

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

In re:)	Chapter 11
)	
UAL CORPORATION <i>et al.</i>,)	Case No. 02-B-48191
)	(Jointly Administered)
Debtors.)	
)	Honorable Eugene R. Wedoff
)	Hearing Date: January 18, 2006, 10:30 a.m.

**RESPONSE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
TO 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 AND
RESPONSE TO TRUSTEES' OBJECTION TO CONFIRMATION OF DEBTORS'
PLAN OF REORGANIZATION BASED ON MATERIAL POST-BALLOTING
CHANGES TO THE PLAN**

Related Docket Nos. 13277, 14635, 14684, 14701

The Official Committee of Unsecured Creditors in the above-captioned cases (the "Committee") hereby responds (the "Response") to the emergency motion (the "PDG Motion") filed by U.S. Bank National Association, The Bank of New York, and Wells Fargo Bank Northwest, N.A., in their capacities as trustees, subordination agents, or collateral agents (collectively, the "Trustees") to allow holders of Class 2E-5 claims to change their votes accepting the First Amended Plan of Reorganization of UAL Corporation, *et al.* (the "Plan") and the Trustee's objection to confirmation of the Plan (the "PDG Plan Objection"). In support of its Response, the Committee hereby states as follows:

PRELIMINARY STATEMENT

After intense arms' length negotiations to resolve the Committee's remaining plan issues, on January 11, 2006, the Debtors and the Committee reached a global settlement of all

Committee objections to confirmation of the Debtors' Plan and to the Committee's objection to the PBGC claim. The Committee's objections to the Plan--all of which were fully disclosed in the Disclosure Statement with respect to the Plan--included the manner of selection of the post emergence Board of Directors, allocation of equity under the Management Equity Incentive Plan, additional consideration to certain specifically designated classes of unsecured creditors to provide for equal treatment of creditors, the scope and duration of the Plan Oversight Committee, certain corporate governance issues, and the retention of certain authority for the Debtors to assume or reject executory contracts and leases. The settlement resolves the objections within the framework disclosed in the Disclosure Statement disseminated with the Plan for creditor votes.

In order to fabricate support for both PDG Motions, the Trustees must ignore or misstate the effect of the Committee's settlement, the significant disclosure with respect to the Committee's objectives that accompanied the Plan for which they voted, the terms of the Debtors' settlement with the Pension Benefit Guarantee Corporation ("PBGC") that permitted the Debtors to direct all or any part of 45% of the PBGC claim (the "PBGC Claim Assignment"), and the terms of their own settlement with the Debtors which allocated \$100,000,000 of the PBGC Claim Assignment to their noteholders alone and then capped their entitlement to any part of the PBGC Assignment Claim to that amount.

As a review of the Disclosure Statement demonstrates, the votes of the Public Debt Holders were cast for the Plan with full knowledge that a settlement with the Committee might well result in the direction of additional consideration to classes other than both the PBGC and Public Debt Holder classes, as well as other beneficial changes reflected in the settlement.

Moreover, the Plan as amended by the settlement does not violate the Public Debt Holder settlement because the Plan still provides the Public Debt Holders precisely what they bargained for-- their pro rata share of the Unsecured Distribution and that portion of the PBGC Claim Assignment not to exceed \$100,000,000. Finally, the direction of the PBGC assignment Claim by the Debtors is consistent with the requirements of the PBGC settlement. Since the actual Plan modifications are not material, adverse to the Public Debt Holders or unforeseeable, the PDG Motion should be denied and the PDG Plan Objection overruled.

BACKGROUND

1. At the time of the hearing on the Disclosure Statement the Committee and the Debtors had not resolved all of their outstanding issues. Accordingly, a description of the remaining disputes was added to the Disclosure Statement under a separate subheading entitled “Ongoing Negotiations with Committee” as set forth below, in relevant part¹:

In their ongoing efforts to reach a consensual Plan, the Debtors and the Creditors Committee continue to discuss certain terms of such Plan and related documents. The areas under discussion include:

The Debtors’ proposed charter, bylaws and other corporate documents regarding shareholder protections, board governance, additional equity issuances and other matters.

The composition of the reorganized UAL Board and its committees, including the terms and identity of directors, and other related matters.

The trigger, grant, vesting and certain other terms of the Management Equity Incentive Program and the Director Equity Incentive Program, including the overall percentages of the equity to be allocated under such Plans.

¹ Additional disclosure regarding these and other objections are repeated in appropriate sections of the Disclosure Statement. The Disclosure Statement stated that the Board would be selected in collaboration with the Committee, for example.

The Creditors' Committee has requested that certain additional recoveries be assigned to the Other Unsecured Claim classes (Class 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, and (iii) repurchased Unsecured Debentures currently held by United.

Scope and duration of the Plan Oversight Committee.

Disclosure Statement at 14 - 15.

2. The Committee settlement addresses and resolves each of these issues. The Plan documents include significant shareholder protections, including limitations on the use of poison pills, and on issuance of additional equity without shareholder approval. The equity allocated to the MEIP and the DEIP under the original programs has been nearly halved. The SAM Distribution was reduced to eliminate any overlap in grant to the recipients of the SAM Distribution and the four hundred intended recipients of the MEIP. The Committee will designate five members of the twelve member Board. All classes of unsecured creditors receive the benefit of the repurchased Unsecured Debentures (which the Debtors might have been able to direct to any corporate purpose) and unsecured creditors (other than the Public Debt Holders) share only in the part of the 45% of the PBGC Claim Assignment that was not previously assigned to the Public Debt Holders in accordance with their settlement or released by the PBGC in furtherance of the global settlement. Finally, the provisions regarding the Plan Oversight Committee were clarified to permit the Plan Oversight Committee to be heard on certain claims objections asserted before confirmation and on assumption of executory contracts with certain cure amounts. All of the settlement terms were disclosed, foreseeable, reasonable resolutions to the Committee objections when the Plan was disseminated for voting. Thus, as a factual matter,

the Public Debt Holders should not be permitted to recast their votes as a result of any unexpected, additional Plan changes.

3. The Public Debt Holders accepted the Plan because it was consistent with the Settlement and Term Sheets with Trustees and Controlling Holders for Public Debt Aircraft (the “PDG Settlement”).

4. Among other things, the PDG Settlement provides, in part, for the distribution to the Public Debt Holders from the PBGC Claim assignment with an express cap as follows:

“United shall direct the PBGC to assign, for the benefit of the Securityholders . . . \$0.50 of each dollar of value derived from 45% of the PBGC’s unfunded benefit liability claim in an aggregate amount up to, **but in no event to exceed \$100 million** (the “Claim Conveyance”). United makes no representations or warranties that the Claim Conveyance will actually generate any value and United does not guaranty that all, or any portion, for the \$100 million in value alluded to above will ultimately be realized.”
(emphasis added)

Plan at page 53.

The Public Debt Holders interpreted the terms of the PBGC settlement to permit the direction a portion of the 45% to a select group of creditors when it directly inured to their benefit. The Second Amended Plan faithfully preserves their agreement with the Debtors and is consistent with their understanding of the Debtors’ assignment authority under the PBGC settlement.

5. The Term Sheets incorporated into the PDG settlement actually prohibit the Trustees and the Public Debt Holders from voting against the Plan unless specified events occurred. The so-called Plan Objection Events were set forth with particularity in the Term Sheets.² To date, no Plan Objection Event has occurred. The Term Sheets simply call for an allowed unsecured claim in a specified amount. The treatment of that claim is set forth in the First Amended Plan and remains unaltered in the Second Amended Plan:

Class 2E-5—Unsecured Public Debt Aircraft Claims

a. Classification: Class 2E-5 consists of Unsecured Public Debt Aircraft Claims against United.

b. Treatment: In full satisfaction, settlement, release, and discharge of and in exchange for each and every Class 2E-5 Claim, on the Distribution Date, 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.** (emphasis added)

The Debtors are in full compliance with the terms of the PDG Settlement. As a result, the Public Debt Holders are contractually barred from voting against the Plan.

² The Plan Objection Events are exclusively limited to the following:

(a) Prior to the execution and delivery of the Transaction Documents, United fails to make any Scheduled Payment when due that is provided for in Exhibit B and such payment default is not cured in accordance with the provisions of the related Adequate Protection Stipulation, or

(b) After the transaction documents are executed and delivered, United defaults on any payment obligation or material covenant, or makes any material misrepresentation, under the Transaction Documents and such default or misrepresentation is not cured in accordance with the terms of the applicable Transaction Documents, or

(c) A plan of reorganization filed by the Debtors (i)(x) contains provisions that are inconsistent with the provisions of this Term Sheet or the Transaction Documents or that prohibit the payment of amounts contemplated to be paid hereunder or thereunder or (y) provides for the entering into any agreement that are inconsistent with the provisions of this Term Sheet or the Transaction Documents or that prohibit the payment of amounts contemplated to be paid hereunder or thereunder, and (ii) such inconsistency or provision is not clarified, corrected or resolved to the reasonable satisfaction of the Transaction Trustee prior to the conclusion of the hearing on the adequacy of the Debtors' disclosure statement related to such plan (a "Plan Filing default") or;

(d) An Unwind Event Occurs.
Term Sheet at 32-33.

6. Finally, the claims of Public Debt Holders, by virtue of their settlement with the Debtors, were separately classified and afforded treatment under the Plan different from and superior to other unsecured creditors. For example, the Trustees claim that the Class 2E-5 claims cannot be reconsidered under Section 502 of the Bankruptcy Code without triggering an event of default. Accordingly, their claims, calculated with reference to Stipulated Loss Value and incorporating a duplicative tax indemnity payment, are allegedly immune from any claw back of the tax obligation overpayment. Moreover, the Public Debt Holders received full releases from the Debtors from all claims and causes of action and a commitment for payment of all their fees and expenses.³

7. Similarly, the Plan separately classified the claims of the PBGC and afforded those claims treatment consistent with the PBGC settlement. Creditors accepted these Plan provisions, including the classification scheme, when voting for the Plan.

ARGUMENT

A. The Committee's Settlement with the Debtors Does Not Constitute a Material Modification Warranting Resolicitation.

The Trustees' arguments that the direction of the 45% giveback, the terms of the Plan Oversight Committee, the Committee's selection of a certain number of directors on the Debtors' new board of directors, indicate, at best, that the Trustees have seriously misread the Disclosure Statement and the Plan. At worst, they demonstrate the Trustees' disingenuous efforts to

³ The Unsecured Claim was an additional feature of a settlement that gave the EETC holders a full recovery, and all Public Debt Holders and EETC holders a commitment for full cooperation in repossession of aircraft, above market prices for repurchase of aircraft, additional cash payments, and protection against further rejections and for full maintenance. According to the Affidavit of Michael Stern, the Public Debt Holders' advisor from Avitas, "it is anticipated that all tranches, except for perhaps the most subordinate tranche, of certificates in each EETC transaction will receive a full recovery on account of the certificates, and that last tranche will receive a significant

improperly disrupt the confirmation process to extract more value out of the Debtors' estates to the detriment of the unsecured creditor body as a whole.

The Trustees Misstate Language Regarding the Direction of the 45% Giveback

The Settlement Agreement between the Debtors and the Committee resolved significant issues that were the subject of ongoing negotiations, as stated in the Disclosure Statement, that did not materially modify the Debtors' Plan and did not adversely affect the recovery of the Trustees.

Pursuant to Section 1127 of the Bankruptcy Code, a pre-confirmation plan modification is permitted as long as the modified plan continues to comply with classification, content, and disclosure requirements. 11 U.S.C. § 1127. Moreover, the proponent of a modified plan may use pre-modification acceptances that were solicited with a pre-modification disclosure statement as long as the modifications did not have a material adverse impact on the treatment of those claims. 11 U.S.C. § 1127(d); *see also* Fed. R. Bankr. P. 3019. Despite the Trustees' protests to the contrary, the Settlement Agreement, to the extent it modifies the Debtors' Plan, satisfies these two conditions, thus affirming the Trustees' acceptance of the Debtors' Plan and allowing confirmation to proceed.

The Trustees allege that the Settlement Agreement materially modifies the Debtors' Plan and adversely affects their interests by providing that "all general unsecured claims, except the Public Debtholders' Unsecured Public Debt Aircraft Claims will receive additional distributions as a result of the Committee's agreement with the Debtors" and that "those distributions directed

recovery enhanced in two of the EETCs by UAL's waiver of its right to payment on account of its holdings in the most subordinated tranches of the EETC, and thus the settlement is fair to all certificateholders."

away from the Public Debt Holders will be substantial.” The Trustees, however, distort the Settlement Agreement and omit significant details—details that were included in the operative Disclosure Statement at the time of solicitation.

First, the “additional distributions” referred to is a product of the Debtors’ settlement with the PBGC (the “PBGC Settlement Agreement”). The PBGC Settlement Agreement provides, in pertinent part, that “[a]t 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.” (PBGC Settlement, ¶ 13.) Not only was this information available to the Trustees at the time of their vote, but also the Disclosure Statement mentioned the 45% giveback, adding that “separate and apart from the PBGC Settlement Agreement, the Debtors’ agreed to consult with the Creditors’ Committee prior to directing any assignment, give 10 days business notice before directing any assignment, gain Bankruptcy Court approval under ‘the best interest of creditors’ test’⁴ pursuant to a *de novo* review, and, if the Debtors do not exercise such discretion, then the Debtors shall direct such distribution to the unsecured Creditor body.” (Disclosure Statement, at 58.)

The language of the PBGC Settlement Agreement and the Disclosure Statement is in direct contradiction to the Trustees’ position that the Debtors’ Plan provided that the 45% distribution would go to the unsecured creditor body as a whole. The Trustees’ belief that the default provision, as stated in the Disclosure Statement, is the controlling provision is a pure

⁴ The Committee settlement, among other things, will allow the Debtors to make significant distributions as soon as practicable after the effective date by virtue of the resolution of the Committee’s objection to the PBGC claims. As a result the direction of the PBGC Assignment Claim to settle this dispute is in the best interests of creditors.

distortion. There is no reference, in any agreement, that vested any right in the 45% distribution in the Trustees other than the provision in their own settlement. Therefore, the Committee Settlement did not deprive the Trustees of any right or distribution it was already entitled to, and as such, it cannot claim that it is adversely affected by the Settlement Agreement.

The fact that the Trustees' recovery is not diminished in any way by the Committee Settlement is crucial in determining whether a new disclosure statement and resolicitation is warranted. In *In re Mount Vernon Plaza Community Urban Redevelopment Corporation I*, 79 B.R. 305, 306 (Bankr. S.D. Ohio 1987), the court found with respect to a series of similar plan modifications that, "taken as a whole . . . the proposed modifications do not adversely change the treatment of the claim of any creditor under the Plan." As such, the court held that the previously assenting creditors were deemed to accept the modified plan. *Id.* In the instant case, the Trustees voted for the Plan with a 15% management equity incentive plan, while the remainder of the 45% giveback was yet to be allocated, and the treasury debentures had yet to be addressed. As a result of the Settlement Agreement, the Committee struck a better deal than the Trustees initially accepted, including at least two elements that directly benefit the Trustees: (i) the reduction of the management equity incentive plan to 8% and (ii) the allocation of the shares related to the debentures held in treasury pro rata to all unsecured creditors. The Trustees cannot complain after the fact that the Committee improved the deal or that it did not get a windfall from each and every element of the improved deal. Thus, taken as a whole, the Trustees' recovery in the instant case is not adversely affected by the Settlement Agreement, and this Court should deem that, pursuant to Fed. R. Bankr. P. 3019, they have accepted the modified Plan.

2. The Trustees Knew that the Debtors and the Committee Were Negotiating Who Will Sit on the Debtors' New Board and the Scope and Duration of the Plan Oversight Committee.

As quoted above, the Disclosure Statement clearly disclosed the changes that the Committee sought to make to the Plan to resolve their remaining objections. In addition, counsel for the Trustees was served with the Committee's objection to the Debtors' Plan on December 13, 2005 and was therefore on notice that the Committee was seeking to alter the Plan along the lines ultimately reached in the Committee settlement. The Trustees can not now argue that these terms of selection of the new board of directors and the scope and duration of the Plan Oversight Committee are something new, which terms were somehow hidden from their scrutiny at the time they voted unanimously for the Plan.

B. The Plan Does Not Unfairly Discriminate against the Trustees.

Except for the requirements of section 1129(b) which are not applicable here, the Bankruptcy Code does not require that claims which are legitimately classified in separate classes receive the same treatment even if the claims are substantially similar. *See In re Dow Corning Corporation*, 244 B.R. 624, 666 (E.D. Mich. 1999). In *Dow Corning*, the debtor formulated a number of classes of breast-implant claims based entirely on the geographic location of the creditors. The court noted that all breast implant claims are, in some respects, substantially similar. Still, the court allowed for the separate classification and differing treatment of the various classes. In reaching its decision, the court noted that 1123(a)(4) pertains only to the treatment of claims *within the same class*. (emphasis in original). The court continued to find that "whether it is appropriate for a proposed plan to provide different

treatment to claims which are legitimately classified in separate classes will arise, if at all, in the context of cramdown." See also *State Street Bank and Trust Company v. Elmwood, Inc.*, 182 B.R. 845 (D. Nev. 1995) (allowing for different repayment provisions for two separate classes of unsecured creditors).

Here, the Plan provides for separate classification of unsecured claims and treatment consistent with the nature of the claims, the settlements reached during the pendency of the cases. The Plan meets the requirements of the Bankruptcy Code for confirmation.

