

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

_____)	
In re)	
)	
UAL CORPORATION, et al.)	Chapter 11
)	
Debtors.)	Case No. 02-B-48191
)	(Jointly Administered)
)	
)	Hon. Eugene R. Wedoff
)	Hearing Date: Sept. 16, 2005
)	Hearing Time: 10:00 a.m.
_____)	

**OBJECTION OF ASSOCIATION OF FLIGHT ATTENDANTS-CWA, AFL-CIO,
TO DEBTORS' MOTION FOR ENTRY OF AN ORDER PURSUANT TO SECTIONS
105(a) AND 363(b) (1) AUTHORIZING THE DEBTORS TO IMPLEMENT A KEY
EMPLOYEE RETENTION PROGRAM FOR SELECT MYPOINTS EMPLOYEES
[Docket No. 12617]**

The Association of Flight Attendants-CWA, AFL-CIO ("AFA"), respectfully submits this Objection to Debtors' Motion for Entry of an Order Pursuant to Sections 105(a) and 363(b) (1) Authorizing the Debtors to Implement a Key Employee Retention Program for Select MyPoints Employees ("KERP Motion" or "Motion"). As we demonstrate below, United plainly has failed to meet its burden of establishing that the MyPoints KERP, as currently proposed, is both fair and reasonable and reflects sound business judgment. Accordingly, the KERP Motion should be denied.

BACKGROUND

1. Over the course of this bankruptcy, tens of thousands of United employees have lost their jobs, while the financial security of those who have remained has steadily eroded. In an effort to ensure a successful reorganization, United's unions have largely agreed to the Company's demands for over \$3.2 billion in annual

wage, benefit and work rule concessions, including \$440 million in annual concessions from Flight Attendants. Each time the unions have negotiated modifications to their collective bargaining agreements, they have done so based on the Company's insistence that the savings are essential to United's successful reorganization and on the Company's pledge that salaried and management ("SAM") personnel and senior executives are sharing the pain and financial sacrifice necessary for United to exit bankruptcy.

2. However, at the same time that union-represented work groups agreed to drastic cuts in wages and benefits through 2010, United's senior executives and SAM employees have received generous increases in compensation. According to the Company's 2004 10-K, United officers' compensation increased in either base salary and/or bonuses by amounts ranging from \$33,799 for Chief Operating Officer Peter McDonald and \$150,413 for Executive Vice President Douglas Hacker to \$377,476 for Chairman, President and Chief Executive Officer Glenn Tilton and \$650,000 for Executive Vice President John Tague.

3. Further, the Company has budgeted \$55 million in increased compensation for SAM employees between 2006 and 2009. According to the Company's business plan, salaried and management employees are to receive pay raises such that in 2009 they will be earning 16.3% and 11.5%, respectively, more than they were earning in 2004, while Flight Attendants will be earning 4% less. See AFA Obj. Debtors' Excl. Mot. (filed Apr. 15, 2005) at 14-15.

4. Finally, in May of this year, as the Company implemented present and future pay cuts for labor and pay increases for management, United's four defined benefit pension plans were terminated, over the objections of AFA and other unions. In eliminating the defined benefit plans, the Company eliminated whatever residue of financial security Flight Attendants had retained after all the concessionary agreements. It is hardly surprising that the annual attrition rate for Flight Attendants has grown by an order of magnitude since the Company filed for Chapter 11, increasing more than five-fold. In August 2005 alone, 570 Flight Attendants either ended their active employment or decided not to accept recall from furlough.

5. Now, against this backdrop of extreme employee sacrifice and suffering, the Company submits the present KERP Motion, which proposes bonuses of over half a million dollars for a handful of unnamed "individuals." As described in Debtors' Motion, the MyPoints KERP contains three components, ostensibly designed "to motivate management to maximize the sale price" of MyPoints. KERP Mot. at 5. First, the MyPoints KERP contains a retention component, providing for "payment equal to 50% of annual salar[ies]" to participants, "50% [payable] at the closing of the sale and 50% [payable] at the earlier of six months post-closing or termination of the [participant] by the purchaser." Id. at 3. Second, the MyPoints KERP contains a severance component, according to which "seven individuals each would be eligible for a severance payment equal to 50% of that respective individual's base salary in

the event MyPoints is sold and that individual's employment is subsequently terminated." Id. Third, the MyPoints KERP contains a sale incentive program that is "a stated percent of the incremental value of the business above \$11 million [up to \$51 million]. . . rang[ing] from 0.25% to 5.0%, depending on the ultimate sale price" and is triggered if the sale price exceeds \$21 million. Id. In their KERP Motion, Debtors provide no information about the identities or positions of those who would be eligible to participate in the MyPoints KERP, nor any information about how the sale incentive would be distributed among the participants.

ARGUMENT

6. Section 363(b)(1) of the Bankruptcy Code provides that a debtor-in-possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). As Debtors acknowledge, under Section 363(b)(1), they have "the burden to establish that a valid business purpose exists" for the MyPoints KERP. KERP Mot. at 5; see also In re Aerovox, Inc., 269 B.R. 74, 81-82 (Bankr. D. Mass. 2001).

7. In determining whether a debtor has carried its burden of establishing that a valid business purpose exists for a KERP, courts assess whether the KERP "is an exercise of [the] Debtor's sound business judgment and is fair and reasonable." In re Georgetown Steel Co. LLC, 306 B.R. 549, 556 (Bankr. D.S.C. 2004); see also In re Aerovox, Inc., 269 B.R. at 80-81; In re Interco, Inc., 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991). As we demonstrate

below, Debtors have manifestly failed to carry their burden of establishing that the MyPoints KERP is both an exercise of the Company's sound business judgment and is fair and reasonable.

1. The MyPoints KERP Is Neither Fair Nor Reasonable.

8. Debtors' KERP Motion should be denied because it is patently unfair and unreasonable. Under the terms of the MyPoints KERP, as proposed, individual participants could receive payments in excess of \$650,000, including over half a million dollars from the sale incentive program alone.^{1/} Especially at this juncture in the bankruptcy, on the verge of exit, after so many have sacrificed so much to enable a successful restructuring, payments of half a million dollars or more is simply, and without question, excessive, irrespective of the rationale. It bears mention that \$650,000 is equal to the average salary of eighteen Flight Attendants. Tens of thousands of Flight Attendants did not sacrifice their jobs, wages and pensions, saving this Company hundreds of millions of dollars, so that it could turn around and take that money to pay out millions of dollars in bonuses to nine "individuals."

9. The MyPoints KERP fails the fair and reasonable test for the additional reason that the severance component does not contain

^{1/} According to the Motion, the "total severance and retention rewards under the MyPoints KERP . . . could total up to \$570,000" and the "sale incentive, which is triggered at a \$21 million sale price and increases incrementally until the sale price equals or exceeds \$51 million, ranges from 2-11% of the sale price." KERP Mot. at 3. Eleven percent of a \$51 million sale price is \$5.61 million, or \$623,000 for each of the nine participants, while the total retention and severance cost of \$570,000 divided among the nine participants is \$63,000.

a mitigation provision. Courts have made clear that severance plans adopted in bankruptcy as part of an employee retention program should contain a mitigation provision reducing the severance amount to reflect earnings during the applicable severance period. See In re Geneva Steel, 236 B.R. 770, 773-74 (Bankr. D. Utah 1999) ("To be acceptable . . . , the severance plan must contain a mitigation provision that reduces the amount payable in the event the executive obtains other employment during the . . . reimbursement period.") To do otherwise would unnecessarily drain the estate of funds and provide senior executives "with a windfall," which is particularly inappropriate in the bankruptcy setting. Id. at 773. Moreover, the MyPoints KERP would bestow substantial severance payments upon an individual who suffered no break in employment because United or another subsidiary of UAL, Inc. had hired that person immediately following the sale of MyPoints.

10. Because the MyPoints KERP provides for cash being drained from the estate to pay a handful of anonymous individuals bonuses, which are clearly excessive, especially given the enormous sacrifices of United's unionized employees, and fails entirely to mitigate against windfalls that those executives would likely receive as a result of those payments, the MyPoints KERP is incontrovertibly unfair and unreasonable. Accordingly, Debtors' Motion should be denied.

2. The MyPoints KERP Does Not Reflect Sound Business Judgment.

11. Debtors have also failed to establish that the MyPoints KERP reflects sound business judgment. Courts "review[] [KERP proposals] on a case-by-case basis, depending on each debtor's particular facts and circumstances," as to why a proposed KERP is an exercise in sound business judgment. In re Georgetown Steel, 306 B.R. at 555; see also In re Montgomery Ward Holding Corp., 242 B.R. 147, 154 (D. Del. 1999); In re America West Airlines, Inc., 171 B.R. 674, 678-79 (Bankr. D. Ariz. 1994). Here, the Company has not even attempted to make the required particularized showing that the MyPoints KERP is, in fact, necessary according to any standard of sound business judgment.

12. First, it is simply impossible for the Court to determine whether the MyPoints KERP is necessary because the Company, unlike its previous KERP motions, has not bothered to identify, by name, position or even job classification, any of the prospective participants in the KERP. It is not even clear whether the prospective KERP participants are employees or consultants, as the Company repeatedly refers to them simply as "individuals." KERP Mot. at 2-3. Thus, there is no way to know if any of them are "crucial employees," much less if any of them are "likely to search for other employment." In re Georgetown Steel Co., 306 B.R. at 556.

13. Second, in contrast to the hundreds of Flight Attendants who are resigning every month, Debtors have adduced no evidence of any risk of attrition among the prospective participants in the

MyPoints KERP. In evaluating KERP programs, courts emphasize that the debtor must demonstrate a substantial risk that key employees will leave the debtor. See, e.g., In re Montgomery Ward, 242 B.R. at 149-50. Debtors generally meet this burden by showing a significant increase in the loss of key employees immediately prior to or after the bankruptcy filing. See id. Alternately, a debtor may show that a significant number of its key employees have threatened to leave or have been approached by rival companies. See id. Here, Debtors have offered no evidence of rising attrition rates at MyPoints, let alone evidence that any of the prospective MyPoints KERP participants have either threatened to leave MyPoints or have been approached by a competitor.

14. Third, Debtors' entire argument for the MyPoints KERP rests on two wholly unsubstantiated conclusory claims. First, Debtors claim that "each of the three elements proposed in the MyPoints KERP (retention, severance, and sale incentive) are commonly used in the sale of business units to retain key management employees and to motivate management to maximize the sale price." KERP Mot. at 5. However, the Company provides no authority, legal or otherwise, to support this claim. Second, Debtors claim that "the financial metrics of the MyPoints KERP are fair and reasonable" because the "severance and retention costs range from 1.1% to 2.7%" "of the expected sales price." Id. According to the Company, "total severance and retention costs for the sale of a business unit are generally no more than 3-5% of the expected sales price." Id. Once again, however, the Company

provides no authority, other than its own say-so, for this unsubstantiated claim.

15. Fourth, the MyPoints KERP does not adequately link specific performance goals and the proposed payments. Typically, courts look for such a linkage as evidence of sound business judgment. See In re Interco, 128 B.R. at 231 (retention plan bonus payments keyed to the achievement of set financial targets); In re Georgetown Steel, 306 B.R. at 558 (upholding programs under the retention plan that "are primarily incentive based and are tied to certain accomplishments" relating to a successful reorganization of the company). Such a linkage is entirely absent from the retention and severance component of the MyPoints KERP. There is simply no logical relation between either the retention payment or the severance payment, neither of which are tied to the sale price, and a MyPoints KERP participant's motivation to maximize the sale price of MyPoints. They receive their retention and severance payments regardless of the sale price.

16. On the other hand, it is conceivable that a sale incentive program, provided it was fair and reasonable, could reflect sound business judgment. To be fair and reasonable, under the circumstances, a MyPoints sale incentive program would not only have to forego the truly excessive payments, it would also have to demonstrate, in more detail than simply a range of sale prices and percentages, that the program, in fact, bases a specific employee's financial reward upon that employee's specific responsibility for

increasing the sale price by a specific amount, none of which the MyPoints sale incentive program currently does.

17. Lastly, Debtors provide no evidence of a sound business rationale for why all three components of the MyPoints KERP are necessary. As discussed above, a fair and reasonable sale incentive program that targeted specific individuals, who were demonstrably responsible for increasing MyPoints' sale price, with modest financial rewards could conceivably serve a sound business purpose. But, thus far, the Company has failed to propose a sale incentive program that reflects that type of sound business judgment. Furthermore, the Company has provided no independent business justification for either the retention component or the severance component of the MyPoints KERP. Accordingly, the Debtors' Motion should be denied.

CONCLUSION

18. For all the foregoing reasons, AFA respectfully requests that the Court deny Debtors' KERP Motion.

Respectfully submitted,

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Dated: September 9, 2005.

Counsel for Association of Flight
Attendants-CWA, AFL-CIO

CERTIFICATE OF SERVICE

I, Robert S. Clayman, hereby certify that, on this 9th day of September 2005, true copies of the foregoing **Objection of Association of Flight Attendants-CWA, AFL-CIO, to Debtors' Motion for Entry of an Order Pursuant to Sections 105(a) and 363(b)(1) Authorizing the Debtors to Implement a Key Employee Retention Program for Select MyPoints Employees** were served via overnight delivery on the attached Core Group Service List and via electronic mail or facsimile on the Updated 2002 Service List. Pursuant to Section C.3.i(1) of the Second Amended Notice, Case Management and Administrative Procedures in this proceeding, service lists have been filed with the Court. In accordance with Rules 9014 and 7004, a true copy of the foregoing Objection was served by first-class mail on Frederic Brace, an Officer of United.

/s/ Robert S. Clayman
Robert S. Clayman