

**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-48191**  
) **(Jointly Administered)**  
**Debtors.** )  
) **Honorable Eugene R. Wedoff**  
)  
) **Hrg. Date: December 27, 2005**  
) **Hrg. Time: 9:30 a.m.**

**DEBTORS' RESPONSE TO EMERGENCY APPLICATION OF CREDITORS  
COMMITTEE TO RETAIN JONATHAN R. MACEY AS CORPORATE  
GOVERNANCE EXPERT [RELATED DOCKET NO. 14156]**

United is concerned about the Committee's application to retain Mr. Macey as its "corporate governance" expert (the "Application") because his proffered expert testimony is completely irrelevant to any requirement for the confirmation of United's proposed plan of reorganization. United's management and professionals should not be sidetracked from addressing the over 50 objections filed against the plan to address Mr. Macey's purported -- but irrelevant -- expert testimony (including discovery, depositions, and trial). Nor should United's estate pay for yet another Committee consultant, especially where his services are at worst completely irrelevant and unnecessary and at best wholly duplicative of the services already provided by Heidrick & Struggles, the Committee's previously-retained consultant on the composition and structure of United's board.

**The Committee's Confirmation Objection**

The Committee has raised three very specific confirmation objections that are germane to this Application. First, the Committee argues that United has declined to provide "fair board representation" to creditors, despite the fact that United and the Committee have been

engaged in good faith discussions for months on the proper makeup, membership, and composition of a post-emergence board, including multiple high-level discussions between United's lead director and the chairman of the Creditors' Committee. In support of its argument the Committee cites Bankruptcy Code Section 1129(a)(5), which simply requires the disclosure of the post-emergence directors before confirmation and also that the appointment of those directors be consistent with the interests of creditors and public policy. Second, the Committee somehow suggests that United's proposed charter violates Bankruptcy Code Section 1123(a)(7), which essentially requires that a plan provide for the election and replacement of board members consistent with applicable corporate law, although the Committee does not allege how United's proposed charter violates applicable (Delaware) corporate law. Third, the Committee objects to a provision in United's proposed corporate charter that authorizes the issuance of "blank check" preferred stock. The Committee does not challenge the legality of this provision, but instead argues that it could be used to adopt a "rights plan," which, so the argument goes, may depress United's future share price in certain scenarios.

### **The Committee's Application to Retain Mr. Macey**

Now the Committee seeks to retain Mr. Macey to provide "corporate governance consulting services and provide expert testimony and an expert report." The Committee states that Mr. Macey will advise the Committee on the following topics: (1) the propriety of United's proposed corporate governance and policy, (2) board composition, and (3) the necessity of blank check preferred stock and rights plans. (The Committee also states that Mr. Macey's advice will not be limited to those topics, although the Committee does not elaborate on any additional topics.)

## **Mr. Macey's Testimony is Irrelevant to Confirmation and His Retention Should be Denied**

The Committee has argued that it requires Mr. Macey's consulting services and expert testimony to support the Committee's "corporate governance" objections to confirmation. However, the Committee has not demonstrated, nor can it demonstrate, that Mr. Macey's services or testimony are in any way relevant to -- or remotely necessary to support -- those objections.

The Committee's first potential "corporate governance" objection is that United's purported refusal to give creditors an undefined "fair representation" on the post-exit board is inconsistent with creditors' interests and public policy. See 11 U.S.C. § 1129(a)(5)(A)(ii). However, Section 1129(a)(5)(A)(ii)'s confirmation standard basically requires that the bankruptcy court find that the proposed board members are qualified and honest as a matter of fact. See Colliers on Bankruptcy ¶ 1129.03[5][b] ("public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."); Bank of America, Illinois v. 203 North LaSalle Street Partnership, 195 B.R. 692 (Bankr. N.D. Ill. 1996), aff'd, 126 F.3d 955 (7<sup>th</sup> Cir. 1997), rev'd on other grounds, 526 U.S. 434 (1999) (rejecting argument that proposed management of reorganized debtors was incompetent for purposes of Section 1129(a)(5)(A)(ii) because of management's failure to pay real estate taxes during case). United cannot see how the expert opinion of Mr. Macey would be relevant to the Court's factual inquiry into the competency and integrity of the specific individuals proposed to serve on United's post-emergence board. The Committee is free to put United to its burden of proof on this point, but expert testimony is completely irrelevant.

And to the extent that the Committee needs specific advice regarding the individuals proposed to serve on the post-exit board, the Committee is already receiving that advice from Heidrick & Struggles, who was retained in May, 2004 as the Committee's special

board consultant, among other things, to conduct “a review and analysis of the appropriate structure and composition of the UAL board of directors to be implemented upon the Debtors’ exit from bankruptcy.” Order Approving H&S Retention at ¶ 2(a). Further, Heidrick & Struggles was engaged to report to the Committee regarding the independence of United’s board, whether the board and its committees are ideally structured within the industry, the impact of Sarbanes-Oxley legislation on the board composition, and any other matters requested by the Committee relating to board composition and operations. H&S Application at p. 6. Heidrick & Struggles already has charged United’s estate \$275,000 in fees through September, 2005 interviewing current members of United’s board and other potential candidates for the post-exit board and communicating its findings to the Committee, among other things. Given this, United fails to see the need for an additional consultant on the issue of whether certain individuals are, as a factual matter, qualified to serve on United’s board post-emergence for purposes of Section 1129(a)(5)(A)(ii).

The Committee’s second potential “corporate governance” objection is that United’s charter does not contain provisions consistent with the interests of creditors and public policy for the selection and replacement of members of the board, as required by 11 U.S.C. § 1123(a)(7). However, Section 1123(a)(7) merely requires that a corporate debtor’s proposed post-emergence corporate charter provide for the election and replacement of board members consistent with applicable corporate law. See In re Eagle Bus Mfg., Inc., 134 B.R. 584 (Bankr. S.D. Tx. 1991) (plan satisfied Section 1123(a)(7) where selection of officers of reorganized debtors would be in the control of board of directors in accordance with applicable corporate law); In re Machne Menachem, Inc., 304 B.R. 140 (Bankr. M.D. Pa. 2003) (plan failed Section 1123(a)(7) where selection and removal of post-emergence directors violated state corporate

law). Here, the Committee has not suggested that United's proposed corporate charter violates Delaware corporate law in any respect. Therefore, there is no need for any evidence on this issue.

But even if the Committee were to suggest that United's proposed charter violated Delaware corporate law in some way, then that would be a straight-forward legal issue for which Mr. Macey would be incompetent to testify as an expert, as this Court has recognized. See In re UAL Corporation et al., 02-B-48191, Hrg. Transcript p. 17, line 13 (Bankr. N.D. Ill. July 1, 2003) (excluding testimony of Explorer Pipeline's expert witness and holding that, "[t]here is a distinction made generally between expert testimony as to complicated facts, which the court is required to adjudicate on one hand, and legal arguments, which, although they may be unfamiliar to the court, nevertheless, are appropriately a subject of briefing and not expert testimony."); see also Good Shepherd Manor Foundation, Inc. v. City of Momence, 323 F.3d 557 (7<sup>th</sup> Cir. 2003) (expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible); Vann Houten-Maynard v. ANR Pipeline Co., No 89 C 0377, 1995 WL 311367 at \*3 (N.D. Ill. May 19, 1995) ("It is well settled that decisions regarding questions, interpretation, and explanation of applicable law are the province of the court.").

The Committee's third potential "corporate governance" objection is that United's charter provides for the issuance of "blank check" preferred stock, which according to the Committee potentially could be used in the future to support a "rights plan" that potentially could impair the stock price of reorganized United in the future. The Committee, however, has failed to articulate how the inclusion of this provision in the charter renders United's plan unconfirmable under Section 1129. Nor has the Committee suggested that such a provision in any way violates Delaware corporate law. Rather, the Committee is merely objecting because it

thinks that this provision, although certainly appropriate, should be different. The Committee's wish that United's charter should be different is simply a "deal point" in United's proposed plan, but is not a proper basis for a plan objection: "So long as the mandatory types of [plan] provisions appear, the plan's ultimate structure, form, and effect are left to the plan's proponent." Colliers on Bankruptcy ¶ 1129.01[2]. Instead, it is for those individual creditors voting on the plan to decide whether to accept a plan of reorganization and a post-emergence charter allowing for the issuance of such preferred stock. Simply put, the Committee's desire that United's proposed charter -- which the Committee does not suggest violates the Bankruptcy Code or Delaware corporate law -- be different is not a basis for a plan objection, and it is certainly not a basis to retain an expert witness in these proceedings.

\* \* \* \* \*

WHEREFORE, United respectfully requests that the Court deny the Application and grant other relief that is just and proper.

Date: December 26, 2005

Respectfully submitted,

UAL CORPORATION, et al.

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