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

In re	)	Chapter 11
	)	
UAL CORPORATION, et al.,	)	Case No. 02-B-48191
	)	(Jointly Administered)
	)	
Debtors	)	Honorable Eugene R. Wedoff
	)	
	)	Hearing Date: December 17, 2004,
	)	9:30 a.m.
	)	Objection Date: December 10, 2004

SECRETARY'S AMICUS BRIEF IN SUPPORT OF INDEPENDENT FIDUCIARY'S MOTION TO ALLOW MINIMUM FUNDING CONTRIBUTION CLAIM OF UNITED AIR LINES PENSION PLANS AS ADMINISTRATIVE PRIORITY EXPENSE (RELATES TO DOCKET No. 8918)

TABLE OF CONTENTS

Introduction and Summary of Argument 1

Factual Summary 4

A. United and its Plans 4

B. Minimum Funding Requirements under ERISA 6

C. United's Funding Obligations Under ERISA 7

D. United's First-Day Order 9

E. Earlier Proceedings under Section 1113 10

F. Current Status. 12

Argument: Minimum Funding Contributions are Entitled to Administrative Expense Priority 13

A. United's Obligation to Pay the Minimum Funding Contributions Arises under a Federal Statute and Must be Treated as a Priority Administrative Expense 14

B. United's Obligation to Make the Contributions to the Plans Must be Treated as an Administrative Expense Priority Because it is Owed Under Collective Bargaining Agreements 19

C. The Obligation to Pay is Entitled to Priority Under Jartran Because the Funding Contributions Arose Post-Petition and Benefited the Operation of United's Business 26

Conclusion 31

TABLE OF AUTHORITIES

Cases: Page(s)

Adventure Resources, Inc. v. Holland, 137 F.3d 786 (4th Cir. 1998) 22, 24, 29

Air Line Pilots Assoc., Intl. v. Shugrue (In re Ionosphere Clubs, Inc.), 922 F.2d 984 (2d Cir. 1990) 22

In re Amarex, Inc., 853 F.2d 1526, 1530 (10th Cir. 1988) 13

In re 1655 Broadway Restaurant Corp., 1997 WL 104961 (S.D.N.Y. Mar. 7, 1997) 24

In re CF&I Fabricators of Utah, Inc., 150 F.3d 1293 (10th Cir. 1998) 29

Cargill Fin. Services Corp., IDS v. Envirodyne Indus., Inc., 1995 WL 461854 (N.D. Ill. July 12, 1995) 13

Chicago Dist. Council of Carpenters Pension Fund v. Cotter, 914 F. Supp. 237 (N.D. Ill. 1996) 21

In re Chicago Lutheran Hospital Association, 75 B.R. 854 (Bankr. N.D. Ill 1987) 24, 27, 30

In re The Circle K Corp., 137 B.R. 346, 350 (Bankr. D. Ariz. 1992) 2, 18, 19

In re Colorado Springs Symphony Orchestra Assoc., 308 B.R. 508 (Bankr. D. Co. 2004) 24

Columbia Packing Co. v. PBGC, 81 B.R. 205 (Bankr. D. Mass. 1988) .29

In re Continental Airlines, 981 F.2d 1450 (5th Cir. 1993) 20

Cumberland Farms, Inc. v. Florida Dep't of Envtl. Prot., 116 F.3d 16 (1st Cir. 1997) 2, 15

In re Demert & Dougherty, Inc., 227 B.R. 508 (Bankr. N.D. Ill. 1998) 13, 27

In re Dena Corp., 312 B.R. 162 (Bankr. N.D. Ill. 2004) 13

Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983) 15

In re Dynacircuits, L.P., 143 B.R. 174, 176-77 (Bankr. N.D. Ill. 1992) .13

In re FBI Distribution Corp., 330 F.3d 36 (1st Cir. 2003) 13, 20

In re Finley, Kumble, Wagner, Heine, Underberg, Manley,
Myerson & Casey, 160 B.R. 882 (Bankr. S.D.N.Y. 1993) 29

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 1989) 15

Ford Motor Credit Co. v. Dobbins, 35 F.3d 860 (4th Cir. 1994) 13

In re Garofalo's Finer Foods, Inc., 117 B.R. 363 (Bankr. N.D. Ill. 1990) 22

In re Hoffman Bros. Packing Co., Inc., 173 B.R. 177 (9th Cir. BAP 1994) 23

In re Jartran, Inc., 732 F.2d 584 (7th Cir. 1984) 3, 13

Journeymen Plasterers Protective and Benevolent Society Local No. 5
v. Energy Insulation, Inc. (In re Energy Insulation, Inc.),
143 B.R. 490 (N.D. Ill 1992) 23

In re Kent Plastics, 183 B.R. 841 (Bankr. S.D. Ind. 1995) 28

Lancaster v. Tennessee Dep't of Health and Env't
(In re Wall Tube & Metal Prod. Co.), 831 F.2d 118 (6th Cir. 1987) 2, 18

Local 232, Allied Industrial Workers of America v. Briggs & Stratton Corp.,
837 F.2d 782 (7th Cir. 1988) 19

In re Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976) 3, 20

In re Manor Oak Skilled Nursing Facilities, 201 B.R. 348
(Bankr. W.D.N.Y. 1996) 23

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection,
474 U.S. 494 (1986) 14, 17

Mirant Corp. v. Potomac Elect. Power Co., 378 F.3d 511 (5th Cir. 2004) 14

In re Moline, 144 B.R. 75 (Bankr. N.D. Ill. 1992) 23

In re N.P. Mining Company, Alabama Surface Mining Comm'n
v. N.P. Mining Company, Inc., 963 F.2d 1449 (11th Cir. 1992) 2, 15, 17

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) 21

N.L.R.B. v. Manley Truck Line, Inc., 779 F.2d 1327 (7th Cir. 1985) 21

In re National Steel Corp., 2004 WL 2403587 (Bankr. N.D. Ill. Oct. 26, 2004) 13, 26, 27

Norris Square Civic Ass'n v. St. Mary Hosp. (In re St. Mary Hosp.),
86 B.R. 393 (Bankr. E.D. Pa. 1988) 15

PBGC v. Skeen (In re Bayly Corp.), 163 F.3d 1205 (10th Cir. 1998) 28

PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.),
126 F.3d 811 (6th Cir. 1997) 20, 28

Penn Terra Limited v. Dep't of Envtl. Res., 733 F.2d 267 (3d Cir. 1984) 14

In re Pre-Press Graphics Co., 287 B.R. 726 (Bankr. N.D. Ill. 2003) 26

Products Specialties and Paper Products Union Local 680
v. Nabisco Brands, Inc., 833 F.2d 102 (7th Cir. 1987) 19

In re Roth American, Inc., 975 F.2d 949 (3rd Cir. 1992) 21, 22, 24

Secretary v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) 16

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 15

Shaw v. International Association of Machinists and
Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir. 1985) 2, 16

In re Sinclair, 92 B.R. 787 (Bankr. S.D. Ill. 1998) 13

Solow v. Am. Airlines, Inc. (In re Midway Airlines, Inc.),
221 B.R. 411 (Bankr. N.D. Ill. 1998) 13

Teamsters Industrial Security Fund v. World Sales, Inc.,
(In re World Sales, Inc.), 183 B.R.. 872 (9th Cir. BAP 1995) 23, 27, 30

Trustees of Amalgamated Ins. Fund v. McFarlin's, 789 F.2d 98 (2d Cir. 1986) 20

United States v. Acme Solvents Reclaiming, Inc., 154 B.R. 72 (N.D. Ill. 1993) 14

United Steelworkers of America v. Unimet Corp. (In re Unimet Corp.),
842 F.2d 879 (6th Cir. 1988) 22

In re Wengert Transportation, Inc., 59 B.R. 226 (N.D. Iowa 1986) 15

Wilmington Trust, Co. v. WCI Steel, Inc., (In re WCI Steel, Inc.),
313 B.R. 414 (Bankr. N.D. Ohio 2004) 24

Statutes and Regulations

Employee Retirement Income Security Act of 1974, as amended
29 U.S.C. §§ 1001, et seq.

Section 2(a), 29 U.S.C. § 1001(a) 15, 16
Section 2(c); 29 U.S.C. § 1001(c) 16
Sections 3(28), 29 U.S.C. § 1002(28) 7
Section 302, 29 U.S.C. § 1082 16
Section 302(a), 29 U.S.C. §1082(a) 7
Section 302(b)(1), 29 U.S.C. § 1082(b)(1) 6
Section 302(b)(2), 29 U.S.C. § 1082(b)(2) 7
Section 302(b)(3), 29 U.S.C. §1082(b)(3) 7
Section 302(c)(10), 29 U.S.C. §§ 1082(c)(10) 7
Section 302(d), 29 U.S.C. § 1082(d) 7
Section 302(e), 29 U.S.C. §1082(e) 7
Section 302(f)(4)(A), 29 U.S.C. § 1082(f)(4)(A) 7
Section 514(d), 29 U.S.C. § 1144(d) 17

Bankruptcy Code, as amended

Section 503(b), 11 U.S.C. § 503(b)(1) 13
Section 362(b)(4), 11 U.S.C. 362(b)(4) 14
Section 365 20
Section 1113. . . . . 3, 21, 23, 25, 26
Section 1113(a) 21
Section 1113(b) 21
Section 1113(c) 21
Section 1113(d) 21
Section 1113(e) 21-22
Section 1113(f). 22

United State Code

28 U.S.C. § 959(b) 14, 17

Other Authorities

Employee Benefits Law, ABA Section of Labor and Employment Law,
Ch. 5.VI (2nd ed. 2000) 6

Donald B. Smith and Richard A. Bales,
Reconciling Labor and Bankruptcy Law; The Application of 11 U.S.C. § 1113,
2001 L. Rev. Mich. St. U. Det. C.L. 1145 (2001) 21

Media

Micheline Maynard, United Seeks an Additional $2 Billion in Cost Cuts,
N.Y. Times, Nov. 5, 2004, at C1 18

Steven Pearlstein, Intervention Before Bankruptcy, Wash. Post,
Nov. 10, 2004, at E1 19

Mark Tatge, The Airlines' New Solution to Pension Costs, Forbes,
Nov. 10, 2004, available at
http://www.forbes.com/services/2004/ 11/10/cz_mt_1110ual.html. 18-19

Elaine L. Chao, Secretary of the United States Department of Labor (the "Secretary") hereby submits this Amicus Brief in Support of the Independent Fiduciary's Motion to Allow Minimum Funding Contribution Claim of United Air Lines Pension Plans as Administrative Priority Expense ("Administrative Expense Motion").

INTRODUCTION AND SUMMARY OF ARGUMENT

The Secretary has primary responsibility for the interpretation and enforcement of the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, et seq. Accordingly, the Secretary has a strong interest in ensuring that courts correctly interpret ERISA. This case presents a critically important issue – whether minimum contributions, required under ERISA section 302, 29 U.S.C. § 1082, constitute an administrative expense and are an actual and necessary cost of operating the debtor's business in a Chapter 11 bankruptcy proceeding, where the debtor in possession has continued and not terminated the affected ERISA plan. The Secretary respectfully submits this amicus brief to aid and assist the Court.

As set forth in the Administrative Expense Motion and explained below, the minimum funding contributions are administrative expenses of the debtors' estate and entitled to administrative priority. First, the Bankruptcy Code contemplates that the debtor in possession must manage and operate its business in compliance with state and federal law. The minimum funding contributions constitute a statutory obligation imposed by ERISA on those employers that maintain and operate ERISA-covered pension plans. Congress enacted ERISA "to ensure that 'if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are

required to obtain a vested benefit – he actually receives it." Shaw v. International Association of Machinists and Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir. 1985). The statutory funding obligation is at the core of the protective purposes of ERISA, which was designed to serve the public welfare by ensuring that employers live up to their pension promises.

Moreover, to permit United to operate its business without complying with applicable law is to give it an unfair advantage over other employers. Therefore, these funding obligations, no less than a company's statutory obligations with regard to environmental statutes, are entitled to administrative, priority status under the Bankruptcy Code. Cumberland Farms, Inc. v. Florida Dep't of Envtl. Prot., 116 F.3d 16, 20 (1st Cir. 1997) (holding that environmental clean-up costs under a state law were entitled to priority even though they arose in part pre-petition); In re N.P. Mining Company, Alabama Surface Mining Comm'n v. N.P. Mining Company, Inc., 963 F.2d 1449, 1458 (11th Cir. 1992); Lancaster v. Tennessee Dep't of Health and Env't (In re Wall Tube & Metal Prod. Co.), 831 F.2d 118 (6th Cir. 1987); In re The Circle K Corp., 137 Bankr. 346, 350 (D. Ariz. 1992).

Second, the Bankruptcy Code expressly addresses collective bargaining agreements and provides an exclusive means for assuming, rejecting or modifying such agreements. Here, United expressly agreed in one collective bargaining agreement that it would make the minimum funding contributions to the Flight Attendants Plan, and agreed in the other collective bargaining agreements not to reduce retirement benefits under those plans. To satisfy its obligations under all the collective bargaining agreements, United must pay the minimum contributions to the Plans. Those collective

bargaining agreements may be rejected or modified only under the specific provisions of Section 1113 of the Bankruptcy Code, and may not be rejected retroactively. Because United has not rejected its funding obligations, the contributions must be treated as administrative expenses and given administrative priority in the bankruptcy proceeding.

Finally, the minimum funding obligation amount constitutes a post-petition debt, which arose out of a transaction with the debtors in possession, and which benefited the estate. In re Jartran, Inc., 732 F.2d 584, 586-87 (7th Cir. 1984); In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976). After filing the bankruptcy petition on December 9, 2002, United did not immediately move to reject the collective bargaining agreements. Instead, it obtained a first-day order authorizing it to maintain the Plans. United's employees continued to provide services with the understanding and belief that their pensions were preserved intact. Four months later, in April 2003, United and the unions agreed to modify the collective bargaining agreements. As a part of the modification, the unions and employees agreed to greater wage concessions to protect their retirement benefits. Since the April 2003 modification, United has continued to operate, benefiting from the labor of its Plan participants. United has not rejected or further modified the CBAs that require it to maintain and fund the Plans. These facts satisfy the Jartran test: the ongoing obligations under the unrejected collective bargaining agreements and under the April 2003 modification constituted post petition transactions with the debtors in possession, and the continued labor of the Plan participants benefited the estate. Therefore, this court should grant administrative expense priority to the funding obligation, which arose post petition.

FACTUAL SUMMARY

A. United and its Plans

UAL Corporation ("UAL") and 26 of its subsidiaries, including its wholly-owned subsidiary, United Air Lines, Inc. ("United"), are currently debtors in possession before this Court, having filed for protection under chapter 11 of the Bankruptcy Code on December 9, 2002 (the "Petition Date"). United is a major commercial air transportation company, engaged in the transportation of persons, property and mail through the United States and abroad.

To operate its business, United entered into collective bargaining agreements ("CBAs") with the Association of Flight Attendants ("AFA"), the Air Line Pilots Association ("ALPA"),[1] the International Association of Machinists and Aerospace Workers ("IAM"), IAM Local 141, the Professional Airline Flight Control Association ("PAFCA") and the Transportation Workers Union ("TWU"). Pursuant to the terms of these CBAs, United sponsors four defined benefit pension plans:

(1) United Air Lines Ground Employees' Plan, formerly known as the Mechanic and Ramp, Stores, Food Service and Related Employee Defined Benefit Pension Plan (including United Air Lines Security Officer Defined Benefit Pension Plan) ("Ground Employees' Plan");

(2) United Air Lines Management, Administrative and Public Contact Defined Benefit Pension Plan ("MAPC Plan"),

(3) United Air Lines Pilot Defined Benefit Pension Plan ("Pilot Plan"); and

(4) United Air Lines Flight Attendant Defined Benefit Pension Plan ("Flight Attendant Plan").

---

[1] No funding contributions are owed to the Pilot Plan until October 15, 2005. The ALPA CBA and Pilot Plan are therefore not included in the Administrative Expense Motion. The Secretary mentions the Pilot Plan here merely to emphasize that the same principles ought to apply if United were to miss its funding contribution obligations to that Plan.

Approximately 120,000 employees and retirees participate in the four Plans.

Under all its CBAs, United agreed to provide retirement benefits, thereby promising to fund the Plans. United pledged not to reduce pension benefits promised in the Plans without first obtaining agreement from the unions.[2] Moreover, under the CBA with the flight attendants, United expressly promised to meet its funding obligations.[3]

---

[2] The AFA CBA provided that: "The Company agrees that the benefits provided in the plans will not be reduced without prior agreement of the union. The plan is subject to approval of the U.S. Treasury Department in the form of continuing qualification of the Plan by the Internal Revenue Service. In the event the Plan is not acceptable to the Internal Revenue Service, the Union and the Company agree to effect the revisions necessary to secure proper qualification. The company will contribute actuarially determined amounts that will be sufficient to provide the benefits that are described therein." AFA CBA, pp. 228-29, 232. In addition, Part A of the AFA CBA set forth the formula for the annual retirement benefit payable at normal retirement. AFA CBA, p. 229

The ALPA CBA provided that United "shall not amend any provision of the Plan which changes negotiated benefits without the prior written consent of the Union." ALPA CBA, p. 264. As noted above, no contributions are currently owed to the Pilot Plan.

The IAM and IAM 141 CBAs stated: "The Company agrees that the benefits provided in the plans will not be reduced without prior agreement of the union. The plan is subject to approval of the U.S. Treasury Department in the form of continuing qualification of the Plan by the Internal Revenue Service. In the event the Plan is not acceptable to the Internal Revenue Service, the Union and the Company agree to effect the revisions necessary to secure proper qualification." IAM CBAs, p. 264. The IAM agreements further included a schedule of revised retirement benefits. IAM CBAs, Schedule B.

The PAFCA CBA provided: "The pension benefits offered management employees under the [MAPC Plan] . . . will apply to employees covered by this Agreement. Such benefits will not be reduced without union approval except when the reduction is accompanied by a simultaneous improvement in benefits which results in an equal or greater cost to the Company." PAFCA CBA, p. 55.

The TWU CBA provided that the sections governing the retirement benefits for the MAPC Plan apply to the TWU employees. March 14, 2003 Agreement with United.

[3] In particular, the AFA CBA requires that United "will contribute actuarially determined amounts that will be sufficient to provide the benefits that are described therein." AFA CBA, pp. 228-29, 232.

United's Board of Directors granted and delegated fiduciary authority over the Plans to the Pension and Welfare Plan Administration Committee ("PAWPAC"), including the duty and responsibility to develop and/or review the Plans' funding policies and to establish procedures for prompt remedial action to correct violations of law. United's Motion for Entry of Order Approving Appointment of Independent Fiduciary, filed September 3, 2004. By notice dated July 6, 2004 and retroactively effective as of June 28, 2004, the members of PAWPAC, who were also senior corporate officers, simultaneously resigned and United's Board of Directors designated United as the named fiduciary for purposes of ERISA. Id. On August 17, 2004, United and the Secretary entered into an agreement requiring United to appoint an independent fiduciary to take all appropriate action with respect to contributions owed to the Plans. Id. at Exh. A (Agreement for Appointment of Independent Fiduciary, dated August 17, 2004). On September 3, 2004, United retained Independent Fiduciary Services, Inc. ("IFS") as the independent fiduciary to pursue all actions in connection with contributions owed to the Plans and any other related ERISA breaches it discovered in the course of those duties. Id. at Exh. D (Fiduciary Services Agreement, dated September 3, 2004).

B. Minimum Funding Requirements under ERISA

ERISA section 302, 29 U.S.C. § 1082, imposes minimum funding requirements on employers who sponsor defined benefit plans. An employer must select an actuarial method under which the plan's benefits will be determined. Based on the selected method, the employer must establish and maintain a funding standard account. ERISA section 302(b)(1), 29 U.S.C. § 1082(b)(1); see generally, Employee Benefits Law, ABA Section of Labor and Employment Law, Ch. 5.VI (2nd ed. 2000). Charges to the funding

standard account include the normal cost of that year's accrued benefits, amortization of that year's past service liability, amortization of net experience losses and losses resulting from changes in actuarial assumptions, and amortization of any prior waived funding deficiency. ERISA sections 3(28), 302(b)(2), 29 U.S.C. §§ 1002(28), 1082(b)(2). The funding standard account is credited with contributions, amortizations of experience gains and gains from changes in actuarial assumptions. ERISA section 302(b)(3), 29 U.S.C. §1082(b)(3). An accumulated funding deficiency results if the charges to the funding standard account exceed the credits. ERISA section 302(a), 29 U.S.C. §1082(a).

Unless a plan is fully funded, an employer must pay contributions to the plan on a quarterly basis as follows:

1st Installment	April 15
2nd Installment	July 15
3rd Installment	October 15
4th Installment	January 15

ERISA section 302(e), 29 U.S.C. §1082(e). If a quarterly payment is not made, the employer must notify the Pension Benefit Guaranty Corporation ("PBGC") within ten days. ERISA section 302(f)(4)(A), 29 U.S.C. § 1082(f)(4)(A). In addition, any deficit or shortfall from a plan year, after all quarterly payments have been made, must be paid within 8 ½ months after the close of the plan year. ERISA sections 302(c)(10), (d), 29 U.S.C. §§ 1082(c)(10), (d).

C. United's Funding Obligations Under ERISA

According to United, from 1994 through 2002, it contributed more than $1.6 billion to the Plans. Debtors' Objection to the AFA Trustee Joinder, Exhibit A (incorporating by reference United's Informational Brief, previously stricken by court) ("Informational Brief"), p. 27.

From the date of its petition to April 15, 2004, United has stated that it contributed $133.4 million to the Plans. Informational Brief, p. 43. On or about April 15, 2004, United made a $110 million quarterly payment for the Plans; subsequently, United recharacterized it as a payment toward the deficit for Plan Year 2003. Debtors' September 2004 Report on Status of Reorganization, dated September 16, 2004 ("September Report"), p. 10 and n.3; Informational Brief, p. 43. According to papers filed in this court by United, it chose to reallocate "its April 15, 2004 contribution to the 2003 plan year [for the Flight Attendants Plan], thereby eliminating any accumulated funding deficiency for the 2003 plan year and creating a credit balance for that plan as of January 1, 2004." September Report, p. 10 n.3.

The effect of the recharacterization was two-fold: 1) it confirmed that no prepetition liability was owed for the Flight Attendants Plan, and 2) the April 15, 2004 quarterly payment for the Plans remained owing. On July 14, 2004, United announced it had deferred deciding whether to pay a $72 million quarterly contribution to the Plans due on July 15, 2004. Debtors' July 2004 Report on Status of Reorganization, dated July 23, 2004, p. 2.

United has not made the July 15 or October 15 quarterly payments, or the September 15, 2004 annual contribution for the 2003 plan year, and has informed the Bankruptcy Court that it "has made the prudent decision to cease making further minimum funding contributions" to the Plans. Debtors' Reply in Support of Motion to Amend Club DIP Facility, dated August 18, 2004, p. 8.

As of October 15, 2004, after taking into account the April 15, 2004 recharacterizations, United's unpaid contributions amount to approximately $803 million,

or more. Affidavit of Keith T. Sartain filed in support of Administrative Expense Motion. According to documents provided to the Secretary by United and filed with the PBGC, United designated the amounts owing to each of the Plans as attributable to the April 15, July 15, and October 15 quarterly payments, and the September 15 annual contribution for the 2003 plan year. None of the payments were designated for earlier periods. No quarterly payments are owed to the Pilot Plan until October 15, 2005. Informational Brief, p. 28.

D. United's First-Day Order

After filing its bankruptcy petition, United filed a motion for entry of a first-day order from the bankruptcy court authorizing, but not directing, it to continue maintaining its Benefit Programs – which include medical, dental, prescription drug, life insurance, disability, and pension plans – in the ordinary course of business, including permission to pay prepetition obligations. First Day Motion,[4] ¶¶ 53-90. For example, with respect to the medical, dental, life insurance and disability plans, United specifically referenced prepetition amounts that it requested permission to pay. Id. at ¶¶ 55, 56, 58, 71. Significantly, with respect to the pension Plans, United stated that the Plans, as of the petition date, "currently [do] not require quarterly contributions." Id. at ¶ 76. In the motion, United requested "authority to maintain such Pension Plans in the ordinary

---

[4] Motion for Entry of (A) Authorizing But Not Directing the Debtors to Continue to Pay Wages, Salaries and Other Compensation in the Ordinary Course of Business Including the Payment of Prepetition Obligations and (B) Authorizing But Not Directing the Debtors to Maintain Their Benefit Programs In The Ordinary Course of Business Including the Payment of Prepetition Obligations and (C) Authorizing And Directing Application Banks And Other Financial Institutions To Receive, Process, Honor and Pay All Checks Presented For Payment And To Honor All Funds Transfer Requests Made By The Debtors Relating To the Foregoing, Docket No. 62 ("First Day Motion"), and Order thereon ("First Day Order").

course of business." Id. at ¶ 78. United did not state that any prepetition amounts were owed to the Plans, nor request that it have authority to make any prepetition payments to the Plans.

In requesting the first-day order, United stressed the importance of retaining its workforce: "Retention of the skilled employees is not only necessary, but 'indispensable' in an airline reorganization . . . . The Debtors' employees are their essential assets; they are critical to any successful reorganization. Deterioration in employee morale and welfare at this critical time undoubtedly would adversely impact the Debtors, the value of their assets and businesses, and ultimately, the Debtors' ability to reorganize." First Day Motion, ¶¶ 97, 100.

E. Earlier Proceedings under Section 1113

As noted by United, it and its unions "vigorously bargained over changes," but United's "proposed changes to pensions quickly became a serious sticking point, with the unions offering additional wage or work rule concessions to minimize changes to the pension plans." Informational Brief, p. 44. On March 17, 2003, United filed its motion to reject its collective bargaining agreements pursuant to Bankruptcy Code section 1113(c). Debtors' Motion to Reject Their Collective Bargaining Agreements pursuant to Section 1113(c), filed March 17, 2003. "Through an extensive and collaborative effort, United and its unions . . . negotiated modifications" to the CBAs, and United filed a motion to approve the modifications. Debtors' Agreed-To Motion to Approve the Modifications to their Collective Bargaining Agreements and to Withdraw Their Section1113(c) Motion, filed April 30, 2003 ("Motion to Approve Modifications"), ¶¶ 20, 27. As a result of the restructuring, United was successful in reducing the pension

formulas for the pilots and flight attendants, but did not eliminate them. Id. The pension provisions in the other CBAs were not reduced. Id. at ¶¶ 33, 40, 45. No other provision concerning the pension Plans was modified, and none was rejected. United remained obligated under the CBAs to continue providing retirement benefits at the promised levels.

On April 30, 2003, this court approved the restructured CBAs. Agreed Order Approving Modifications to Debtors' Collective Bargaining Agreements and Withdrawal of Debtors' Section 1113(c) Motion ("Order"), entered on May 1, 2003. Under the Order, United was "authorized to enter into and perform under the CBAs as modified by the Restructuring Agreements." Id. at ¶ 3. The Order acknowledged United's right to seek further relief under section 1113, and the unions' right to contest any such action. Id. at ¶ 4. The Order also provided:

> Neither this Order, approval of the Restructuring Agreements or execution of or entry into the Restructuring Agreements by the Debtors shall, in and of themselves, create administrative expense or priority claims pursuant to Sections 507, 1113, 1114 or otherwise by the Unions (or by employees represented by the Unions) that would not otherwise (but for the execution or approval of the Restructuring Agreements) be entitled to such levels of priority; provided, however, that the foregoing does not apply to the claims with respect to reimbursement of professional fees and expenses described in the Motion.

Order, ¶ 5. Further, according to the Order, "nothing shall limit the Debtors' obligation to comply with the CBAs as modified by the Restructuring Agreements pursuant to Section 1113(f)." Id. at ¶ 4. Thus, while United reserved the right to seek further relief under section 1113, it clearly acknowledged its ongoing obligations under the CBAs, until it sought such further relief.

As a result of the restructuring, United announced that the "modifications equitably addressed the financial, transformational and labor relations imperatives presently facing United in a cooperative manner that will best serve the interests of the Estate." Motion to Approve Modifications, ¶ 14. At the same time, United represented that its "employees will be highly motivated to continue delivering high quality service." Id. at ¶ 17. United "readily acknowledge[d] that the modifications to the CBAs represent significant sacrifices for United's unionized workers." Id. at ¶ 48.

F. Current Status

On November 5, 2004, United filed a motion for a scheduling conference on the Debtors' potential motion under 11 U.S.C. § 1113(c). On November 23, 2004, United filed a motion to reject the current CBAs, including the provisions requiring it to maintain the Plans.

According to United, as of January 1, 2004, Plan participants were categorized as follows:

Active Employees	59,256
Deferred (terminated) Employees	28,249
Retirees	35,231
Total Participants	122,736

Informational Brief, p. 21.

On November 30, 2004, IFS filed the Administrative Expense Motion seeking an order classifying the unpaid minimum funding contributions as priority administrative expenses.

ARGUMENT

Minimum Funding Contributions are Entitled to Administrative Expense Priority

An administrative expense claim is governed by section 503(b) of the Bankruptcy Code, 11 U.S.C. § 503(b)(1), which provides in relevant part:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including—
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case[.]

Administrative priority claims are strictly construed because it is presumed that the debtor has limited resources to distribute among its creditors. See In re FBI Distribution Corp., 330 F.3d 36, 41-42 (1st Cir. 2003); Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 865 (4th Cir. 1994); In re Amarex, Inc., 853 F.2d 1526, 1530 (10th Cir. 1988); In re National Steel Corp., 2004 WL 2403587, at *7 (Bankr. N.D. Ill. Oct. 26, 2004); In re Dena Corp., 312 B.R. 162, 171 (Bankr. N.D. Ill. 2004); In re Dynacircuits, L.P., 143 B.R. 174, 176-77 (Bankr. N.D. Ill. 1992).

As noted by the Seventh Circuit in In re Jartran, Inc., 732 F.2d 584, 586 (7th Cir. 1984), the policy behind priority treatment is to encourage creditors to extend credit to debtors in order to enable a reorganization to succeed. The moving party bears the burden of proving, by a preponderance of the evidence, that it is entitled to an administrative expense priority. FBI Distrib., 330 F.3d at 42; In re Demert & Dougherty, Inc., 227 B.R. 508, 512 (Bankr. N.D. Ill. 1998); Cargill Fin. Services Corp., IDS v. Envirodyne Indus., Inc., 1995 WL 461854, at *3 (N.D. Ill. July 12, 1995); Solow v. Am. Airlines, Inc. (In re Midway Airlines, Inc.), 221 B.R. 411, 446 (Bankr. N.D. Ill. 1998); In re Sinclair, 92 B.R. 787, 788 (Bankr. S.D. Ill. 1998). As explained below, the

Independent Fiduciary can meet this burden on three separate bases, and is entitled to an order giving administrative expense priority to the funding obligations.

A. United's Obligation to Pay the Minimum Funding Contributions Arises under a Federal Statute and Must be Treated as a Priority Administrative Expense

The Supreme Court has observed that "Congress has repeatedly expressed its legislative determination that the trustee is not to have carte blanche to ignore nonbankruptcy law." Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 502 (1986); United States v. Acme Solvents Reclaiming, Inc., 154 Bankr. 72, 73-74 (N.D. Ill. 1993) ("Congress did recognize that in some circumstances bankruptcy policies were to yield to higher priorities."). The Bankruptcy Code itself "clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is pending." Mirant Corp. v. Potomac Elect. Power Co., 378 F.3d 511, 523 (5th Cir. 2004); Penn Terra Limited v. Dep't of Envtl. Res., 733 F.2d 267, 278 (3d Cir. 1984) ("In enacting the exceptions to section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities. Indeed, if the policy of preservation of the estate is to be invariably paramount, then one could not have exceptions to the rule.");11 U.S.C. 362(b)(4).

Congress intended that a debtor in possession comply with state and federal law in the continued operation of its business. 28 U.S.C. § 959(b) ("debtor in possession . . . shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor would be bound to do if in possession thereof"). Section 959(b) has consistently been read to apply to both federal and state laws; it "requires a debtor to

conform with applicable federal, state, and local law in conducting its business." Norris Square Civic Ass'n v. St. Mary Hosp. (In re St. Mary Hosp.), 86 Bankr. 393, 398 (E.D. Pa. 1988); In re Wengert Transportation, Inc., 59 Bankr. 226, 231 (N.D. Iowa 1986).

Moreover, permitting a debtor in possession to flout its obligations under applicable state and federal law would give the bankruptcy estate "an unfair advantage over nonbankrupt competitors." Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.), 963 F.2d 1449, 1459 (11th Cir. 1992). Thus, "it makes sense that when a trustee or debtor in possession operates a bankruptcy estate, compliance with state law should be considered an administrative expense." Id. at 1458; Cumberland Farms, Inc. v. Florida Dep't of Envtl. Prot., 116 F.3d 16, 20 (1st Cir. 1997) ("[P]ayment of a fine for failing, during bankruptcy, to meet the requirements of . . . environmental protection laws is a cost 'ordinarily incident to operation of a business' in light of today's extensive environmental regulations.").

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989); Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983) (ERISA was enacted in recognition of the "special nature and purpose of employee benefit plans" to ensure that participants receive the benefits to which they are entitled under the plans offered by their employer.). Congress enacted the statute 30 years ago in recognition of the strong "national public interest" in ensuring "the continued well-being and financial security of millions of employees and their dependents [which] are directly affected by these [retirement] plans." ERISA section 2(a), 29 U.S.C. § 1001(a).

In passing ERISA, Congress's fundamental goal was "to ensure that 'if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually receives it." Shaw v. International Association of Machinists and Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir. 1985) cert. den. 471 U.S. 1137 (1985) quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S. Ct. 1895, 1899 (1981).

To achieve that goal, Congress was concerned "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered." ERISA section 2(a); 29 U.S.C. § 1001(a). Congress concluded that it was "therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness." Id. As most relevant here, Congress declared that a policy of the statute was to ensure that employers "meet minimum standards of funding." ERISA section 2(c); 29 U.S.C. § 1001(c); see also Secretary v. Fitzsimmons, 805 F.2d 682, 690-91 (7th Cir. 1986) ("Congress was not only concerned about the welfare of individual beneficiaries but was equally concerned with the impact of employee benefit plans on the stability of employment, the successful development of industrial relations, the revenues of the United States, the free flow of commerce, and the general welfare of the nation.").

Here, as long as the Plans continue, United must satisfy the minimum funding standards to make good on the promises it has made. United fully recognizes the value placed on the pension benefits promised in the CBAs through the pension plans. United

acknowledges that its employees offered additional wage or work concessions to minimize reductions to their pensions. Yet, through its refusal to pay the funding contributions, United is reneging on those promises.

United does not dispute that it owes the minimum funding contributions to the Plans. Instead, United has taken the position throughout these proceedings that although it is in violation of the minimum funding standards, it is excused from compliance with ERISA by virtue of its bankruptcy filing. United's position is untenable. While ERISA section 514(d), 29 U.S.C. § 1144(d), provides that ERISA does not "alter, amend, modify, invalidate, impair or supersede any law of the United States," as explained above, another federal statute, 28 U.S.C. section 959(b), requires bankrupt debtors to comply with federal, state and local law in conducting their business. For this reason, as set forth above, courts have made clear that a bankruptcy filing does not excuse the debtor from compliance with statutory obligations applicable to the continued operation of the company. See e.g., Midlantic, 474 U.S. at 502 (where the law required environmental clean-up activities, "the efforts of the [bankruptcy] trustee to marshal and distribute the assets of the [bankruptcy] estate must yield to governmental interest in public health and safety").

In view of Congress's clear intent that bankrupt debtors continue to comply with federal and state law in operating their businesses, the cost of compliance is to be considered an administrative expense. See N.P. Mining Company, 963 F.2d at 1458; Cumberland Farms, 116 F.3d at 20. Under ERISA, United was and is obligated as of specific post-petition dates to make funding contributions under the statute. This

obligation constitutes an administrative expense entitled to priority in the bankruptcy proceeding.

This is even more clearly the case where, as here, "public health, safety and welfare have been affected post petition." In re The Circle K Corp., 137 Bankr. 346, 350 (D. Ariz. 1992) (citing Lancaster v. Tennessee Dep't of Health and Env't (In re Wall Tube & Metal Prod. Co.), 831 F.2d 118 (6th Cir. 1987)). Thus, for instance, in cases where the public would face "a continuing, potentially disastrous environmental health hazard," courts have held that the cost of cleaning up the hazard is actual and necessary. Wall Tube, 831 F.2d at 124.

In this case, while environmental hazards are not at issue, protecting the public welfare by ensuring that retirement plans are properly funded is no less serious a concern, as evinced by Congress when it enacted ERISA. The treatment of United's obligations to its Plans may be of keen interest to the other legacy airlines and could have a "domino effect." As one analyst wrote, "given that the industry has become a commodity business with no pricing power, what happens to costs inside bankruptcy must then be adopted by the players outside of bankruptcy." Mark Tatge, The Airlines' New Solution to Pension Costs, Forbes, Nov. 10, 2004, available at http://www.forbes.com/services/2004/11/10/cz_mt_1110ual.html. As reported by the New York Times, if United succeeds in eliminating its pension obligations, "other airlines are likely to try similar moves." Micheline Maynard, United Seeks an Additional $2 Billion in Cost Cuts, N.Y. Times, Nov. 5, 2004, at C1. Quoting the chief financial officer of another legacy airline, the Time's article stated that airline was "looking to 'stay abreast' of pension moves at United," and that it was "going to have to be fully competitive if we are going to be a

successful organization." Id. In addition to the airlines, the automobile industry is also of serious concern. See Steven Pearlstein, Intervention Before Bankruptcy, Wash. Post, Nov. 10, 2004, at E1. The consequences would be disastrous for the working public, retirees and the economy. United should satisfy its obligations under the law and pay its minimum contributions to the Plans.[5]

B. United's Obligation to Make the Contributions to the Plans Must be Treated as an Administrative Expense Priority Because it is Owed Under Collective Bargaining Agreements

All of United's CBAs require it to provide the promised benefits to the Plans' participants and beneficiaries, and bar United from reducing benefits without agreement from the unions. In addition, the flight attendants' CBA expressly requires that United "contribute actuarially determined amounts that will be sufficient to provide benefits." Together with the promise not to lower pension benefits, the flight attendants' CBA contractually obligates United to pay the minimum funding amounts. While the other CBAs do not directly impose a funding obligation on United, that obligation is implicit under the CBA terms prohibiting United from reducing pension benefits without the unions' approval. See e.g., Local 232, Allied Industrial Workers of America v. Briggs & Stratton Corp., 837 F.2d 782, 787-88 (7th Cir. 1988) citing Products Specialties and Paper Products Union Local 680 v. Nabisco Brands, Inc., 833 F.2d 102 (7th Cir. 1987) (where CBA requires employer to "continue" pension plan, "relatively drastic action –

[5] Citing the cases that tie the amount owed to the post-petition labor under the Jartran test, see, infra, at 29-30 & n.11, the Independent Fiduciary seeks only the amount earned by the employees through their post-petition labor. Administrative Expense Motion, pp 23-24. Under the more relevant cases cited above, see In re Circle K Corp., supra, the full amount of the delinquent contributions that are due and that will come due while the Plans remain in effect should be classified as costs necessary to comply with applicable law, and therefore a priority administrative expense.

failing to fund the plan or terminating the plan – [are] examples of what would constitute a failure to 'continue' the plan under the collective bargaining agreement."). By failing to comply with the funding standards of ERISA, United is reneging on these obligations and impermissibly reducing the promised benefits in violation of all the CBAs. Because the minimum contributions are an obligation under the collective bargaining agreements that have not been rejected, they should be treated as priority administrative expenses.

In cases concerning an executory pre-petition contract, section 365 of the Bankruptcy Code authorizes the debtor to assume or reject the executory contract (or unexpired lease), subject to certain limitations, and classifies the non-debtor's claims as unsecured and without priority if that executory contract is rejected. By rejecting an unfavorable pre-petition contract, a debtor can rid itself of an unfavorable contract and reduce it to a general unsecured claim for damages.[6] Moreover, an expense for services performed pre-petition that accrues post-petition, under a pre-petition executory contract that has not been assumed or rejected, generally is not payable as an administrative expense, but rather, as a general unsecured claim. FBI Distrib., 330 F.3d at 42-43; PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 816 (6th Cir. 1997); Amarex, 853 F.2d at 1530; Trustees of Amalgamated Ins. Fund v. McFarlin's, 789 F.2d 98, 101 (2d Cir. 1986); Mammoth Mart, 536 F.2d at 954. That general rule, however, does not apply to collective bargaining agreements.

For pre-petition executory contracts that are CBAs, section 1113 of the Bankruptcy Code creates specific procedures and standards for modification or rejection

---

[6] Rejection is considered a breach of contract, however, and does not negate, invalidate or terminate the contract. In re Continental Airlines, 981 F.2d 1450 (5th Cir. 1993).

of the CBA, which supersede the provisions of section 365.[7] The purpose of section 1113 is to reconcile the policy of the Bankruptcy Code to allow rehabilitation of the chapter 11 debtor with the policies of labor laws, which include the protection of employees' rights to organize and to bargain collectively.[8] "In enacting section 1113, Congress intended to preclude employers from using bankruptcy law as an offensive weapon in labor relations by going into bankruptcy and unilaterally rejecting or modifying the extant collective bargaining agreement." In re Roth American, Inc., 975 F.2d 949, 956 (3rd Cir. 1992).

Accordingly, a CBA may only be rejected or modified pursuant to section 1113 of the Bankruptcy Code.[9] Chicago Dist. Council of Carpenters Pension Fund v. Cotter, 914

---

[7] Congress passed section 1113 in response to the Supreme Court decision in NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), holding that a collective bargaining agreement is an executory contract subject to rejection by a debtor in possession under section 365(c) of the Bankruptcy Code. In Bildisco, the Supreme Court held that a debtor in possession may reject a collective bargaining agreement if (1) it burdens the estate; (2) equities favor rejection; and (3) reasonable efforts to negotiate a voluntary modification have been made and there is no likelihood that it would produce a prompt satisfactory solution. In passing section 1113, which supersedes the holding of Bildisco, Congress rejected the Supreme Court's approach. "Congress enacted 11 U.S.C. § 1113, which forbids unilateral modifications prior to a court hearing and ruling upon an application to modify a collective-bargaining agreement. Section 1113 sets forth exhaustive procedural requirements to insure that the interests of the union are represented and protected before any action is taken to modify the rights of its members under the collective-bargaining agreement. Congress's response suggests the inference that it disfavors unilateral mid-term modifications by an employer absent the economic hardship which warrants a filing for bankruptcy, and then, only under the meticulous procedural safeguards provided by § 1113." N.L.R.B. v. Manley Truck Line, Inc., 779 F.2d 1327, 1332 n.7 (7th Cir. 1985).

[8] Donald B. Smith and Richard A. Bales, Reconciling Labor and Bankruptcy Law: The Application of 11 U.S.C. § 1113, 2001 L. Rev. Mich. St. U. Det. C.L. 1145 (2001).

[9] Section 1113(a) provides that a "debtor in possession . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section." The procedures for rejection are set forth in sections 1113(b), (c) and (d).

Section 1113(e) authorizes the bankruptcy court to grant interim relief:

F. Supp 237 (N.D. Ill. 1996) (section 1113 is the exclusive means by which to reject a collective bargaining agreement) (citing Air Line Pilots Assoc., Intl. v. Shugrue (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 989-91 (2d Cir. 1990)); In re Garofalo's Finer Foods, Inc., 117 B.R. 363, 369 (Bankr. N.D. Ill. 1990) ("Although section 1113(c) references only rejection and not modification, the same requirements apply to the latter form of relief. Otherwise, the mandate of section 1113(f), stating that no provision of title 11 shall be construed to permit unilateral termination or alteration of any provision of a collective bargaining agreement, prior to compliance with the provisions of section 1113, would be meaningless."); see also Adventure Resources, Inc. v. Holland, 137 F.3d 786 (4th Cir. 1998); Roth American, 975 F.2d at 957-58 (benefits under CBA earned post-petition where debtor did not move to modify or reject CBA under § 1113 were entitled to administrative priority status); United Steelworkers of America v. Unimet Corp. (In re Unimet Corp.), 842 F.2d 879, 884 (6th Cir. 1988) (section 1113 "unequivocally prohibits the employer from unilaterally modifying any provision of the collective bargaining agreement") (emphasis in original). For the past 18 months – from

---

> If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

Section 1113(f) states that "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."

the April 2003 CBA modifications to its recent request for a scheduling order to begin section 1113 proceedings – United has not taken proper action to reject, modify or otherwise restructure the provisions in the CBAs concerning the Plans or their benefits.

Nor does this recent request to initiate section 1113 proceedings change the analysis. A CBA may not be rejected retroactively. Teamsters Industrial Security Fund v. World Sales, Inc., (In re World Sales, Inc.), 183 Bankr. 872 (9th Cir. BAP 1995) (citing In re Hoffman Bros. Packing Co., Inc., 173 Bankr. 177 (9th Cir. BAP 1994). As the Ninth Circuit Bankruptcy Appellate Panel cogently observed:

> [The] rights [of the employees] accrue as services rendered on the basis provided for by the CBA. These rights vest post-petition, and as indicated it would violate § 1113(f) to transform these rights into general unsecured claims upon subsequent rejection of the CBA. Hence, employees working under a CBA are insulated from the consequences of immediate rejection under § 365(g); subsection 1113(f) mandates that any conflict between § 1113 and other code sections must be resolved in favor of § 1113 as a whole. Because a CBA may not be rejected retroactively, unilateral breaches prior to rejection cannot be relegated to unsecured status.

Id.

Unless and until rejection is approved by the Court through a section 1113 proceeding, United must comply with all provisions of a collective bargaining agreement. Journeymen Plasterers Protective and Benevolent Society Local No. 5 v. Energy Insulation, Inc. (In re Energy Insulation, Inc.), 143 B.R. 490, 495 (N.D. Ill 1992) (until a collective bargaining agreement is rejected, the debtor must abide by its terms); In re Moline, 144 B.R. 75,78 (Bankr. N.D. Ill. 1992) (same); In re Manor Oak Skilled Nursing Facilities, 201 B.R. 348, 350 (Bankr. W.D.N.Y. 1996) (same).

Moreover, a post-petition obligation arising under a collectively bargained agreement that has not been rejected under section 1113 must be paid as an

administrative expense. In re Chicago Lutheran Hospital Association, 75 Bankr. 854, 856-7 (Bankr. N.D. Ill 1987). In such cases, "[p]ermitting the employees to continue to accrue benefits was necessary to the debtor-in-possession's reorganization attempt and was required by the terms of the collective bargaining agreement." Id. at 857. A number of courts have held that these claims are entitled to administrative expense priority without a determination of whether the right to payment arose pre- or post-petition, or whether the expense is an actual and necessary expense that benefits the estate. See Adventure Resources, 137 F.3d at 798 ("[T]he obligations of an executory contract must be accepted along with its benefits."); Roth American, 975 F.2d 949 (provisions under unmodified CBA given full effect on their face without further analysis); In re Colorado Springs Symphony Orchestra Assoc., 308 Bankr. 508, 519 (Bankr. D. Co. 2004) ("So long as the bargaining unit members provide consideration to a debtor-in-possession as contemplated by the collective bargaining agreement, then whatever obligation is owed to the workers under that agreement's unmodified terms, and based upon the consideration provided by the workers, is an allowable administrative expense under 11 U.S.C. § 503 (b)(1)(A)."); see also In re 1655 Broadway Restaurant Corp., 1997 WL 104961 (S.D.N.Y. Mar. 7, 1997) (having not moved to reject or modify the CBA, debtor is bound by terms of CBA which requires debtor to make timely payments to union pension and welfare funds); Wilmington Trust. Co. v. WCI Steel, Inc., (In re WCI Steel, Inc.), 313 B.R. 414 (Bankr. N.D. Ohio 2004) (debtor is required to perform all obligations under unmodified pension agreement that is a CBA, including making minimum funding contributions to the pension plan).

Here, United previously sought and obtained the unions' agreement for wage and other concessions under the CBAs. After filing its motion under section 1113 to reject the CBAs, United and its unions "vigorously bargained over changes," but United's "proposed changes to pensions quickly became a serious sticking point, with the unions offering additional wage or work rule concessions to minimize changes to the pension plans." The negotiations reflected the high value that the unions and employees placed on their pension benefits, even going so far as to protect those benefits by making greater wage concessions.

United withdrew its section 1113 motion after reaching agreement with the unions. United pronounced that the "modifications equitably addressed the financial, transformational and labor relations imperatives presently facing United in a cooperative manner that will best serve the interests of the Estate," and acknowledged the sacrifices being made by the employees. The modifications did not freeze accruals, terminate the Plans or excuse United from its obligation to make the minimum funding contributions required under ERISA to make good on its promises not to reduce pension benefit levels. For 18 months, United held up its end of the bargain by making contributions to the Plans, and its employees continued to provide services. In July 2004, without initiating the section 1113 process, United began publicly questioning the viability of the Plans and stopped making the required minimum contributions to the Plans. By doing so, United impermissibly reduced the level of retirement benefits promised in the CBAs in violation of section 1113. Moreover, it clearly reneged on its promises to the flight attendants union that it would continue to fund that Plan. Now, after over $800 million has accrued in delinquent contributions to the Plans, United has filed a motion under section 1113 to

rejects the CBAs, including the provisions requiring it to maintain the Plans. While United may seek to modify or reject the CBAs prospectively, it may not do so retroactively. Permitting United to treat the minimum funding payments as general unsecured claims would be a retroactive rejection of the collective bargaining agreements, an act that is prohibited by section 1113 and which Congress sought to prevent through section 1113. The funding payments should, instead, be given administrative priority status.

C. The Obligation to Pay is Entitled to Priority Under Jartran Because the Funding Contributions Arose Post-Petition and Benefited the Operation of United's Business

United's funding obligation must be treated as a priority administrative expense on yet a third basis. Although an expense for pre-petition services that accrues post petition is generally treated as an unsecured, nonpriority claim, where the debtor in possession has induced post-petition performance that has benefited the estate, the debt is treated as an administrative, priority expense. See Jartran, 732 F.2d at 586-87 (inducement to perform must be made post-petition by the debtor-in-possession and must benefit the estate for administrative expense status). Thus, to establish administrative expense priority on this basis, the claimant must show that the debt: (1) arose out of a post-petition transaction with the debtor in possession; and (2) benefited the operation of the business. Jartran, 732 F.2d at 586-87 (citing Mammoth Mart, 536 F. 2d at 954; National Steel Corp., 2004 WL 2403587, at *7; In re Pre-Press Graphics Co., 287 B.R. 726, 730 (Bankr. N.D. Ill. 2003) (citing Jartran).

The first element of the Jartran test focuses on whether the right to payment arose pre-petition or post-petition, not the time at which the contract was executed. National

Steel, 2004 WL 2403587, at *9. The second element requires that the creditor show that the expense is an actual and necessary expense that benefits the estate as a whole. Jartran, 886 F.2d at 871. It is measured by the benefit received by the estate, not the costs incurred by the claimant. See Demert & Dougherty, 227 B.R. at 513.

Here, the first element of the Jartran test is met because the employees of United were induced to remain on and labor for United at least in part by United's promise to continue making contributions to the Plans.[10] As noted above, during the first 18 months of these proceedings, which included the restructuring of the CBAs, United made the minimum funding contributions to the Plans maintained pursuant to the CBAs. While it filed a motion in March 2003 to reject the CBAs, it withdrew the motion one month later after having negotiated modifications that affected wages and the calculation of certain pension benefits. United acknowledged the sacrifices of its employees and recognized that additional wage concessions were being agreed to in order to protect pension benefits. As a result of the negotiated modifications, United withdrew its motion to reject

---

[10] Some courts have focused on currently-employed employees when applying the Jartran test. See e.g., Chicago Lutheran Hospital Association, 75 B.R. at 856-7; World Sales, 183 B.R. at 872. The Secretary believes retirees should be included in the Jartran analysis because of the impact that United's treatment of its retirees has on current employees. In providing services in expectation of promised retirement benefits, a current employee may very well look to the manner in which United deals with its retirees. The Court should take into account the fact that many active employees continue to labor for United, in part, with the belief that the retirees' benefits will be protected. In addition, a retiree, in most instances, will be in the weakest position and least able to absorb reductions in benefits. Unlike active employees, a retiree generally will not be able to make up the shortfall after his or her pension is cut. Here, the debtor not only made contributions to the Plans for 18 months post-petition, but also renegotiated the CBAs and agreed to continue the Plans at current levels in exchange for wage concessions from the unions. These actions related to the Plans as a whole and did not differentiate between current employees and retirees. Because the employees understandably relied on these actions in continuing to provide their labor for the company, United should be held to the entire funding obligation.

the CBAs. Since then, until its November 23, 2004 motion to reject the CBAs, United has filed nothing to reject the CBAs and its obligation to maintain promised retirement benefits. United's employees have continued to work in good faith, accruing pension benefits and relying on the terms of the restructured CBAs. Pension benefits accrued post petition because United continued the Plans, as it was obligated to do under the CBAs and the modifications to them. In reliance on the CBAs and United's post-petition conduct, union members, who were participants in the Plans, continued to provide post-petition services to United. After agreeing to restructure the CBAs, the employees agreed to lower wages and benefits, in exchange for United's agreement to continue providing the retirement benefits promised in the CBAs. Therefore, the first requirement under Jartran is satisfied.

These facts plainly distinguish this case from the Sixth and Tenth Circuit decisions where the courts distinguished the labor performed post petition and allowed administrative expense priority only to those benefits tied to the post petition labor. In those cases, the employees did not continue to work in reliance on the debtor's post-petition continuation of its pension plans. See Sunarhauserman, 126 F. 3d 811 (shortly after the petition date, the debtor sought bankruptcy court authority to terminate its pension plan in a distress termination and during the bankruptcy the Debtor moved amended the pension plan to freeze all further accruals under the plan.); PBGC v. Skeen (In re Bayly Corp.), 163 F.3d 1205 (10th Cir. 1998) (employees ceased performing services for the employer before the employer filed for bankruptcy and thus the liabilities under the pension plan stem from nonforfeitable benefits accrued by employees as a result of pre-petition labor). See also In re Kent Plastics, 183 B.R. 841 (Bankr. S.D. Ind.

1995) (employees' retirement plan frozen six years prior to petition date therefore unpaid minimum funding obligations were based on prepetition labor and therefore not entitled to administrative expense treatment); In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882, 886 & n.7 (Bankr. S.D.N.Y. 1993) (only thirty-eight of the 746 pension plan participants were still working for debtor at time of its Chapter 11 filing; four months later, no employees remained); but see Columbia Packing Co. v. PBGC, 81 Bankr. 205 (D. Mass. 1988) (last plan contribution made two years before Chapter 11 petition; company ended operations seven months later).[11]

The facts here are most analogous to those in Adventure Resources. See 137 F.3d at 791. Like United, Adventure Resources and its numerous subsidiaries simply chose not to make the pension contributions required under the CBAs in effect, operating under chapter 11 for 43 months. Id. at 791-92. The Fourth Circuit wrote that since Adventure Resources "continue[d] to reap the benefits of its bargain without concern that the non-debtor party . . . be made whole," id. at 790, the debtor was fully liable for the pension contributions missed both before and after the petition date as a priority administrative expense. Id. at 798; but see In re CF&I Fabricators of Utah, Inc., 150 F.3d 1293, 1299-1300 (10th Cir. 1998) (without discussion, court held that only claims arising directly from post-petition labor was entitled to administrative priority).

[11] The courts in some of these cases made actuarial calculations in an attempt to link funding obligations to the post-petition work provided by whatever fraction of participants remained as employees post-petition. Because this case can be distinguished from those cases in that the employees here reasonably relied on United's promises and conduct with regard to the entire funding obligation, the Secretary submits that this Court need not launch into a study of actuarial valuations, but should instead hold United liable for the entire amount. See note 8, supra. To the extent the Court believes it is necessary to apportion liability based on the post-petition labor, the Secretary notes that the Independent Fiduciary has provided the necessary calculations.

The second element of Jartran requires a showing that the expense is an actual and necessary expense that benefits the estate as a whole. As noted above, the union members have continued to provide services to United under the CBAs which has benefited the estate and permitted United to continue to operate during the post-petition period. See Chicago Lutheran Hospital Assoc., 75 B.R. at 856-7; World Sales, 183 B.R. at 872. United has characterized these post petition services as "not only necessary, but 'indispensable,'" "essential," and "critical." First Day Motion, ¶¶ 97, 100. It is plain that these services benefited the estate. Accordingly, the second element of the Jartran test is met. Therefore, under the Jartran test, at least a part of the funding obligations constitute a priority administrative expense.

CONCLUSION

For all the reasons set forth above and in the Independent Fiduciary's motion, this court should classify the minimum funding contributions as priority administrative expenses and grant the relief sought by the Independent Fiduciary.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

Dated: Washington, D.C.
December ____, 2004

TIMOTHY D. HAUSER
Associate Solicitor of Labor
Plan Benefits Security Division

RISA SANDLER
Counsel for Fiduciary Litigation

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

THERESA S. GEE
Senior Trial Attorney

CHRISTINE HERI
Senior Trial Attorney

SONYA L. LEVINE
Trial Attorney

EVAN NORDBY
Attorney

By: Christine Z. Heri · PBO
(Attorney Signing)

United States Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Suite N 4611
Washington, D.C. 20210
(202)693-5600

and

United States Department of Labor
Office of the Solicitor
Federal Building
230 S. Dearborn Street
Chicago, IL 60604
(312)353-7836