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Objection Deadline: November 9, 2005 @ 8:00 p.m. (by agreement)
Hearing Date: November 16, 2005 @ 12:30 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
DELTA AIR LINES, INC., *et al.*,	)	05-17923 (PCB)
	)	(Jointly Administered)
Debtors.	)	

OBJECTION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL TO DEBTOR'S MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENT

[Related to Docket No. 1004]

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PRELIMINARY STATEMENT

A union has good cause to reject a debtor's Section 1113(c) proposal if the proposal seeks modifications to the union's contract that are not "essential for the debtor's reorganization." *In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 90 (2d Cir. 1992). Debtor Delta Air Lines, Inc. ("Delta" or the "Company") has proposed that the Delta pilots accept, in addition to one billion dollars in annual savings negotiated by the pilots only one year ago, further reductions totaling over $325 million per year. If this proposal were accepted, the Company's pilot costs per available seat mile ("CASM") – a standard measure of pilot unit cost – would quickly fall well below the Company's own stated target and would be lower than the pilot CASM of its low-cost competitors. Not even Delta argues that such a low pilot CASM is necessary for the Company to reorganize and emerge as a strong competitor. Indeed, Delta's *own* costing analysis shows that concessions that the pilots have *already* provided, when combined with additional concessions ALPA proposes, will generate enough pilot labor cost savings to allow it to reorganize successfully.

Debtor's $325 million proposal, moreover – especially when viewed in combination with the 2004 restructuring that has not yet been fully implemented – places an extraordinary share of the restructuring costs on the shoulders of the Company's pilots and as a result is far from equitable. Delta's proposal also assumes that the debtor will make no further contributions to its defined benefit pension plan for Delta pilots but makes no provision for what will happen to the retirement earnings of the pilots if, as a result, the defined benefit plan is terminated. Delta's proposal then rubs salt in this wound by taking away from the pilots the very equity returns that they received under the first phase of the restructuring, with no provision for new equity returns despite the proposed increase in the pilots' total restructuring value.

Delta's over 6,000 active pilots are represented by the Air Line Pilots Association, International ("ALPA" or the "Union"). ALPA also represents pilots at nearly every other major network carrier and at a variety of express carriers, at several so-called "low-cost" carriers ("LCCs"), and at several cargo operators. ALPA and the represented pilots have successfully negotiated numerous restructuring agreements with failing airlines, including in recent years massive concessionary agreements with United, US Airways, Northwest, and, of course, Delta. In some cases, there have been multiple such agreements with the same carrier. In every instance, ALPA and the carrier's pilots have taken the hard steps to enable the carrier to reorganize in the face of the post-9/11 industry traumas, rising fuel costs, and competitive pressures. The Delta pilots – despite the one billion dollars in annual concessions that they have already negotiated – are prepared to act again and have offered Delta significant additional concessions that reach the Company's own pilot labor cost target and that fully protect the Company's short term liquidity and EBITDAR[1] needs while providing for Delta's exit from Chapter 11 and long-term competitive strength.

Delta is not in bankruptcy because of its pilot labor contract. Nor is it in bankruptcy because of competition from LCCs. LCCs have been a substantial presence in the industry for years, including during the late 1990s when Delta was making record profits. Delta, as it readily admits, is in Chapter 11 because fuel costs have risen too fast and too high for Delta to keep up. But having been driven into the courthouse by fuel prices, Delta is now pursuing exactly the strategy that Congress meant to banish when it enacted Section 1113 – using the Bankruptcy Code opportunistically to get by court decree what it could not get at the bargaining table: its long-sought wish list of contract changes. This is a short-sighted strategy. Rejection

[1] Earnings Before Interest, Taxes, Depreciation, Amortization, and Aircraft Rent.

of the pilots' contract and imposition of draconian cuts will not advance the Company's reorganization but will inflict a deep and lasting wound from which the Company will recover, slowly, if at all. The only solution for Delta's problems, short-term and long-term, lies in further negotiations, based not on greed but on need – the need to reorganize and compete which ALPA has already recognized.

In response to Delta's Section 1113 proposal, ALPA has offered concessions worth an average of $90.7 million per year over four years, considerably more than Delta needs to reach its goal of a 0.82 cents pilot CASM.[2] Indeed, the combination of the 2004 pilot concessions (of $1 billion) and the millions offered in ALPA's proposal would result in a pilot CASM of 0.79 cents in 2006 and 0.78 in 2007 – well below the pilot CASM Delta has told the Court it needs. Taking $325 million from the pilots, as Delta proposes, would push its pilot CASM below *.63 cents*, well below anything Delta claims it needs to return to profitability and indeed below the pilot CASM of the LCCs with which Delta claims it competes.

In this pre-hearing brief, ALPA sets forth a multi-tiered analysis,[3] based upon data presented by Delta prior to November 9, 2005, which demonstrates that the as yet unrealized savings from the 2004 pilots' concessions, combined with the additional $90.7 million more in average annual concessions that ALPA now offers, will not only allow Delta to reach and exceed its pilot labor cost target but also return to profitability without ever coming near breaching its

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[2] It is important to note that ALPA does not agree that Delta needs to reach a 0.82 cent pilot CASM to be profitable and competitive. ALPA reserves the right to present evidence at the hearing contesting Delta's contention that it needs to reach this target.

[3] ALPA's analysis presented herein is subject to possible modification based on information presented by the Company for the first time at 1:00 p.m. on November 9, 2005, the day this objection was due.

DIP loan covenants. For this reason, and others explained below, Delta's motion should be denied.

BACKGROUND

Delta's Pilots

Delta's pilots perform a job that requires years of experience and training and a high-level of skill and responsibility. Many of Delta's pilots initially learned to fly during their years of U.S. military service (traditionally, the vast majority of Delta's pilots have been former military personnel). These future commercial pilots often honed their skills while flying dangerous military sorties – indeed, today some are currently on military leave in Iraq – flying planes in extreme conditions, such as landing on aircraft carriers in turbulent waters. Other Delta pilots spent years flying for express carriers or corporate jet operations before being hired.

All Delta pilots (whether or not previously in the military or employed by an express carrier) upon being hired by Delta participate in an extensive training program regulated by the U.S. Federal Aviation Administration ("FAA"). Their training and skill development – including qualifying to fly on ever more advanced types of aircraft – continues for the rest of their careers.

Delta pilots are either captains or first officers who assist the captains. The latter constitutes approximately one-half of the overall pilot group. A small number of Delta pilots also serve as pilot instructors.

Under the Pilot Working Agreement ("PWA"), bidding for route, aircraft type, and position (captain or first officer) is determined by seniority, and a pilot's earnings are dependent upon position held and the type of route and aircraft flown. For example, the most senior pilots generally fly as captains on the largest aircraft and international routes. The most junior pilots serve as first officers on the smallest aircraft on domestic routes and earn approximately $80,000 per year under the terms of the PWA. B-737 aircraft and MD-88 aircraft together constitute a majority of Delta's fleet and are employed on domestic routes. MD-88 pay is higher than B-737 pay; first officers flying MD-88s (about 21% percent of Delta's first officers) earn between about $85,000 and $113,000 per year under the PWA. Pilots spend years as a first officer before having sufficient seniority to hold a captain position; the current most junior captain was hired in April 1997.

Captains earn more, but junior captains do not earn much more. For example, pilots with two years of captain seniority on domestic routes flying the MD-88 aircraft earn approximately $150,000 per year. More senior pilots with 12 years of captain seniority who fly B-767 aircraft earn about $187,000 per year. Only the small number of captains flying the largest Delta aircraft (B-777s) on international routes – who generally have many years of seniority before achieving this position and constitute just 1.2% percent of all Delta pilots – may earn the top pilot salary of about $220,000 per year.

In addition, junior captains and junior first officers in any flying category (aircraft type and pilot base) typically hold a "reserve" line position. Hundreds of pilots are on reserve each month. Reserve pilots are guaranteed approximately 70 hours of pay (approximately 87.5% of the pay of regular line-holder pilots on the same aircraft) and are on call approximately 18 days per month. This means that for eight of those days, they have to be able to report to work within two hours of being contacted by the Company, and for the other days, within 12 hours of contact.

Pilots have a shorter span of earning years than all other Delta employees. Pilots typically commence their Delta careers only after spending years flying for the military or other smaller civilian employers. Many have lost earnings due to furloughs (Delta pilot furloughs are described *infra,* p. 10). Others have lost earnings due to medical conditions. Pilots are subject to periodic medical certification by physicians authorized by the FAA. Certain conditions that may not be disabling in other professions, such as diabetes or myocardial infarction, may bar commercial airline pilots from flying, either permanently or for a number of years. *See, e.g.*, 14 C.F.R. §§67.113(a), 67.112(a)(1). Finally, federal law mandates that pilots stop flying commercial aircraft and end their Delta pilot careers by age 60. *See* 14 C.F.R. §121.383(c).

This cut-off of earnings for pilots at no later than age 60 makes pilot pension benefits extremely important. It means that pilots must stop earning retirement benefits earlier than other workers and must rely on them starting at an earlier age.

Delta has a tax-qualified defined benefit pension plan for pilots and two "non-qualified" plans.[4] Delta also has a defined benefit pension plan for its other employees. These two defined benefit plans are currently underfunded by $10.6 billion, according to the PBGC. The PBGC estimates that if the two plans were terminated, plan participants would lose $2.2 billion and, as we explain below (pp. 38-39), the pilots would undoubtedly bear a disproportionate share of those losses.

Delta estimates that it will be required to contribute $2.6 billion to its pension plans between 2006-2008. *See* Delta's Sept. 12, 2005 Information Brief ("Info. Br.") at. 33. Of this amount, approximately $1.4 billion will be due to the pilots' plan. Delta has announced that it has not budgeted for required contributions to the plans and does not intend to make them. *See id*. It has already failed to make a required $160 million contribution to the pilot plan that was

[4] The two "non-qualified" plans – the "bridge" plan and the "supplemental" plan – are considered unfunded because no trust or other arrangement that is beyond the reach of Delta's general creditors has been established to pay benefits under them; Delta pays the benefits as they come due.

due on October 15, 2005. Delta's failure to make these payments puts the pilot plan at significant risk of being terminated.

Pilot Concessions; Management Waste

As the Company recognizes, "through all of the various business cycles," Delta's pilots and other employees "have been very innovative and willing to make sacrifices for the good of the company." Info. Br. at 7. Starting with the days in the 1980s when the Delta pilots joined with other employees to purchase and give their company a Boeing 767 aircraft – the "Spirit of Delta" – Delta pilots have repeatedly participated in their Company's economic recoveries.

The pilots have provided such sacrifices in part because pilots cannot easily pick up and change jobs. Pilots' flying skills – which take years of training and experience to develop – are essentially non-transferable. Further, job changes are costly even within the pilot profession since, to a large extent, pilots' pay and benefits depend on their seniority with their employer, and pilot seniority is not transferable between carriers. As a result, the fate of Delta's pilots is directly tied to the fate of the airline – probably to a far greater extent than other Delta employees, especially "revolving door" management teams. This means that when sacrifice is truly needed, the pilots are there to help. If they turn down a Company request for concessions, while offering a more realistic package, as they have done now, it is because they have made a considered, good faith judgment that the Company has not shown that it needs what it seeks. Pilots are also very aware, as shown below, of management's history of squandering labor savings on themselves or on ill-conceived ventures.

The 1996 Concessionary Contract

Almost a decade ago, in 1996, the Delta pilots granted their Company a major four-year concessionary package. Management then turned around and used this money to grant wage increases to “non-pilot employees”[5] and top management.

The 1996 contract resulted from Delta’s earlier management actions. In the early 1990s, Delta dug itself into a financial hole with route purchases and capacity increases. *See generally* Info. Br. at 7. The Company turned to ALPA to help it out. In the 1996 PWA, effective until mid-2001, ALPA provided approximately $150 million worth of annual concessions in pay cuts, reduced vacations and workrule changes – including a lower pay rate and different workrules for aircraft flown in the Company’s low-cost “Sunshine Operation,” designed to compete with the LCCs in the New York-Florida market. The Delta pilots granted these concessions even though the Company’s annual report had recently announced that its CEO had been granted a $560,000 bonus (as an addition to his $475,000 salary), despite the Company’s financial woes.

Not long after the pilots entered into the concessionary 1996 PWA, the Company’s profits increased considerably: “as the economy picked up in the mid-1990s, the airlines rebounded strongly and generated *record profits through the end of the decade*.” Info. Br. at 7 (emphasis added). Despite this financial success, Delta – showing its lack of appreciation to the pilots for their sacrifices – *rejected* an ALPA request to re-open the PWA in order to permit the pilots to recover some of their wage cuts. The Company told ALPA at that

[5] None of Delta’s employees, except the pilots and approximately 175 flight dispatchers are represented by a union. Declaration of Geraldine Carolan (“Carolan Dec.”), ¶7. These employees are referred to collectively as the “non-pilot employees.”

time that “a contract is a contract” and the pilots were stuck with it despite the dramatic improvement in industry economic conditions.

To make matters worse for the pilots, during the 1996 to 2000 period, when the Company was taking millions from the pilots in concessions, the Company spent billions on increases for non-pilot employees and top management and on repurchasing stock. *First*, in 1996, Delta restored a 5% wage cut previously imposed on the non-pilot employees and restored certain vacation cuts, and it then granted an additional wage increase to these employees of approximately 7%. As a result, Delta’s non-pilot employees enjoyed and continue to enjoy among the best pay anywhere for the type of work they do. *See, e.g.*, Declaration of Michael L. Wachter (“Wachter Dec.”) at ¶66 (conceding that Delta’s employees “are highly paid as compared to those in similar occupations outside the airline industry” and listing double-digit percent wage premiums they enjoy over comparable workers elsewhere in the economy). *Second*, from 1996 to 2000 the total income (salary and bonus) for the Delta CEO went from approximately $1 million to over $2.1 million.[6] *Third*, from 1996 to 2000, Delta spent over $2.4 *billion* to repurchase its own stock. This money, if left in the company, would have entirely prevented any liquidity crisis in 2005.

<u>The 2001 PWA</u>

As a result of management’s refusal to recognize pilot sacrifices during the 1996-2000 period, when new contract negotiations commenced for their 2001 PWA, the pilots sought to recoup their losses under the 1996 PWA, to share in the Company’s prosperity and to capture in earnings some of the new productivity efficiencies that Delta was enjoying through its use of

[6] Delta CEO Ronald Allen retired in 1997 and was replaced by Leo Mullin. Allen’s golden parachute consisted of an immensely valuable list of items, including an 8-year consulting contract at $500,000 per year, a $4,586,515 payment covering severance pay, health benefits and incentive award, and a $765,600 annual pension.

faster aircraft that had more seats and more cargo-carrying capacity and that used fewer pilots. Further, as ALPA will show at the hearing, Delta's top management explicitly adopted the view that Delta is a "premier carrier" whose pilots *should be* the highest paid in the industry. It was exactly this view that drove both sides in negotiating the pilots' 2001 PWA.

ALPA succeeded in securing substantial gains for the pilots in the new 2001 PWA, which was scheduled to run through April 30, 2005. At the same time, Delta's non-pilot employees continued to enjoy an industry leading level of compensation, and Delta's management also achieved gains.

September 11, 2001

Terrorists commandeering commercial aircraft attacked the United States on September 11, 2001, and Delta, like the rest of the airline industry, immediately began to suffer enormous losses of revenue. Delta financed these losses with added debt, Info. Br. at 31, but also laid off huge numbers of employees, including over a thousand pilots – nearly half of whom are still laid off Attrition further reduced Delta's pilot workforce. The Delta pilot workforce declined from 9,618 pilots working on September 1, 2001 to 6,131 today, a decline of over one-third. *See* Carolan Dec. at 22 (chart). In this period, pilots have suffered a steeper percentage decline in their numbers than the percentage decline of non-pilot employees. *See id*. These employee cuts, however, did not stop the flow of red ink, and Delta kept borrowing more and more money, hoping that when the economy and the industry's fortunes turned around, it could once again began to generate profits. As a result, Delta is now burdened with "a significant amount of indebtedness and other obligations." Info. Br. at 31.[7]

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[7] "As of June 30, 2005, Delta had approximately $14.1 billion of total indebtedness . . . ." Info. Br. at 31. "Delta's increased indebtedness is demonstrated by the sharp spike in its debt-to-asset ratio from .75 in 2000 to 1.31 in the first quarter of 2005." *Id*.

Management Takes Care of Itself

As Delta struggled to stay afloat on a sea of borrowed money, its top management found money to take care of itself. Just months after 9/11, Delta's Board of Directors approved a 2002 salary for its then CEO (Leo Mullin) of $795,000, a bonus of $1.4 million, and an award of 963,000 stock options valued at $8.21 million at the time of the grants *and*, simply for renewing his employment agreement, a grant of 150,000 restricted stock units valued at $2.03 million. Altogether, Delta spent over $29 million on executive salaries and bonuses in 2002 (which does not include the value of stock awards and other compensation).

In addition, in January 2002 Delta created special individual retirement trusts (supplemental executive retirement plans or "SERPs") for 33 top executives at a cost of over $25 million, which also covered the taxes that the executives would have incurred for receiving the advance payments into the trusts. The CEO, for example, received $4.5 million in advance payments and an additional $3.7 million in tax "gross-up" payments. *See* Debtor's March 25, 2003 SEC Schedule 14A, at 26. The Company funded the SERPs over three years; the SERPs were fully funded at 100% of their present value (as of December 31, 2003) by the end of 2004. *Id.*

The Pilots Provide Relief

Obviously, these salary bonus increases and trusts for top management did not sit well with pilots, but this did not stop them from providing enormous concessions to save their Company.

Facing financial crisis, the Company repeatedly and successfully turned to the pilots for relief. First, Delta and ALPA negotiated an unprecedented, innovative agreement – Letter of Agreement # 45 – permitting Delta to employ pilots who had taken early retirement to operate some of the large aircraft types for which the Company had not trained enough other pilots to replace the retired pilots. These "post-retirement pilots" saved the Company millions in potential lost revenue by enabling flight operations to continue on the lucrative routes served by these aircraft. But they cost junior pilots the opportunity to return from layoff or to be upgraded to higher positions. No other pilot group has ever negotiated such an arrangement.

Of greater significance, ALPA and the Delta pilots negotiated the 2004 restructuring agreement. Oddly, while management made an initial proposal for concessions in April 2003 (a fact that the Company stresses, *e.g.*, Carolan Dec., ¶26), it nowhere explains why it waited until *September 2004* (not a typo) to present to ALPA a financial model and business plan to support this request for concessions.[8] Nor does management explain that ALPA had repeatedly asked the Company to provide this information, and that management repeatedly declined until, in early spring of 2004, the Company brought in a new management team, including a new chief financial officer, and it then asked for several more months to assemble the requested material.

Delta management finally responded in September 2004, announcing what it then called its "transformation plan" to achieve $5 billion in annual gains through cost cuts and revenue improvements. *See* Info. Br. at 27. As part of this plan, Delta sought a massive concessionary package from the pilots, and in less than two months the pilots negotiated exactly such a package, in Letter of Agreement #46 ("LOA #46").

As ALPA will show at the hearing, as a result of the pilot concessions in 1996 and 2004 and the benefits enjoyed by non-pilot employees during times when pilots were receiving less, pilot average salary growth from 1991 to 2005 and from 1995 to 2005 was *below* that of the non-pilot employees. By starting its comparisons of pilot to non-pilot compensation in 2000,

[8] ALPA provided proposals before September 2004 for concessions, but not at the level sought by the Company.

see, e.g., Carolan Dec. ¶¶48, 50-51, the Company deliberately omits earlier years that are highly relevant to any comparisons of pay levels.

The Company Will Continue To Gain Additional Savings From The Pilots' 2004 One Billion Dollar Concessionary Package

In LOA #46, which became effective in December 2004, Carolan Dec. ¶28, the Delta pilots agreed to accept, among other things:

(a) a 32.5% wage cut;

(b) substantial work rule-productivity changes, including dramatic reductions to staffing requirements;[9]

(c) a freeze on service accruals under the pilot defined benefit pension plan; and

(d) other benefit changes, such as a reduction in vacation pay and an increase in the cost borne by the pilots for medical coverage. *See, e.g.*, Carolan Dec. at ¶¶9, 31 (calling LOA #46 "a significant concession by the pilots").[10]

The Company admits that LOA #46 will generate $1 billion in annual pilot cost savings. *See* Info. Br. at 26; Second Declaration of Edward Bastian ("2d Bastion Dec.") at 26. It has already obtained substantial savings from LOA #46, but has not yet fully implemented all work rule and productivity changes so as to achieve the full $1 billion in annual savings.[11] For

[9] These staffing changes both limit the number of future pilots and slow the career progression for pilots already employed, by making it more difficult for a pilot to move up to higher paying aircraft and routes as he obtains more seniority.

[10] In LOA #46, ALPA negotiated a Pilot Stock Option Plan which provided over 30 million stock options to the pilots, valued at approximately $127 million. All of the options are now without value as a result of the Delta bankruptcy. ALPA also negotiated a profit sharing plan for the pilots which has yet to yield any benefit for the pilots.

[11] This is true as well for the Company's overall $5 billion "transformation" plan. *See* Declaration of Edward Bastian filed on Sept. 12, 2005 ("1st Bastian Dec.") ¶¶23-25 (by "end of

example, Delta reported in its quarterly "Form 41" filings with the U.S. Department of Transportation that its total pilot costs dropped from approximately $546 million in the second quarter of 2004 to approximately $364 million in the second quarter of 2005. This drop indicates that, on an annualized basis, Delta had by the second quarter of 2005 achieved about three-quarters of the $1 billion in savings that LOA #46 will provide.

The $364 million figure when annualized translates into a 2005 annual pilot cost of $1.456 billion. LOA #46, however, will continue to drive down Delta's pilot costs substantially in 2006. According to Delta's own pilot costing of October 14, 2005, its total pilot labor cost for 2006, absent *any* further pilot concessions, would be an amount (which ALPA will present in the hearing) which – when divided by the number of available seat miles ("ASMs") that Delta projects for 2006 – results in a pilot CASM of 0.88 cents. This would mark a significant drop from Delta's pilot CASM of 1.65 in second quarter 2004 and 1.05 in second quarter 2005. *This 0.88 pilot CASM will be achieved in 2006 without a single additional dollar of concessions*.

<u>Delta's Bankruptcy Filing</u>

When Delta began to implement its 2004 "transformation plan" changes, Delta's CEO Jerry Grinstein stated that Delta wanted "to do it once and do it right." Delta's Sept. 22, 2005 SEC Form 8K filing ("Sept. 22 8K"), Ex. 99.2. And Delta, with the help of the pilots' $1 billion in concessions, had done "it right." As of June 2005, it had achieved most of the benefits of the "transformation plan" and was ahead of schedule to meet its goal of $5 billion in financial improvements. *See* Info. Br. at 4. Delta admits that it was fuel prices – not LCC competition,

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2004" Delta had achieved savings of less than half of the $5 billion savings of its transformation plan); 2d Bastian Dec. at 13 n. 6 (by June 30, 2005, "Delta implemented initiatives to achieve approximately 85% of the $5 billion").

not pilot pay – that drove Delta into bankruptcy, as fuel prices rose to unpredicted and extraordinarily high levels and outpaced Delta's efforts to regain profitability. *See id*.

<u>Delta's "In-Court" Two-Year Business Plan</u>

On September 22, 2005, after a week in bankruptcy, Delta announced a new two-year "transformation" business plan aimed at generating an additional $3 billion per year and returning the Company to profitability by the end of 2007. In particular, Delta estimates that its plan will provide a net income in 2007 of $498 million. *See* 2d Bastian Dec. ¶6.

Delta seeks to achieve these targets first by generating $1.1 billion annually through "network improvements" such as fleet simplification and expanded international routes. The Company also seeks in its "transformation" plan $970 million in "in-court savings" such as debt relief and aircraft lease savings and $930 million in savings from its employees. Of the $930 million in employee cost reductions that Delta says it needs, it seeks $325 million from the pilots, in the form of the wage cuts, benefit reductions and work rule changes set forth in its Section 1113 proposal (the "Proposal").

Delta claims that it needs the $325 million from the pilots in order to reduce its pilot CASM to 0.82 cents. *See* 2d Bastian Dec. at 19 (chart). According to Delta, achieving a 0.82 cent pilot CASM would make Delta competitive with the LCCs, by giving Delta a pilot CASM no more than 10% above the average of the LCCs' pilot CASM. *See* Delta's Oct. 19, 2005 SEC Form 8K filing ("Oct. 19 8K"), Ex. 99.1, p. 10. In Delta's analysis, $325 million in additional pilot cuts would reduce its second quarter 2005 pilot CASM of 1.05 by 22%, thus yielding the target of 0.82. *See* 2d Bastian Dec. at 18-19 (including chart on p. 19).

This analysis, however, is critically flawed in its assumption that, without further pilot cuts, Delta's pilot CASM would remain at its second quarter 2005 level of 1.05 cents. Indeed, as explained above, Delta's own costing analysis (even with a necessary upward adjustment pointed out by ALPA) shows Delta achieving an 0.88 cent pilot CASM in 2006 *without any additional cuts in pilot costs*.

<u>Delta's Section 1113 Proposal</u>

Delta's Proposal, *see* Exhibit 3 to Vol. III of Delta's Exhibits, seeks, among other things, to cut pilot wages by 19.5%, eliminate certain pay guarantees, reduce vacation accrual and vacation pay, reduce sick leave pay, impose a "hard" freeze on the accrual of any further benefits in the pilots' defined benefit pension plan (meaning that not only would no further service credits be accumulated, but no future increased earnings would be used in the calculation of pension benefits), discontinue employer contributions to the 401(k) plan, eliminate the pilot stock option plan and require pilots who retire in the future to pay the entire cost of their retiree health insurance. The Proposal also includes numerous work rule changes and changes in the PWA's "scope" or job security section which would allow Delta, among other things, to contract out far more of its flying to regional Delta Connection Carriers flying larger aircraft operated by non-Delta pilots. The Proposal would also eliminate all restrictions on the Company's right to furlough pilots and would further give Delta the right to furlough pilots without notice. Finally, Delta proposes that the terms of its Proposal not become amendable until the end of 2010, thereby seeking to lock in these drastic changes for over five years, a period far beyond the scope of the Company's two-year "transformation" plan.

The only "upside" for the pilots in the Proposal is a marginal enhancement of the employee profit-sharing plan. Currently, the plan pays employees zero unless Delta earns a pre-tax income of over $500 million, pays employees 10% of any pre-tax income between $500 million and $1.5 billion, and pays employees 20% of any pre-tax income over $1.5 billion. The Proposal would amend the plan by providing a payout to employees of 15% of any pre-tax income up to $1.5 billion, but as discussed below, this revision would not come close to making up for pilot concessions under the Proposal, even should the Company's profits suddenly soar.

Failed Negotiations For An Interim Agreement

Although unwilling to accept Delta's patently unnecessary Proposal, ALPA hoped (and continues to hope) to achieve a consensual agreement with the Company regarding PWA modifications that Delta may actually need. Because Delta claimed that it needed contract changes quickly, ALPA proposed that the parties engage in negotiations and try to avoid a Section 1113 process. *See* Delta Ex. 32. The Company then proposed an interim agreement, proposing the full pilot wage cut of 19.5% and the elimination of pay guarantees (as contained in the Proposal) and requiring ALPA to accept this proposal in short order and enter a comprehensive deal within weeks. In return, ALPA offered to have the pilots accept an immediate 9% pay cut – worth about $87 million to the Company – pending negotiations to amend the PWA. In an October 31 counterproposal, however, the Company effectively killed the interim negotiations by demanding that ALPA's negotiating committee accept *that very day* a 19% pilot wage cut, a cut just shy of the 19.5% that Delta seeks in its Proposal, and elimination of certain pay guarantees. Not only did Delta's outrageously short ultimatum guarantee that the interim negotiations would fail, but so too did Delta's attempt to use the *interim* negotiations to obtain nearly the entire pilot pay cut it said it needed in a comprehensive agreement. With interim negotiations effectively out of the way, Delta then filed the instant motion.

ALPA's Counterproposal

On November 9, 2005, ALPA made a comprehensive proposal to Delta which exceeds the cost savings offered in ALPA's interim proposal. The proposal, attached hereto as ALPA Exhibit 1 ("Ex. 1"), provides average annual cost savings of approximately $90.7 million over four years. It provides Delta with over $105 million in 2006, during which the Company's cushion above the EBITDAR DIP loan covenant minimum is at the lowest. *See* 2d Bastian Dec. at 11. The proposal also provides for, among other things: (1) a reduction in pilot pay by 9% commencing December 1, 2005 (for 7 months), and then by 7% (for 6 months) and 5% thereafter; (2) elimination and reduction of other pilot pay guarantees; (3) a reduction in vacation pay; (4) changes in work rules; (5) a "hard freeze" for the defined benefit plan; (6) reduction in other benefits; and (7) that any plan of reorganization provide equity, security or other consideration for its pilots after their concessions under the ALPA proposal and in 2004. *See* Ex. 1.

ARGUMENT

I. SECTION 1113 OF THE BANKRUPTCY CODE IMPOSES STRICT SUBSTANTIVE AND PROCEDURAL REQUIREMENTS THAT DELTA HAS NOT SATISFIED

Section 1113 requires a Chapter 11 debtor seeking to modify a collective bargaining agreement without the union's consent to seek court approval to reject the agreement under standards far more stringent than those applicable to ordinary commercial contracts. 11 U.S.C. §1113. Combining labor and bankruptcy goals, the procedural and substantive elements of Section 1113 are designed to promote collective bargaining and to ensure that unionized employees, while contributing to the reorganization effort, do not bear a disproportionate burden of the debtor's reorganization. *See In re Century Brass Prods., Inc.*, 795 F.2d 265, 272-73 (2d Cir. 1986); *see also In re U.S. Truck Co. Holdings, Inc.*, 165 L.R.R.M. (BNA) 2521, 2530 (Bankr. E.D. Mich. 2000) ("Congressional goal evidenced by Code §1113 is to encourage the debtor in possession and the labor union to reach a mutually acceptable agreement"). The Bankruptcy Code gives collective bargaining agreements special status in recognition of the national labor policy favoring collective bargaining and the important role of collective bargaining in maintaining labor and economic stability.

Section 1113 was enacted specifically in response to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco,* 465 U.S. 513 (1984). The *Bildisco* decision heightened and confirmed existing fears that companies were using the "bankruptcy law as an offensive weapon in labor relations." *Adventure Resources, Inc. v. Holland,* 137 F.3d 786, 797-98 (4th Cir. 1998) (*quoting In re Roth American,* 975 F.2d 949, 956 (3d Cir. 1992)). *Bildisco* was met with immediate and fierce opposition by organized labor. *See Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.,* 791 F.2d 1074, 1082-84 (3d Cir. 1986) (examining legislative history). Agreeing that *Bildisco* created a "new and dangerous imbalance in the collective bargaining process," 130 Cong. Rec. H1831 (daily ed. March 21, 1984) (comments of Rep. Vento), Congress enacted Section 1113, which "replace[d] the *Bildisco* standard with one that was more sensitive to the national policy favoring collective bargaining agreements." *Wheeling-Pittsburgh*, 791 F.2d at 1089; *see also* 130 Cong. Rec. S8898 (daily ed. June 29, 1984) (comments of Sen. Kennedy) (the intent of the law is "to overturn the *Bildisco* decision which had given the trustee all but unlimited discretionary power to repudiate labor contracts and to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process").

Congress accomplished its objective by taking the rejection of collective bargaining agreements out of Section 365 of the Bankruptcy Code and creating a separate statutory section applicable to such agreements which "provides that a debtor in possession may assume or reject a collective bargaining agreement only by following the provisions of the statute." *Wheeling-Pittsburgh*, 791 F.2d at 1083. Section 1113 was intended to restore the balance of power in collective bargaining in bankruptcy by (1) creating *substantive* protections that, among other things, require a debtor to establish that its proposal is limited to those "necessary modifications in . . . employee benefits and protections that are necessary to permit the reorganization of the debtor" and "assure[s] that all creditors, the debtor and all of the affected parties are treated fairly and equitably," and (2) imposing strict procedural requirements that must be satisfied prior to seeking rejection of a collective bargaining agreement, including the requirement that the debtor provide the union "with such relevant information as is necessary to evaluate the proposal" and meet with the union "to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement." 11 U.S.C. §1113(b) (emphasis added).

Delta has failed to meet this Section 1113 standard. It has also refused to accept ALPA's reasonable proposal that provides Delta with more than is "necessary" and treats the pilots fairly and equitably.

II. DELTA CANNOT ESTABLISH THAT ITS PROPOSED CHANGES TO THE PWA ARE NECESSARY TO PERMIT ITS REORGANIZATION

Section 1113 requires that any modifications allowed by the court must be necessary. *See* 11 U.S.C. §1113(b)(1)(A). Although the Second Circuit has held that debtors need not first present the "absolutely minimal" modifications necessary for reorganization as a prelude to 1113 relief, *see Truck Drivers Local 807, IBT v. Carey Transp., Inc.*, 816 F.2d 82, 88 (2d Cir. 1987); *In re Royal Composing Room, Inc.*, 848 F.2d 345, 348 (2d Cir. 1988), the debtor must nonetheless prove that the proposed changes are necessary "to complete the reorganization process successfully." *Carey*, 816 F.2d at 90. As the Second Circuit has noted, Congress imposed a heavy burden of proof on the debtor seeking rejection "to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion." *Century Brass*, 795 F.2d at 272.

A. <u>Delta Does Not Need $325 Million In Additional Pilot Cuts To Achieve Its Target Pilot Labor Costs</u>

Delta's entire case rests on a flawed analysis, namely, that it needs $325 million in additional pilot cuts to achieve its target of a 0.82 cent pilot CASM. ALPA's analysis addresses the Company's pilot costs structure from three different perspectives. First, we use Delta's own costing analysis to demonstrate that Delta can reach its pilot CASM target with no more than the additional average $90.7 million in annual savings that ALPA proposes. We then use two other sources of data – public data reported by Delta to the U.S. Department of Transportation and figures from Delta's own business model – to confirm this analysis.

First, ALPA relies on Delta's pilot costing of October 14, 2005. As noted, *supra*, p. 14, this Company costing yields a pilot CASM of 0.88 cents for 2006. To bring this pilot CASM figure down to Delta's target of 0.82 cents would require a reduction of pilot labor costs of $78 million, substantially less than the $105.9 million that ALPA's proposal offers in 2006 concessions. Indeed ALPA's proposal would bring the pilot CASM to 0.79 cents in 2006 and 0.78 cents in 2007, below the figure Delta seeks to attain.

ALPA's second approach uses the public "Form 41" data that Delta files quarterly with the U.S. Department of Transportation. Using this data, ALPA calculates what Delta's pilot CASM *would have been* in second quarter 2005 had Delta achieved the entire LOA #46 savings by that time. ALPA does not contend that Delta did or should have captured all the LOA #46 savings in second quarter 2005; we perform this exercise simply to test the hypothesis that *when* Delta does achieve the entire LOA #46 savings in 2006, its pilot CASM will fall to 0.88 cents without any additional pilot concessions. The Form 41 data, which contains both pilot labor cost figures and available seat mile figures, indicates that Delta's total pilot costs were approximately $546 million in second quarter 2004 and $364 million in second quarter 2005. The difference between these two numbers, after necessary adjustment is made to account for the difference in available seat miles between the two quarters, is about $190 million, a figure that represents the actual savings that LOA #46 produced through second quarter 2005.[12] Because the full $1 billion in annual savings that LOA #46 provides would amount to $250 million per quarter, the difference between $250 million and the actual realized savings of $190 – about $60 million – is the amount of LOA #46 savings *unrealized* as of second quarter 2005. If that $60 million *had* been realized in second quarter 2005, the total pilot cost for the quarter would have been $60 million less than it actually was, or about $304 million. Divided by the available seat miles for that quarter, this pilot cost yields a pilot CASM of 0.88 cents – exactly the same number that we estimate for 2006 using Delta's costing analysis. In other words, this second prong of ALPA's analysis confirms that without any additional pilot concessions, capturing the full amount of the LOA #46 savings yields a pilot CASM of 0.88 cents.

ALPA's third approach uses figures from Delta's bankruptcy business plan. Delta built its business plan using, among other things, cost figures from the Company's various departments, including its flight operations department (about 97% of the flight operations department's costs are pilot labor costs). As ALPA will show at the hearing: (1) Delta's business plan does not account for a portion of pilot savings that Delta agrees LOA #46 will generate, and (2) when this missing pilot savings is taken into account, and deducted from the model's figure for 2006 flight operation costs, and then divided by the Company's ASM estimate for 2006, the analysis yields a pilot CASM once again of 0.88 cents, just as ALPA's two other approaches do. This provides yet further confirmation that LOA #46 by itself – with no further

[12] Adjustment of the actual difference to $190 million is required to properly compare the two quarters because the second quarter 2005 had more available seat miles and this difference alone drives up the pilot costs. The adjustment controls for this difference and make an apples-to-apples comparison.

pilot concessions – will take pilot CASM to 0.88 cents. Thus, it would take no more than $78 million in additional pilot concessions to bring the pilot CASM down to the Company's target of 0.82 cents. A $90.7 million average annual pilot cost reduction brings the pilot CASM to *below* Delta's requested level. Delta certainly does not need $325 million in additional pilot concessions.

Taking an additional $325 million annually from the pilots would push Delta's pilot labor CASM down to 0.63 cents in 2006, as ALPA will show at the hearing. This 0.63 cents level is far below anything Delta claims it needs to return to profitability. Indeed, it would push Delta's pilot labor CASM to just above the level at JetBlue and below all other carriers with which Delta compares itself, including US Airways and Air Tran. *See* 2d Bastian Dec. at 19 (chart).

Because Delta cannot prove that it needs the entire $325 million it seeks in pilot cuts, the Section 1113 motion fails; a debtor cannot just prove that it needs some relief, it must prove that it needs the amount of relief it has requested. *See In re Fiber Glass Indus., Inc.*, 49 B.R. 202, 206-08 (Bankr. N.D.N.Y. 1985) (court record "does not permit approval of the debtors' [Section 1113] application" where debtor did not provide evidence that the "particular" level of employee concessions was necessary for reorganization, even though debtor may be "correct ... that without substantial modifications of this contract, the debtor faces liquidation"); *see also* this Court's prior decision in *In re Royal Composing Room, Inc.*, 62 B.R. 403, 410 (Bankr. S.D.N.Y. 1986) (Union may appropriately focus on the Company overall proposed package "if the bargaining were over the *amount* of the relief the Debtor required or the *proportion* of the total relief needed to be allocated to the Union") (emphases in original).

B. <u>Delta Does Not Need An Additional $325 Million To Return To Profitability And To Avoid Breaching Its DIP Loan Covenants</u>

Delta's business plan seeks to attain a net income of $498 million for 2007. *See* 2d Bastian Dec. ¶6. Delta does not need $325 million from the pilots to accomplish this since, as described above, LOA #46 is still generating as yet unrealized savings. When the full $1 billion in LOA #46 savings are realized by the end of 2006, additional average annual pilot concessions of $90.7 million will produce an operating margin and net income of almost precisely Delta's goal.[13]

Similarly, as ALPA will demonstrate at the hearing, when LOA #46 savings are fully accounted for, the additional concessions that ALPA is offering will enable Delta to achieve virtually the same liquidity and EBITDAR levels that it currently projects in its business plan and to avoid breaching its DIP loan covenants by a comfortable margin.

Delta bases its argument that it could be in danger of breaching its DIP loan covenants on the assumption that it would get *no* additional labor savings it seeks from the pilots or non-pilot employees. *See* 2d Bastian Dec. at 12 (showing breach if model "[e]xcludes $930 million of annual labor cost"); *see also* Declaration of Timothy R. Coleman ("Coleman Dec.") at 8 (containing projections of financial performance "excluding $930 million of annual labor cost reductions"). This is a baseless assumption, first, because the non-pilot employees from whom Delta seeks $605 million of the $930 million in total labor costs savings are non-union employees, unprotected by a collective bargaining agreement. Delta is free to, and will, implement its cost-savings measures as to them, capturing the $605 million.

[13] The operating margin that ALPA's offer would generate, which is just shy of Delta's own target, would make it very attractive to lenders and investors.

Given that Delta *will* get the $605 million in savings from the non-pilot employee group, Delta makes no showing that it also needs the *entire* $325 million in proposed pilot savings to avoid being in danger of breaching its DIP covenants. *See In re Fiber Glass Ind*, 49 B.R. 202, 206-08 (Bankr. N.D.N.Y. 1985); *see also In re Royal Composing Room, Inc.*, 403, 410 (Bankr. S.D.N.Y. 1986). As demonstrated above, the pilot concessions in ALPA's proposal would provide a more than sufficient cushion.[14]

C. Delta Has Not Established That It Needs The Full $325 Million To Remain Competitive Or To Return To Profitability

The Company contends that it needs pilot cost reductions in order to make its unit costs and pilot CASM competitive. *See* Delta Memorandum in Support of the Motion to Reject ALPA Collective Bargaining Agreement ("Delta Mem."), at 11. This argument is without merit.

As ALPA will show at the hearing, Delta's overall CASM is below that of the other network carriers – American Airlines, United Air Lines and Continental Airlines – the group of premier carriers of which Delta considers itself part. It is also nearly the same overall CASM as US Airways. Delta's projected CASM, through its transformation plan, will likely be comparable to the overall CASM of American, United and Continental and close to US Airways, even without any further pilot reductions.

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[14] Moreover, Delta's plan includes a highly questionable "management focus penalty," in which Delta assumes that management will be unable to capture millions of dollars in otherwise obtainable savings due to management being distracted by bankruptcy related issues. We are unaware of any other carrier or debtor claiming such a "penalty" nor are we aware of any court having ever endorsed the theory. It seems particularly questionable here given the large number of advisors that Delta has employed at great expense to assist it in bankruptcy matters, leaving management largely free to concentrate on operations. If this "penalty" were removed from Delta's business plan, Delta would have need for even less pilot cost reductions than it claims. In any event, there is no justification for making Delta's pilots pay further for management's inability to do its job.

Delta makes the claim that it needs to reduce its CASM in order to compete with the LCCs which, according to Delta, are competing with Delta on more and more routes. *See* Delta Mem. at 11. As noted, Delta concludes that in order to remain competitive its "costs must be within 10% of LCCs' costs." *See* Oct. 19 8K, Ex. 99.1, at 10. Delta identifies AirTran and US Airways as principal competitors. *See* Info Br. at 14-15; 2d Bastian Dec. ¶43. But Delta's CASM is *currently* within 10% of AirTran's CASM, *see* Oct. 19 8K, Ex. 99.1, at 10 (CASM figures for first half of 2005; hence, Delta's CASM does not include all cost savings to be achieved under LOA #46), and of the CASM of US Airways.[15]

Delta acknowledges, moreover, that the issue is not simply what its CASM level is, but how this level compares to its revenue per available seat mile ("RASM"). Delta Mem. at 11. It is the amount by which RASM exceeds CASM that generates profit. *Id*. Delta concedes that as a premier carrier, it "generates a 'revenue premium' relative to LCCs due to the structure of its network assets and the generally higher mix of business travelers." Coleman Dec. ¶12; *accord* 2d Bastian Dec. ¶41.[16] Through its business plan's revenue initiatives, Delta is planning to achieve a higher RASM in 2007. As ALPA will show, even without any pilot concessions, the difference between Delta's RASM and CASM will likely be higher in 2007 than the other network carriers and LCCs.[17]

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[15] Delta asserts that US Airways is a "competitive threat to Delta" on international flying because the two carriers fly to the same general "destinations." Info. Br. at 16. This ignores that Delta's passengers leave from different U.S. points than US Airways passengers and that US Airways has few transatlantic flights to the European cities served by Delta.

[16] As ALPA will show, Delta's revenue premium over LCCs is above 10%, *contra* Delta Mem. at 6.

[17] Delta asserts that it has been "significantly affected by LCCs" as shown by the fact that it currently has "LCC competition in 46 (*92 percent*) of its 50 largest domestic markets. Delta Info. Br. at 13-14 (emphasis in original). However, the extent of this effect is questionable. In the late 1990s when Delta "generated *record profits through the end of the decade*," *id*. at 7, it

D. <u>Delta Has Not Established A Need To Lock-In the Proposed Pilot Pay and Benefit Cuts For Five Years</u>

The Proposal would keep in place its proposed pilot pay cuts, benefit reductions and workrule changes through December 31, 2010. Delta has made no showing that it needs to lock in these pilot cuts for over five years.[18] Indeed, Delta's own business plan shows that employee cuts, combined with the other elements of the "transformation" plan, will return Delta to profitability in 2007. *See* 2d Bastian Dec. ¶6. Once Delta is back on its feet financially, there would be no justification for keeping the pilots working under the yoke of the huge pay and benefit cuts set out in the Proposal. No other employee group, including management, will have their pay and benefits cuts frozen; presumably, Delta will adjust upward the pay and benefits of these other groups as the financial picture in 2007 and thereafter allows. Indeed, that is exactly what Delta did in the 1990s: while keeping depressed pilot pay in place, it freely shared with its non-union employees the benefits of the prosperity it enjoyed at the end of the 1990's.

Moreover, it is impossible to know now what the state of the economy, the airline industry, and Delta's finances will look like in 2008, 2009 and 2010. *See* Delta Mem. at 25 ("no one can say for certain what the future portends"). Indeed, Delta does not even have a business plan that goes beyond 2007. Delta cannot possibly prove to this Court that it will be unable to turn a profit three, four or five years out unless the pilots continue to work under the pay and benefit cuts contained in the Proposal. Its proposed five-year term constitutes exactly the type of overreaching and opportunistic use of bankruptcy that Congress sought to end when it enacted

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had LCC competition in 34 to 38 (up to *75 percent*) of Delta's largest domestic markets. *Id*. at 14. Delta was able to remain profitable at that time even with substantial LCC competition. It could do so then, and could do so now if properly managed, because of Delta's ability to charge a revenue premium. Further, LCC competition in Delta's 50 largest domestic markets has increased by only 12% since 2001.

[18] ALPA's proposal maintains the current duration of its PWA – December 31, 2009.

Section 1113. *See Adventure Resources*, 137 F.3d at 798 (Section 1113 intended to prevent use of bankruptcy law as "as an offensive weapon in labor relations") (citation omitted).

Delta argues that it needs to lock in pilot costs for five years "to assure potential investors and leaders that Delta's costs will remain under control." Delta Mem. at 32. Delta provides no evidence, however, that investors and lenders will only provide Delta with necessary capital if it achieves five years' of guaranteed depressed pilot pay. To the contrary, Delta's investment advisor indicates that two years of savings from Delta's business model would give it sufficiently attractive metrics of financial health. *See* Coleman Dec. ¶¶17-18 and accompanying charts. That is all that is required to attract potential investors and lenders; they do not need a guarantee that Delta's costs will not increase going forward from 2007. Indeed, Delta could never give such a guarantee, given that it has only a two-year model. Further, given Delta's self-proclaimed "market approach" to paying its non-union employees, Delta Mem. at 22, Delta may well have to raise non-pilot employee pay if the labor markets for those employees tighten. Indeed, Delta virtually guarantees that it will raise management pay, to avoid attrition in its management ranks. *See* Delta Mem. at 24, n.22. These non-pilot labor costs – added to possible increases in fuel costs, *see* 2d Bastian Declaration ¶21 – together far exceed Delta's pilot costs. It makes no sense, and is unfair, to argue that capital markets will need to be assured that Delta's pilot costs will "remain under control" for five years, Delta Mem. at 32, when Delta gives no such assurance as to other, collectively greater, cost items.

Finally, Delta claims that a duration shorter than five years is not workable. *See* Delta Mem. at 32. It fails to explain, however, why it would be unworkable for appropriate pilot pay reductions to remain in place for one year less (per ALPA's proposal) or an even shorter period (in 2007, when Delta is profitable).

III. THE PROPOSAL WOULD GIVE DELTA GREATER SAVINGS THAN IT NEEDS

A. Even Under The Company's Own Costing Analysis, The Proposal Would Generate More Than $325 Million In Annual Savings

The Company's own costing of the Proposal indicates that it would give the Company more than the $325 million in pilot labor savings that it says it needs: its costing shows the items in the Proposal would yield annual savings of $339.7 million. *See* Carolan Dec. at 8. In negotiations, Delta indicated to ALPA that it would, within certain constraints, accept any combination of items in the Proposal that yielded $325 million. *See id*. at 7 n.10. But Delta *failed* to negotiate an agreement with ALPA and is now seeking relief under Section 1113 based on a proposal that it admits would yield more savings than it claims it needs. Since Section 1113 requires that the proposal on which a request for relief is made contain only "those necessary modifications in the employee benefits and protections that are necessary to permit the reorganization of the debtor," 11 U.S.C. §1113(b)(1)(A), the Court should reject Delta's application on this ground alone. Unlike a party to a negotiation, the Court is not free to pick and choose which items should be included.

B. The Proposal Would Produce Substantial Savings For Which The Company Has Not Accounted

In addition, the Proposal would yield far more savings to Delta even than the $339.7 million that it projects. For example, Delta fails to attribute any cost savings to its proposed elimination of the "rotation pay guarantee," which guarantees a pilot a certain minimum amount of pay for the series of flights that constitute a "rotation," even if the Company cancels one or more of the flights. Delta's pilot data summary shows that a certain percentage of the hours for which it paid its pilots in the last year was attributable to such rotation pay guarantee. Using this data, ALPA estimates that if the Proposal were implemented, Delta would reap about $6.1 million in savings per year from the elimination of pay guarantee. In any event, there can be no doubt that Delta errs in attributing *zero* cost savings to this item in the Proposal.

Delta also attributes *zero* cost savings to the change in the PWA's scope clause that would allow it to contract out more flying to pilots employed by the Delta Connection Carriers ("DCC") – through the provision of a large number of 79-seat aircraft to these DCC carriers which perform flying on behalf of Delta with non-Delta pilots. *See* Exhibit 5 to Vol. III of Delta's Exhibits, at p.2. By contracting out flying that would otherwise have been performed by Delta pilots, the Company would have less work available for the Delta pilot group, and would thus be able to reduce its pilot headcount accordingly. Indeed, the Company forecasts furloughing 300 additional pilots by the end of 2007. The resulting pilot furloughs would produce substantial savings for the Company, projected in the range of $54 million, not including costs the Company would avoid by not having to train these furloughed pilots.[19] The Company's failure to "credit" ALPA for the savings that would be produced by the contracting out of pilot work is particularly unfair since Delta does "credit" non-pilot employees with the savings that would be produced by outsourcing some of their work.[20]

Even when Delta attributes a cost savings to a particular item in its Proposal, in many instances it undervalues the savings that the Proposal would yield. For example, the Proposal seeks to eliminate the current requirement in the PWA that all furloughed pilots be recalled by August 1, 2008. *See* Carolan Dec. at 8; Company, Ex. 1 (PWA Section 1.J.3, per

[19] Delta, like all commercial carriers, provides mandated training for its pilots both on a regular recurring basis and also when a pilot is assigned to a different aircraft type.

[20] The "transformation" plan contemplates, and includes within the $605 million to be sought from the non-pilot employees, an annual savings of $225 million from "outsourcing and/or elimination of non-pilot positions." Delta Mem. at 22. Thus, the Company "credits" these non-pilot employees with the savings Delta will obtain from having someone else do their jobs more cheaply, but gives the pilot no credit for the same thing.

LOA #46). Delta estimates that eliminating this mandatory recall provision would save it $5.8 million, based on its projection that it would have 368 pilots on furlough by August 1, 2008, and that even if it furloughed these 368 again immediately after recall, it would have to pay them contractually-mandated recall pay. Delta's savings estimate here is far too low because the number of pilots who will be on furlough on August 1, 2008 will likely be far higher than the Company's estimate of 368 (an estimate that Delta never explained to ALPA). The Company currently has 475 furloughed pilots; its own projection is that its planned operational changes will produce another 300; and ALPA conservatively estimates that reductions in pilot vacation allowances and work rules, by allowing the Company to squeeze more work from the pilots, would probably produce at least another 100.

C. The Proposal Contains Work Rule Changes That Are Counterproductive

In evaluating the Proposal, the Court should note that certain items that the Company seeks are squarely at odds with the Company's proclaimed need to further increase pilot productivity. For example, the Company proposes eliminating "duty period credit" and reducing "rotation credit." *See* Proposal, §§12(K), 12(L)(1). "Duty credit" penalizes the Company for the inefficient use of a pilot's time, by requiring the Company to pay the pilot for time it keeps him on duty but not flying. "Rotation credit" does the same, by requiring certain payment to a pilot for the entire time he is assigned to a rotation of flights, even if poor management planning leaves him on the ground for long periods between flights. These work rules promote productivity by creating an incentive for management to minimize the amount of time a pilot spends waiting around between flights. Eliminating or diluting these incentives is simply counterproductive.

As another example, the Company proposes that when a first-officer pilot on a 100-seat aircraft bids for a new assignment, he be permitted to bid only for the captain seat in that same aircraft, and not for assignment on any other aircraft. *See* Proposal, §22(G)(4). The necessity of having the Court allow Delta to impose this item on the pilots is highly suspect because Delta *has no 100-seat aircraft* and has no current plans (and no readily available cash) to acquire them. This is yet another example of Delta's overreaching, using Section 1113 as an opportunity to grab any and every pilot workrule change on its long wish-list. This 100-seat aircraft item is also counterproductive because it will reduce operational flexibility, preventing the 100-seat first officer from being assigned where there may be vacancies on other aircraft. In particular, since the 100-seaters (if Delta ever acquires them) will likely be the entry-level aircraft for newly hired pilots, unless vacancies develop in the captain seat, a bottleneck will quickly develop when Delta starts replacing retiring pilots with new hires.

IV. DELTA FAILS TO ESTABLISH THAT ITS PROPOSAL TREATS THE PILOTS FAIRLY AND EQUITABLY

Section 1113(b)(1)(A) requires that a debtor demonstrate that "all creditors, the debtor and all of the affected parties are treated fairly and equitably." The Second Circuit has found that the purpose of this provision "is to spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree." *Century Brass*, 795 F.2d at 273.

A. Delta Seeks Disproportionately Greater Sacrifice From Its Pilots Than From Other Employee Groups

1. Pilot Pay Cuts Would Be The Deepest and Longest Lasting

Delta seeks far greater sacrifice from the pilots than from any other employee group. The Company seeks to cut the pilots' pay by 19.5%, while cutting pay of senior management (other than the CEO) by only 15%, supervisory and administrative personnel by only 9% and other employees by only 7 to 10%. *See* Delta's Sept. 22 8-K. Not only would the pilots' pay cuts be the deepest (with the sole exception of the CEO), they would also be the longest lasting. The Proposal would lock in the 19.5% pilot wage cut through at least 2010. By contrast, the Company has made no commitment to maintain the pay cuts for its other employees for any length of time and would be free, whenever it chose, such as when its financial condition improves in 2007, to restore some or all of the pay of the other employee groups. Indeed, the Company has a history of sharing renewed prosperity with certain employees groups but not the pilots, *see supra*, pp. 8-9 (discussing 1996 to 2000 time period).

Moreover, when viewed from the perspective of the 2004 concessions, it becomes clear that the total amount of pilot givebacks that the Company is seeking is grossly disproportionate to the sacrifice it seeks from other employee groups. In 2004, the pilots agreed to a concessionary package of 32.5% pay cuts and substantial benefit reductions that saved the Company $1 billion on an annual basis. *See* Delta Mem. at 33-34. If the Court grants the further pilot pay cuts that the Company now seeks, the pilots will have suffered a remarkable compound paycut of *46%* within slightly over a year and given the Company at least *$1.339* billion in annual savings. No other employee group will come close to that level of sacrifice. We are not aware of any such level of concessions by any comparable group of employees in the airline industry – or, indeed, in *any* industry.

Delta seeks to justify the grossly disparate cuts in pilot versus non-pilot pay by asserting that the pilots' share of the total labor savings that Delta seeks – 35% – is the same as the pilots' share of the Company's payroll in the first half of 2005. *See* Carolan Dec. ¶2 & n.4. But the pilot concessions from LOA #46 continue to drive down pilot labor costs, so without any additional cuts, pilot labor costs in 2006 will be substantially lower than they were in 2005. *See supra*, p. 14. Accordingly, by 2006, even without further cuts, pilot payroll will constitute less than 35% of the Company's labor costs, making it that much more inequitable for the pilots to have to bear 35% of Delta's proposed employment cost savings. For example, the pilots now constitute about 32% of Delta's labor CASM. *See* 2d Bastian Dec. at 19-20 (charts showing second quarter 2005 pilot CASM was 1.05 cents, out of a combined pilot and non-pilot employee CASM of 3.26 cents). Delta plans to reduce its non-pilot labor CASM to 1.77 cents in 2006. *See* Oct. 19 8K, Ex. 99.1, p. 12. As described above, *see supra*, pp. 14, 23, the continued LOA #46 savings will drive 2005 pilot CASM from 1.05 to 0.88 cents, and an additional $325 million in cuts would drive it down to around .63 cents. At this level pilot CASM would be only 26.3 % of Delta's total labor CASM. This alone demonstrates that Delta is seeking to impose on its pilots a disproportionate share of the total 2005 labor reductions.

In trying to minimize the disproportionate amount it is seeking from the pilots versus the other employee groups, Delta asks the Court to focus on pay levels solely between 2000 and 2005. *See* Delta Mem. at 17-18. The myopic focus on this timeframe, however, distorts the picture. First, it *ignores* the late 1990's, *see* discussion above, pp. 8-9, during which Delta "generated record profits," *See* Info. Br. at 7, profits it shared at the time with its management and non-union work force, and not with the pilots.

In addition, the Company's chosen timeframe deliberately shifts the focus away from the period that matters most: the present, or, more precisely, the period beginning in 2004 and continuing today, during which Delta has been seeking to reorganize and transform its operations to cope with mounting financial pressures. During this critical period the pilots have indisputably borne most of the financial sacrifice, agreeing to take huge pay cuts and sharp benefit reductions for the greater good of the Company.

Delta also attempts to minimize the pilots' sacrifice by noting that the pilots' actual compensation since the 2004 concessions has not fallen by the same percentage as the

32.5% pay cut they received. *See* Delta Mem. at 19. If so, this is only because pilots have worked more hours, and more efficiently, and because some pilots have moved from first officer to captain or have moved to larger equipment—either move being a very great increase in responsibility. *See* Delta Mem. at 19. Further, the pilots' actual compensation since 2004 has dropped at more than twice the rate of the non-pilot employees. *See* Carolan Dec. at 33 (chart at top of page) (pilot compensation dropped 15.4% from 2004 to 2005, while non-pilot employee pay dropped only 6.4%). In dollar terms, the Delta pilots on average lost about $31,000 in earnings – multiple times the magnitude of losses suffered by any other employee group. *See id*. Thus, while the Company may not have achieved a 32.5% reduction in pilot earnings, it achieved both a double-digit reduction in pilot earnings *and* a substantial increase in pilot labor.

The Company claims that the non-pilot employees "have borne the brunt" of cost reductions since 2000 in part because their numbers have been reduced by almost 33% since 2000. *See* Delta Mem. at 17. According to Delta, flying capacity has only been reduced by 7.2%, "which demonstrates the huge increase in productivity of the remaining non-pilot employees." *See id*. But the pilots have suffered an even more severe decline in their relative numbers since 2000, with a drop of over 36%. *See* Carolan Dec. at 22 (chart at top of page). By the Company's logic, this larger percentage reduction in the number of pilots means that the pilots' productivity has grown faster than the non-pilot employees'.

2. <u>The Proposal Would Drive Pilot Pay Below Market Levels While The Pay Of Delta's Non-Pilot Employees Would Remain Substantially Above Market Rates</u>

Delta's own analysis shows that its Proposal would drive Delta pilot pay to a level 6.9% *below* the average pay of thirteen large and mid-sized airlines. *See* Wachter Dec., Ex. 1. It would leave the Delta pilots earning less than pilots at such relatively small or low-cost carriers as Frontier, Alaska, AirTran and JetBlue. *See id*. Delta has demonstrated no need to drive its pilot pay levels below the levels of these other carriers, which operate smaller planes over shorter routes and that all have substantially lower revenue generating capability than Delta.[21]

In addition, Delta's own analysis shows that the Proposal would drive the pilot to non-pilot employee pay ratios at Delta below industry standards. Exhibit 5 of Michael Wachter's declaration shows the ratios of pilot pay to the pay of seven different categories of non-pilot employees. In none of these categories would the ratios at Delta after implementation of the Proposal be higher than the corresponding ratios at the thirteen large and mid-sized carriers to which Delta compares itself, and in four of the seven categories Delta's ratios would be *lower*. *See* Wachter Dec., Ex. 5 (indicating that post-Section 1113, Delta would have lower ratios between pilot pay and the pay of utility employees, above wing customer service agents, supply attendants and reservation agents).

Delta points out that even after the pay cut it seeks, Delta pilots would on average still earn more than the monthly average earnings for individuals in various occupations outside the aviation industry, such as optometrists and marketing executives. *See* Wachter Dec., Ex. 4. This proves nothing. The pilots of nearly *every one* of the thirteen large and mid-size airlines to which Delta compares itself would also earn more than individuals in these other occupations. *Compare* Wachter Dec., Ex. 1 *to* Wachter Dec., Ex. 4. In any event, "the unique nature of the pilot job," Wachter Dec. ¶35, makes comparison to other professions of little, if any, significance. Marketing executives, for example, do not have to retire at 60, do not have to pass regular physical fitness exams and government-mandated training to keep their jobs, and do not

[21] Delta points out that Delta pilots earn more than the pilots at regional airlines and would continue to even after a $325 million cut in their costs. *See* Wachter Dec. ¶¶31-34 & Exhibit 3. But comparing the pay of Delta's pilots to those of regional carriers is comparing apples to oranges, as ALPA will explain at the hearing. For one thing, Delta admits, as it must, that regional carriers "have much lower operating costs than the major carriers." Carolan Dec. ¶18(a).

operate multi-million dollar pieces of equipment with scores of human beings seated inside, often through turbulent and dangerous skies. Pilots, but not marketing executives, must execute flawlessly, time after time.[22]

While the Proposal would drive Delta pilot pay below market level, the pay of Delta's non-pilot employees would remain substantially above market levels even after the pay cuts Delta implements. Delta concedes that its "employees currently are highly paid as compared to those in similar occupations outside the airline industry." Wachter Dec. ¶66. Even after Delta's planned pay cuts, these non-pilot employees will continue to enjoy a healthy pay premium. Delta's own analysis shows that its mechanics will earn 38.1% more than workers performing comparable work elsewhere in the economy, its utility workers 32.5% more, its "below-wing" customer service agents 30.1% more and its "above-wing" customer service agents 28.9% more. *See* Wachter Dec., Ex. 8.

That these non-pilot employees enjoy a substantial pay premium is also demonstrated by the fact that they rarely quit their jobs. While workers in the overall economy quit their jobs in 2004 at an annual rate of over 21%, less than 2% of Delta's flight attendants and mechanics quit and less than 5% of its utility employees, supply attendants and customer service agents quit. *See* Wachter Dec., Ex. 13. What makes these low quit rates even more remarkable is that these non-pilot employees are non-union. Unlike the pilots, who would sacrifice highly-valuable, non-transferable collectively-bargained seniority rights if they quit, non-union employees lose no contract rights by quitting. Moreover, unlike the pilots, whose

[22] Even more meaningless is Delta's comparison of Delta pilot benefits to the benefits of the average U.S. private sector worker. *See* Wachter Dec. ¶¶76-85. First, while Delta pilots have better benefits than the average worker, so to do the pilots at the other major airlines. And better benefits are justified since, among other things, pilots have much more training and responsibility and risk than the average worker.

skills in the cockpit are not readily transferable to other industries, non-pilot employees like mechanics or customer service agents can readily apply their skills elsewhere. This strongly suggests that the non-union Delta employees stay at Delta for one reason: they are very well paid and will continue to be so, even after Delta implements its cuts.[23]

In any event, pilot job stability is exactly the goal that Delta should most want to maintain. Experience, maturity, and good judgment are the product of long service, not rapid turnover. The public, and Delta, all benefit mightily from the dedication of the Delta pilots to their careers and their company—a dedication that management has never come close to matching.

B. The Pilots Will Likely Suffer Enormous Losses In This Reorganization In Addition To Any Of The Cuts Set Forth In Delta's Section 1113 Proposal

In weighing whether it is fair and equitable for the Company to impose on its pilots cost reductions of $325 million, the Court should also keep in mind the enormous additional sacrifices that the pilots will likely suffer before this Chapter 11 case is through, and also the savings that these sacrifices will generate for the Company. In particular, it should consider the likely termination of the pilots' pension plans and the hundreds of pilot furloughs that will likely occur.[24]

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[23] Delta's management makes the claim that its own members are underpaid. *See* Wachter Dec. ¶59. This claim is self-interested, as management will very likely be asking the Court's permission soon to give itself raises. *See* Delta Mem. at 24, n.22. In any event, Delta's own labor economist could not endorse the specifics of management's analysis that it is underpaid. *See* Wachter Dec. ¶60.

[24] Delta makes clear that in calculating the savings from its Proposal, it does not include either cash saved due to its failure to contribute to the pension plans or from "reduced headcount" due to planned capacity reductions. *See* Delta Mem. at 3, n.5.

1. <u>Likely Termination Of Pilot Pension Plan</u>

If Delta continues to fail to make pension contributions to the pilots' pension plans – and it has announced that it will not make those contributions – those plans may well be terminated. Delta omits this in its brief. It fails to mention that such termination would cause staggering losses to the pilots and at the same time allow the Company to capture savings of as much as $179 million in 2006[25] and as much as $1.6 billion through the end of 2009.[26] The PBGC estimates that participants in Delta's pilot and non-pilots pension plans would lose a total of $2.2 billion in accrued benefits if those plans were terminated. *See* PBGC Sept. 15, 2005 press release entitled "Statement of PBGC Executive Director Bradley Belt on Airline Bankruptcy Filings." Most of this loss would fall on the pilot plan participants, since PBGC guarantees would replace most of the pension losses of the other employees but would replace a mere fraction of the pilots' losses. When US Airways' pension plans were terminated, for example, the pilots lost $1.9 billion, or over 50% of their accrued benefits, while non-pilot participants lost just $0.2 billion, or less than 5% of their benefits.

ALPA will show that, if the pilots' defined benefit pension plan were terminated, many pilots would suffer grievous losses of their hard-earned benefits. For example, a pilot who is 51 years old with 24 years of service at Delta and retires at age 60 would lose over *$118,000* each year in annual pension benefits. A pilot who is 43 years old with 18 years of service and

[25] Delta also failed to make a required $160 million payment on October 15, 2005. This payment included its regularly scheduled contribution of $31.3 million plus additional contributions resulting from the Plan's liquidity shortfall. The Plan requires such contributions where liquid assets fall below a certain level in relation to its disbursements.

[26] In addition, the termination of the non-qualified plans would save Delta approximately $84 million per year, and result in an average annual loss of $24,000 per retired pilot receiving non-qualified benefits. The estimated total loss of non-qualified benefits for the 3,485 retired pilots receiving these benefits would be $83.6 million annually.

retires at age 60 would lose approximately $41,000 per year in annual pension benefits.[27] The pilots would not only suffer a greater loss of pension benefits from plan termination, but the loss of plan benefits will hurt them more since mandatory retirement at age 60 both gives the pilots that much less time to accrue other retirement savings and leaves them a longer period in retirement during which they depend on whatever pensions they have accrued.

2. Predicted Layoffs of Hundreds of Pilots

In addition to the likely loss of their pension plans, hundreds of Delta pilots will likely be laid off during the course of this case. Delta estimates that the changes that it intends to make to its operations – reducing the size of the fleet and increasing productivity – will allow it to furlough probably 300 pilots. ALPA believes the number of furloughs will likely be far higher, since reductions in vacation allowance and other work rules changes will allow the Company to squeeze more work out of the pilot group and thus reduce it in size. In determining the amount that the pilots can fairly be expected to contribute to the Company's reorganization, the Court should take into account the fate of pilots who will be thrown out of work and who will undoubtedly suffer serious financial loss. Delta correctly notes that current conditions in the aviation industry, including layoffs at other carriers, will make it "difficult to find other jobs in the airline industry" and that those who do find jobs will find "themselves at the bottom of the seniority list." Delta Mem. at 41.

The sacrifice of furloughed pilots will allow the Company to save tens of millions of dollars annually in wages, benefits and training costs that it will not incur. At the same time,

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[27] The examples given here are of pilots other than those who would have been eligible to retire within three years of the termination. Those eligible to retire within three years of the termination fall within category three of ERISA's plan termination priority scheme, *see* 29 U.S.C. §1104, and consequently would probably have most of their benefits preserved. However, were the pilot defined benefit pension plan to terminate in 2006, only about 8 % of the pilot group would fall within category three.

those pilots who continue to work will benefit the Company through their increased productivity; fewer pilots will be generating even more revenue than they do today. Especially when viewed in the context of the additional sacrifices that the pilots will likely have to make during this reorganization, and the ways in which Delta will derive substantial benefits from the pilot group, it becomes abundantly clear that the Proposal seeks too much from the pilots.

C. The Proposal Seeks Too Much Relief From The Pilots Compared To Other Creditors

In determining from whom a debtor should fairly seek relief, the Court takes into account the respective cost-spreading abilities of the various constituencies. *See Carey Transp.*, 816 F.2d at 93. Here, there is no question that the pilots are least able to bear the brunt of the Company's far-reaching proposed cuts. Whereas other creditors, such as the large businesses that constitute many of Delta's trade creditors, bondholders and aircraft lessors, have sources of income and business apart from Delta, the pilots (and other employees) rely on their wages from Delta. It is plainly unfair to seek, as the "transformation" plan does, essentially the same amount from the employees ($930 million) as from these other business constituencies ($970 million). *See* Sept. 22, 2005 8K. And it is particularly unfair to seek such deep cuts from the pilots because they, even more than other employees, are dependent on the Company, having spent years of their careers investing in non-transferable flying skills and accumulating years of non-transferable seniority.

V. ALPA HAD GOOD CAUSE TO REJECT THE PROPOSAL

ALPA had good cause to reject the Proposal since, as explained above, the Proposal is neither necessary to Delta's reorganization nor fair and equitable to the pilots. ALPA did not make the decision to reject the Proposal lightly. Its elected pilot leaders and its teams of legal and financial advisors reviewed the Company's business plan and projections and data presented prior to November 9, 2005. ALPA's rejection of Delta's proposal and development of the ALPA proposal of November 9, 2005 were based upon that review. In the past, in both 1996 and 2004, when Delta demonstrated that it needed substantial pilot concessions, ALPA and the pilots agreed to give them. ALPA has also given substantial pilot concessions at other carriers when the need has been demonstrated. Here, however, Delta has simply failed to prove its case, particularly since its own costing data shows that its pilot labor costs will continue to fall without any further cuts, allowing Delta to meet its various targets without $325 million more in pilot savings.

In addition, ALPA had good cause to reject the Proposal because Delta requested enormous sacrifice from the pilots but denies them any meaningful "upside" if their sacrifices produce a reversal of the Company's fortunes. In particular, as explained above, the Proposal would lock in depressed pilot wages and reduced pilot benefits for over five years, regardless of any improvement in the Company's financial performance.

The Proposal does provide that the pilots would continue to participate in the employee profit-sharing plan, and it would marginally improve the plan by providing a payout of 15% of any pre-tax income up to $1.5 billion. Even though the Company uses the adjective "generous" at least four different times in its brief to describe the profit-sharing plan, *see* Delta Mem. at 4, 26 (twice), 32, such repetition does not make it so. Even if the Company were to reach its goal of $498 million in pre-tax income by the end of 2007, the profit-sharing plan would produce a payout for all employees of $74.70 million, only $26.15 million of which would go to the pilots. . This sum would be trivial compared to the $325 million (and more, *supra*, p. 29) that the Company would save under its Proposal in that year alone. Indeed, even if the Company were wildly successful in future years, with a pre-tax income in the multiple *billions* of dollars, the proposed enhancement to the profit-sharing plan would never produce more than $43.75 million for the pilots.

VI. DELTA CANNOT ESTABLISH THAT THE BALANCE OF THE EQUITIES CLEARLY FAVORS REJECTION OF THE PWA

Finally, Delta's motion should be denied because it cannot show that the "balance of the equities clearly favors rejection" of the PWA. 11 U.S.C. §1113(c)(3); *see also Carey Transp.*, 816 F.2d at 93 (articulating the permissible equitable considerations). In evaluating the balance of the equities, the Court must first consider the prospects of a pilot strike in the event of contract rejection. *See Carey*, 816 F.2d at 93; *Int'l Bhd. of Teamsters v. IML Freight, Inc.*, 789 F.2d 1460, 1463 (10th Cir. 1986) (reversing a bankruptcy court's decision permitting rejection because the bankruptcy court failed to consider that the antagonistic labor relations atmosphere made it likely that a damaging work stoppage could result from rejection); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 371 (Bankr. N.D. Ill. 1990) ("Courts have utilized various factors in the [§1113] analysis. . . . [including] whether the employees would react to rejection by striking, and if that would injure the debtor."); *cf. In re Pesce Baking Co. Inc.*, 43 B.R. 949, 961 (Bankr. N.D. Ohio 1984) (denying rejection because "[c]onsidering the risk of a strike or decreased productivity, [the debtor's] projected savings is highly speculative."). Delta cannot expect the Delta pilots necessarily to stand idly by if the PWA is rejected and the debtor's draconian terms are imposed. Indeed, the Delta pilots have already begun to activate a pilot strike preparation committee to provide for their self-defense.

There is no serious question that rejection of the PWA would leave ALPA free to strike. Each court to have considered the issue – including this Court – has concluded that once a collective bargaining agreement is rejected a union is free to strike or take other lawful forms of self-help. *See Royal Composing Room*, 62 B.R. at 405 (noting that if the changes the debtor imposes after rejection are unacceptable, the employees are free to strike), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, 848 F.2d 345 (2d Cir. 1988); *Briggs Transp. Co. v. Int'l Bhd. of Teamsters*, 739 F.2d 341, 344 (8th Cir. 1984) (rejecting employer's request for injunctive relief against union picketing after rejection); *In re Evans Prods. Co.*, 55 B.R. 231, 234 (Bankr. S.D. Fla. 1985); *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 806 (Bankr. W.D. Ky. 1985) ("[f]ollowing the rejection of a collective bargaining agreement . . . the employees retain the right to strike as their ultimate bargaining tool"); *see also* J. Berkman, *Nobody Likes Rejection Unless You're A Debtor in Chapter 11*, 34 N.Y.L. SCH. L. REV. 169, 194 (1989); D. Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503, 523 (1994). Indeed, a commercial creditor whose contract is rejected under Section 365 obviously has no obligation to continue to provide the debtor with goods and services. Unionized employees whose contract is rejected are similarly free to withhold their services.

Moreover, the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§101-15, which deprives federal courts of jurisdiction to enjoin a work stoppage, *see id*. at §104(a), and which was intended to "tak[e] the federal courts out of the labor injunction business," *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960), would prohibit this Court from enjoining a strike by ALPA. *See Burlington N.R.R. Co. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 437 (1987) (in enacting NLGA, Congress took the "extraordinary step of divesting federal courts of equitable jurisdiction" in labor disputes). The Second Circuit has repeatedly held that the NLGA applies with full force in bankruptcy cases, despite the impact a strike might have on a debtor's estate. *See In re Petrusch*, 667 F.2d 297, 300 (2d Cir. 1981) (vacating bankruptcy court's strike injunction on the ground that the NLGA deprived the court of jurisdiction to enjoin the strike, noting that nothing in Bankruptcy Code supersedes the NLGA);

Truck Drivers Local 807 v. Bohack Corp., 541 F.2d 312, 318 (2d Cir. 1976) (reversing bankruptcy court injunction against picketing by union, holding that NLGA prohibits injunction despite debtor's claim that picketing would put it out of business); *In re Third Ave. Transit Corp.*, 192 F.2d 971, 973 (2d Cir. 1951) (reversing bankruptcy court's injunction against threatened strike, holding that bankruptcy court's power "must be exercised within the scope of a jurisdiction which is limited by the broad and explicit language of the [NLGA]"). Congress enacted the NLGA in response to a perceived abuse by the federal courts of their equitable power to enjoin strikes, *see Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 715-16 (1982), an abuse that was seen often in railroad bankruptcies, where courts wielded their injunction power in an effort to preserve the debtor's estate. *See* W. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1155-57 (1989).

That labor relations between the pilots and Delta are governed by the RLA does not change the conclusion that the Delta pilots would have a right to strike if the PWA is rejected. The RLA provides for a so-called "major dispute" resolution process for negotiating amendments to a collective bargaining agreement during which the carrier is required to maintain the status quo of employee pay, rules and working conditions. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n,* 491 U.S. 299, 303 (1989); *Burlington N. R.R.*, 481 U.S. at 445; *Bhd. of R.R. Trainmen, et al. v. Jacksonville Terminal Co.*, 394 U.S.369, 378 (1969). If a carrier fails to maintain the status quo, it forfeits the right to obtain an injunction if its employees strike. *Rutland Ry. Corp. v. Bhd. of Locomotive Eng'rs*, 307 F.2d 21, 41 (2d Cir. 1962); s*ee also Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960) (strike injunction properly denied where carrier has abrogated RLA's major dispute provisions); *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union,* 396 U.S. 142, 155 (1969). (a "union cannot be expected to hold back its own economic weapons, including the strike" upon carrier's implementation of unilateral changes); *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 302-03 (1970); *Seafarers' Int'l Union v. Galveston Wharves*, 400 F.2d 320, 332-33 (5th Cir. 1968). Accordingly, if Delta rejects the PWA and implements unilateral (as opposed to negotiated) changes to pilots' terms and conditions of employment, ALPA will have the right to strike.

Delta argues that following a rejection of the PWA pursuant to Section 1113, the major dispute process "will apply." Delta Mem. at 42. That is, Delta claims that it may unilaterally impose changes to the pilots' terms and conditions of employment but the pilots may not strike. *See id*. The flaw in this argument is apparent. The major dispute process requires *both* parties to maintain the status quo. If the Section 1113 bargaining and hearing process functions, as it were, as a foreshortened RLA "major dispute" process following which the carrier is relieved of its RLA obligation to maintain the status quo, so too the same process must operate to free the pilots of any obligation to refrain from lawful economic force. *See Burlington N.R.R.*, 481 U.S. at 445 (after exhaustion of RLA major dispute process, both parties may resort to self-help). Accordingly, if the PWA is rejected, the Delta pilots will have the right to strike.[28]

A pilot walkout would have a devastating impact on Delta. Unlike companies in other industries, airlines cannot stockpile inventory; each and every flight requires the services of a flight crew. Delta would be unable quickly or easily to hire replacement pilots to continue its

[28] *Aircraft Mech. Fraternal Ass'n v. Atlantic Coast Airlines*, 125 F.3d 41 (2d Cir. 1997), cited in Delta Mem. at 42, does not apply. The carrier there modified conditions that existed *prior* to the negotiation of *any* collective bargaining agreement. *Id*. at 42. It thus did not repudiate contractually negotiated terms and conditions of employment and did not breach the obligation of Section 2, First of the Railway Labor Act to "make and maintain agreements concerning rates of pay, rules and working conditions[.]" 45 U.S.C. §152, First. No case has forbidden a strike when existing collective bargaining agreements have been unilaterally repudiated.

operations (even if such hiring were lawful) because any such replacements would, as a matter of federal aviation law and regulations, have to undergo a requisite period of training before flying Delta's commercial aircraft. Delta has given no indication that it has any operational or financial plans to cope with a pilot walk-out. Because granting Delta's motion might lead to a strike which would have a devastating impact on the bankrupt estate, a balance of the equities does not clearly favor granting the motion.[29]

But even if Delta were right that ALPA had no right to strike, the balance of the equities would still not clearly favor rejection of the PWA. If Delta rejects the PWA and imposes the draconian terms on the pilots set forth in the Proposal, the pilots will be angry, frustrated and demoralized. Delta correctly notes that "a significant part" of its past success has been "its good relations with its dedicated workforce." Info. Br. at 6. The Company surely recognizes that maintenance of a high level of pilot morale is critical to achieving its future plans. Imposing deep cuts on the pilots through court order will for years poison the pilots' relations with the Company, undermine their morale and extinguish any enthusiasm the pilots might have to cooperate with management. Because granting the motion is a recipe for disaster, not reorganization, it should be denied.

[29] The Court should also consider the fact that rejection of the PWA would give ALPA a significant damages claim for breach of contract against the estate. *See In re Moline Corp.*, 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992) (as labor agreements are executory contracts, "§365 must apply to fill the gap left by §1113"), *appeal denied,* 1992 WL 245669 (N.D. Ill. Sept. 17, 1992); *In re Indiana Grocery Co., Inc.*, 138 B.R. 40, 50 (Bankr. S.D. Ind. 1990); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 371 (Bankr. N.D. Ill. 1990); M. Baxter, *Is There a Claim for Damages From the Rejection of a Collective Bargaining Agreement Under Section 1113 of the Bankruptcy Code?*, 12 Bankr. Dev. J. 703 (1996).

CONCLUSION

For the foregoing reasons, Debtors' motion to reject the CBA under Section 1113 should be denied and the parties must continue to negotiate.

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