A) TRUSTEES' OBJECTION TO CONFIRMATION OF
DEBTORS' PLAN OF REORGANIZATION BASED ON MATERIAL POST-
BALLOTING CHANGES TO THE PLAN AND (B) EMERGENCY PROVISIONAL
MOTION OF TRUSTEES PURSUANT TO RULE 3018 TO ALLOW HOLDERS OF
CLASS 2E-5 CLAIMS TO CHANGE VOTES RELATING TO DEBTORS' FIRST
AMENDED PLAN OF REORGANIZATION**

(Relates to Docket Nos. 13277, 14635, 14684, 14699 and 14701)

After receiving an *exclusive* assignment of an amount not to exceed \$100 million of value from the PBGC Claim, the Trustees now object to an assignment of a portion of the PBGC's claim that was foreshadowed in the Disclosure Statement, and that is simply the mirror image of the prior assignment for their benefit alone that the Trustees demanded and received five months ago. The Trustees' sole argument is that United's direction of the assignment of 45% of the PBGC's UBL claim adversely modifies the Plan and violates the Term Sheets approved as part of the PDG Settlement. It does neither. The Assignment does not affect the Plan, is not a modification of the Plan, and does not violate the Term Sheets. The workings of the assignment provision in the PBGC settlement were (i) fully disclosed as part of the PBGC Settlement Agreement (which the Trustees supported as modified to incorporate language specifically relating to them); and (ii) later expressly set forth in the Disclosure Statement. The Debtors have fully complied with that provision in all respects. The Trustees' faulty memory

may stem from the fact that when the Trustees were assigned some \$100 million of the PBGC UBL claim to the exclusion of all other creditors, the Trustees fully accepted the benefits of the PBGC Settlement Agreement and kept silent regarding the selective nature of that assignment. Now that the remainder of the PBGC UBL claim is to be assigned in a manner fully consistent with and foreseeable under the PBGC Settlement Agreement, but not to the Trustees' liking, the Trustees are attempting to make the assignment clause a Plan and Term Sheet issue. It is not.

Simply put, United has satisfied the standard set forth in the PBGC Settlement Agreement to assign the remainder of the PBGC UBL claim as provided in its January 13 notice, and the Trustees cannot now attack that assignment as inconsistent with the Plan. Because the Trustees' objection is based on the false premise that the PBGC assignment is a Plan issue, every argument flowing from this premise is tainted. And the fact that the Trustees consistently, indignantly and hyperbolically cling to their false premise does not make it any less false. Finally, because a selective assignment was completely foreseeable and contemplated in the PBGC Agreement and the Disclosure Statement, the actual Assignment raises no new issues and the Trustees' objection is untimely. Therefore, the Trustees' objection should be overruled. Similarly, in the absence of any Plan modification, material or otherwise, the Trustees' Rule 3018 Motion must also be denied. The only question for this Court is whether the substantive requirements set forth in the PBGC Settlement Agreement are satisfied and the answer to that question is clearly "yes."

Background

On April 22, 2005 the Pension Benefit Guaranty Corporation ("PBGC") and United Air Lines, Inc. (one of the Debtors herein, "United") reached an agreement "consensually

resolv[ing] virtually all issues between United and the PBGC.”¹ The Court approved this agreement (the “PBGC Agreement”) on May 11, 2005.² Attached to the PBGC Approval Order is the PBGC Agreement itself (Exhibit 1) and “Additional Terms and Conditions” (Exhibit 2) (“Additional Terms”). The Additional Terms memorialized agreements reached with various parties in interest clarifying certain aspects of the PBGC Agreement. As part of the consideration for the PBGC Agreement, United agreed to provide PBGC certain consideration in new UAL stock in United’s plan of reorganization (“Plan”)³, and PBGC was also “allowed a single prepetition, general unsecured claim” against United’s estate (the “Unfunded Liability Claim”).⁴ Most relevant for present purposes, Section 13 of the PBGC Agreement provides:

Release and/or Assignment of Claims. At United’s option, PBGC shall assign 45% of the distribution that it receives or is to receive on account of its claims in the Chapter 11 Cases as directed in writing by United.⁵

In response to the objections of the OCUC and the Trustees, two paragraphs of the Additional Terms were added that contain the procedural and substantive requirements that must be met in connection with an assignment under this provision. First, paragraph 3 of the Additional Terms provides:

United’s direction of PBGC’s assignment of 45% of its unfunded benefit liability claim shall be consistent with the best interests of

¹ Debtors’ Emergency Motion to Approve Agreement With PBGC [Docket No. 11024] (“PBGC Approval Motion”), p. 1.

² Order Approving Debtors’ Emergency Motion to Approve Agreement with PBGC [Docket No. 11229] (the “PBGC Approval Order”).

³ All citations to the Plan herein are based on the Debtors’ *First* Amended Plan of Reorganization.

⁴ *Id.*, ¶ 2.

⁵ *See also* Paragraph 21(g) of the PBGC Approval Motion.

general unsecured creditors, shall be subject to at least ten (10) business days prior notice to the Committee, shall have been made after consultation with the Committee, and shall be subject to Bankruptcy Court approval after notice to the Rule 2002 service list parties and hearing under the best interest of creditors' test in a *de novo* review; failing United's direction otherwise consistent with the foregoing, United shall direct distribution to the unsecured creditor body.

And paragraph 6 of the Additional Terms reads in relevant part:

United's direction of PBGC's assignment of 45% of its unfunded benefit liability claim shall be consistent with applicable law including the provisions of the Bankruptcy Code and shall be subject to ten (10) business days prior notice to the Aircraft Trustees. United shall consult with the Aircraft Trustees as the documents reflecting and evidencing the securities are negotiated with PBGC.

In January, 2006 the Debtors reached an agreement with the OCUC resolving the OCUC's objections to the Plan. As part of this agreement, the Debtors agreed to direct the assignment (the "Assignment") of the remainder of the PBGC Claim (a portion of the PBGC Claim had already been assigned to the Trustees as part of the PDG Settlement in August, 2005).⁶ It is this Assignment that the Trustees complain about. However, United has fully complied with all the procedural requirements of the PBGC Agreement,⁷ and as will be shown below, United has also

⁶ See "Plan Issues" term sheet, attached to the Notice of Withdrawal of Confirmation Objection of Official Committee of Unsecured Creditors as Part of Settlement [Docket No. 14635], filed with the Court and served on January 12, 2006. The Debtors' agreement to direct the assignment of the remainder of the 45% is found in the section entitled "Additional Consideration" on p. 2.

⁷ The procedural requirements are that an Assignment pursuant to Section 13 of the PBGC Agreement: (i) "Shall be subject to at least ten (10) business days prior notice to the Committee," (ii) "Shall have been made after consultation with the Committee" (iii) "Shall be subject to Bankruptcy Court approval after notice to the Rule 2002 service list parties and hearing under the best interest of creditors' test in a *de novo* review" and (iv) "Shall be subject to ten (10) business days prior notice to the Aircraft Trustees." Additional Terms, ¶¶ 3, 6. On January 13, 2006 United filed its Notice of Assignment Pursuant to PBGC Agreement [Docket No. 14684] (the "Notice"), which was served on the Core Group service list, the 2002 service list, and an "affected parties" service list of the Aircraft Trustees. Therefore, the required parties were served. Moreover, Because the Assignment will certainly not occur before January 27, 2006 (10

complied with the PBGC Agreement's substantive requirements, which is the only standard it must meet.

I. THE ASSIGNMENT IS NOT A VIOLATION OF THE DISCLOSURE STATEMENT, THE PLAN OR THE TERM SHEETS, NOR IS IT A MODIFICATION OF THE PLAN

A. The Assignment Was Disclosed

The PBGC Agreement was approved by the Court in May, 2005 after lengthy discussions among United, the OCUC, the Trustees and other interested parties. The Trustees filed an objection to the approval of the PBGC Agreement, and a reading of the Additional Terms clearly shows that its concerns were taken into account. Contrary to the Trustees' argument, the ability of the Debtors to direct an assignment pursuant to Section 13 of the PBGC Agreement was clearly disclosed in Section C .4.b(ii)(f) of the Debtors' Disclosure Statement.⁸ The Disclosure Statement also makes it very clear that the Debtors' direction of such an assignment could involve distributions to selected recipients, and in that sense be exclusionary in nature. For example, Section I.N. discloses that the Debtors had been conducting an ongoing dialogue with the OCUC about *precisely* what has come to pass, and that:

The Creditors' Committee has requested that certain additional recoveries be assigned to the Other Unsecured Claim Classes (Classes 1E-3, 2E-6, 3E-3, and 4E through 28E), including, without limitation, (i) the remaining unassigned portion of the 45% of the PBGC Claim, (ii) the SAM Distribution and SAM Notes,

business days after filing), the Notice is fully compliant with the requirements of the Additional Terms. Moreover, as evidenced by the fact that the Plan Issues term sheet memorializes the agreement between the OCUC and United regarding the Assignment, it is clear that United has also complied with the requirement that the Assignment be made "after consultation with the Committee." Finally, Because the Assignment will be discussed during the Confirmation Hearing, the hearing requirement will also be satisfied.

⁸ First Amended Disclosure Statement for Reorganizing Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code [Docket No. 13279] ("Disclosure Statement").

and (iii) repurchased Unsecured Debentures currently held by United.⁹

Thus, it was public information early on that it was possible, if not likely, that these “additional recoveries” would not be shared with Class 2E-5, holders of the Unsecured Public Debt Aircraft Claims—the Class the Aircraft Trustees complain has been “left out.”¹⁰ This paragraph—although informational and non-binding in nature—accurately reflected the understanding of the parties to the PBGC Agreement that United’s direction of an assignment pursuant to Section 13 of the PBGC Agreement was not required to be distributed to all unsecured creditors, but rather could be distributed to less than all. This is entirely consistent with the last clause of paragraph 3 of the Additional Terms, which states “failing United’s direction otherwise consistent with the foregoing, United shall direct distribution to the unsecured creditor body.” That means only if United did *not* direct an assignment to less than all the unsecured creditors (or any other stakeholder) would the “default” apply, i.e., distribution to all unsecured creditors.¹¹ And the Trustees’ contention that an assignment must be made to all general, unsecured creditors would make the default provision a nullity because by the Trustees’ reading (and misquoting of the

⁹ Disclosure Statement, p. 14. Moreover, this position was not surprising given the OCUC’s oft-expressed displeasure with the Debtors’ negotiations with the Public Debt Group.

¹⁰ *See, e.g.*, Objection, Introduction, p. 2.

¹¹ The Objection does serious violence to the actual language of the Disclosure Statement in an attempt to distort the historical record. The Trustees state that “Nothing in Debtors’ eleventh hour deal with the Committee, or its purported ‘Notice of Assignment’ is consistent with the terms of the PBGC Settlement Order, which unambiguously directs that the distribution be made to the entire unsecured creditors body (as Debtors indicated in its pre-solicitation Disclosure Statement”. *See* Objection, footnote 3, p. 3 In fact, the Disclosure Statement never states that “the distribution be made to the entire unsecured creditors body,” but only if the Debtors *did not make a direction*: “[I]f the Debtors do not exercise such discretion [to direct the Assignment], then the Debtors shall direct such distribution to the unsecured Creditor body.” Disclosure Statement, p. 58.

assignment clause) the only option would be to distribute the entire PBGC Claim to the general, unsecured creditor body.

B. The Assignment Does Not Violate the Plan

As described above, the PBGC Settlement gave the Debtors the right to direct an assignment of the PBGC Claim. The ongoing negotiations in connection with the Debtors' exit from bankruptcy gave form to this right to direct, and the Debtors made two "directions in writing" implementing paragraph 13 of the PBGC Agreement: (i) to the Public Debt Aircraft Holders (virtually the same group as the Aircraft Trustees here) in August, 2005¹² and (ii) as part of the Debtors' agreement with the OCUC in January, 2006. The Aircraft Trustees were therefore the first beneficiary of the implementation of Section 13 of the PBGC Agreement and later, on the eve of confirmation, distribution of the remainder of the PBGC Claim fell into place with the Debtors' agreement resolving the OCUC's objections to the Plan. It must be emphasized that *these directions by the Debtors were simply implementations of the terms of the PBGC Settlement*. They are not Plan provisions, and because the Trustees withdrew their

¹² On August 5, 2005 the Debtors finalized a settlement regarding all the Public Debt Aircraft (the "PDG Settlement"). In consideration for the settlement and release of all PDG administrative claims, the Debtors agreed to direct the assignment of a portion of PBGC's claim to the PDG, to the exclusion of other creditors "[T]he Debtors directing PBGC to assign for the benefit of (and allocated among) the pre-1997 PDG transactions (as determined by the controlling holders of those transactions) \$0.50 of each dollar of value derived from 45% of PBGC's unfunded benefit liability claim in an aggregate amount up to, *but in no event to exceed*, \$100 million (the "PBGC Claim Proceeds"), with no guarantee by the Debtors of the proceeds actually obtained from PBGC's claim and no obligation to top-off the actual PBGC Claim Proceeds realized under the settlement if less than \$100 million." Disclosure Statement, Section C.5.d.iii., p. 69 (emphasis added). As discussed below on p. 9, the Trustees agreed to cap their recovery in exchange for receiving the first dollars out the door.

objection to the PBGC Settlement based upon the special language in that settlement, they cannot now object to its implementation.¹³

By the same token, the Debtors' directions of these assignments do not change the Plan. They simply implement the negotiated and court-approved terms of the PBGC Settlement. The directions are included in the Plan because the PBGC Settlement requires them to be "in writing" and they affect the disposition of the distribution that PBGC will receive as part of the Plan. The Debtors' direction of the assignment of certain PBGC distributions in the Plan Issues term sheet (memorializing the agreement between the OCUC and the Debtors in connection with the withdrawal of the OCUC's Plan objections), although later in time, is no more a part of the terms of the Plan than the Debtors' direction of the PBGC distribution in the PDG Settlement—a windfall which the Trustees demanded and were happy to receive.

There is nothing improper about a creditor receiving an assignment of value from another creditor as part of a settlement or compromise, even if that means one creditor is treated differently under a plan than another creditor.¹⁴ Here, the default of paragraph 3 of the Additional Terms was that the PBGC Claim would revert to the general unsecured creditor body,

¹³ See, e.g., *In re Bernard*, 201 B.R. 600, 603 (Bankr. D. Mass. 1996) ("The Bank cannot be heard objecting to a Plan that does no more than implement the provision of an agreement it entered into voluntarily").

¹⁴ The right of a claimant to assign its claim is widely accepted and is inherent to the concept of property alienability. *In re Marin Town Ctr.*, 142 B.R. 374, 382 (Bankr. N.D. Cal. 1992) ("The assignability of intangible rights is the general rule, non-assignability the exception"). Indeed, the right of a creditor to assign or transfer its claims is a routine occurrence in bankruptcy cases, and is clearly recognized and allowed by Bankruptcy Rule 3001(e)(2). *In the Matter of Quakertown Shopping Center, Inc.*, 366 F.2d 95, 98 (3d Cir. 1966) ("A creditor may voluntarily transfer his claim against a bankrupt estate without obtaining the approval of the Bankruptcy Court"). In similar situations, courts have approved pre-plan agreements in which a creditor—as here—executed a formal contract to assign part or all of the ultimate distribution to which it would become entitled. See, e.g., *In re SPM Manufacturing Corporation*, 984 F.2d 1305 (1st Cir. 1993).

unless otherwise assigned. Thus, the Assignment clause itself clearly contemplated selective parceling out of value. Despite this possibility, the Trustees withdrew their objection to the PBGC Agreement. Indeed, the Trustees were the first party to lock-in a selective recovery under the Section 13 of the PBGC Agreement—a recovery which was for the Trustee’s sole benefit and to the exclusion of the rest of United’s creditors—at a time when the value of PBGC’s claim was hotly debated.

The terms of the PDG Settlement called for the assignment to the Aircraft Debt Holders “of each dollar of value derived from 45% of PBGC’s unfunded benefit liability claim in an aggregate amount up to, *but in no event to exceed*, \$100 million.” The assignment to the Public Debt Aircraft Holders in the PDG Settlement therefore acted as an implicit cap on their recovery from this asset. These holders locked in their recovery at a time when it was unknown what unsecured claims would ultimately be worth (and when the OCUC was asserting that the PBGC Claim was worth \$2 billion or less). The Holders essentially obtained certainty and the lion’s share of the first proceeds in return for relinquishing a possible upside, and they should now not be heard to complain.¹⁵ Even though the Trustees already have drunk from the trough, they demand a second helping because they believe that other creditors have no right to exclude them. This position cannot be squared with the Trustee’s previous position.¹⁶

¹⁵ For instance, if the PBGC Claim had been allowed at an amount such that the 45% assignable portion was worth \$2 billion and if Plan recoveries turned out to be 55¢ on the dollar, the total distribution for the PBGC Claim would have been \$100 million and the Trustees would have received \$50 million—as much as all other creditors combined.

¹⁶ In fact, the Trustees cannot undermine the assignment made as part of the OCUC settlement without undermining their own assignment under the PDG Settlement. The Trustees have therefore become trapped in the Mikado Dilemma. In the Mikado, the national government had passed a law requiring capital punishment for young men who “flirted, leered or winked.” The anti-capital punishment council of one village appointed the condemned man next to be beheaded to the post of Town Executioner, so that he could not behead anyone else until he first

Finally, as discussed at length below,¹⁷ under the Plan the Trustees will receive a “Pro rata share of the Unsecured Distribution,”¹⁸ and the Plan defines the “Unsecured Distribution” as “The shares of New UAL Common Stock to be issued pursuant to the Plan . . .”¹⁹ No matter how the PBGC Claim is assigned, the Trustees will still receive their bargained for pro rata share of the Unsecured Distribution as proposed under the Plan—i.e., a pro rata recovery in the form of New UAL Common Stock on their Class 2E-5 Claims, which is the same recovery other unsecured creditors will receive on their Unsecured Claims.

C. The Assignment Does Not Violate the Term Sheets

In their Objection, the Trustees argue that the Assignment embodied in the settlement with the OCUC violates the provisions in the Term Sheets allotting the Trustees’ allowed, general unsecured claims.²⁰ Stated differently, the Trustees argue that, taking into account the settlement with the OCUC, the Plan does not treat the Trustees’ deficiency claims as allowed pre-petition, unsecured claims. As discussed above, the Trustees’ arguments are misplaced, as, in fact, the Plan is quite clear its treatment of the Trustees’ deficiency claims as

cut off his own head—which he could not, of course, do. *See*, W.S. Gilbert & Arthur Sullivan, *The Mikado* (1885).

¹⁷ *See* Section II.A.3 at pp. 15-17.

¹⁸ Plan, Section III.D.11; *see also* chart on p. 40.

¹⁹ Plan, Section I.D.267.

²⁰ Objection, pp. 10-11. Although not cited in the Objection, the applicable provision reads, “United shall incorporate in its plan of reorganization that the deficiency claim so agreed should be an allowed pre-petition, general unsecured claim in the Case.” *See, e.g.*, Term Sheet for the 2001-1 Transaction dated August 5, 2005, Section V.J., p. 32. The applicable Plan provisions are III.D.11, which prescribes the treatment of Class 2E-5 to be: “Each Holder of an Unsecured Public Debt Aircraft Claim shall receive such Holder’s pro rata share of the Unsecured Distribution in accordance with the Public Debt Aircraft Settlement Agreement.” “Unsecured Distribution” is defined in I.D.272 to be “The shares of New UAL Common Stock to be issued pursuant to the Plan [not including the MEIP, DEIP, and Employee Distribution].”

general unsecured claims.²¹ The Trustees also appear to cite to another provision in the Term Sheets stating, in relevant part, “the Financings and the Transactions will be post petition obligations of United approved by the Bankruptcy Court and not subject to different treatment in any plan of reorganization by United.” This provision simply meant that the restructuring of the public aircraft debt transactions would be embedded in the Plan. They have been. Thus, it is an utter mystery how this provision relates to treatment of the Trustees’ unsecured deficiency claim. In any event, as discussed herein, neither the Plan as amended nor the Assignment violate the Term Sheets. The Trustees’ arguments amount to nothing more than an attempt to tie their assertions regarding the Debtors’ compliance with the Bankruptcy Code to the Term Sheets, presumably to manufacture a default under the Term Sheets. Since the Trustee’s general unsecured claims are not prejudiced by the settlement with the OCUC (because they will receive the same pro rata distribution as all other unsecured creditors), or the Assignment, there has been no Plan Filing Default, no Term Sheet Default, and no Unwind Event, and therefore the Assignment does not call into question the feasibility of the Plan.

II. THE ASSIGNMENT FULLY COMPLIES WITH THE TERMS OF THE PBGC SETTLEMENT AGREEMENT

A. The Settlement Agreement also complies with the PBGC Agreement’s Substantive Requirements for the Assignment

The Additional Terms of the PBGC Agreement required that any exercise of United’s ability to direct PBGC to assign the 45% UBL Claim must be: (1) “consistent with the best interests of general unsecured creditors,” (2) subject to Bankruptcy Court approval under the “best interests of creditors’ [sic] test in a *de novo* review,” and (3) “consistent with applicable

²¹ See Plan, Section III.D.11.

law including the provisions of the Bankruptcy Code.” United has fully complied with these provisions.

1. The Assignment Is Consistent With the Best Interests of General Unsecured Creditors

First, the Additional Terms require the Assignment to be consistent with the best interests of general unsecured creditors.²² A fundamental purpose of the Bankruptcy Code is to facilitate the debtor’s successful reorganization for the benefit of all stakeholders.²³

For the last thirty-seven months, United has operated its business as a debtor in possession under Chapter 11 of the Bankruptcy Code. And throughout the entire process, United’s creditors have waited for the Company to complete its reorganization. Now, with its reorganization complete, the time has come for United to emerge from bankruptcy protection and continue as a going concern for the benefit of *all* creditors. Any further delay of United’s exit from Chapter 11 is unnecessary and detrimental to both United and its creditors. Thus, resolution of OCUC’s objection was not only in the best interests of United and the Creditors’ Committee, but of the entire general unsecured creditor body.

In granting United the right to direct assignment of part of its claim, PBGC demonstrated its willingness to cooperate with other stakeholders to complete United’s reorganization. Moreover, PBGC’s concession provided United with a valuable tool for

²² Additional Terms, ¶ 3.

²³ See *In re Bonner Mall P’ship*, 2 F.3d 899, 916 (9th Cir. 1993) (“The Supreme Court has made clear that successful debtor reorganization and maximization of the value of the estate are the primary purposes [of Chapter 11.]” (citing *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 527 (1984) and *Toibb v. Radloff*, 501 U.S. 157, 163-164 (1991); *In the Matter of 203 N. LaSalle Street P’Ship*, 190 B.R. 595, 598 (Bankr. N.D. Ill. 1995) (“Chapter 11 bankruptcy is a collective remedy that seeks a balance between the interests of all parties in order, as much as possible, to maintain the viability of the debtor as a going concern while protecting the interests of all creditors and other interested parties.”)).

facilitating deals such as the settlement with the Aircraft Trustees and some \$100 million of value was directed to the Trustees for the sole benefit of their Holders. With less than a week remaining before the confirmation hearing, United recognized that the Creditors' Committee's objection to United's Plan represented one of United's last significant hurdles. Therefore, United decided to use its right to direct the assignment of the remaining portions of the 45% UBL Claim to resolve the Creditors' Committee's objections and, in turn, propel United towards exit. Thus, United's use of the assignment provision in the PBGC Agreement was entirely consistent with its purpose, and is in the best interest of creditors. While the Trustees appear to be arguing that the Assignment may be perceived as not in the best short-term interest of *each* creditor (i.e., those in Class 2E-5, although the Debtors would quarrel with that conclusion), that is not the test the Aircraft Trustees bargained for. And it hardly could have been or the selective assignment to the Aircraft Debt Holders previously approved by this Court could not have survived scrutiny.

2. The Assignment Complies With the “Best Interests of Creditors Test”

The Additional Terms also require that United exercise its right to assign the 45% UBL Claim in a manner that satisfies the best interests of creditors test.²⁴ The best interests of creditors test requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest of such class under the Plan on account of such claim or interest: (i) has accepted the plan; or (ii) will receive as much or more under the Plan than it would receive in a hypothetical Chapter 7 liquidation.²⁵

²⁴ Additional Terms, ¶ 3.

²⁵ 11 U.S.C. § 1129(a)(7).

As United discussed in its Confirmation Memorandum, the Plan satisfies the best interests of creditors test.²⁶ In either a forced or an orderly liquidation, the Debtors would be administratively insolvent and unsecured creditors, such as the debt holders at issue here, would receive no distribution. On the other hand, under the Plan, the debt holders are estimated to recover 4-8% on their claims. Thus, estimated recoveries under the Plan for the Trustees' holders are equal to or in excess of the recoveries estimated in a hypothetical Chapter 7 liquidation.

Nothing in the Settlement Agreement changes this result. The Settlement Agreement merely contemplates that PBGC will assign a portion of its allowed general unsecured claim to another group of creditors. If creditors—including PBGC—were receiving more on account of their claims under the Plan than they would receive in a hypothetical Chapter 7 liquidation, it simply cannot be that PBGC's assignment of its claim somehow increases the value of other creditors' claims. Put another way, the fact that a different set of creditors is holding a particular general unsecured claim does not mean that recovery on that claim will be any different than the recovery on all other general unsecured claims. Accordingly, the Settlement Agreement satisfies the best interests of creditors test.

3. The Assignment Is Consistent With Applicable Law Including the Bankruptcy Code

Finally, the Additional Terms require that United exercise its right to direct PBGC to assign the 45% UBL Claim in a manner consistent with applicable law including the

²⁶ Reorganizing Debtors' Memorandum of Law (a) In Support of Confirmation of the Debtors' Second Amended Joint Plan of Reorganization of the Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code and (b) In Response to Objections Thereto [Docket No. 14506] ("Confirmation Memorandum") at pp. 19-20.

provisions of the Bankruptcy Code.²⁷ The Debtors submit that the Assignment is fully compliant with applicable law and the Bankruptcy Code. Nevertheless, the Aircraft Trustees have argued that the Assignment violates the PBGC Agreement because it requires United to discriminate unfairly against the Aircraft Trustees' holders.²⁸ Yet even a cursory review of the language of the Plan, the PBGC Agreement, and applicable authority destine this argument to failure.

First, “discrimination” only becomes an issue in a Section 1129(b) cramdown situation. Because the Trustees voted for the Plan, discrimination is not an issue, and the Trustees are not thereby entitled to change their votes. Second, by the terms of the Plan, the Assignment is not discriminatory. The Trustees' argument that the PBGC Claim must be factored in to their recovery on account of their Class 2E-5 Unsecured Claim is off the mark. Under the Plan, the Trustees will receive a “Pro rata share of the Unsecured Distribution.”²⁹ The Plan defines the “Unsecured Distribution” as: “The shares of New UAL Common Stock to be issued pursuant to the Plan . . .”³⁰ Similarly-situated creditors are receiving the exact same percentage recovery for the claims they hold, either directly or by assignment of a portion of the PBGC Claim.

Irrespective of how the PBGC Claim is assigned, the Trustees will still receive their bargained for pro rata share of the Unsecured Distribution as proposed under the Plan—i.e., a pro rata recovery in the form of New UAL Common Stock on their Class 2E-5 Claims, which is the same recovery other unsecured creditors will receive on their Unsecured Claims. Indeed,

²⁷ Additional Terms, ¶ 6.

²⁸ Objection, pp. 2-3, n.3.

²⁹ Plan, Section III.D.11.

³⁰ Plan, Section I.D.267. Thus there is no misclassification issue and no violation of Section 1123 of the Bankruptcy Code. *See also* Section III.A.3. below, pp. 17-18.

if the PBGC Claim were assigned to the Trustees (and part of it was) that assignment would be on top of the pro rata recovery provided for under the Plan for their Class 2E-5 Claim. This projected recovery was prominently disclosed in the Plan.³¹ And nowhere in the Plan is the PBGC Claim made part of or synonymous with the Unsecured Distribution to which Class 2E-5 is entitled. Thus, Class 2E-5 claimants neither had nor should have had any expectation of recovery from the PBGC Claim. The Trustees state that “The general unsecured claims of Trustees for Public Debt Holders were to be pari passu with the claims of all other general, unsecured creditors. This was the basis on which votes were solicited and cast.”³² And, in fact, that is exactly what has transpired. Simply put, the Trustees voted on a plan that is providing them with the precise recovery disclosed in the Plan, and the fact that the Trustees would now like an additional recovery is hardly a Plan modification requiring resolicitation.³³ The fact that

³¹ Plan, Section III.A.2.a.

³² Objection, p. 4.

³³ The Trustees cite two cases in support of their position that the Assignment constitutes a material modification warranting resolicitation. However, the cases do not support the Trustees’ position. In *In re Concrete Designers, Inc.*, 173 B.R. 354 (Bankr. S.D. Ohio 1994), the debtor solicited creditor votes with a disclosure statement related to an entirely different plan. While the disclosure statement provided that unsecured creditors would receive either 100% over five years or a lump sum payment of 40%, the debtor’s proposed plan only provided for 80% recovery over four years or a lump sum payment of 50%. *Id.* at 356. In *In re Frontier Airlines, Inc.*, 93 B.R. 1014 (Bankr. D. Colo. 1988), the debtor proposed modifications to allow creditors to elect between one of two options for treatment. *Id.* at 1024. However, the debtor’s disclosure statement did not contemplate such alternatives. *Id.*

United’s Disclosure Statement expressly contemplated the possibility of United assigning the 45% UBL Claim to less than all general unsecured creditors. Indeed, as noted above, the fact that the default rule under the Assignment Provision was assignment to all general unsecured creditors necessarily means that United could elect to direct assignment of a portion of PBGC’s claim to less than all of the general unsecured creditors. Thus, unlike the modifications in *Concrete Designers* and *Frontier Airlines*, United’s right to direct assignments of the PBGC Claim was fully disclosed prior to solicitation. See *In re American Solar King Corp.*, 90 B.R. 808, 823-824 (Bankr. W.D. Tex. 1988) (discussing that only “material” modifications require additional disclosure).

the unsecured claims of other creditors will be larger by virtue of the Assignment (and the claim of the creditors in Class 2E-2 are not increased) in no way detracts from the fact that each dollar of unsecured claim, regardless of who it is held by, will receive precisely the same recovery.

Second, a selective assignment is not discriminatory at all, but precisely what the PBGC Agreement contemplated. So, the Trustees' complaint is not about dilution of their recovery—there is none—but rather a failure of accretion of additional value to which they have no vested rights.

Finally, the Trustees argue that “will result in a Plan that improperly classifies claims under § 1122 and 1123(a).”³⁴ The Trustees say that Plan's classification scheme was originally fine, but due to the Assignment it now is not. However, the Assignment had nothing to do with the Plan's classification scheme, and did not affect it. As discussed in the Debtors' Confirmation Memorandum,³⁵ no other party has objected to the classification scheme. Further, the Plan's classification scheme fully complies with the Bankruptcy Code. As discussed at some length in the Debtors' Confirmation Memorandum,³⁶ The Seventh Circuit has recognized that under 11 U.S.C. § 1122 “a debtor in bankruptcy has considerable discretion to classify claims and interests in a chapter 11 reorganization plan,”³⁷ and the Debtors have valid reasons for the scheme chosen, namely the different rights and different attributes of the claims.³⁸ In this

³⁴ Objection, p. 5. *See also* p. 7, n.6.

³⁵ Confirmation Memorandum, p. 9.

³⁶ *Id.* at pp. 7-9.

³⁷ *In re Wabash Valley Power Assoc., Inc.*, 72 F.3d 1305, 1321 (7th Cir. 1996) (citing *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994)).

³⁸ *See* Confirmation Memorandum, pp. 8-9. *See also In re U.S. Truck Co.*, 800 F.2d 581,585 (6th Cir. 1986) (“Section 1122(a) specifies that only claims which are ‘substantially similar’ may

particular case, there is no question—and the Trustees do not raise one—about the homogeneity of Class 2E-5. And, in fact, one of the “different attributes” of Class 2E-5 is the fact that it is already the beneficiary of an assignment from the PBGC Claim. Therefore, the Debtors’ classification of Class 2E-5 was entirely valid and proper under the Bankruptcy Code.

III. THE TRUSTEES’ OBJECTION IS NOT TIMELY

The PBGC Agreement, which contained the Debtors’ option to direct the assignment of the PBGC Claim, was approved in May, 2005. The PDG Settlement, which was the first implementation of the Debtors’ option, was approved in August, 2005. The second implementation—as part of the Debtors’ settlement of the OCUC’s Plan objections—was therefore nothing new, and should have been no surprise to anyone. If the Trustees in fact had a valid Plan objection, they could have filed it by the December 12, 2005 objection deadline—although one could question how the Trustees could have made a valid objection even then, since they approved the PBGC Settlement. Therefore, using the filing of the Debtors’ agreement with the OCUC in January was completely foreseeable and contemplated by the PBGC Agreement. In fact, it would have been strange if the Debtors had *not* taken advantage of the assignment option. The only justification the Trustees offer for filing their Objection now was that the Assignment was an “eleventh-hour deal.” That is not enough.³⁹

be placed in the same class. It does not require that similar claims *must* be grouped together, but merely that any group created must be homogenous [sic]”) (emphasis in original).

³⁹ The Trustees filed a “Reservation of Rights with Respect to Debtors’ Plan of Reorganization” [Docket No. 13907] on December 12, 2005. It purports to reserve the Trustees’ rights with respect to “the treatment of their Secured Aircraft Claims, Unsecured retained Aircraft Claims, Unsecured Rejected Aircraft Claims and other claims, however designated or applicable, that is not consistent with the Term Sheets.” Reservation of Rights, ¶ 4, p. 3. However, the Debtors’ Notice of (a) Objection and Voting Deadlines, (b) Solicitation and Voting Procedures, and (c) Hearing to Confirm the Plan of Reorganization [Exhibit 10 to Docket No. 12642] at p. 2 states that objections to the Plan must “state with particularity the grounds for such objection.” The

The Motion does not even mention Bankruptcy Rule 9006(b), the proper vehicle for relief here, which requires a showing of “excusable neglect.”⁴⁰ The Supreme Court has held that by “excusable neglect” “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.”⁴¹ Because the Disclosure Statement expressly laid out the OCUC’s position on disposition of the remainder of the PBGC Claim, the Assignment was a totally foreseeable action on the Debtors’ part, and the Trustees late-filed Objection was clearly not caused by “inadvertence, mistake, or carelessness,” nor were these circumstances beyond the Trustees’ control. Instead the Trustees somehow assumed that what the Disclosure Statement plainly contemplated would not come to pass. That assumption is not an appropriate basis for a finding of “excusable neglect.” Therefore, on this ground alone the Trustees’ Objection (and related Rule 3018 Motion) should be overruled and the relief sought therein denied.

IV. THE TRUSTEES HAVE NO RIGHT TO CHANGE THEIR VOTES

Although the Trustees have filed a Rule 3018 Motion seeking to change their votes, that motion is simply a procedural byproduct of their flawed arguments. Because their arguments are untimely and are based on the false premise that the Assignment violates the PBGC Agreement and the Plan (which it does not), the relief sought in the Rule 3018 Motion must be denied. Even if the Debtors had to cram down the Trustees’ class, there is no

Trustees’ objection was obviously not compliant with this requirement, and the Trustees cannot rely on the Reservation of Rights as a placeholder that tolled the objection deadline.

⁴⁰ See Bankruptcy Rule 9006(b) (court may permit late filing “where the failure to act was the result of excusable neglect”).

⁴¹ *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 389 (1993).

discrimination here, let alone unfair discrimination, because by the Assignment United is merely taking an action that it was allowed to do by the PBGC Agreement. All unsecured creditors still get the same recovery per dollar of allowed claim as set forth in the Plan. Finally, as discussed above, the Trustees' Objection is not timely, and its lack of timeliness is not excusable. Because the Trustees were well aware of the Debtors' option to direct the assignment of the remainder of the PBGC Claim, and that (as noted in the Disclosure Statement) such assignment might well go to less than all unsecured creditors, the Trustees could easily have foreseen a range of potential outcomes. If the Trustees had decided that this range was unacceptable, the time to vote "no" was at the time of the original solicitation. It is inappropriate for the Trustees to "wait to see what they would get" and, now disappointed, attempt to extract leverage over the Debtors and Plan confirmation by attempting to change their votes at the last minute.

V. THE TRUSTEES' OTHER ARGUMENTS ARE NOT WELL TAKEN

The Objection raises the issue that "[b]ecause the agreed amendments will materially affect the treatment of Class 2E-5 creditors under the Plan, at the very least, votes for approval of the Plan must be resolicited."⁴² This argument must fail for the same reason the Trustees' other arguments must fail—the same false premise. As discussed at length above, the Assignment does not "materially affect" the treatment of Class 2E-5 creditors under the Plan. Therefore, no resolicitation is necessary or required under the Bankruptcy Code.

The Trustees also complain about the post-exit makeup of the Debtors' board of directors.⁴³ The Trustees were well aware that the OCUC was extensively negotiating with the Debtors over the makeup of the postconfirmation board and would likely have significant input

⁴² Objection, p. 5.

⁴³ Objection, pp. 12-13.

as to the board's makeup. The Plan itself had built-in flexibility as to the naming of the Reorganized Debtors' Board.⁴⁴ The Trustees had their chance to object to this flexibility, but chose to remain silent. However, now that the Trustees see more money on the table, they think a threat to hold up confirmation will get them an additional piece of the pie. This Court should not countenance this tactic.

The same logic applies to the Trustees' wish to now "opt out" of the releases under the Plan.⁴⁵ Once again, the Trustees' treatment under the Plan simply has not changed. The releases are an integral part of the Plan and this Court should see the Trustees' threat to renege on the releases as nothing more than an attempt to extract an additional recovery from the PBGC Claim.

Finally, the Trustees argue⁴⁶ that the OCUC has "blatant[ly] disregard[ed] . . . its fiduciary duties to members of its constituency."⁴⁷ This argument is, again, based on the same fallacious foundation. The OCUC's agreement is fully consistent with the assignment the OCUC said they would request in the Disclosure Statement, and is fully consistent with the PBGC Agreement. Moreover, the OCUC agreement with the Debtors is in the best interests of the unsecured creditors because its terms are favorable to the unsecured creditors as a whole and allows the Debtors to expeditiously exit bankruptcy and begin making distributions to unsecured creditors.

⁴⁴ See *In re American Solar King Corp.*, 90 B.R. 808, 815 (Bankr. W.D. Tex. 1988) (finding that the "debtor's inability to specifically identify future board members does not mean that the debtor has fallen short of the requirement imposed" under Section 1129(a)(5)(A)(i)).

⁴⁵ Objection, p. 7, n.7.

⁴⁶ Objection at pp. 5, 12-13 and n.9.

⁴⁷ *Id.* at p. 12.

Conclusion

The Trustees' complaints about the Assignment flow from a flawed premise—that the Debtors' direction of the assignment of the remainder of the PBGC Claim is a new term of the Plan. Because it is not, the Trustees' arguments about discriminatory treatment, violation of the Plan, modification of the Plan, and resolicitation are off the mark and should be overruled.

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Respectfully submitted,

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