

No. 06-2780
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED RETIRED PILOTS BENEFIT PROTECTION
ASSOCIATION,

Appellant,

v.

UNITED AIR LINES, INC., et al.,

Debtor-Appellee.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division

No. 06 CV 00844

The Honorable Judge John W. Darrah

REPLY BRIEF OF APPELLANT
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ARGUMENT

There is no dispute amongst the parties that the issues raised in URPBPA's appeal are ripe and should be reviewed by this Court. URPBPA hereby replies in support of its position that this Court should rule (1) that the release and "exculpation" provisions in United's plan of reorganization ("POR") do not bar the retired pilots from pursuing potential claims against ALPA and (2) that United's retired pilots are entitled to compensation for the termination of the Pilot Plan that is similar to the compensation provided to United's active pilots.

I. This Court Should Rule That The Release And Exculpation Provisions In United's Plan Of Reorganization Do Not Extinguish The Rights Of United's Retired Pilots To Assert Claims Against ALPA.

Contrary to United and ALPA's arguments, which attempt to characterize the releases in United's POR as "standard" and "commonplace," nondebtor releases are not, and should not be, routinely handed out at confirmation hearings. The Circuit Courts of Appeals that permit the entry of permanent injunctions releasing nondebtors from liability only do so (1) when the affected party is deemed to have consented to the release or, (2) in exceptional circumstances, when the release is found to be essential to the reorganization of the debtor and the affected parties are given adequate or complete compensation for the release of their claims. Courts require particularized factual findings showing unique circumstances that would justify the release of nondebtors. While URPBPA does not believe any of the release provisions in United's POR that attempt to restrict the potential post-confirmation claims of retired pilots against ALPA are justified, there can be no question that the "exculpation" provision in United's POR, to the extent it relates to the retired pilots' potential claims against ALPA, is improper and should be stricken.

The “Exculpation Clause” located at Article X(G) of United’s POR purports to release ALPA from any potential claim asserted by a retired pilot with the exception of claims involving “gross negligence or willful misconduct” even though the retired pilots did not receive a penny for the release of their potential claims and even though the Bankruptcy Court did not make any findings regarding whether this “exculpation” provision was necessary to United’s reorganization or fair to the retired pilots. [See A-4, pp. 29-33.] Even though the Bankruptcy Court itself stated that broadly releasing potential claims United’s retired pilots may have against ALPA would constitute “the denial of due process to them,” [A-4, p. 31], when United continued to press the issue, and suggested that it would be difficult to modify its POR to address the court’s concerns, the Bankruptcy Court approved the exculpation and release provisions despite its appropriate due process concerns. This was improper because the exculpation provision in United’s POR, as it applies to the retired pilots, cannot be justified under existing law.

None of the Courts of Appeals (or any other court, to URPBPA’s knowledge) has ever approved a nonconsensual release in favor of a nondebtor (like ALPA) in a situation where the released parties (i.e., United’s retired pilots) have received no compensation for the forced release of their claims. When the Bankruptcy Court summarily rejected URPBPA’s objection to the POR’s “exculpation” provision, the Bankruptcy Court, in effect, forced the retired pilots to settle claims against ALPA without giving the retired pilots any compensation for the settlement.

The only argument United and ALPA assert in an attempt to justify the “exculpation” of ALPA is based on a distorted interpretation of a single case, In re PWS Holding Corp., 228 F.3d 224 (3d Cir. 2000), which clearly does not support their position. Under the truly overwhelming weight of authority, the exculpation of ALPA is improper and should not be permitted to stand. URPBPA will demonstrate that the POR’s exculpation provision should be stricken to the extent

it applies to potential retired pilot claims against ALPA because it is inconsistent with the case law outside and inside of the Seventh Circuit and inconsistent with PWS Holding. URPBPA will further argue that this Court should strike the POR's release provision to the extent it purports to bar potential retired pilot claims against ALPA.

A. United's Attempt To "Exculpate" The Claims Of Nonconsenting Retired Pilots Lacks Any Support From Case Law Outside Of The Seventh Circuit.

United's accusation that URPBPA fundamentally misunderstands the law related to releases is an attempt to mask the fact that United's "exculpation" provision (which is nothing other than a limited release) is contrary to every important federal case regarding Chapter 11-related releases of nondebtors. URPBPA will begin with an examination of the case law outside of the Seventh Circuit.

Neither the third-party releases nor the "exculpation" clause in United's POR would pass muster in the three circuits that have held that third-party releases and injunctions are always impermissible. Feld v. Zale Corp., (In re Zale Corp.), 62 F.3d 746, 760-61 (5th Cir. 1995) ("Section 524 prohibits the discharge of nondebtors....Accordingly, because the permanent injunction as entered improperly discharged a potential debt of CIGNA, a nondebtor, the bankruptcy court exceeded its power under § 105"); Resorts International, Inc. v. Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995) ("this court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors"); Landsing Diversified Props.-II v. First National Bank & Trust Co., (In re Western Real Estate Fund, Inc.), 922 F.2d 592, 601 (10th Cir. 1990), *modified sub nom.*, Abel v. West, 932 F.2d 898 (10th Cir. 1991) ("Not only does such a permanent injunction improperly insulate nondebtors in violation of section 524(e), it does so without any countervailing justification of debtor protection...") According to these courts, § 105(a) of the Bankruptcy Code cannot be used to release third-party

claims a bankruptcy court would not have the authority to adjudicate in the first place. A bankruptcy court should not be permitted to release any claim it cannot try on the merits (and the Bankruptcy Court here does not have had the authority to try a lawsuit between ALPA and the retired pilots).

The “exculpation” clause in United’s plan would not pass muster in the Third Circuit. Like the Fifth Circuit, the Third Circuit questions whether bankruptcy courts even have the jurisdiction (let alone the authority under the Bankruptcy Code) to enter releases or injunctions in favor of third parties. In re Combustion Engineering, Inc., 391 F.3d 190, 227-28 (3rd Cir. 2005) held that, even when a debtor is financially interdependent with a nondebtor, and the release of that nondebtor will increase the recovery of Chapter 11 creditors, the debtor still may not use a plan of reorganization to create “related to” jurisdiction over claims against the nondebtor because “the boundaries of bankruptcy jurisdiction cannot be extended simply to facilitate a particular plan of reorganization.” *See also* Zale, 62 F.3d at 756-57 (the Fifth Circuit held that bankruptcy court did not have “related to” jurisdiction over a bad faith claim against a nondebtor insurer).

Despite arguments like the ones raised in United and ALPA’s briefs, the existence of a post-petition indemnification agreement does not change this analysis. The Combustion Engineering and Zale courts both held that post-petition indemnification agreements cannot be used to bootstrap subject matter jurisdiction that would not otherwise exist. Combustion Engineering, 391 F.3d at 226-27; Zale, 62 F.3d at 756-57 (“Because CIGNA, Feld, and NUFIC are not debtors and because the property at issue--the bad faith claims--is not part of the estate,

the bankruptcy court would have no jurisdiction absent the indemnification agreement in the settlement...[T]he settlement cannot provide the basis for jurisdiction over bad faith claims.”¹

Courts in the Third Circuit that have considered nondebtor releases on the merits have either (1) held that such releases are never permitted, *see In re Arrowmill Development Corp.*, 211 B.R. 497, 506 (Bankr. D.N.J. 1997) *discussing First Fidelity Bank v. McAteer*, 985 F.2d 114 (3rd Cir. 1993) (“Keeping in mind that the Third Circuit’s analysis that section 524(e) specifically limits the scope of the discharge, and that the Bankruptcy Code does not contemplate a discharge of nondebtors, this court holds that plans of reorganization may not contain provisions which discharge nondebtors”) or (2) held that the release of a nondebtor claim “cannot be accomplished without the affirmative agreement of the creditor affected.” *Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (citing additional cases in support).

In the most widely followed case in the Third Circuit, *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 n.11 (3rd Cir. 2000), the court stated that it did not need to “speculate on whether we might validate a non-consensual release that is both necessary and given in exchange for fair consideration” because the nondebtor release in that case was so obviously deficient. The *Continental* court stated that, even under the most flexible test for the approval of nondebtor releases, a court may only approve a permanent nondebtor release if it

¹ As noted by United and ALPA, on February 2, 2006, District Court Judge John Darrah ruled that the Bankruptcy Court had no more than “related to” jurisdiction over the proceedings initiated by the Pension Benefit Guaranty Corporation (“PBGC”) for the involuntary termination of the Pilot Plan. *In re United Air Lines, Inc.*, 337 B.R. 904 (N.D. Ill. 2006). Because the District Court ruled that the Bankruptcy Court did not have the authority to enter a final ruling in those proceedings, Judge Darrah reversed the Bankruptcy Court’s October 28, 2005 judgment order and instructed the Bankruptcy Court to issue proposed findings of fact and conclusions of law for the District Court’s *de novo* review. United did not appeal this ruling and, as a result, it constitutes the law of the case. Obviously, if the Bankruptcy Court does not have jurisdictional authority to enter a final order terminating the Pilot Plan, and the Bankruptcy Court does not have jurisdiction to adjudicate a lawsuit between the retired pilots and ALPA regarding issues related to the termination of the Pilot Plan, the Bankruptcy Court did not have the jurisdiction to enter an order barring retired pilots from initiating a post-confirmation lawsuit against ALPA. The Bankruptcy Court exceeded its jurisdiction when, in its January 20, 2006 confirmation order, it purported to release and exculpate claims the retired pilots may have against ALPA.

specifically finds that (1) the release is necessary to the reorganization, (2) the release is fair to the creditor whose nondebtor claim is being released **and** (3) the creditor upon whom the release is being imposed has received reasonable consideration for the release of its claims (this compensation must be more than the distribution the creditor would otherwise receive with respect to its claims against the debtor). Continental, 203 F.3d at 212-15; *see also* In re Genesis Health Ventures, Inc., 266 B.R. 591, 608-09 (Bankr. D. Del. 2001) (“the message of Continental appears to be that the type of financial restructuring plan under consideration here would not present the extraordinary circumstances required to meet even the most flexible test for third party releases...[and therefore]...[t]he release of third-party claims against the Senior Lenders must be stricken”); In re Prussia Assoc., 322 B.R. 572, 598 (Bankr. E.D. Pa. 2005) (following Continental, the court held that even under the most flexible tests, nonconsensual releases must be necessary to a reorganization plan and given in exchange for fair consideration). The Continental court also held that “the fact that the reorganized Continental Airlines might face an indemnity claim sometime in the future...does not make the release and permanent injunction ‘necessary’ to ensure the success of Continental Debtors’ reorganization.” Continental, 203 F.3d at 216.

It is clear that the “exculpation” clause in United’s POR conflicts with all of the important Third Circuit cases (including PWS Holding, which is discussed separately below) because the Bankruptcy Court never entered specific findings that the “exculpation” provision in United’s POR is (1) necessary to United’s reorganization and (2) fair to the retired pilots **and** (3) neither ALPA nor United provided the nonconsenting retired pilots with compensation for these released claims. Under Third Circuit law, the POR’s “exculpation” clause (if not all of the nondebtor releases in United’s POR that affect the retired pilots) would be stricken.

When the Continental court referred to the more flexible tests for the nonconsensual release of nondebtors, the court was referring to case law from the Second, Fourth and Sixth Circuits. But the cases that have been resolved under this more flexible standard involved unique circumstances not present in this case and, in addition, the parties whose claims were involuntarily released were given consideration for their released claims.

In Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002), the Sixth Circuit stated: “Because such an injunction is a dramatic measure to be used cautiously, we follow those circuits that have held that enjoining a non-consenting creditor’s claim is only appropriate in ‘unusual circumstances.’” The Sixth Circuit’s “unusual circumstances” test is only satisfied if the bankruptcy court: (1) makes detailed factual findings (not conclusory assertions) that the nondebtor release is essential to the debtor’s reorganization; (2) makes similarly detailed findings that the released nondebtor is making a significant contribution to the reorganization under the terms of the plan; and (3) “ensures an opportunity for those claimants who choose not to settle to recover in full, and this determination must be supported by particularized findings.” Dow Corning, 280 F.3d at 659. The Dow Corning court explicitly modeled its ruling on In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2nd Cir. 1992), Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989) and MacArthur v. Johns-Manville Corp., 837 F.2d 89, 93-94 (2nd Cir. 1988), which are also cases in which Chapter 11 debtors and nondebtors who faced massive liabilities pooled their resources to satisfy the claims of tort claimants.

In each of these cases, the parties whose claims were involuntarily released, unlike United’s retired pilots, received full or substantial compensation for their released claims. Here, the POR’s “exculpation” provision was imposed on the retired pilots even though the

Bankruptcy Court never made any factual findings to support the provision and even though the retired pilots never received any compensation for the forced release of their potential claims against ALPA. United's "exculpation" clause could not have been approved under Sixth Circuit law delineated in Dow Corning, under Second Circuit law, which cautions that "a nondebtor release is a device that lends itself to abuse," In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2nd Cir. 2005), or under the Fourth Circuit's opinion in Robins, which approved nonconsensual releases only after it was demonstrated that the "entire reorganization hinges" on the nondebtor releases and, more importantly, the affected claimants were given full compensation for their released claims. Robins, 880 F.2d at 701-02.

While the case law in the First, Eighth, Eleventh and D.C. Circuits is not developed at the circuit court level, the opinions of lower courts in those circuits indicate that there is no support for the enforcement of "exculpation" provisions like the one United seeks to impose on the retired pilots. See Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983-84 (1st Cir. 1995) (identified but did not rule on issue); In re Boston Harbor Marina Company, 157 B.R. 726, 730 (Bankr. D. Mass. 1993) ("The Plan's provisions on the release and injunction create insurmountable obstacles to confirmation"); In re Salem Suede, Inc., 219 B.R. 922, 937 (Bankr. D. Mass. 1998) (after comparing 11 U.S.C. § 524(g), which provides for nondebtor releases in narrow instances "specifically designed to apply in asbestos cases only," to 11 U.S.C. § 524(e), which states that a bankruptcy discharge may only be issued to a bankruptcy debtor, the court stated that "Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an extremely limited class of cases reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos cases"); In re Master Mortgage, 168 B.R. 930, 937 (Bankr. W.D. Miss. 1994) (in this well-known case cited by United, the bankruptcy

court stated that “a permanent injunction is a rare thing, indeed, and only upon a showing of exceptional circumstances in which the factors outlined above are present will this Court even entertain the possibility of a permanent injunction.” The court approved the third-party injunction because the affected creditors voted overwhelmingly in favor of the plan of reorganization and these creditors were scheduled to receive full payment for their released claims); In re Hoffinger Industries, Inc., 321 B.R. 498, 514 (Bankr. E.D. Ark. 2005) (court rejected third-party release injunction when the debtor failed to produce evidence that “an injunction in favor of third parties was essential to reorganization” and when the proposed plan of reorganization failed “to provide for payment of all, or substantially all, of the claims of the class, and most particularly of Bunch, specifically and perhaps pointedly affected by the injunction”); In re Davis Broadcasting, Inc., 176 B.R. 290, 292 (M.D. Ga. 1994) (“It is thus clear that this is a post-confirmation injunction and [that] violates 11 U.S.C. Section 524(e) and accordingly exceeds the power and authority of the Bankruptcy Court because the section referred to prohibits release or a post-confirmation stay of the obligations of non-party guarantors”); In re L.B.G. Properties, Inc., 72 B.R. 65, 66 (Bankr. S.D. Fla. 1987) (section 524(e) prohibits plan provisions releasing nondebtor guarantors); In re Transit Group, Inc., 286 B.R. 811, 821 (Bankr. M.D. Fla. 2002) (holding that most of the proposed nondebtor releases were not “fair, necessary or supported by any factual findings”).

B. The “Exculpation” Clause Is Not Permissible Under Seventh Circuit Law.

In re Specialty Equipment, 3 F.3d 1043, 1047 (7th Cir. 1993) states as follows:

Accordingly, courts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code....Unlike the injunction created by the discharge of a debt, a consensual release does not inevitably bind individual creditors. It binds only those creditors in favor of the plan of reorganization.

Although United and ALPA rely upon Specialty Equipment to support what they characterize as the “consensual” release in United’s POR, neither party cites Specialty Equipment or any other Seventh Circuit case in support of the “exculpation” provision. That’s because, just like every other federal circuit, the “exculpation” clause in United’s POR cannot be supported by Seventh Circuit law.

The Seventh Circuit does not permit the type of nonconsensual, nondebtor release that is set forth in the POR’s “exculpation” provision. As the court stated in In re Sybaris Clubs International, Inc., 189 B.R. 152, 159 (Bankr. N.D. Ill. 1995) after an exhaustive review of the law regarding nondebtor releases: “the Debtor has not, and in fact, cannot cite any authority in the Seventh Circuit that would allow a non-consensual injunction to stand.” Likewise, In re Spiers Graff, 190 B.R. 1001, 1012 (Bankr. N.D. Ill. 1996) cites a number of cases and holds that “injunctions should not be used to give permanent relief to non-debtors from their possible liability to creditors.” Although United seems to believe it can avoid clear Seventh Circuit law by calling a nonconsensual release injunction an “exculpation” clause, the title of the provision obviously has no effect on the application of Seventh Circuit law which holds that such provisions are unacceptable.

C. PWS Holding Provides No Support For The “Exculpation” Provision.

United and ALPA both cite PWS Holding, and no other case, in an attempt to justify the inclusion of the “exculpation” provision in the POR. A cursory review of PWS Holding shows that it does not even come close to supporting the extraordinary “exculpation” provision in United’s POR.

In PWS Holding, the Third Circuit ruled that the release in the debtor’s plan of reorganization, which released members of the debtors’ unsecured creditors’ committee for all

claims related to their committee work except for claims asserting “willful misconduct and gross negligence,” was acceptable because the release did nothing more than restate the limited grant of immunity that applies to committee members under 11 U.S.C. § 1103(c). PWS Holding, 228 F.3d at 244-46. In its discussion of the release provision, the PWS Holding court stated: “Because we conclude this standard of liability is the standard that already applies in this situation, we believe that Paragraph 58 affects no change in liability.” The PWS Holding court made it clear that it was not changing the law enunciated in Continental regarding nonconsensual releases and that the release provision contained in the debtors’ plan actually did not affect the liability of any of the parties to the bankruptcy proceedings.

Unlike the “exculpation” provision in United’s POR, the release in PWS Holding was not a forced settlement of potential creditor claims against a nondebtor. In fact, the PWS Holding court confirmed the Third Circuit’s previous holding in Continental, which states that a nondebtor release may not be imposed on a creditor unless it is fair and necessary to the debtor’s reorganization and the creditor receives reasonable compensation for the release.

Interestingly, the one case United and ALPA cite to support the POR’s “exculpation” provision helps defeat their “mootness” argument. The debtors in PWS Holding argued that, if the appeal of the plan of reorganization’s release provision was successful, this would “unravel the entire plan of reorganization.” Id. at 236. The court responded to this argument as follows:

We disagree. There are intermediate options. The releases (or some of the releases) could be stricken from the plan without undoing other portions of it.

Id. The same is true here. As it is argued below, this Court has the authority to strike portions of United’s release and exculpation provisions without upsetting any other part of United’s POR.

D. This Court Should Also Hold That The Plan Of Reorganization's Release Provisions Do Not Release Potential Retired Pilot Claims Against ALPA.

URPBPA believes this Court was correct when it held that “[a] creditor’s approval of the plan cannot be deemed an act of asset beyond the confines of the bankruptcy proceeding.” Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982). A creditor who votes in favor of a plan of reorganization and the treatment the plan provides with respect to its claims against a Chapter 11 debtor should not be deemed to have “consented” to the release of independent claims the creditor may have against a third-party nondebtor.

Even though the Specialty Equipment court stated (in dicta) that “courts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code,” that opinion did not hold that release provisions are always enforceable against creditors who have voted in favor of a plan of reorganization. Specialty Equipment, 3 F.3d at 1047. First, according to the court, release provisions may only be approved if they are non-coercive. Second, the opinions which do permit “consensual releases” rely upon Bankruptcy Code § 105(a), which permits a bankruptcy court to provide equitable relief so long as the relief is consistent with other provisions of the Bankruptcy Code. As a result, a release provision should not be approved when its application would be inequitable.

In addition, as the court stated in Sybaris Clubs, 189 B.R. at 159, the power to issue “injunctions that protect non-debtor third parties...is limited to situations in which an independent grant of such power exists in addition to § 105.” Because neither United nor ALPA have identified a provision of the Bankruptcy Code that would permit any release of claims United’s retired pilots may have against ALPA, and because the application of the POR’s release provisions against United’s retired pilots would be inequitable, this Court should hold that the POR does not release potential retired pilot claims against ALPA.

It would not be equitable for this Court to uphold the validity of release provisions that purport to bar retired pilot claims against ALPA. Here, the retired pilots who understood the complicated provisions of United's POR and the plan voting procedures (many did not) were forced to make an untenable choice. A retired pilot could either vote for United's POR, and be deemed to have "consented" to the release of his or her independent claims against ALPA without receiving any compensation for the release of those claims, or vote against the POR and still be saddled by the POR's "exculpation" provision. This is not the type of non-coercive "consent" required by Specialty Equipment. As a result, this Court should also rule that the POR's release provisions do not release claims retired pilots who voted in favor of United's POR may have against ALPA.

E. United and ALPA's Other Arguments Regarding The Exculpation And Release Clauses Should Also Be Rejected.

United and ALPA assert a number of other arguments in support of the POR's release and exculpation provisions. These arguments should also be rejected. For instance, United makes contradictory assertions regarding the alleged merit (or lack thereof) of claims the retired pilots may have against ALPA. On page 31 of its brief, United wildly exaggerates the effect retiree lawsuits against ALPA could have by asserting that, if the release and exculpation provisions in the ALPA agreement are undone, the entire ALPA agreement could be undone and this could lead to the unwinding of all of United's agreements with its employee groups. If this were true, it would certainly indicate that the retired pilots were forced to sacrifice powerful (and valuable) claims against ALPA without any compensation.

But then, on page 52 of its brief, United suggests that any claims the retired pilots may assert against ALPA are baseless because they have already been resolved against the retired pilots. If United is right, and the retired pilots do file suit against ALPA, ALPA will have the

opportunity to prove that the retired pilots' claims have no merit and, if appropriate, the retired pilots' lawsuit will be dismissed. But if the retired pilots' potential claims truly have no value, there is no compelling reason for these claims to be enjoined in the first place.

Thankfully, this Court need not attempt to resolve the merits of any claims the retired pilots may have against ALPA. The merits of any such claims should be judged at the appropriate time by a trial court with proper jurisdiction. As stated in Transit Group, 286 B.R. at 819, a bankruptcy court should not attempt to prejudge a nondebtor claim because a debtor's assertion that a nondebtor claim will fail "does not justify the grant of a non-debtor release" and the suspicion that lawsuit against a nondebtor may "fail is not a good reason to deny the creditor the right to try." The Bankruptcy Court erred by prejudging the merits of claims retired pilots may have against ALPA during a perfunctory exchange with counsel for URPBPA. [See A-4, pp. 29-33]. This was reversible error.

The fact is that United never took the potential claims of the retired pilots seriously during the confirmation process because United never once asked URPBPA (who represents approximately half of the retired pilots) for any input regarding its proposed POR. Furthermore, because United and ALPA, who employ sophisticated counsel, had to have known that the "exculpation" clause in the POR had no legal support, the parties accepted the risk that that provision would be stricken from the POR. It is, of course, impossible to believe that United's planes will stop flying and the active pilots will stop working if this Court rules that the "exculpation" provision in United's POR does not prevent retired pilots from asserting claims against ALPA.

Any argument that URPBPA's appeal of the POR's improper release provisions is "moot" or that the release and "exculpation" provisions may not be stricken from a plan of

reorganization must fail as well. An appellate court that reverses an improper release provision does not need to unravel an entire plan of reorganization because, as the court stated in PWS Holding, 228 F.3d at 236: “The releases (or some of the releases) could be stricken from the plan without undoing other portions of it.” Courts have often stricken improper release provisions from confirmed plans of reorganization and this Court should do so as well. *See, e.g.*, Lowenschuss, 67 F.3d at 1402 (Ninth Circuit affirmed district court order vacating release provisions from a confirmed plan of reorganization); Continental, 203 F.3d at 205 & 217 (nondebtor release and permanent injunction provisions in plan of reorganization vacated by Third Circuit); Arrowmill, 211 B.R. at 507 (third party release provisions of reorganization plan held to be improper and of no effect). Striking these improper provisions would certainly make a great deal more sense, under the circumstances, than reversing the order confirming United’s plan of reorganization in its entirety, as the Third Circuit did in Combustion Engineering, 391 F.3d at 248-49. The release and “exculpation” provisions in United’s POR have taken rights away from United’s retired pilots without any “due process” or compensation and this Court has the right to rule that these provisions are improper and unenforceable.

An order vacating the POR’s “exculpation” and release provisions, to the extent these provisions relate to potential retired pilot claims against ALPA, would not be unfair to United or ALPA and it would have no effect on any of United’s other constituencies. Neither United nor ALPA sought to confer with URPBPA during the plan confirmation process and neither party even attempted to provide the retired pilots with fair compensation for the claims that were purportedly released in United’s POR.

II. United's Mootness Argument Should Be Rejected And This Court Should Seek To Remedy The Unfair Discrimination Against The Retired Pilots.

There are currently two appeals pending before this Court in addition to this appeal. One of these other appeals (which has been consolidated under Case Nos. 06-2662, 06-2714 and 06-2843 and will be referred to as the "Pilot Plan Appeal") relates to the PBGC's attempt to terminate the Pilot Plan. The other appeal (Case No. 06-1867, which will be referred to as the "October Payment Appeal") relates to United's obligation to pay non-qualified pension benefits to the retired pilots for October 2005. All three of these appeals are scheduled for oral argument before this Court on September 26, 2006.

There are issues that have been briefed in connection with the October Payment Appeal and the Pilot Plan Appeal that relate to URPBPA's argument that retired pilots are entitled to compensation for the termination of the Pilot Plan that is similar to the compensation that has or is being provided to United's active pilots. First, in the October Payment Appeal, United argues over and over again that, in Chapter 11 proceedings, similarly-situated creditors should be treated similarly. Interestingly, the argument United raises in that appeal directly supports URPBPA's argument here, which is that United's POR unfairly gives active pilots generous compensation for the termination of the Pilot Plan without giving the similarly situated retired pilots equal or similar compensation. Second, URPBPA's response brief in the Pilot Plan appeal responds to United's "equitable mootness" argument and many of URPBPA's arguments in that brief apply here as well.

United has argued throughout its October Payment Appeal that a fundamental principle of bankruptcy law is that similarly situated creditors should be given similar treatment in bankruptcy proceedings. While United misapplies that principle in the October Payment Appeal (by comparing the retired pilots' rights to receive non-qualified pension benefits to the rights of

wholly unrelated general unsecured creditors), United has all but forgotten the “equality principle” it cites from In re Stoecker, 179 F.3d 546, 551 (7th Cir. 1999), in this appeal. But here, United’s active and retired pilots are similarly situated. United’s active and retired pilots have lost their defined benefit pension plan. But, although United’s POR does not provide the retired pilots with any form of compensation for the termination of the Pilot Plan, the POR provides the active pilots with \$550,000,000 in convertible notes, increased additional monthly contributions to the pilots’ directed account plan and other compensation. This is unfair and improper.

On page 46 of its response brief, United attempts to argue that “the \$550 million in convertible notes paid to active pilots was in consideration for a global deal which included, among other things, wage and work-rule concessions, promises to continue flying United’s plans, and the ‘no fight clause.’” This Argument ignores the terms of the agreement between ALPA and United which specifically links the payment of certain benefits earmarked for the active pilots to the termination of the Pilot Plan. For instance, paragraph 5(a) of Letter Agreement 05-01 [see A-5, p. 3] states that “[i]n the event the A Plan is terminated pursuant to 29 U.S.C. § 1341 or § 1342 following judicial approval of such termination,” United will give the active pilots a new directed account plan in the amount of 6 percent of pilot compensation which is called the “C Plan Contribution.” Paragraph 5(c) provides for an increase in this C Plan Contribution.

Likewise, paragraph 7 of Letter Agreement 05-01 (“Convertible Notes”) states as follows:

In the event that the A Plan is terminated pursuant to 29 U.S.C. § 1341 or § 1342 following judicial approval of such termination, the Revised 2003 Pilot Agreement and the Plan of Reorganization shall provide for the issuance of \$550 million of UAL convertible

notes, as described in Exhibit D to this Letter Agreement, or a trust or other entity designated by the Association...

[A-5, p. 4.] As it can be seen, the payment of these \$550 million in convertible notes is specifically linked to the termination of the Pilot Plan.

Although United cites unsupported dicta from In re UAL Corp., 443 F.3d 565 (7th Cir. 2006) that states that the retired pilots will lose less if the Pilot Plan is terminated, this statement is wrong. United's retired pilots earned and are entitled to two-thirds of the tax-qualified pension benefits in the Pilot Plan and, as a result, the retired pilots, as a whole, were bound to receive more from the Pilot Plan if it would have continued. Yet, United has attempted to give all of the plan termination compensation to the active pilots. This is unfair discrimination that should be remedied by this Court. While it is likely that this matter would have to be remanded to the Bankruptcy Court to determine the actual amount of compensation that United would be required to give United's retired pilots in order to ensure equality of treatment between the retired and active pilots, this Court should rule that equality of treatment is required.

Contrary to United's arguments, this appeal is different from URPBPA's appeal contesting the Bankruptcy Court's approval of Letter Agreement 05-01 and, as a result, the opinion in In re UAL Corp., 443 F.3d 565 (7th Cir. 2006) does not control here. In that appeal (which URPBPA seeks to appeal to the United States Supreme Court), URPBPA argued that Letter Agreement 05-01 should not have been approved by the Bankruptcy Court because it was the product of § 1113 negotiations that improperly excluded the retired pilots. URPBPA argued that an authorized representative should have been appointed to represent retired pilots in negotiations related to the Pilot Plan. Here, URPBPA is not contesting the validity of the Letter Agreement or addressing any issues related to the way in which United and ALPA entered into that agreement. Rather, URPBPA is arguing that, if active pilots are given compensation under

Letter Agreement 05-01 that is specifically linked to their loss of pension benefits, retired pilots should be given similar compensation for their loss of pension benefits. URPBPA is arguing that United has unfairly discriminated against similarly-situated creditors by only compensating the active pilots for the loss of the Pilot Plan.

In URPBPA's reply and response brief in the Pilot Plan Appeal, URPBPA responds to United's "equitable mootness" argument. Many of those same arguments apply here. In particular, URPBPA demonstrated that even if this Court believes United's "equitable mootness" argument has some potential merit, this Court cannot accept United's unsupported allegations at face value. Rather, this case would have to be remanded for further consideration of United's allegations. *See Evirodyne*, 29 F.3d at 304 ("The record before us is not adequate to enable us to determine whether modification of the plan of reorganization would bear unduly on the innocent. Therefore, if we had doubts about the merits...and thought that the issue of 'equitable mootness' might be dispositive, we would have to remand the case to the bankruptcy court for determination of that issue."); *In re Andreuccetti*, 975 F.2d 413, 418-19 (7th Cir. 1992) (court stated that "determining whether an appeal has become moot requires a fact-specific inquiry into the nature of the relief sought, and the effects that relief could have on the overall reorganization plan" and held that "the present record cannot support the district court's conclusory determination" that the appeal at issue was moot); *Apex Pharmaceuticals*, 203 B.R. at 438 (resolving mootness argument would require remand because "the record on appeal is not adequate to decide whether modification of the Agreement at this point would bear unduly on the innocent.") As this Court stated recently in another case involving URPBPA and United, the proper way of handling an "equitable mootness" argument is to give a lower court instructions on remand to "deny any relief that would jeopardize United's newly recovered solvency." *In re*

UAL Corp., 443 F.3d at 567. What is clear from the precedent is that an appellee's assertion that it would be inequitable to grant an appellant relief must be proven with actual evidence. United's "mootness" argument is supported by nothing more than unproven allegations.

While United attempts to distinguish its more recent financial models from Gershwin 4.1, what United fails to tell this Court is that United has not given URPBPA any of the more recent versions of its Gershwin model. While it is difficult to believe United's assertion that United cannot provide its retired pilots with relief and that the financial model upon which it based plan confirmation has no margin for error, this is a matter that could be addressed below if this Court were to order the Bankruptcy Court to provide a feasible remedy to the retired pilots. During these remanded proceedings, United could produce the newer versions of its financial model so that its assertions regarding its inability to provide appropriate compensation to the retired pilots could be evaluated based on actual evidence.

United also argues that, because URPBPA did not request a stay pending appeal, this appeal should be summarily dismissed. This Court rejected the same argument in the above-referenced appeal when it addressed URPBPA's appeal on the merits despite the lack of a stay. Id. Requesting a stay is not a mandatory step comparable to filing a timely notice of appeal. In re UNR Industries, 20 F.3d 766, 769 (7th Cir. 1994); In re Specialty Equipment, 3 F.3d 1043, 1047 (7th Cir. 1993) (holding there is no general requirement that a party obtain a stay as a precondition for appealing plan of confirmation). None of URPBPA's stay motions has been granted and URPBPA is not aware of any orders that have been stayed during United's Chapter 11 proceedings. As stated in Capital Factors v. Kmart Corp., 291 B.R. 818, 823 (N.D. Ill. 2003), a case cited by United in which the court rejected the debtors' "doomsday speculations" and

denied its mootness argument, motions for stay orders have a slim chance of success and are “not required in order to preserve appellate rights.”

CONCLUSION

URPBPA respectfully requests that this Court exercise its authority to modify the Plan of Reorganization so as to reallocate adequate consideration to URPBPA and to excise the portions of the release, exculpation and injunction provisions from the Plan of Reorganization that purport to release the ALPA Released Parties from any liability they may have to United’s retired pilots.

Dated: August 30, 2006

Respectfully Submitted,

UNITED RETIRED PILOTS BENEFIT
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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. RULE 32(a)(7)

(1). This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,650 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(2). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word in 12 font size in Times New Roman type style.

Dated: August 30, 2006

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The undersigned, counsel for the Appellant, United Retired Pilots Benefits Protection Association, hereby certifies that on August 30, 2006, two copies of Appellant’s Reply Brief as well as a digital version containing the brief, to be served upon each of the following parties by e-mail and overnight mail upon:

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