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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

DELTA AIR LINES, INC., et al.,

Debtors.

Chapter 11 Case No.

05-17923 (PCB)

(Jointly Administered)

**DALRC'S MEMORANDUM OF REPLY IN SUPPORT OF
DALRC'S APPLICATION FOR COMMITTEE APPOINTMENT**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reject Delta's request, on 3 days' notice, to rule that Section 1114 does not apply: (1) to Delta's major changes for the November open enrollment period, and (2) to all future changes of benefits for non-pilot retirees. Delta's rationale is that all non-pilots' benefits are amendable.¹ But Congress, in Section 1114, for good reason defined retiree benefits broadly without excluding amendable benefits. Without Section 1114's protection, critical medical, disability and survivor benefits will be among the first costs cut in the bankruptcy. Section 1114(a) retiree benefits are not immune to necessary cost cuts, but Section 1114 requires fairness and negotiation with an effective retiree representative to minimize the harm to retirees. Delta, however, has not justified its breathless request to immediately eliminate all Section 1114 protections for the 36,500 non-pilot retirees and dependants without a noticed motion. But that request does underline the urgent need to appoint the DALRC Board as a proven effective committee to represent the non-pilot retirees under Section 1114.

This Court should also reject the transparent effort of Delta and the Creditors' Committee to create a combined, truncated and obviously weaker retirees' committee more to their liking. That effort to dilute the DALRC Board's effectiveness is especially inappropriate since: (1) neither Delta nor the Creditors Committee contest that all Delta's other retiree groups, including the Pioneers to whom Delta would give a seat, (a) support the DALRC Board's appointment to represent non-pilot retirees as a Section 1114 committee, and (b) reject Delta's proposal, and (2) Delta's proposed benefit cuts currently affect only non-pilot retirees.

¹ Delta's view is that except for premium waivers, "all provisions of the Delta Family-Care Plans remain subject to termination or modification." (Declaration of Robert Kight ("Kight Decl."), p. 17, ¶ 40.) Given Delta's belief that it can eliminate medical coverage, the remaining commitment to pay the non-existent premiums would not mean much. Similarly, Delta asserts in its plan documents that it can amend, terminate or modify disability benefits "in its sole discretion" and that it can do the same for survivor benefits. Reply Declaration of Cathy Cone, October 25, 2005, at ¶ 21 and Exhibit L, ("Cone Reply Decl.," filed concurrently herewith).

II. THE COURT SHOULD APPOINT THE DALRC BOARD AS A SECTION 1114 RETIREE COMMITTEE

A. THE DALRC BOARD IS BROADLY REPRESENTATIVE AND EFFECTIVE.

Delta concedes by its silence that the DALRC Board has worked for two years to prepare for this bankruptcy and to educate and advocate for Delta retirees about bankruptcy and benefits issues. Delta and the Creditors' Committee also do not dispute other fundamental facts: (1) the DALRC Board of 10 retirees provides the necessary and extraordinary experience, expertise² and size to continue its work to represent the Delta employees, and to reduce the need for expensive professional advisers; (2) every other retiree organization supports the DALRC to represent non-pilot retirees as a Section 1114 Committee; and (3) before Delta's bankruptcy, the DALRC also received Delta's endorsement as the non-pilot retirees' representative on health benefits issues.

With this history, the entire Board should now be appointed as the Committee, with later consideration of adjusting it, if needed. For right now there is much work to do given Delta's announced plans. The DALRC Board has been working for free and is committed to continue to do so in the future. With this degree of commitment, talent and knowledge, there is no legitimate reason to spurn their offer of help.³

B. THE DEBTOR'S AND CREDITORS' COMMITTEE PROPOSAL IS A TRANSPARENT ATTEMPT TO DILUTE THE COMMITTEE'S EFFECTIVENESS.

While not challenging the DALRC Board as the natural and expected non-pilot Retiree Committee, the Debtor and the Creditors' Committee want to limit the DALRC's representation

² The DALRC Board includes a former President of Delta, who has also served as the CEO of World Airways, Continental and Air Canada; the former Chief Operating Officer of Delta; and the former Senior Vice President in charge of Delta Human Resources. See Affidavit of Cathy Cone, September 22, 2005 ("Sept. 22 Cone Aff."), at ¶ 12.

³ Should the Court be interested in pilots and non-pilots being on the committee, the representation of both groups should be proportional to their retiree numbers, as discussed below at Section V, not according to Delta's formula that more than doubles the pilots' representation.

to two DALRC members and generally dilute the contribution that the DALRC should be making, by: (1) having the Trustee “canvas” the retirees for two additional non-pilot members; (2) placing a Delta Pioneer on the Committee over the Pioneers’ opposition; and (3) adding a pilot retiree designated by DP3 and one additional pilot member. The Debtor and Creditors’ Committee provide no rationale for their proposal.

The Debtor also provides no basis for suggesting that their gerrymandered committee, “would balance an appropriate deference to existing Delta retiree groups against the interests of the majority of retirees who are not a member of any ad hoc retiree group.” (Debtor Memorandum, p. 16). It makes no sense at this critical time to search for committee members who have not been at all involved with these complicated matters over the past two years, and neither the Debtor nor the Creditors’ Committee have suggested any logic to suggest that the DALRC has not ably represented all retirees, including the “silent majority.”

There is also no sense to the Debtor’s suggestion that the DALRC’s representation on the Committee should be defined by the size of its dues-paying membership (Debtor Memorandum, p. 16). There is no reason to believe that any retirees, irrespective of their affiliation, would want to dilute the effectiveness of the one group that has been fighting to protect their interests. The most that can be said about the size of the DALRC’s membership is that Delta breached its promise to provide the DALRC with an address list of retirees, thereby limiting the DALRC’s membership solicitation efforts.⁴

In addition, the Delta Pioneers have rejected the Debtor’s and Creditors Committee’s suggestion to place a Pioneer on the Committee. Not surprisingly, Ms. Malone, the Pioneers national President, has loudly rejected the Debtor’s proposal and reconfirmed that the Pioneers

⁴ See October 13, 2005 Supplemental Affidavit of Cone (“Supp. Cone Aff.”) at ¶ 7, and correspondence between Counsel for Delta and the DALRC attached collectively to the October 25, 2005 Reply Declaration of Dean M. Gloster (“Gloster Reply Decl.”) at Ex. A.

want the DALRC Board to speak for the retirees on Section 1114 issues in one unified voice. (See October 24, 2005 letter of Patricia Malone, attached to the Cone Reply Decl. as Exhibit G and her earlier letter attached to the September 22, 2005 Cone Affidavit as Ex. C). Underlining the absurdity of the Debtor's Pioneers seat proposal is that almost all of the DALRC Board members are members of the Pioneers. The Debtor's and Creditors' Committee's Pioneers' gambit⁵ illustrates why this Court should not allow them to have any hand whatsoever in shaping the Retiree Committee.

III. DELTA MUST COMPLY WITH SECTION 1114 TO CHANGE NON-PILOT MEDICAL BENEFITS

Delta is proposing to almost double health care costs for its sickest retirees.⁶ The 13,700 non-pilot retirees under various early retirement packages will lose the "Enhanced Option" benefits (with lower deductibles, copays and caps on out-of-pocket costs.) And other non-pilots will face steep increases in their deductible and maximum out of pocket costs. Most Delta non-pilot retirees are receiving pensions of less than \$2,000 a month, and many receive less than \$1,000. (Cone Reply Decl., at ¶ 3.) For an early retiree receiving less than \$1,000 a month with major medical needs, the Enhanced Option now and "family" coverage for his or her spouse, Delta is proposing to triple the deductible, increasing it to \$1,500, and to almost double the cap on out-of-pocket costs, from \$4,000 to \$7,000. Thus, such a retiree receiving less than \$12,000 a year would pay \$4,000 more for the same medical coverage, in after-tax dollars, raising his total costs to \$8,500. On an individual level, the consequences will be catastrophic.

⁵ The Debtor's and Creditors' Committee's Pioneers seat proposal is particularly galling, since during the last two weeks, at Delta's request, the Delta Pioneers took down their link to the DALRC Web site, since in Delta's view it was inappropriate for a social organization like the Delta Pioneers to have any apparent contact or association with an organization involved in bankruptcy advocacy for retirees. (Cone Reply Decl., at ¶ 20). In addition, the Delta Pioneers include pilots and active employees. Delta simply wants to dilute the focus of the Committee in protecting challenged non-pilot retiree benefits early in the case.

⁶ Delta inaccurately characterizes these changes as "in keeping with past practices." That is not true. The changes are extraordinary. (Cone Reply Decl., at ¶ 5.)

Dozens of Delta’s retirees have written to the DALRC to describe the painful choice between buying medicine or food they will face if their benefits are cut, given that they are barely able to keep their “heads above water” under current benefit levels. (Cone Reply Decl., ¶ 8.) Still others are putting off essential medical procedures because they simply cannot afford them, or they are forced to decide which medical conditions they will treat. Because of their age, and the concomitant health problems that come with old age, these retirees are unable to obtain replacement insurance, nor are they able to return to the work force they have been away from for years or sometimes decades.

A. SECTION 1114 PROVIDES EXPLICIT STATUTORY PROTECTION FOR RETIREE MEDICAL BENEFITS AS THEY EXISTED SIX MONTHS PRIOR TO THE BANKRUPTCY.

1. The Language Of Section 1114 Is Clear.

When interpreting whether Section 1114 encompasses “amendable” benefits, we start, as always, with the plain words of the statute.⁷ Section 1114(e)(1) provides that notwithstanding any other provision of Title 11, a debtor, “shall timely pay and shall not modify *any* retiree benefits” except when the court, after notice and hearing, orders such modification or the debtor and authorized representative agree to the modification of benefits. 11 U.S.C. § 1114(e)(1) (emphasis added). Further, under Section 1114, the retiree benefits subject to its protection are those payments made “under any plan, fund, or program . . . maintained or established . . . by the debtor prior to filing a petition commencing a case under this title” for the purpose of providing retired employees non-pension benefits. 11 U.S.C. § 1114(a). The plain language of

⁷ The Supreme Court repeatedly has held that where the language of a statute is clear, the language must be deemed conclusive and applied according to its ordinary meaning. See, e.g., Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (“It is well established that ‘when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.’”); see also In re Century Brass Products, Inc., 795 F.2d 265, 273 (2d Cir. 1986) (“Our construction of the statute follows from its plain language”). Thus, if the statutory language is plain, no further construction of the statute is required, for there is nothing to construe. INS v. Cardoza-Fonseca, 480 U.S. 421, 445 n. 29 (1987).

Section 1114 therefore clearly encompasses the entire category of retiree benefits, including “amendable” benefits. “[T]he language of the statute makes it quite clear that – absent the occurrence of two statutory conditions – the debtor in possession is required to continue the payment of retirement benefits at prepetition levels *The statute contains no other basis for debtors to modify or cease the payment of retiree benefits.*” In re Speco Corp., 195 B.R. 674, 678 (S.D. Ohio 1996) (emphasis added).

Thus, nowhere does the statute purport to recognize, much less carve out, an exception for “amendable” benefits. On the contrary, “the statute makes no distinction whatsoever about the basis on which retiree benefits are paid” – including “whether the employer has the power to modify such agreement or plan outside of bankruptcy” – “but rather includes ‘any plan, fund, or program’ maintained or established by the debtor prior to filing.” Susan J. Stabile, Protecting Retiree Medical Benefits In Bankruptcy: The Scope Of Section 1114 Of The Bankruptcy Code, 14 Cardozo L. Rev. 1911, 1932 (1993); In re Farmland Indus., Inc., 294 B.R. 903, 917 (Bankr. W.D. Mo. 2003) (“There is nothing in the language of the statute to suggest that Congress intended to allow the termination of retiree benefits in those instances where the debtor has the right to unilaterally terminate those benefits under the language of the plan or program at issue.”) Application of the plain meaning rule leads to the inarguable result that Section 1114 reaches “any retiree benefit,” amendable or not.

a. The Contrasting Language of Section 1129(a)(13) Demonstrates That Congress Knew How to Limit 1114’s Scope.

The different language used by Congress in Section 1129(a)(13) triggers another legislative interpretation maxim confirming that Section 1114 is not limited to non-amendable benefits. “[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” Sosa v. Alvarez-

Machain, 542 U.S. 692, 124 S. Ct. 2739, 2754 (2004). Section 1129(a)(13) protects Section 1114 benefits, post confirmation, “at the level established” under Section 1114 and, most critically, only “for the duration of the period the debtor has obligated itself to provide such benefits.” 11 U.S.C. §1129(a)(13). By contrast, Section 1114 contains no such “duration of the period ... obligated” limitation. This critical difference between the two provisions is presumed to be intentional, and highlights Congress’ choice not to limit the reach of Section 1114 to non-discretionary benefits except in the post-confirmation context under Section 1129(a)(13).

b. Section 1114 Protects “Affected Parties,” And Not Just Creditors Who Have “Claims.”

Delta makes much of the word “claim” in Section 1114 to suggest that the only parties protected by Section 1114 are those who have a “claim” for breach of an executory contract providing benefits, thereby excluding Delta’s retirees who do not have such a “claim.” But Delta bases its argument on a misreading of the discrete scope of Sections 1114(i) and (j). Section 1114(i) simply prohibits a Debtor from exercising setoff of benefits paid under Section 1114 against other “claims” for unpaid benefits to be paid under Bankruptcy Code Section 553. It does not contemplate or require that all rights under 1114 be restricted to claims. Similarly, Section 1114(j) prevents application of limits under Section 502(b)(7) to limit claims for benefits, if those claims exist. In those cases where the protected rights to benefits are not claims, Section 502(b)(7) would never apply in the first place, since it only limits “claims.” Finally, a closer reading of the statutory language directly contradicts Delta’s interpretation. Sections 101(10)(B) and 502(g) of the Bankruptcy Code say the holder of a claim for breach of an executory contract is a “creditor.” Section 1114(g)(3) and (f)(1)(A) say, however, that the court must weigh the impact on both the “affected parties” protected by Section 1114 and “the creditors.” This is clearly a reference to “affected parties” who are not creditors, specifically

because they do not have a claim for breach of an executory contract. They do, however, have protected “retiree benefits.”

c. Congress Expanded Section 1114’s Protections In The 2005 Amendments To Further Protect Retiree Benefit Plans.

The changes in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 also contradict Delta’s cramped and ERISA-driven reading of Section 1114. In Section 1114(l) Congress expanded Section 1114’s protection to benefits as they existed six months prior to the Chapter 11 filing, if the Debtor was insolvent at the time of the benefits change. Thus, Congress specifically contemplated that Section 1114 would apply to benefits that could be amended (and thus were amendable) by the Debtor. Moreover, the trigger on whether Section 1114 applies is not whether the benefits are contractual or protected by ERISA, but whether the company was insolvent. Congress made it clear the statute is designed to protect retiree benefits in the context of company insolvency, not to enforce provisions of a different statute, ERISA. Delta’s argument that this change to Section 1114 should only apply to a pre-bankruptcy violation of ERISA therefore makes no sense. If Congress intended such an outcome, it could have said so.⁸

⁸ Delta’s reliance on Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) is misplaced for the proposition that Congress must have known that Section 1114 did not apply to pre-existing health benefits such as those of Delta’s non-pilot retirees when it enacted the 2005 Amendments. In Lorillard, the Court considered whether the Age Discrimination in Employment Act of 1967 provided for a right to jury trial in a private action. In finding that it did, the Court noted that “[l]ong before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the [Fair Labor Standards Act (“FLSA”)]. Indeed, *every court to consider the issue had so held.*” (emphasis added, citations omitted). Therefore, the Court concluded that Congress had extensive knowledge of the operation of Fair Labor Standards Act, as illustrated by its selective incorporation and amendment of FLSA provisions for the Age Discrimination in Employment Act, and that Congress could not be assumed to have been unaware that courts had uniformly afforded jury trial under the FLSA. Id.

The contrast between Lorillard and this case is stark. First, the limited amendment to Section 1114(l) found in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 did not “adopt a new law incorporating sections of a prior [well-known] law.” See Section 1114(l). Second, and dispositively, bankruptcy courts are at most split on the issue of non-union retiree benefit modifications, as Delta is well aware, and the plain reading of the statute is contrary to Delta’s position. While Delta’s opposition claims that there is a “prevailing judicial interpretation” among the courts and legal commentators, Delta omits entirely Collier’s primary commentary citing four opinions finding that “the plain language of section 1114 prohibits modification of retiree benefits” “regardless of a unilateral termination right.” 7 Collier on Bankruptcy §1114.03[1] at 1114-16, n. 6a (2005). Lacking judicial unanimity among bankruptcy courts, district courts, or circuit courts, there is no evidence that Congress was

2. The Policy Considerations Underlying Section 1114 Require It To Be Applied To Amendable Benefits.

The purpose of Section 1114 is clear. “Congress responded to the particular vulnerability of retirees by passing a statutory provision that gives all retirees a protection they would not otherwise have had but for the fact that their former employer filed for bankruptcy.” Stabile, supra, at 1946. And the situation here is precisely what Congress had in mind. The numerous emails received by the DALRC confirm retirees with pre-existing medical conditions cannot get replacement insurance or health coverage. (See Declaration of Richard J. Butler, ¶4.)

Not only are retirees especially vulnerable as a class, but “they also are in a very weak negotiating position with the debtor, and therefore less able than others to protect their interests.” Stabile, supra, at 1947. Having already made their contribution to the company, sometimes decades ago, “there is nothing that retirees have that the company needs.” Retiree Benefits Security Act of 1987: Hearings on S.548 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 16 (statement of Sen. Heinz). As a result, their benefits are seen as the first cost that can be cut without endangering the debtor’s ongoing business.

In response to the vulnerable predicament of retirees, Congress passed Section 1114 to give retirees substantive and procedural protections to allow for negotiation on a level playing field, and to allow courts to weigh the harm and fairness of deep cuts to retiree medical, disability, and survivor benefits. See S. Rep. No. 119, 100th Cong., 2d Sess. 7, reprinted in 1988 U.S.C.C.A.N. 683, 689 (“the Committee recognizes that the special treatment of retiree benefits [is] created by section 1114”); see Stabile, at 1949 (“special protection really means allowing

endorsing Delta's view in adopting the 2005 Amendments, especially when Delta's reading is contrary to the plain language of the statute as recognized by the leading treatise.

retirees to stand on a more equal footing with other creditors ... fair and equitable treatment does not necessarily mean treating all parties equally”). Moreover, the negotiation provision of Section 1114 allows for win-win agreements, as retirees have the potential to negotiate current benefit cuts in return for the debtor’s commitment that “amendable” benefits won’t be cut further for a specific time frame – a commitment which will be enforceable post-confirmation under Section 1129(a)(13).

a. Congress Intended For Section 1114 To Provide A Mechanism For Negotiating Changes To Retiree Health Benefits Once A Debtor Sought Chapter 11 Relief.

The legislative history of Section 1114 further buttresses the conclusion that Congress did not intend to restrict the statute’s scope to only those entities that are prevented from modifying benefits outside of Chapter 11. As Senator Hefflin explained, the bill “would also provide with respect to *all* retirees that the employers can modify retiree insurance benefits in the absence of a negotiated settlement *only* if the court authorizes such modifications and when such modifications are necessary to enable the company to continue its business fairly and equitably to all parties.” 1987 Senate Hearings, supra, at 1 (statement of Sen. Hefflin). The leading bankruptcy treatise concurs, and the legislative history of Section 1114 supports the conclusion that:

Regardless of a unilateral termination right in the contract, the plain language of section 1114 prohibits modification of retiree benefits unless the court approves such modifications under sections 1114(g) and (h). . . . [T]he legislative history of section 1114 . . . indicates that the statute was intended to protect retirees regardless of whether a collective bargaining agreement was in effect, as well as the pervasive nature of the statutory scheme which is meant to provide special protection to retirees. Also supporting this view is the 2005 addition of new subsection (l) to section 1114 limiting a company’s ability to modify retiree benefits during the 180-day period prior to the filing of the bankruptcy petition.

7 Collier on Bankruptcy, § 1114.03[1], pp. 1114-16 – 1114-17 (15th ed. rev. 2005). Moreover, the legislative history of Section 1114 must be understood against the backdrop of events leading to the statute’s enactment. As the Bankruptcy Court for the Southern District of New York explained in In re New York Trap Rock Corp., 126 B.R. 19 (S.D.N.Y. 1991), “[t]his legislation was enacted in response to the termination of the health and life insurance benefits of approximately 79,000 retirees in the LTV Corporation Chapter 11 case. Pursuant to this legislation, a trustee in bankruptcy or a debtor in possession is required to continue to pay retiree benefits throughout reorganization under a ‘plan, fund, or program’ and at the levels maintained prior to the filing of the bankruptcy case, until or unless a modification is agreed to by the parties or ordered by the court.” Id. at 21-22.

B. THE CASE LAW CITED BY DELTA DOES NOT SUPPORT ITS SWEEPING POSITION.

Given the clarity of Section 1114’s language, the Debtor’s attempt to displace that language with its own strained interpretation should be summarily rejected. And even if the Court looks beyond the straightforward language of the statute, the case law cited by the Debtor requires no different result here.

The primary case on which the Debtor relies, LTV Corp. v. United Mine Workers (In re Chateaugay Corp.), 945 F.2d 1205 (2d Cir. 1991), did not even reach the issue before this Court: the treatment of retiree health benefits for employees not covered by a collective bargaining agreement. The sole question before the Chateaugay court was whether the Retiree Benefits Bankruptcy Protection Act of 1988⁹ required LTV to continue to provide health benefits to retirees covered by collective bargaining agreements after the expiration of those agreements. Chateaugay, 945 F.2d at 1206. Thus, not only does Chateaugay not address the application of

⁹ The substantive terms of sections 2 and 3 of the RBBPA were later codified as Section 1114.

Section 1114 to the unexpired health benefits of non-union retirees, but the many, substantive differences between the protections afforded retirees covered by collective bargaining agreements and those without the benefit of such agreements would make any extension of the holding of Chateaugay to the latter group inappropriate.¹⁰

The decision in Chateaugay is further distinguished by the critical fact that the LTV retirees confronted a situation in which their collectively bargained for rights had expired, thus leaving them with no extant contractual rights. The rights of Delta's non-pilot retirees, on the other hand, continue in full force and effect, although subject in some instances to modification.¹¹ This distinction strips Chateaugay of any application here.

Nor have the “overwhelming majority” of courts that have considered the issue here – numerous proposed changes to the medical benefits peculiar to non-union retirees – concluded that Section 1114 is inapplicable, as the Debtor asserts.¹² Indeed, the weight of authority holds that Section 1114 applies to amendable benefits. See In re Farmland Indus., *supra*; In re Speco Corp., *supra*; In re New York Rock Trap Corp., *supra*, and In re Ames Dep't Stores, Inc., 1992 WL 373492 (S.D.N.Y. Nov. 30, 1992), *rev'd on other grounds*, 76 F.3d 66 (2d Cir. 1996) (finding “the Debtor’s cavalier attempt to unilaterally terminate the Retired Employees’

¹⁰ Significantly, a subsequent decision by the bankruptcy court in the LTV bankruptcy proceeding implicitly approved the determination that the RBBPA protected salaried employees who receive benefits under health plans terminable at will by the employer. See In re Chateaugay Corp., 140 B.R. 64, 69-70 (S.D.N.Y. 1992).

¹¹ Indeed, the distinction between a right that naturally expires by its own terms, as in Chateaugay, and a right which the Debtor affirmatively seeks to terminate, led the court in In re Federated Dep't Stores, Inc., 132 B.R. 572 (Bankr. S.D. Ohio 1991), to conclude that “[t]he cases of In re Doskocil Co. and In re Chateaugay Corp. stand simply for the proposition that expiration of old contract rights involving retiree benefits may operate to short-circuit the modification process [of Section 1129(a)(13) and 1114.]” *Id.* at 574. Unexpired, arguably amendable rights like those at issue in this bankruptcy proceeding are not addressed by either Chateaugay or Doskocil.

¹² The Debtor’s contention that Collier has “concluded that section 1114 does not apply to amendable benefits” presumably overlooks Section 1114.03[1] of the treatise, explaining “Bankruptcy courts have been split on the issue whether a debtor must comply with the procedures and requirements of section 1114 even if the debtor has a legal right under a prebankruptcy retirement plan to unilaterally terminate retiree benefits.” 7 Collier on Bankruptcy, §1114.03[1], p. 1114-16 (15th ed. rev. 2005).

insurances benefits produces a drastic and most undeserving result” and ordering the Debtor to follow the requirements of Section 1114).

Moreover, the majority of the cases cited by the Debtor either did not deal with retiree medical benefits or were not decided under Section 1114. The decision in In re Raytech Corp., 242 B.R. 222, (Bankr. D. Conn. 1999), for example, was decided under ERISA, after the court concluded that “Section 1114 . . . is not implicated here.” Id. at 225 n.3; see also In re Penn Traffic Co., 2005 Bankr. LEXIS 785 (Bankr. S.D.N.Y. Mar. 11, 2005) (deciding, without discussion, that “Section 1114 is inapplicable” to discretionary life insurance policies); In re North American Royalties, Inc., 276 B.R. 860 (Bankr. E.D. Tenn. 2002) (Section 1114 did not prevent termination of retirement benefits plan where the company was ceasing operations and retirees had been provided notice, filed objections, and given an opportunity for discovery). The court in In re CF & I Fabricators, 163 B.R. 858 (Bankr. D. Utah 1994), like Chateaugay, merely concluded that where the union workers ended up with no collective bargaining agreement, there was no contractual right to benefits to enforce. Id. at 874; see also In re New Valley Corp., 1993 WL 818245 (D.N.J. Jan. 28, 1993) (also following Chateaugay).¹³

Delta’s reliance on the Second Circuit’s decision in In re Ames Dep’t Stores, Inc., 76 F.3d 66 (2d Cir. 1996), overruled on other grounds, Lamie v. U.S. Trustee, 540 U.S. 526 (2004) is equally superfluous, as the Second Circuit expressly declined to examine the issue of Section 1114’s application to amendable benefits: “[b]ecause our review is limited to the merit of Skadden’s fee application as of the time it was made, we see no need to examine into the present status of the pertinent law.” Id.

¹³ The unpublished decision in New Valley is unpersuasive for the additional reason that it was premised on an unwarranted attempt to harmonize Sections 1114 and 1129(a)(13) of the Bankruptcy Code with the provisions of ERISA. Id. at *3. Because the two statutory schemes are independent of each other, the imposition of any limitation on the application of Section 1114 derived from the strictures of ERISA’s vesting requirements is unfounded.

The Debtor's reliance on In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723 (Bankr. S.D.N.Y. 1992) is even more misplaced, as that decision in fact supports the application of Section 1114 to discretionary benefits. As described above at III(A)(1)(a), the contrast between Sections 1129(a)(13) and 1114, which were at issue in Drexel, supports the DALRC's interpretation.¹⁴

C. IN ANY EVENT, DELTA IS CHANGING BENEFITS THAT ARE NOT AMENDABLE.

Delta concedes that, for the over thirteen thousand non-pilot early retirees, it promised not to change the "specific retiree medical premium waivers." Kight Decl., at ¶ 17. But that's effectively what Delta is doing, in no longer offering the Enhanced Option for non-pilot retirees. That Enhanced Option is still available for pilots who are paying part of the cost. But Delta will just stop paying the premiums for that coverage for the non-pilots who took the early retirement package. They are essentially the only other users of the Enhanced Option. (Cone Reply Decl. ¶ 1).

Further, Delta led retirees, in its "Decision Booklet" on accepting early retirement programs, to believe that while Delta "reserved" the right to change benefits, those changes would only be imposed once Delta's aggregate medical costs were more than 150% of its 1993 levels (the "Cap".) Because of declining head count, Delta has never reached the Cap. (Cone Reply Decl., at ¶ 10.) For example, page 3 of the Decision Booklet for ERMO, the program with the most early retirees, provides by explanation:

¹⁴ Section 1129(a)(13) does not protect retiree medical benefits beyond the confirmation date unless as a result of the negotiation process under Section 1114, the parties have agreed to a specific term that would extend beyond the confirmation date. Congress knew how to limit the reach of Section 1114 to non-discretionary benefits had it so intended, but expressly chose not to limit that reach except in the post confirmation context under Section 1129(a)(13).

Delta's overall retiree medical costs remain subject to the 150% cap implemented in 1993. At that time, the company established a limit – 150% of actual 1993 retiree medical cost levels—on the total contribution that the company provides for retiree medical coverage. It's important to note that the ERMO does not waive any premiums that may be implemented as a result of Delta's retiree medical costs reaching the 150% cap....Because it's impossible to accurately project future health care costs, Delta cannot predict when the cap will be reached. However, once the cap is exceeded, Delta will evaluate a number of alternatives, including changing the retiree health plans available, benefit levels paid, and/or company and retiree premium levels paid.

Early Retirement Medical Option Decision Booklet at 3 (Gloster Reply Decl., Ex. B).

Thus, while Delta may seek refuge in its oft repeated reservations, it's perfectly reasonable to infer on a class wide basis that retirees under these early retirement programs reasonably understood that the 150% Cap provision trumped Delta's reservations to the extent that Delta had to reach the Cap before Delta could first invoke its reservation. (See Kight Decl. pp. 17-18 quoting Delta reservation language). If this were not the case, the reasonable retiree would suppose there would be no meaning to the Cap provision since Delta could at any time trigger its reservation rights. It is equally reasonable to infer that Delta employees gave up their jobs in detrimental reliance on this reasonable understanding. (Cone Reply Decl., at ¶ 10.)

At a minimum, then there are important factual disputes over whether the benefits Delta proposes changing are truly “amendable,” and this Court should not summarily rule in favor of Delta without a factual determination following Delta's providing “relevant information” to a Section 1114 retiree committee as required by Section 1114(f)(1)(B).

IV. THE COURT SHOULD APPOINT TWO SECTION 1114 COMMITTEES

There are critical differences between the non-pilot and pilot retirees that justify appointing separate committees. As a threshold matter, the ALPA has the right to represent the retired pilots under Section 1114(c)(1), and should have some influence on how those pilots are represented. Until ALPA renounces its right, the pilots should not serve on a larger committee

representing all retirees (let alone have two times the representation on that committee that their numbers justify). At this juncture, the ALPA has indicated that it wishes the pilots to have a separate committee.¹⁵ (Gloster Reply Decl., at ¶ 4.)

The non-pilot and pilot retirees are differently situated, which also justifies the appointment of two committees. First, the timing of benefits changes and the statutory protections are different for both groups, since the pilots are protected by a collective bargaining agreement under Section 1113. In fact, at this point the Debtor is (1) only proposing changes to non-pilot benefits, and (2) promoting a novel legal theory that only affects non-pilots, because pilots have “contractual” benefits. This creates the urgent need for a non-pilot committee. Second, the pilot retirees have different benefits than non-pilot retirees, and typically different economic interests. As a result, it is most efficient in this case to have each group separately represented by the committee members who have already extensively analyzed the various interests and benefits of each group for the past two years.

But the most important reason for separate representation is that Section 1114 requires a relative fairness test, requiring that changes to retiree benefits assure “that all creditors, the debtor and all affected parties are treated fairly and equitably.” 11 U.S.C. § 1114(g)(3). Putting pilots and non-pilots on one committee will mute some of the compelling arguments that each group could make separately: The pilot retirees can be expected to argue that they have already lost their non-qualified pension benefits in the case and should not have to sacrifice bargained-for health benefits as well, until others have also made sacrifices. The non-pilot retirees could argue that they already have fewer benefits than the pilots and should not have to sacrifice medical benefits until the pilots are asked to make equivalent cuts. It will be difficult for a

¹⁵ This is consistent with the committee formation in the United bankruptcy, where the pilots were represented by a separate committee from the other union workers and from the non-union retired management employees.

committee (or counsel) representing both groups to simultaneously assert these kind of arguments vigorously. Finally, there are likely very difficult compromises ahead on retiree benefits, and committee consensus to agree to those compromises will be far more difficult with a merged committee.¹⁶

Contrary to Delta's and the Creditors' Committee's argument, there is no unified case law, or compelling policy that requires one retiree committee in all circumstances.¹⁷ The Creditors Committee acknowledges that in the United Airlines bankruptcy case, the court appointed two separate retiree committees, with the two committees agreeing to share certain professionals (Creditors Committee Memo at 14, n.10). The parties there noted that the number of 1114 committees is best left to the discretion of the bankruptcy judge, who focused on how the accounting costs could be shared. *Id.* There is no reason that separate committees formed from the DALRC Board and DP3 could not enter into a similar arrangement here. Finally, the Debtor also attempts to parse the language of Section 1114(c)(2) which does not address the

¹⁶ Both the Debtor and the Creditors Committee focus on differences among the benefit programs of the pilots and non-pilots which allegedly do not justify separate committees without addressing the differences discussed above (Creditors' Committee Opp'n Memo, at 15,18, Debtor's Opp'n Memo at 14).

¹⁷ None of the reported decisions that either the Creditors' Committee or Delta rely upon for the proposition that courts should not appoint more than one Section 1114 committee are applicable. Those courts either did not discuss whether multiple committees may be appointed under Section 1114 or appointed one committee without discussing whether the retirees requested separate committees. *See In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 518 (Bankr. S.D.N.Y. 1991) (stating without discussion that one Section 1114 committee had been appointed for both the pilot and non-pilot retirees, but noting also that other unions would separately represent themselves in negotiations over retiree benefits); *Matter of Patrick Cudahy, Inc.*, 88 B.R. 895, 898 (Bankr. E.D. Wis. 1988) (granting official retirees committee motion under Bankruptcy Code Section 608 to be recognized as authorized representative of all retirees without explaining nature of disagreements between retiree groups); *In re Mirant Americas Energy Marketing, L.P. v. Official Committee of Unsecured Creditors of Enron Corp.*, 2003 U.S. Dist. LEXIS 18149 *27-*28 (S.D.N.Y. Oct. 9, 2003) (stating outside of Section 1114 context that separate committees may be appropriate where conflicts of interest would render joint representation inadequate, but affirming bankruptcy court order allowing joint representation because creditors were adequately represented); *In re Salant Corp.*, 53 B.R. 158, 161 (Bankr. S.D.N.Y. 1985) (same); *In re Transworld Airlines, Inc.*, 1992 Bankr. LEXIS 1344 *8 (Bankr. D. Del. March 20, 1992) (same); *In re Sharon Steel Corp.*, 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989) (same).

issue (Debtor's Memo. at 9, n.6), and looks to elliptical orders from other courts that do not address the issue before this Court.¹⁸

The Debtor and Creditors' Committee also speculate that two Committees would be more administratively cumbersome for them in reaching decisions, but there is no reason to believe that one committee would be any more efficient. When serious conflicts arose, one group or the other would have to hire separate counsel to advise it, and the Debtor and Creditors' Committee would find itself for all practical purposes in the same situation they claim to be able to avoid with one committee. Because of the unique circumstances in this case, the retirees' requests for two separate committees are justified and supported by precedent. The Court should grant DALRC's Application for appointment as a separate committee under section 1114.

Finally, the Court need not yet address the issue of separate or combined pilot representation: The only changes currently proposed by the Debtor are to non-pilot benefits, and the legal theory Delta asserts on the reach of Section 1114 currently only affects non-pilots without "contractual" benefit rights. The court should appoint a non-pilot committee immediately, to address those urgent issues.¹⁹

¹⁸ Toward that end, Delta cited several unpublished bankruptcy court orders without providing copies of them to the Court or the parties. See Delta Objection, p.10, n.7 (citing In re U.S. Airways, Inc., No. 04-13819-SMM (Bankr. E.D. Va. Oct. 28, 2004); In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 13, 2005); In re Solutia, Inc., No. 03-17949 (PCB) (Bankr. S.D.N.Y. Sept. 28, 2004); In re Kaiser Aluminum Corp., No. 02-10429 (Bankr. D. Del. Aug. 25, 2003); In re Nat'l Steel Corp., No. 02-08699 (Bankr. N.D. Ill. Apr. 21, 2003); In re Bethlehem Steel Corp., No. 01-15288 (BRL) (Bankr. S.D.N.Y. Sept. 12, 2002)). These orders provide no support to the Debtor or Creditors' Committee position that bankruptcy courts are limited to appointing one Section 1114 committee when retirees legitimately and reasonably request the appointment of two. Rather, in summary fashion, the bulk of the court orders which Delta relies upon appoint one retiree committee without discussing whether multiple committees were requested or whether the retirees had conflicting interests, and are therefore inapplicable.

¹⁹ We support the immediate appointment of a retired pilots committee as well, given the likelihood of a future attempt by Delta to modify pilot retiree benefits.

V. IF ONLY ONE COMMITTEE IS APPOINTED FOR BOTH PILOT AND NON-PILOT RETIREES, THE REPRESENTATION SHOULD BE PROPORTIONATE.

Rob Kight concedes that there are 5,000 retired pilot participants and 22,000 non-pilot retirees receiving Delta health care benefits. (Kight Decl., at ¶ 7.) That is roughly a 9:2 ratio of non-pilots to pilots. The ratio of non-pilot retirees to pilot retirees is even higher.²⁰ Yet Delta has proposed a committee with a ratio of 5:2 non-pilots to pilots. Giving non-pilots only about half their proportionate representation is especially inappropriate early in the case, when the only benefits challenged by Delta are those of non-pilots. Delta's agenda is to keep the committee small, with as few non-retirees as possible, and to keep the knowledgeable DALRC Board members who can be most effective off that committee. The Debtor should not be allowed to sculpt the makeup of an adverse party for its own tactical agenda.

VI. CONCLUSION

The plain language of Section 1114 protects the non-pilot retirees from the sweeping changes to the retiree medical benefits that Delta is improperly seeking to impose without any negotiations with an effective representative of the retirees. The DALRC is best prepared to serve as that representative, and the DALRC respectfully requests the Court grant its Application for an Order appointing the DALRC Board as the Retiree Committee.

²⁰ Although we understand that ratio of non-pilot retirees to pilot retirees is much higher than this figure, and accordingly the ratio of disability and survivor non-pilot beneficiaries may be greater. Apparently many more non-pilots may get health benefits through their spouse or partner. The figures in the Kight Declaration are inconsistent with Delta's earlier pleadings in the case, which stated that there were only 23,500 total retirees. That discrepancy, and the difficulty in verifying the figures in the Kight declaration, point out the need for the "relevant information" the Debtor must provide under Section 1114(f)(1)(B).

