IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE DELTA AIR LINES, INC.	)	MDL DOCKET NO. 1424-JEC
	)	
	)	ALL ACTIONS

PARTIES' JOINT MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS, AND PLAINTIFFS' MOTION FOR APPOINTMENT OF CLASS COUNSEL

Plaintiffs and Defendants hereby respectfully move the Court, pursuant to Rule 23(e)(1)(A) and (e)(2) of the Federal Rules of Civil Procedure, to give final approval to the class-wide Stipulation and Agreement of Settlement ("Settlement Agreement" or "Agreement") entered into by the parties on May 19, 2005, and to which the Court gave preliminary approval on May 24, 2005; grant final certification of the Settlement Class (consisting of two subclasses) that the Court conditionally certified on May 24, 2005, pursuant to Rules 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure; and for such other and further relief as may be appropriate in carrying out the settlement for the Court. In addition, Plaintiffs respectfully move, pursuant to Rule 23(g)(1) of the Federal Rules of Civil Procedure, for appointment of counsel for the Settlement Class. The grounds for these Motions are as follows:

1.

The issues in this case have been litigated intensively, both at the administrative and judicial level, over the several years since these actions were transferred to this Court for coordinated pretrial proceedings.

2.

Through diligent efforts of the parties and their counsel, a settlement of all claims was reached. The settlement is set forth in the Settlement Agreement, a copy of which was filed with the Court on May 20, 2005.

3.

In accordance with the Settlement Agreement, the parties moved the Court for its preliminary approval; approval of the Class Notice specified therein; and conditional certification of a Settlement Class consisting of two subclasses—the Lump Sum Subclass and the Minimum Benefit Subclass—which encompass all five claims asserted by Plaintiffs in their Amended Complaints. (The overwhelming majority of members of the Minimum Benefit Subclass are also members of the Lump Sum Subclass.) The Court granted the Motion by Order dated May 24, 2005 (the "Preliminary Approval Order").

4.

The subclasses, as set forth in Agreement ¶ 3.10, consist of the following persons:

(a) **The Lump Sum Subclass** shall include (1) all Delta pilots who retired on or before January 1, 2005 and elected a lump sum distribution of pension benefits since that option was first made available effective March 2, 1989, or, if deceased, their respective Beneficiaries, (2) all Delta pilots who were employed by Delta on January 1, 2005, (3) Alternate Payees who were not receiving any benefits from the Retirement Plan as of January 1, 2005, and (4) Alternate Payees who were receiving benefits from the Retirement Plan as of January 1, 2005 and elected a lump sum distribution.

(b) **The Minimum Benefit Subclass** shall consist of (1) all Delta pilots who were employed by Delta on February 1, 1972 and who retired on or after January 1, 1990 or, if deceased, their respective Beneficiaries, and (2) Alternate Payees of any such pilot described in (1).

5.

The overall settlement is fair, reasonable, and adequate, meets all requirements of applicable law, and is deserving of the Court's final approval.

6.

The Agreement has been fashioned to take into account the relative strength of the Plaintiffs' claims and of Defendants' defenses to those claims; the cost, delay, and uncertainty of continued litigation; and last, but not least, the current financial circumstances of the Defendants.

7.

The Agreement provides that the Defendants are to provide the following relief:

(a) In satisfaction of Counts II-V of the Amended Complaints, Payment of $15,500,000.00 from the IRS-qualified Delta Pilots Retirement Plan ("Plan"). This money will comprise what the Agreement designates as the "Qualified Settlement Fund," and used to pay expenses, attorneys' fees, and claims of those Minimum Benefit Subclass members who are legally permitted to receive additional payments from the Plan's IRS-qualified trust—namely, individuals whose benefits are not in excess of the limits prescribed in section 415(b) of the Internal Revenue Code, 26 U.S.C. § 415(b), and who thus are not receiving payments from the "excess benefit" Delta Pilots Bridge Plan ("Bridge Plan"). Agreement ¶¶ 5.1(b), 7.4, and 7.5. Pursuant to the Agreement ¶ 5.1(b), and the Preliminary Approval Order, these funds have been segregated from the other general assets of the Plan.

(b) Also in satisfaction of Counts II-V of the Amended Complaints, Payment of $500,000.00 from Delta Air Lines, Inc. ("Delta"). This money will be paid into what the Agreement designates as the "Non-Qualified Settlement Fund," and used to pay expenses and the claims of those Minimum Benefit Subclass

members who are *not* legally permitted to receive additional payments from the qualified Plan—namely, persons receiving payments from the excess benefit Bridge Plan. Agreement ¶¶ 5.1(a), 7.1. Delta has deposited those funds in an escrow account at Wachovia Bank, which is serving as escrow agent. *Id.* ¶¶ 3.21, 5.1(a), 7.1, as required by the Agreement ¶ 5.1(a) and the Preliminary Approval Order.

(c) In satisfaction of Count I of the Amended Complaints, the issuance of 1,000,000 Warrants to purchase Delta common stock. The Warrants will expire five years from the date of issuance and will be distributed to the Lump Sum Subclass members after a portion is used to pay part of Plaintiffs' Attorneys' fees. Agreement ¶ 5.1(c), 7.2.

8.

Pursuant to the Settlement Agreement, The Garden City Group, Inc., located in Melville, New York, was appointed as Settlement Administrator. The Garden City Group, Inc. has extensive experience in administering settlements in all kinds of class actions. *See* <www.gardencitygroup.com/about/index.html >.

9.

Following the Court's preliminary approval of the Settlement Agreement, Delta compiled data that was used by the Settlement Administrator to provide

notices to class members within the 45 day deadline specified in the Settlement Agreement. *See* Preliminary Approval Order ¶ 4; Agreement ¶ 6.1. On July 20, 2005, the Settlement Administrator mailed Class Notice to the last known address of class members based on that list. *See* Affidavit of Jose Fraga, July 27, 2005, filed on August 1, 2005.

10.

The Class Notice (Exhibit 1 to the Settlement Agreement) approved by the Court on May 24, 2005 properly advised Class members of all appropriate information regarding the Settlement Agreement, including their rights under the Settlement Agreement, their right to object to the Settlement Agreement, the need to file objections by no later than August 24, 2005 (the deadline adopted by the Court in Scheduling Order No. 17, based on the Settlement Administrator's effectuation of mailing of the Class Notice on July 20, 2005; *see* Settlement Agreement ¶ 11.2(d)); and the right to appear at the September 6, 2005 Rule 23(e)(1)(C) fairness hearing. *See* Affidavit of Jose Fraga, July 27, 2005, Ex. 1, filed August 1, 2005. The individual mailing of the Class Notice satisfies all requirements of Rule 23(e)(1)(B) and Due Process.

11.

Minimum Benefit Subclass members also received, with their Class Notice, a Claim Form (attached as Exhibit 4 to the Settlement Agreement) that they needed to return by the same August 24, 2005 cut-off date in order to document and establish their entitlement to recovery in the form of a cash payment from the Qualified or Non-Qualified Settlement Fund. Agreement ¶ 6.3. *See* Affidavit of Jose Fraga, July 27, 2005 & Ex. 2, filed August 1, 2005.

12.

Distribution of the Qualified Settlement Fund requires some further administration in order to comply with IRS regulations pertaining to the distribution of money from IRS-qualified retirement plans. Those individuals who timely submitted a Claim Form and are determined to be Minimum Benefit Subclass Members eligible for a distribution from the Qualified Settlement Fund because they are not current recipients of benefits from the Bridge Plan will be sent a Distribution Packet containing the necessary forms for that purpose. Agreement ¶ 7.6(a).

13.

Specifically, the Distribution Packet of election and consent forms will be sent to those Minimum Benefit Subclass members to determine whether they can

receive a single payment; whether they can only be paid with an annuity; whether their spouse consents to a single payment; and whether their recovery, if paid as a single amount, will be "rolled over" into another qualifying account such as an Individual Retirement Account. Agreement ¶¶ 8.1, 8.2.

14.

The actual distribution of Warrants to the Lump Sum Subclass members and payments to the Minimum Benefit Subclass members from both the Non-Qualified Fund and the Qualified Fund, as well as the payment of Attorneys' Fees and Expenses and remaining Settlement Administrative Expenses, will occur after the Court's entry of the Final Order and Judgment.

15.

The further grounds for these Motions are set forth in detail in the parties' respective memoranda submitted in support of the Motions, the Settlement Agreement and exhibits submitted in connection and in support of the Motions, and the entire record in the case.

16.

As of this date, no objections to the Settlement Agreement have been filed by any class member. In the event that any objection is timely filed by August 24,

2005, the parties will address it in a supplemental submission or at the September 6, 2005 Fairness Hearing.

WHEREFORE, the parties respectfully request that the Court:

(a) Grant final approval to the Settlement Agreement as fair, adequate, and reasonable;

(b) Certify the Settlement Class consisting of the two subclasses as defined in the Settlement Agreement;

(c) Enter the Final Order and Judgment proposed by the parties.

(d) Enter such other and further Orders and grant such other and further relief as may be appropriate for the purpose of effectuating the Settlement Agreement.

In addition, Plaintiffs respectfully request that the Court

(a) Appoint Plaintiffs' Attorneys as Class Counsel for the purpose of the settlement, as provided in the Agreement.

RESPECTFULLY SUBMITTED:

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

/s/ David F. Walbert
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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2005, I electronically filed the foregoing **Parties' Joint Motion for Final Approval of Class Settlement and Certification of Settlement Class, and Plaintiffs' Motion for Appointment of Class Counsel** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Philip C. Cook
Patrick Connors DiCarlo
Howard Douglas Hinson
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/s/ David F. Walbert
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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND PLAINTIFFS' MOTION FOR APPOINTMENT OF CLASS COUNSEL

I. PRELIMINARY STATEMENT

Plaintiffs Robert D. Berger ("Berger"), Samuel O. Gamble ("Gamble"), William G. MacAulay ("MacAulay"), and the Estate of Mac Braun, by its personal representative, Ann Braun Goldfein ("Braun") (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their joint motion with Defendants[1] for final certification of a settlement class ("the Class") and for final approval of the parties' May 19, 2005 Stipulation and Agreement of Settlement Agreement ("Settlement," "Settlement Agreement," or "Agreement"), pursuant to Rule 23(a), (b)(1)-(2), and (e)(1) of the Federal Rules of Civil Procedure. In

[1] Defendants are Delta Air Lines, Inc. ("Delta"), the Administrative Committee of Delta Air Lines, Inc. ("the Committee"), The Delta Pilots Retirement Plan ("the Plan"), The Delta Pilots Bridge Plan ("the Bridge Plan"), and The Delta Pilots Supplemental Annuity Plan ("Supplemental Annuity Plan") (collectively, "Defendants"). They are filing their own memorandum in support of the joint motion.

addition, Plaintiffs respectfully submit this memorandum in support of their motion for appointment of counsel for the Class, pursuant to Rule 23(g)(1) of the Federal Rules of Civil Procedure.

For the reasons discussed in detail below, the Settlement Class easily satisfies the requisite criteria of Rule 23, and the Settlement of this litigation is eminently fair, adequate, and reasonable, and deserving of final approval. In addition, Plaintiffs' counsel have amply demonstrated their fitness during the four year-long course of this litigation to serve as counsel for the Class.

II. STATEMENT OF FACTS

A. Plaintiffs' Claims and Defendants' Defenses

Plaintiffs are three retired Delta pilots (and the estate of one deceased retired pilot) hired by Delta and on the system seniority list of Delta prior to February 1, 1972 ("Pre-'72 Pilots"). In their Amended Complaints, filed on December 18, 2002, ("Complaints"), they collectively asserted five claims.[2]

[2] Plaintiffs' employment and pension histories are set forth in detail on pages 6-8 of Plaintiffs' October 11, 2004 memorandum of law in support of their motion for summary judgment ("Plaintiffs' October 11th Memorandum"). A thorough overview of the framework and structure of the Plan and the provisions and methodologies that have been at issue in this litigation can be found on pages 3-5 of Plaintiffs' October 11th Memorandum, pages 4-9 of Defendants' October 12, 2004 memorandum of law in support of their motion for summary judgment as to Count I, pages 3-12 of Defendants' October 12, 2004 memorandum of law in

In Count I of their Complaints, all four Plaintiffs allege that although Delta pilots, irrespective of what pension formula they are eligible to receive benefits, may elect to receive the portion of their accrued pension benefit that is otherwise payable as a "variable annuity" in the form of a lump sum paid at retirement, Defendants' lump sum valuation methodology violates the requirement in section 204(c)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), codified at 29 U.S.C. § 1054(c)(3), that such lump sum payments be the actuarial equivalent of a participant's normal retirement benefit.

In Count II of their Complaints, Plaintiffs Berger, Gamble, and MacAulay challenge, as violative of, *inter alia*, the "anti-cutback" provision of section 204(g)(1) of ERISA, codified at 29 U.S.C. § 1054(g)(1), Defendants' July 1, 1996 amendment to the Plan, which changed the valuation formula in section 8.02(B)(v) of the Plan—that had pegged the value of "Benefit Units" (earned under the Minimum Benefit formula available to Pre-'72 Pilots) at retirement to changes in the Standard & Poor's 500 Stock Index ("S & P 500") since January 1, 1972—and substituted for that valuation formula a permanently fixed Benefit Unit value of

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support of their motion for summary judgment as to Count II, and pages 4-18 of Defendants' October 12, 2004 memorandum of law in support of their motion for summary judgment as to Counts III, IV, and V.

$240.31, the value of Benefit Units in effect on the date of the amendment.

In Count III of their Complaints, Plaintiffs Berger, Gamble, and MacAulay allege that Defendants did not provide legally-sufficient notice—in accordance with section 204(h) of ERISA, codified at 29 U.S.C. § 1054(h)—of the July 1, 1996 amendment to the Plan that prospectively reduced the earnings multiplier component of the Minimum Benefit formula in section 8.02(B) of the Plan from 2% to 1% of earnings.

In Count IV of their Complaints, Plaintiffs Braun and Gamble allege that even prior to freezing Benefit Unit values outright in July 1996, Defendants had wrongly construed section 8.02(B)(ii)(c) & (v) of the 1989 version of the Plan, requiring that Benefit Units be valued "as of" or "on" participants' Normal Retirement Date, respectively, as allowing it to employ the value of those units that had most recently been calculated as of December 31st of the calendar year preceding the start of the current plan year (which runs from July 1st to June 30th). Those Plaintiffs alleged that Defendants' practice had thereby resulted in a six- to seventeen-month "lag" (depending on a Pre-'72 Pilot's retirement date) in the pegging of Benefit Units to changes in the S & P 500.

Finally, in Count V of their Complaints, Plaintiffs Berger and Gamble challenge, as violative of the "anti-forfeiture" provision of ERISA, section

203(a)(1), codified at 29 U.S.C. § 1053(a)(1), and the statute's "anti-alienation" provision, section 206(d)(1), codified at 29 U.S.C. § 1056(d)(1), the application of a Joint and Survivor ("J & S") Factor (based on the age of the retiree and the age of the retiree's spouse at the time of retirement) to reduce the Minimum Benefit formula pension benefits of married Pre-'72 Pilots.

Defendants have vigorously disputed all of Plaintiffs' claims, arguing, *inter alia*, that, as to Count I, lump sum payments do, in fact, represent the actuarial equivalent of the variable annuity portion of participants' pension benefits; that, as to Count II, the July 1, 1996 freeze of Benefit Unit values was not a "cutback" within the meaning of ERISA § 204(g)(1) because (i) Plaintiffs had not "accrued" benefits (within the meaning of ERISA) under the Minimum Benefit formula at the time of the amendment, and (ii) the July 1, 1996 amendment did not reduce whatever value Plaintiffs' Minimum Benefit possess as of that date.

In addition, as to Count III, Defendants argued that they provided direct notice of the July 1, 1996 amendments to Plan participants in accordance with ERISA § 204(h); that, as to Count IV, their annual, year-end valuation of Benefit Units prior to July 1, 1996 was a longstanding and reasonable interpretation of the Plan provision concerning Benefit Unit valuations and continued a valuation method employed in a predecessor pension plan; and that, as to Count V, the

reduction of the Minimum Benefit of married Pre-'72 Pilots is lawful, having been adopted pursuant to a 1972 agreement between Delta and the Air Line Pilots Association ("ALPA") and for the legitimate purpose of partially offsetting the cost to Delta of providing benefits to married Pre-'72 Pilots' beneficiaries under the separate Delta Disability and Survivorship Plan ("D & S Plan").

B. Prior Proceedings

1. Initial filings and Administrative Proceedings

Plaintiffs commenced the four actions currently before the Court in their respective transferor courts in May and June of 2001. By order dated October 31, 2001, the Judicial Panel on Multidistrict Litigation transferred the actions to this Court for coordinated pretrial proceedings. *See In re Delta Air Lines, Inc.*, 170 F. Supp. 2d 1359, 1360 (J.P.M.L. 2001). Subsequently, the parties entered into a stipulation filed on May 31, 2002, pursuant to which Plaintiffs pursued an expedited administrative determination of their claims in order to resolve the parties' dispute over whether judicial consideration of Plaintiffs' claims was precluded by reason of their not having exhausted available administrative remedies. The administrative proceedings concluded with the Committee's October 30, 2002 decision denying all of Plaintiffs' claims, including one claim respecting the calculation and payment of lump sums of pension benefits (relating

to the mortality table used by Defendant) that Plaintiffs did not further pursue in this litigation.

2. The Amended Complaints, Renewed Judicial Proceedings, and Mediation Efforts

Following the completion of the administrative proceedings, Plaintiffs filed their Complaints on December 17, 2002. On January 21, 2003, Defendants filed answers, and also filed a motion to dismiss Count IV for lack of subject matter jurisdiction and for a more definite statement as to the other counts. The Court denied Defendants' motion, as well as Plaintiffs' subsequent motions for class certification and to compel discovery, without prejudice after the parties entered into voluntary mediation in the summer and fall of 2003.

In the meantime, the parties had pursued discovery for a 120-day period from January 21, 2003 to May 21, 2003. During that time, all of the Plaintiffs were deposed, including Plaintiff James B. Porter, who subsequently dismissed his claims voluntarily with prejudice by Order docketed December 13, 2004.

After the unsuccessful conclusion of the parties' mediation efforts before the Honorable Roy E. Barnes, who was assisted by Professor Edward A. Zelinsky of the Benjamin N. Cardozo School of Law in New York City (a specialist in tax law), briefing was completed on Plaintiffs' motion to compel discovery, and

Defendants, for their part, filed a motion to dismiss Plaintiffs' claims against the Bridge Plan and the Supplemental Annuity Plan (collectively, "the Non-Qualified Plans") for lack of subject matter jurisdiction.

In August 2004, the Court granted Defendants' motion to dismiss, holding that Plaintiffs' claims against the Non-Qualified Plans were subject to mandatory arbitration under the Railway Labor Act. *See In re Delta Air Lines, Inc. ERISA Litig.*, No. 1:02-MD-1424-JEC, order at 15-26 (N.D. Ga. Aug. 9, 2004). In addition, the Court denied Plaintiffs' motion to compel discovery, holding that Plaintiffs were not entitled to discovery and that the Court's consideration of their claims was limited to review of the evidence contained in the administrative record. *See id.*, order at 30-33, 34. Plaintiffs timely moved for partial reconsideration of the Court's ruling. Their partial reconsideration motion was addressed solely to the Court's ruling on their motion to compel discovery. That motion was fully briefed and *sub judice* at the time the parties reached a settlement in principle.

On October 11 and 12, 2004, the parties filed cross-motions for summary judgment. On December 15, 2004, the parties filed responses to each other's summary judgment motions, and Plaintiffs also filed a motion for voluntary dismissal with prejudice of Counts III and IV of the Complaints. Reply briefs in

support of the parties' respective summary judgment motions and Defendants' response to Plaintiffs' voluntary dismissal motion were due on March 8, 2005, but the due dates were continued after a settlement in principle was reached.[3]

3. The Settlement

Despite the unsuccessful outcome of their 2003 mediation efforts, the parties continued to discuss the possibility of settlement outside formal mediation. The settlement discussions consisted of numerous telephone conferences, meetings, e-mails, letters, and eventually the exchange of many proposals and counter-proposals. The settlement negotiations were at all times vigorous, often spirited, and at arm's length. The parties reviewed and considered extensive information regarding their respective positions on the merits and the financial status of Delta, which is the sponsor of the three defendant plans.

After their extensive and spirited efforts, the parties reached a settlement that fairly, adequately, and reasonably balances the various competing considerations that includes a careful balancing of the merits of the parties' respective claims and

[3] Based on the parties having informed the Court of their settlement—and, in particular, on their anticipated filing of their joint motion for preliminary approval of the settlement and conditional certification of a settlement class—the Court, by Order dated May 9, 2005, denied, without prejudice, Plaintiffs' motion for partial reconsideration, Plaintiffs' motion for voluntary dismissal of Counts III and IV, and the parties' respective motions for summary judgment.

defenses; the objective of providing meaningful relief to the members of the class of pension plan participants on whose behalf Plaintiffs commenced these actions while achieving, for Defendants, closure at a bearable cost; the goal of avoiding further costly, burdensome, and time-consuming litigation for all sides; and the current delicate financial posture of the pension plans' sponsor, Delta.

The parties signed a formal Stipulation and Agreement of Settlement on May 19, 2005, which was approved by the Committee and by Delta's Board of Directors that same day. On May 20, 2005, the parties filed a joint motion for preliminary approval of the Settlement Agreement; for conditional certification of the Settlement Class, including its two subclasses; and for approval of the notice to be sent to the settlement class ("Class Notice"). In addition, Plaintiffs moved for appointment as counsel for the Settlement Class.

On May 24, 2005, the Court issued an Order that, *inter alia*, granted preliminary approval of the Settlement Agreement, conditionally certified the settlement class, appointed counsel for the settlement class, and approved the notice to be sent to the settlement class.

C. The Terms of the Settlement

As in all cases, many practical and legal considerations drive the parties' final settlement, the terms of which are set forth in the Settlement Agreement.[4] In this case, the parties' assessment of the relative strength of the claims asserted by Plaintiffs and Defendants' defenses to those claims shaped the specific relief agreed upon. Those considerations were then melded with the practical financial considerations that have beset Delta for the past several years and that continue to do so to this day. These practical considerations are discussed in detail in Section III(A)(2), *infra*. The terms of the settlement as set forth in the Agreement are summarized here.

1. The Subclasses

The Settlement Class is divided into two subclasses. The Lump Sum Subclass encompasses claims arising under Count I of Plaintiffs' Complaints. This subclass includes pilots who retired on or before January 1, 2005 or who continued to be employed by Delta on January 1, 2005 and who received or are eligible to receive lump sum payments of a portion of their pension benefits. In addition, because former spouses of pilots who are entitled to benefits from the Retirement

[4] All of the terms and definitions specified in the Agreement are incorporated herein and may be used in the interests of brevity and simplicity.

Plan pursuant to a qualified domestic relations order ("QDRO") have specific rights under the Plan that are protected by ERISA, they, too, are class members. These class members are defined as "Alternate Payees" under Paragraph 3.3 of the Agreement and in accordance with ERISA. *See* 29 U.S.C. § 1056(d)(3) (statute's anti-alienation bar does not apply to assignments of benefits pursuant to QDRO); *id.* § 1056(d)(3)(J)-(K) ("alternate payee" is a person having the right to receive any portion of a participant's benefits under a QDRO; statute confers on them the legal rights of "beneficiaries"); *see generally id.* § 1132(a)(1)(B) and (3) (civil actions may be brought by "beneficiaries"). The Lump Sum Subclass is thus defined as follows:

> (1) all Delta pilots who retired on or before January 1, 2005 and elected a lump sum distribution of pension benefits since that option was first made available effective March 2, 1989, or, if deceased, their respective Beneficiaries, (2) all Delta pilots who were employed by Delta on January 1, 2005, (3) Alternate Payees who were not receiving any benefits from the Retirement Plan as of January 1, 2005, and (4) Alternate Payees who were receiving benefits from the Retirement Plan as of January 1, 2005 and elected a lump sum distribution.

Agreement ¶ 3.10.

The Minimum Benefit Subclass includes all Delta pilots who retired during the Class period and who were employed by Delta on February 1, 1972, the date that determines whether pilots are eligible to retire under the Minimum Benefit

formula provisions. The Minimum Benefit Subclass includes all Delta pilots covered by Counts II-V of the Complaints. In addition, as with the Lump Sum Subclass, Alternate Payees of these pilots are subclass members. The Minimum Benefit Subclass is thus defined as follows:

> (1) all Delta pilots who were employed by Delta on February 1, 1972 and who retired on or after January 1, 1990 or, if deceased, their respective Beneficiaries, and (2) Alternate Payees of any such pilot described in (1).

Agreement ¶ 3.10.

2. **Lump Sum Subclass**

As a practical matter, the financial impact of the Lump Sum claim varies depending upon when Class members retired, or, if they are not retired as of January 1, 2005, the number of years of service they have accrued. Furthermore, unlike the additional benefits that could be formulaically calculated if Plaintiffs prevailed on the claims asserted in Counts II-V (which pertain solely to the Minimum Benefit formula available to Pre-'72 Pilots), there would be no such certainty if Plaintiffs were to prevail on Count I. Rather, as explained below, the value of the variable adjustment, if any, depends upon Delta's future economic success and the investment returns of the Plan's trust fund.

For these and other reasons, the Lump Sum claim has been settled by Delta's agreement to issue securities in the form of Warrants to all members of the Lump Sum Subclass. The number of Warrants allocated to particular subclass members varies based on when they retired or, for those not yet retired as of January 1, 2005, the number of years of accumulated service. The Settlement provides for the issuance of a total of one million Warrants to the entire Lump Sum Subclass, entitling subclass members to purchase one million shares of Delta common stock. The Warrants are divided into four equal series and expire five years after they are issued. The Warrants will be issued upon Final Approval of the Settlement. The four series are as follows: Series A will have an exercise price equal to the average closing price (rounded up to the nearest whole cent) of Delta common stock for the five days preceding the May 19, 2005 Settlement Agreement (*i.e.*, $2.96); Series B will have an exercise price of $2.50 higher than Series A (*i.e.*, $5.46); Series C will have an exercise price of $2.50 higher than Series B (*i.e.*, $7.96); and Series D will have an exercise price of $2.50 higher than Series C (*i.e.*, $10.46).[5] *See* Agreement ¶ 5.1(c).

[5] Shares of Delta common stock closed at $2.77 on May 12, 2005; $2.78 on May 13, 2005; $2.90 on May 16, 2005; $3.01 on May 17, 2005; and $3.30 on May 18, 2005. *See* <http://finance.yahoo.com/q/hp?s=DAL>. Consequently, the five-day average price of Delta common stock for the five days preceding the parties'

(a) Allocation of Warrants

The Settlement Agreement includes an initial allocation of Warrants among the several categories of the Lump Sum Subclass members. That allocation varies depending upon when a pilot retired; the number of years of service of subclass members who are still active pilots; and the specific status of subclass members who are Alternate Payees. *See* Agreement ¶ 7.2.

The initial allocation provided in the Agreement was necessarily left open to adjustment when the exact number of subclass members in the various Warrant allocation categories would be known. Since that data was not available until Delta went through its records to identify all subclass members with specificity—and that did not occur until after the Court's May 24, 2005 preliminary approval of the Settlement (*see* Agreement ¶ 6.1)—the final Warrant allocation could only be done as part of the Court's final approval. As the Settlement Agreement provides:

> Prior to the Final Approval of the Settlement, the Plaintiffs will provide to the Court for its review and approval as part of the Final Order and Judgment a schedule of the number of warrants to be issued to each individual Lump Sum Subclass members set forth in § 7.2. That schedule will be based upon the warrant allocation units set forth

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execution of the Settlement Agreement was $2.952. Rounded up to the nearest whole cent in accordance with paragraph 5.1(c) of the Agreement, that makes the exercise price of Series A of the Warrants $2.96. The three remaining series have exercise prices that increase by $2.50 each over the preceding series.

> in § 7.2, the number of Class Members in each of the several categories as determined from the information provided by the Defendants pursuant to § 6.1(a), and the total number of Warrants to be available for distribution to the Lump Sum Subclass after reduction for the Warrants issued as part of Plaintiffs' Attorneys' Fees.

Agreement ¶ 7.2(a).

Using the exact number of Lump Sum Subclass members that are now known and contained in the database prepared by Delta, a very minor modification of the initial Warrant Allocation is appropriate. Specifically, the initial Warrant Allocation Units need to be adjusted by slightly increasing the allocations to the retired pilot Lump Sum Subclass members. It is those individuals, of course, who have by far the most significant claim for lost benefits as a result of the lump sum methodology that was at issue in Count I. The following table sets forth both the initial and final allocation of warrants for the various Lump Sum Subclass categories:

Status of Lump Sum Subclass Member	Preliminary Allocation of Warrants	Final Allocation of Warrants
Pilots retired before 4/1/99	144	152
Pilots retired between 4/1/99 and 1/1/05	72	76
Pilots active as of 1/1/05 with 20 or more years of service as of that date	48	48
Pilots active as of 1/1/05 with more than 10 but less than 20 years of service as of that date	28	28

Pilots active as of 1/1/05 with less than 10 years of service as of that date	16	16
Alternate payees who were receiving benefits from retirement plan on 1/1/05 and received lump sum distribution before 4/1/99	40	40
Alternate payees who were receiving benefits from the retirement plan on 1/1/05 and received a lump sum distribution after 3/31/99	20	20
Alternate payees who were receiving no benefits from the retirement plan on 1/1/05	8	8

With one allocation unit corresponding to one Warrant—so that four allocation units equal four Warrants, one from each of the four separate series,[6] Agreement ¶ 5.1(c)—the total number of Warrants to be issued to the Lump Sum Subclass members, net of fees, will be 680,532.[7] This number is calculated by multiplying the exact number of eligible class members times the number of Warrants finally allocated to each such subclass member, as follows:

[6] Thus, by way of illustration, a pilot who retired on April 1, 2000 and received a lump sum payment and is therefore entitled to 76 Warrants under the above allocation will receive 19 Warrants from each of the four series. A pilot who retired on July 1, 1996 and received a lump sum payment and is therefore entitled to 152 Warrants will receive 38 Warrants from each of the four series.

[7] This calculation assumes the Court's approval of Plaintiffs' counsel's fee request that would award counsel approximately 32% (exactly 319,428 Warrants) of the total of 1 million Warrants.

Status of Lump Sum Subclass Member	Final Allocation of Warrants	Number of Persons	Total Number of Warrants
Pilots retired before 4/1/99	152	1,797	273,144
Pilots retired between 4/1/99 and 1/1/05	76	2,775	210,900
Pilots active on 1/1/05; 20 or more yrs service	48	570	27,360
Pilots active on 1/1/05; 10-20 yrs service	28	4,052	113,456
Pilots active on 1/1/05; under 10 yrs service	16	3,180	50,880
Alt. payees receiving benefits from the ret. plan on 1/1/05; lump sum before 4/1/99	40	39	1,560
Alt. payees receiving benefits from the ret. plan on 1/1/05; lump sum after 4/1/99	20	102	2,040
Alt. payees receiving no benefits from the ret. plan 1/1/05; lump sum before 4/1/99	8	149	1,192

3. Minimum Benefit Subclass

The Minimum Benefit Subclass includes all Delta pilots who retired during the Class period and who were employed by Delta on February 1, 1972, the date that determines whether pilots are eligible to retire under the Minimum Benefit formula provisions. The Minimum Benefit Subclass includes all Delta pilots

covered by Counts II-V of the Complaints.[8] In addition, as with the Lump Sum Subclass, Alternate Payees of these pilots are subclass members. The Minimum Benefit Subclass is thus defined as follows:

> (1) all Delta pilots who were employed by Delta on February 1, 1972 and who retired on or after January 1, 1990 or, if deceased, their respective Beneficiaries, and (2) Alternate Payees of any such pilot described in (1).

Agreement ¶ 3.10.

All members of the Minimum Benefit Subclass are eligible to receive monetary relief under the Settlement.[9] To actually receive benefits, they only had to fill out and return by August 24, 2005 a Claim Form (approved by the Court in its May 24, 2005 Preliminary Approval Order) that the Settlement Administrator mailed to them to establish their eligibility and obtain basic information necessary to facilitate payment. Agreement ¶¶ 3.9, 6.3, 6.6 & Ex. 4; Fraga Aff., Ex. 2. The amount of benefits that will be paid to Minimum Benefit Subclass members will

[8] Most Minimum Benefit Subclass members are also members of the Lump Sum Subclass, inasmuch as the overwhelming majority of Delta pilots elect a lump sum payment in lieu of the Variable Annuity portion of their pension benefits upon retirement. Based on data furnished by Delta, the Settlement Administrator sent notice to 1,972 prospective members of the Minimum Benefit Subclass. Of these, 1709 are also members of the Lump Sum Subclass. *See* Affidavit of Jose C. Fraga, dated July 27, 2005 (filed with the Court on August 1, 2005) ("Fraga Aff."), ¶ 3.

[9] Individuals who are members of both subclasses will receive the total benefits that they are entitled to receive as a member of each subclass.

depend on a number of factors. The most significant factor is whether the subclass member is a "Bridge Plan Participant" as defined in the Agreement. Agreement ¶ 3.7. Bridge Plan Participants already receive the maximum permitted by law from the qualified Plan—*see generally* 26 U.S.C. § 415(b) (prescribing limits on annual benefits that can be paid out of IRS-qualified trust)—because a precondition to receipt of payments from the Bridge Plan is that participants have already reached the limit of what they are entitled by law to receive from an IRS-qualified pension plan, but are entitled to additional pension benefits by reason of prior collective bargaining agreements.

Therefore, Minimum Benefit Subclass members who are Bridge Plan Participants can receive their cash recovery only from the Non-Qualified Settlement Fund that was established by a $500,000.00 payment from Delta into an escrow account on June 8, 2005, ten business days after the Court's May 24, 2005 entry of the Preliminary Approval Order. *See* Agreement ¶ 5.1(a). It would be unlawful for these subclass members to receive further payments from the qualified Retirement Plan. On the other hand, Minimum Benefit Subclass members who are *not* Bridge Plan Participants will receive payments entirely from the Qualified Settlement Fund, which is being funded by the qualified Plan having

segregated into a separate account $15,500,000 following the Court's entry of the Preliminary Approval Order. *See* Agreement ¶ 5.1(b).

(a) **Allocation and distribution of the Non-Qualified Settlement Fund**

The Non-Qualified Settlement Fund[10] will be distributed as follows. First, subject to the Court's final approval, the four individual Plaintiff Class representatives will receive Case Contribution Compensation (*i.e.*, incentive awards for the prosecution of these claims on behalf of the Class) in the amount of $7,500 each. *Id*. ¶ 7.1(a).[11] Next, the *pro rata* portion[12] of Plaintiffs' Attorneys'

[10] Any interest that accumulates in the Non-Qualified Settlement Fund will be part of the fund. This fund is being kept at a separate account established for this purpose at Wachovia Bank, NA. Agreement ¶¶ 3.21, 3.24, 5.1(a).

[11] This Court and others "routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (citation and internal quotation marks omitted; approving $300,000 incentive awards in lieu of award under settlement; average class member would receive $38,000 in compensation under settlement's terms); *accord In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993) ("[I]ncentive awards are appropriate to recognize the efforts of the representative plaintiffs to obtain recovery for the class.") (awarding $2,500 to each class representative who produced documents during discovery, and additional $5,000 to every representative who was also deposed); *see also Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (district court acted within its discretion in awarding incentive award to class representatives) (citing cases); *Spicer v. Chicago Bd. of Options Exch., Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 535 (E.D. Pa. 1990).

Expenses and the Administrative Expenses of the Settlement Administrator will be paid from the Non-Qualified Fund. *Id.* ¶¶ 7.1(c)-(d). Of the remainder of the Non-Qualified Settlement Fund, 10% will be allocated for the payment of Alternate Payees whose former spouse is a current Bridge Plan Participant, Agreement ¶ 3.7, upon their timely submission of a completed Claim Form establishing their entitlement to payment, *id.* 7.1(b). The remainder of the Fund will be distributed to Minimum Benefit Subclass members who are retired pilots and who are Bridge Plan Participants or, if such a pilot is deceased, their beneficiary, if the beneficiary is a Bridge Plan Participant. *Id.* ¶ 1(e). Again, timely submission of a completed Claim Form is the only requirement to receive payment.

While all Bridge Plan Participants who are Minimum Benefit Subclass members are entitled to receive payments from the Non-Qualified Fund, claims of those pilots who retired on or after July 1, 1997 will be compensated substantially higher than claims of pilots who retired prior to that date. As explained below, that date reflects when the July 1, 1996 Benefit Unit "Freeze Claim," would have first

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[12] The percentage of expenses to be paid from the Non-Qualified Fund will be $500,000/$16,000,000 (a 1/32 share), or 3.125% of the total.

been felt by Minimum Benefit Pilots—*i.e.*, the beginning of the next Plan year, given the Plan's method of valuing Benefits Units only once annually, at the end of each calendar year and the use of that single Unit value for the entire Plan year beginning with the next Plan year.[13] Consequently, those pilots who retired on or after July 1, 1997, or their Beneficiaries if deceased, will each receive four times the amount of the payment made to pilots (or their Beneficiaries) who retired prior that date. *Id.* ¶ 7.1(g). The same four-to-one recovery ratio applies to Alternate Payees whose former spouse retired on or after July 1, 1997, as compared to those whose former spouse retired after that date. *Id*. ¶ 7.1(f).

The amount of compensation that Minimum Benefit Subclass members will actually receive from the Non-Qualified Settlement Fund cannot be determined exactly until Claim Forms are returned and reviewed for their sufficiency by the

[13] Although the Plan amendment amending section 8.02(B) of the Plan and freezing the value of Benefit Units on the basis of their December 31, 1995 value became effective on July 1, 1996, it had no practical effect until participants began retiring on or after July 1, 1997. As noted above, even prior to the freeze, the Plan valued Benefit Units only once annually, at the end of each calendar year, and each new Benefit Unit valuation applied to the Benefit Units of Pre-'72 Pilots retiring as of the start of next Plan year the following July 1st and for that entire Plan year. Thus, even absent the freeze, Benefit Units would have retained their December 31, 1995 value until July 1, 1997, when a new value would apply to Benefit Units of retiring pilots based on a revaluation pegged to the December 31, 1996 value of the S & P 500.

Settlement Administrator. *Id.* ¶ 7.1(f)-(g). At the same time, however, a reasonable estimate of the amount of payments can be made from the data that Delta furnished to the Settlement Administrator as to the number of Pre-'72 Pilots and other Minimum Benefit Subclass members and by assuming 100% participation by eligible subclass members.[14]

Plaintiffs' counsel have voluntarily agreed to waive their right to recover a percentage of the Non-Qualified Fund as a part of their Attorneys' Fees. The Non-Qualified Fund is thus reduced only by (1) the *pro rata* share of Settlement Administrative Expenses[15] and Attorneys' Expenses and (2) the total of the four Plaintiffs' Case Contribution Compensation ($30,000.00). Making reasonable approximations for interest in the Fund and deducting the appropriate portion of

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[14] The actual individual recovery would increase in proportion to the percentage of eligible Class members who fail to return their Claim Forms. In many class actions, class members return claim forms at a relatively low rate. *See In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2001 WL 283163, at *12 (E.D. Pa. Mar. 21, 2001) (median class participation rate only about 15%, maximum of 40%). According to the Settlement Administrator in this case, however, the number of Claim Forms submitted by Minimum Benefit Subclass members indicates a remarkable 55% participation rate, with a week still remaining. *See infra* at 63-64.

[15] Wachovia Bank has charged a $1,500 escrow administration fee that was taken entirely from the Non-Qualified Settlement Fund since it pertains solely to that Fund.

the Administrative Expenses and Attorneys' Expenses,[16] at least $450,000 should remain for distribution to eligible Minimum Benefit Subclass members. Therefore, these Minimum Benefit Subclass members would recovery approximately the following amounts:

Bridge Plan recipient Minimum Benefit Subclass Member	Number Eligible	Approx. Payment *if* 100% Settlement Participation
Pilots (or Beneficiaries, if pilot deceased) who retired after 6/30/97	112	$1,955.00
Pilots (or Beneficiaries, if pilot deceased) who retired before 7/1/97	381	$490.00
Alternate Payee whose former pilot-spouse retired after 6/30/97	5	$3,330.00
Alternate Payee whose former pilot-spouse retired before 7/1/97	34	$830.00

(b) Allocation and distribution of the Qualified Settlement Fund.

The same kind of approximations can be made for the entitlements and distributions to those Minimum Benefit Subclass members who are not affected by the Bridge Plan limitations and, therefore, will be paid from the Qualified

[16] *See* Memorandum in Support of Application for Final Approval of (1) Plaintiffs' Counsel's Fees and Expenses and (2) the Expenses of the Settlement Administrator, filed August 17, 2005, at 2-5.

Settlement Fund. Interest or other earnings will again remain as part of the Fund, which was established and began accruing interest following the Court's Preliminary Approval Order. *Id.* ¶¶ 3.30, 5.1(b). The Fund will be reduced by the *pro rata* share of Plaintiffs' Attorneys' Expenses and the Settlement Administrative Expenses.[17] *Id.* ¶ 7.4. From this amount, Plaintiffs' Attorneys are seeking a fee award of one-third of the net Fund, and the balance thereafter will be allocated to payment of the qualifying Subclass members.

After deduction for all Expenses and Fees, the amount available for distribution to these subclass members should be approximately $10,100,000.00.[18] As with the Non-Qualified Settlement Fund, 10% of this amount will be allocated to the qualifying Alternate Payees, with the remainder going to qualifying retired pilots and their Beneficiaries, if deceased. Using the number of Minimum Benefit

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[17] The combined amount of Plaintiffs' Attorneys' Expenses and the Settlement Administrator's Expenses is $523,047.99. *See supra* at 24 n.15. The *pro rata* share of that total to be paid from the Qualified Settlement Fund is $506,702.74.

[18] This is determined by deducting from the initial sum ($15,500,000.00) the *pro rata* Attorneys' Expenses and Settlement Administrative Expenses and allowing for a partial offset by interest/earnings, for an estimated net reduction of $350,000.00. Attorneys' Fees in the amount of one-third of the remaining balance ($15,150,000.00) would then be deducted in an estimated amount equal to $5,050,000.00. The remainder in the Qualified Settlement Fund after those deductions would be $10,100,000.00.

Subclass members identified by Delta, and again assuming 100% participation and return of completed Claim Forms, these subclass members would receive the following sums:

Minimum Benefit Subclass Member	Number Eligible	Approx. Payment *If* 100% Settlement Participation
Pilots (or Beneficiaries, if pilot deceased) who retired after 6/30/97	607	$11,800.00
Pilots (or Beneficiaries, if pilot deceased) retired before 7/1/97	653	$2,950.00
Alternate Payee whose former pilot-spouse retired after 6/30/97	55	$15,900.00
Alternate Payee whose former pilot-spouse retired before 7/1/97	34	$3,975.00

Finally, individuals entitled to receive payment from the Qualified Settlement Fund will be sent an additional election form, which will determine how they will be paid their monetary recovery. Agreement ¶¶ 3.19, 6.4, 8.1. This is a federally-mandated procedural requirement for distributions from IRS-qualified retirement plans. For example, retired pilots qualified to receive payment from the Qualified Settlement Fund may elect either a lump sum or a life annuity that is the equivalent of the lump sum payment—except that married persons must

receive their payment in the form of a joint and 50% survivor annuity unless their spouse consents to a lump sum distribution in accordance with ERISA requirements. *Id.* ¶ 8.1. Alternate Payees are entitled to receive payment from the Qualified Settlement Fund either as a lump sum or in the form of a life annuity. *Id.*[19]

If a Minimum Benefit Subclass member eligible for recovery from the Qualified Settlement Fund has timely submitted a proper Claim Form but fails to submit his or her election or consent forms, that subclass member will still be entitled to receive the full consideration to which he or she is entitled. Payments will be made pursuant to the "defaults" that apply when such subclass members entitled to receive payments make no election. Agreement ¶ 8.1. Further, those individuals who are entitled to a lump sum distribution from the Qualified Settlement Fund—as opposed to an annuity—will be allowed to roll those payments into another qualified retirement account, such as an Individual

[19] Those Minimum Benefit Subclass members who have timely filed proper Claim Forms but do not return a completed election form will only be allowed to receive a life annuity (or if married, only a joint and 50% survivor annuity). Beneficiaries of deceased pilots who are entitled to receive payment from the Qualified Settlement Fund will receive their payment in a lump sum.

Retirement Account ("IRA"), subject to statutory restrictions.[20]

III. ARGUMENT

THE COURT SHOULD CERTIFY THE CLASS, APPOINT CLASS COUNSEL, AND GIVE FINAL APPROVAL TO THE SETTLEMENT

A. The Court Should Give Final Approval to the Settlement

1. Applicable Standards Pertaining to Approval of Settlements

(a) The Strong Judicial Policy Favoring Settlements

It is long settled that "compromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 585 (1910); *Murchison v. Grand Cypress Hotel Corp*., 13 F.3d 1483, 1486 (11th Cir. 1994) ("We favor and encourage settlements in order to conserve judicial resources"); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (noting "the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement"); *Lewy v. Weinberger*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation") (citing authorities).

[20] The Internal Revenue Code does not allow individuals over 70-½ years of age to roll payments from one qualified plan to another. Consequently, a fair number of Minimum Benefit Subclass members may not be permitted by law to elect such a "roll-over."

This policy is particularly strong where complex class action litigation is concerned, as the Eleventh Circuit, this Court, and many others have noted. *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"); *In re Domestic Air Trans. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993) ("[S]ettlements of class actions are highly favored in the law and will be upheld whenever possible because they are means of amicably resolving doubts and preventing lawsuits.") (citation and internal quotation marks omitted); *accord Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation"); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("[T]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation") (citing authorities); *Airline Stewards & Stewardesses Ass'n. v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166-67 (7th Cir. 1980) ("Federal Courts look with great favor upon the voluntary resolution of litigation through settlement. This rule has particular force regarding class action lawsuits") (citations omitted); *aff'd*, 455 U.S. 385 (1982); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) ("there is an overriding public interest in settling and quieting litigation," and "[t]his is particularly true in class action suits .

. . which frequently present serious problems of management and expense") (footnote omitted); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[L]itigants should be encouraged to determine their respective rights between themselves. Particularly in class action suits, there is an overriding public interest in favor of settlement.") (citation omitted); *Laube v. Campbell*, 333 F. Supp. 2d 1234, 1238 (M.D. Ala. 2004) ("Judicial policy favors voluntary settlement of class-action cases").

The rationale for this policy is simple. "Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312-13 (7th Cir. 1980) (citations omitted); *accord In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) (class action settlements are favored because they "conserve[] scarce judicial resources"); *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000) (class action settlements "conserve judicial resources by avoiding the expense of a complicated and protracted litigation process"); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 688 (N.D. Ga. 2001) (class action settlements **"**conserve scarce resources that would otherwise be devoted to protracted litigation").

(b) The Factors to Be Considered in Evaluating a Settlement

The two fundamental inquiries that a court makes in passing on a settlement are whether it is (i) fair, adequate, and reasonable; and (ii) not the product of collusion between the parties. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 688 (N.D. Ga. 2001). In assessing these two prongs, a settlement is presumed not to be the product of collusion where sufficient discovery has been conducted and the parties have bargained at arm's length. *See City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). Here, the parties crafted a settlement only after first developing an adequate factual record through both administrative proceedings conducted in the summer and fall of 2002 and through discovery conducted from January to May 2003. Their settlement discussions were at all times at arm's length and, if anything, spirited. *Cf. In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-MDL-1317-SEITZ, 2002 WL 31761432, at *1 (S.D. Fla. June 13, 2002) (approving settlement "arrived at by arm's-length negotiations by highly experienced counsel").

As to the overall fairness, adequacy, and reasonableness of a class action settlement, the Eleventh Circuit has enunciated the six criteria to be considered:

(1) the likelihood of success at trial;

(2) the range of possible recovery;

(3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable;

(4) the complexity, expense, and duration of litigation;

(5) the substance and amount of opposition to the settlement; and

(6) the stage of proceedings at which the settlement was achieved.

Leverso v. SouthTrust Bank of Ala., N.A., 18 F.3d 1527, 1531 n.6 (11th Cir. 1994); *Bennett*, 737 F.2d at 986; *Ingram*, 200 F.R.D. at 688; *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993).

In considering these factors, however, the Court "ought not try the case in the settlement hearings." *Cotton*, 559 F.2d at 1330 ("It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.") (citing cases); *accord In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000) ("[T]he Court should not conduct a trial on the merits.").

Thus, the Court "should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of

absolutes and an abandoning of highest hopes." *Cotton*, 559 F.2d at 1330 (citation and internal quotation marks omitted); *accord In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 350 (N.D. Ohio 2001) ("the Court may not second guess the settlement terms") (citing cases). Thus, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Com'n of City and County of San Fran.*, 688 F.2d 615, 625 (9th Cir. 1982). "Ultimately, the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Id.* (citation and internal quotation marks omitted).

Significantly, in evaluating the fairness of the settlement, the Court is "entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330; *Ingram*, 200 F.R.D. at 689 (same); *accord In re Smith*, 926 F.2d 1027, 1028 (11th Cir. 1991) ("A trial judge . . . should be hesitant to substitute his or her own judgment for that of counsel."); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1149 (11th Cir. 1983) ("Courts often accord great weight

to the opinions of counsel for the class in approving class action settlements.") (citing cases); *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d at 1333 ("The court is entitled to rely on the judgment of the parties in approving the proposal and should be hesitant to substitute its own judgment for that of counsel.") (citation and internal quotation marks omitted); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 313 (N.D. Ga. 1993) ("[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.") (citing cases; internal quotation marls omitted).[21] This is because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *In re Pacific Enters. Secs. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

2. <u>The Court Should Give Final Approval to the Settlement</u>

Under the applicable standards, the instant Settlement is eminently worthy of final approval.

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[21] *See also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class.") (citation and internal quotation marks omitted); *McNary v. American Sav. and Loan Ass'n*, 76 F.R.D. 644 649 (N.D. Tex. 1977) ("Courts have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching").

(a) The Likelihood of Success at Trial, Range of Possible Recovery, and the Point on or Below the Range of Possible Recovery at Which a Settlement Is Fair, Reasonable and Adequate

This Court has noted that the first, second, and third of the factors that the Eleventh Circuit enunciated in *Bennett* "are closely related." *Ingram*, 200 F.R.D. at 689; *see In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d at 1333 ("In assessing the settlements, the Court must look to the range of possible damages that Plaintiffs could recover at trial and then combine this assessment with the likelihood of Plaintiffs' success at trial to determine whether the settlements fall within the range of recoveries that is fair."); *see also Dillard v. City of Foley*, 926 F. Supp. 1053, 1063 (M.D. Ala. 1995) (four factors of stage of proceedings; likelihood of success at trial; complexity, expense, and likely duration of lawsuit; and range of possible recovery are interrelated). In essence, these factors require the Court to weigh the results achieved through the settlement against the possible outcomes had the case been litigated to conclusion.

In evaluating the likelihood of success and range of possible recovery, however, "[i]t is essential that the Court *not* examine the settlement as if defendants had been found liable." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 313 (emphasis added); *accord In re Corrugated Container Antitrust Litig.*, 643 F.2d at 212 ("[T]his type of evaluation is not and cannot involve a trial

on the merits. [T]he very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Nor could it be achieved if the range of possible recovery had to be charted with precision.") (citation and internal quotation marks omitted); *Meyer v. Citizens and Southern Nat'l Bank*, 677 F. Supp. 1196, 1207 (M.D. Ga. 1988) ("It is important to note that when comparing the terms of the settlement with the possible recovery at trial, 'the [C]ourt is not confined to [a] mechanistic process of comparing the settlement to the estimated recovery times a multiplier derived from the likelihood of prevailing on the merits.'") (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217 (5th Cir. 1981)). As this Court has noted, the *Bennett* factors "often justif[y] approving settlements that are substantial compromises of the relief that could be obtained through litigation." *Ingram*, 200 F.R.D. at 689.

Here, it is difficult to predict the likelihood of Plaintiffs' success on their claims had no settlement been achieved. The Court had not rendered any merits determinations in the case, and the parties were still in the process of completing the briefing of their cross-motions for summary judgment. However, the Court's

August 9, 2004 dismissal of the claims against the Non-Qualified Plans for lack of lack of jurisdiction—including its determination that those plans were exempt from the ERISA provisions at issue in this litigation, *see In re Delta Air Lines, Inc. ERISA Litig*., No. 1:02-MD-1424-JEC, order at 17-19—did make it clear that class members receiving benefits from the Bridge Plan stood no chance of recovering anything in this litigation. Hence, to the extent the Settlement Agreement pays them anything, it places them in a substantially more advantageous position than the one in which they stood in the wake of the Court's ruling. A more detailed discussion of the balancing of the merits is set forth below in Section 2(d), *infra*.

Moreover, as also discussed below, a salient factor—if not the paramount consideration—in fashioning the carefully balanced settlement package in this litigation was the cold and hard reality of Delta's current financial condition. Therefore, even if Plaintiffs and the Class *might* ultimately be entitled to a substantially greater award of back benefits had they continued to litigate and ultimately prevailed on their claims, a "death knell" judgment would have been a hollow victory that would have furthered no one's interests, least of all those of deserving class members. Thus, the compromises that Plaintiffs made and the relief that was crafted in the Settlement Agreement were with Defendants' limited

ability to pay in mind and with the added objective of ensuring that the Settlement would not compromise Delta's financial viability.

(b) The Complexity, Expense and Duration of the Litigation

Simply stated, "[t]his factor is intended to capture 'the probable costs, in both time and money, of continued litigation.'" *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, (3d Cir. 1995) (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)); *see, e.g., Ass'n For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 469 (S.D. Fla. 2002) (approving settlement after noting that, "absent settlement," case would "require a protracted and expensive trial and appeal, under circumstances where the ultimate results are highly uncertain"). In essence, the Court must consider whether "absent settlement, th[e] matter . . . will require a protracted and expensive trial and appeal, under circumstances where the ultimate results are highly uncertain." *Ass'n For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 469 (S.D. Fla. 2002); *cf. Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1168 (5th Cir. 1978) (noting "the time and expense which must be incurred before the dust of combat has finally settled" in many cases and observing that, in that particular class action, filed years earlier, court was "encounter[ing] another

judicial paleolithic museum piece") (citation and internal quotation marks omitted).

Given such considerations as the fact that nearly four years had already elapsed since the commencement of the constituent cases in this centralized multidistrict litigation; Delta's status as one of the premier airlines in the world (which, although strapped financially, could still afford to pay for quality legal counsel in order to mount a spirited legal defense) as well as the reputation of the counsel representing it; and the representation of Plaintiffs by counsel experienced in class action and complex litigation, it was virtually certain that further litigation would be "bloody" in that it would tax a large amount of financial resources. *Cf. In re Sunbeam Secs. Litig.*, 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001) (complexity, expense, and duration of litigation favor militated in favor of approval of settlement where complex case had "already taken more than three years to work its way" to point of settlement; "plaintiffs' lead counsel's experience in litigating class-action securities cases" make it likely that plaintiffs would continue to vigorously pursue their claims; and given defendant's reputation "as a well-known and well-respected accounting firm," it was "highly unlikely that [it] would put up little fight at trial").

(c) The Reaction of the Class to the Settlement

It is noteworthy that, to date, no Class members have objected to the Settlement.[22] The absence of objections weighs heavily in favor of approval of the Settlement. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("'a small number of objections . . . can be viewed as indicative of the adequacy of the settlement'") (quoting treatise), *cert. denied sub nom. Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 125 S. Ct. 2277 (2005); *In re Lucent Techs., Inc., Secs. Litig.*, 307 F. Supp. 2d 633, 644 (D.N.J. 2004) ("The absence of objections from the overwhelming majority in response to the Notice to Class Members should be considered in approving the Settlement."); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("It has repeatedly been held that one indication of the fairness of a settlement is the lack of or small number of objections.") (citing authorities; internal quotation marks omitted) *State of N.Y. ex rel. Vacco v. Reebok Int'l Ltd.*, 903 F. Supp. 532, 538 (S.D.N.Y. 1995) ("minuscule" number of objections to settlement "also support[ed] its approval"), *appeal dismissed*, 96 F.3d 44 (2d Cir.

[22] Pursuant to paragraph 11.2(c)-(d) of the Settlement Agreement and Scheduling No. 17, the deadline for filing of objections is August 24, 2005—which is 35 days from the date of the Settlement Administrator's mailing of the Class Notice. In the event that there are any objections, Plaintiffs will address them in a supplemental submission or at the September 6, 2005 Fairness Hearing.

1996); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (citing cases), *appeal dismissed*, 391 F.3d 812 (6th Cir. 2004), *cert. denied sub nom. Sams v. Hoechst Aktiengesellschaft*, 125 S. Ct. 2297 (2005); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378 (D.D.C. 2002) ("the paucity of objections . . . militates in favor of the settlement[]") (citation and internal quotation marks omitted); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) ("the absence of substantial objections and relative absence of opt-outs strongly favors approval") (citing cases); *see also Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990) (noting that "out of 281 class members, only twenty-nine[] filed objections to the proposed settlement"); *cf. Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1217 (5th Cir. 1978) (district court should have withheld approval of settlement that was opposed by 70% of subclass members).

Indeed, the reaction of class members to a settlement "may be the most significant factor" in a court's inquiry. *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 511 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), *cert. denied sub nom. Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 125 S. Ct. 2277 (U.S.

May 16, 2005) (No. 04-1339); *accord Shuford v. Alabama State Bd. of Ed.*, 897 F. Supp. 1535, 1548 (M.D. Ala. 1995) ("In determining whether a settlement is fair, adequate, and reasonable, the obvious *first* place a court should look is to the views of the class itself.") (citing cases; emphasis added). Here, the reaction to date is strong evidence that the Settlement is eminently worthy of final approval.

(d) Stage of the Proceedings at Which the Settlement Was Achieved

The theory underlying this factor is that "[a] settlement should not be approved if the parties do not have an '"adequate appreciation"' of the merits of the case." *Parks v. Portnoff Law Assocs.*, 243 F. Supp. 2d 244, 251 (E.D. Pa. 2003) (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 319 (3d Cir. 1998)) (internal citation and quotation marks omitted).

In this case, the Settlement was concluded after nearly four years of litigation, including two rounds of administrative proceedings (in which both sides adduced ample expert proof, particularly with respect to Plaintiffs' challenge to the Plan's lump sum methodology), discovery, extensive motion practice, and formal mediation. The parties had ample opportunity to gauge the respective strengths and weaknesses of Plaintiffs' claims and Defendants' defenses, respectively. In fact, at the time that the parties achieved the settlement in principle, briefing had almost been completed on voluminous summary judgment cross-motions. *Cf. In re*

Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d at 1338 (finding that parties "were well-informed of the strengths and weaknesses of each side's case" and that settlement was "not a quick settlement," after noting that parties had "taken expert testimony, reviewed voluminous documents, filed numerous motions, and conducted over 70 depositions," which showed that settlement was "entered into when both parties were fully apprized of the facts, risks and obstacles involved with the possibility of continued litigation"). The backdrop against which the Agreement was reached should dispel any suggestion of collusion.

(e) Other Settlement Considerations

Aside from those general considerations, there are a host of particular facts in the present case that weigh compellingly in favor of the present Settlement. One of the overriding factors that has been ever-present in settlement discussions in this case—not only recently, but during the mediation proceedings in 2003 as well—is the financial condition of Delta and its various retirement plans. When the initial complaints were filed in the late spring of 2001, Delta's stock was trading in the range of $46.00-$47.00 per share, giving it a market capitalization some *thirty-fold* its current market capitalization of approximately $230 million. Delta had experienced its most profitable years in history, and the company's cash position

was excellent. It was widely regarded as one of the strongest, if not the strongest, airlines in the United States financially.

Delta's financial condition has deteriorated dramatically since that time for a number of reasons, not least of which is the havoc wreaked on the U.S. airline industry by the events of September 11, 2001. For the four-year period ending on December 31, 2004, it sustained total losses of $8.5 billion. With the revised collective bargaining agreement between Delta and ALPA in October 2004, however, Delta's management put forward a comprehensive plan for turning the company around and bringing it to profitability. That plan entailed extensive cost-cutting throughout the company's operations. Since then, Delta's financial condition has continued to be hurt by the historically high price of crude oil and jet fuel in recent months. Oil prices now stand about forty percent higher than where they were just one year ago, and Delta has just reported that its aircraft fuel expenses for the sixth-month period ending on June 30, 2005 were up fifty-six percent over the same period a year ago. The parties cannot predict future oil prices, but it is reasonable to assume that Delta's future financial condition (like that of its competitors in the airline industry) will depend, in large measure, on world oil prices. These matters and other financial issues are discussed at some length in Delta's 2005 first and second quarter Form 10-Q's filed with the U.S.

Securities and Exchange Commission ("SEC") on May 10, 2005 and August 15, 2005, respectively, and its 2004 Form 10-K, filed with the U.S. Securities and Exchange Commission on March 10, 2005.[23]

As a practical matter, Delta asserts that the company is not in a financial position to be able to pay a multimillion dollar settlement in this case, even if it were inclined to do so. The great majority of the cash to be paid towards the settlement comes not from Delta, but from the IRS-qualified retirement Plan.[24] Although payment from the Retirement Plan still creates an obligation for Delta, that debt is payable over some fifteen years and is far more manageable than the possibility of a direct payment from Delta. In light of Delta's present financial straits, the recovery provided to the Class under the settlement is "a positive alternative to the prospect of receiving no recovery." *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d at 1334.

Additionally, payment from the Retirement Plan also confers a more meaningful benefit to the Class than payment from Delta itself. Many, if not the

[23] Summaries of these SEC filings are *available at* http: //biz.yahoo.com/e/050815/dal10-q.html (second quarter 2005 Form 10-Q), http: //biz.yahoo.com/e/050510/dal10-q.html (first quarter 2005 Form 10-Q), and http: //biz.yahoo.com/e/050310/dal10-k.html) (2004 Form 10-K).

[24] Only $500,000 of the total of the $16 million cash component of the Settlement will come from Delta itself.

majority, of Minimum Benefit Subclass members who will be receiving such payments will be able to roll their payments into an IRA or other qualified retirement plan. By so doing, they will be deferring taxes, and thus receive substantially more economic benefit than they would receive if a direct payment were made by Delta. The Minimum Benefit Subclass members who do not receive a single payment will receive their benefits through a monthly annuity equivalent, which will afford those subclass members the benefit of deferred taxes.

If Plaintiffs were to prevail on their major claims in this case—the Lump Sum Claim (Count I) and the Freeze Claim (Count II)—and recover all of the additional benefits that are arguably available under both claims, the parties recognize that the amount of such a judgment would be crushing, if not catastrophic, for Delta in light of the company's present financial predicament. Delta obviously has every interest in avoiding that possibility, but Plaintiffs and the Class have just as great an interest in avoiding a death-knell judgment or Pyrrhic victory. Most Class members are currently receiving pension retirement benefits from Delta, or hoping to do so in the future. The Class as a whole has no interest in pursuing its claims—no matter how compelling they might be—to the point where Delta's financial viability would be irreparably impacted. Plaintiffs have been acutely cognizant of that dynamic throughout their consideration of

settlement in this case.

(f) The Settlement's Components and Allocations Are Fair, Reasonable, and Adequate

The cash terms of settlement alone create a "win-win" result, rather than a "zero-sum" settlement. That is true for Defendants, and it is even more so for Plaintiffs. Although the Qualified Plan is currently under-funded, it was substantially *over*-funded under applicable rules when these cases were filed, and the Retirement Plan is much more able to bear the expense of settlement than is Delta itself. Also, as noted above, the tax advantage of settlement by payment of funds from the Qualified Plan is a substantial additional benefit for the Class.

The allocation of the cash benefits to be paid to the Minimum Benefit Subclass and the allocation within the subclass is again very reasonable. Of the several claims that arise out of the Minimum Benefit provisions, the Freeze Claim has the most potential merit in light of case law treating analogous cost-of-living ("COLA") or "living pension" adjustments as accrued benefits under ERISA.[25] Hence, the settlement allocates substantially greater compensation to Minimum

[25] *See Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 468-70 (7th Cir. 1992); *Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458, 1463-65 (9th Cir. 1985) *Laurenzano v. Blue Cross and Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189, 199-201 (D. Mass. 2001).

Benefit Subclass members affected by that claim (*i.e.*, Pre-'72 Pilots retiring July 1, 1997 and later).

Plaintiffs acknowledge that the facts developed both during the administrative proceedings and after the completion of those proceedings left no realistic possibility that the Notice Claim could succeed. With respect to the J & S Factor Claim, although Plaintiffs believe that married Pre-'72 Pilots who retired under the Minimum Benefit were inequitably treated in comparison to married Pre-'72 Pilots' benefits under the Final Average Earnings ("FAE") formula, which were not subjected to this reduction (even though FAE recipients' beneficiaries receive the same level of benefits from the D & S Plan), Plaintiffs acknowledge that the issue is *sui generis* and that there is no case law or regulation that is dispositive of the claim. It, too, faced formidable obstacles.

As to the Timing Claim, which relates to the Retirement Plan's pre-July 1, 1996 Benefit Unit valuation formula (*i.e.*, the Plan's single, annual, end-of-the year valuation of Benefit Units), Plaintiffs believe that Defendants' interpretation of the Retirement Plan ran afoul of plain plan language (specifically, section 8.02(B)(ii)(c) & (v) of the 1989 version of the Retirement Plan), but they recognize that that claim is subject to deferential review under Eleventh Circuit precedent. In order to prevail, Plaintiffs would have to convince this Court that the Committee's

interpretation and application of the Plan language was arbitrary and capricious, an exceedingly difficult test to meet in this Circuit.[26] Whatever the merits of that claim, its prospects of success were significantly less than those of the Freeze Claim.

Therefore, the "line" that the settlement draws between Minimum Benefit Subclass members—whereby similarly-situated pilots who retired on or after July 1, 1997 receive four times the amount recovered by those who retired before that date—is a very fair and realistic reflection of the relative strength of the claims of the groups of Minimum Benefit-eligible Pre-'72 Pilots whose Benefit Unit values were affected, on the one hand, by the Freeze Claim (*i.e.*, all July 1, 1997 and later Minimum Benefit-eligible retirees), and those Benefit Unit values were affected by the Timing Claim (*i.e.*, all pre-July 1, 1997 Minimum Benefit-eligible retirees). The total amount of funds that will be paid to all Minimum Benefit Subclass members who submit their Claim Forms will reflect a reasonable and appropriate

[26] *See, e.g., Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984) ("In reviewing the Administrative Committee's interpretation of the remarriage provision of the Delta Plans, this court's judicial role is limited to determining whether the [Committee's] interpretation was made rationally and in good faith—not whether it was right. Thus, the Administrative Committee's interpretation of the intent or meaning of the provisions of the Delta Plans need not be the best possible decision, only one with a rational justification.") (citation and internal quotation marks omitted).

payment for all of the Minimum Benefit claims, weighted most heavily, as they should be, in favor of the post-July 1, 1997 Minimum Benefit Subclass members—*i.e.*, those who were affected by the Freeze Claim, with the allocation to both groups reflecting compensation for the subsidiary J & S Factor Claim, which had the same impact on married Minimum Benefit-eligible Pre-'72 Pilots irrespective of their retirement date.

The much greater disproportion in the allocations, of course, arises from the total payments by the Defendants from the two separate sources—from Delta into the Non-Qualified Settlement Fund and from the Plan into the Qualified Settlement Fund. The disparity is large,[27] and rightfully so. As a practical matter, the claims of those Minimum Benefit Subclass members who are eligible to receive payment only from the Non-Qualified Settlement Fund are much weaker than the same claims by subclass members who are entitled to receive qualified payments from the qualified Plan (*i.e.*, persons receiving no payments from the Bridge Plan, which is an "excess benefits" plan under Section 415 of the Internal Revenue Code).

Indeed, this Court's August 9, 2004 decision dismissing the claims against

[27] Because of the relative number of beneficiaries in the two groups, *see supra* at 25, 27 (Tables setting forth allocations from Qualified and Non-Qualified Settlement Funds), the actual disparity of individual recoveries is less than the overall difference in the size of the two Funds ($500,000 compared to $15,500,000).

the non-qualified plans (the Bridge Plan and the Supplemental Annuity Plan) pointedly justifies the distinction in the size of the payments made by Defendants to the two Funds. Although various arguments could be advanced on behalf of non-qualified recipients that may entitle them to a recovery of benefits—in addition to the possibility of an appeal of this Court's ruling—the fact remains that, at the time the Settlement was reached, the claims affecting Minimum Benefit Subclass members who were receiving Bridge Plan payments had failed.

The suitability and wisdom of the component of the Settlement that resolves Count I (Plaintiffs' challenge to Defendants' methodology for calculating and paying lumps sums of pension benefits) is also plain. It, too, reflects a "win-win" strategy. As an initial matter, in light of the Court's August 9, 2004 decision, Plaintiffs' prospects for success on their Count I challenge to Defendants' lump sum methodology were anything but assured. In its decision, the Court held that the arbitrary and capricious standard of review would govern its resolution of all of Plaintiffs' claims. *See In re Delta Air Lines, Inc. ERISA Litig.*, order at 31. Because the Committee's conclusion that recipients of lump sum payments of pension benefits were, in fact, receiving the actuarial equivalent of the variable annuity portion of their benefits was supported by ample evidence in the administrative record that Defendants had submitted from actuaries, absent the

Court's granting Plaintiffs' motion for partial reconsideration and reversing its holding as to the applicable standard of review, Plaintiffs faced a formidable hurdle as to Count I.

Indeed, even assuming that Plaintiffs prevailed on the Lump Sum Claim on the threshold issue of liability, the amount of benefits to which they would have been entitled would be another open question. Unlike the benefits recoverable under the Freeze or Timing Claim (Counts II and IV)—which could be calculated formulaically for any given Minimum Benefit Subclass member by adjusting applicable Benefit Unit values—the calculation of benefits that would be due under the Lump Sum Claim (Count I) would be open to further dispute between the parties.

The reason for that uncertainty is both legal and equitable. If Plaintiffs prevailed on their claim that Defendants violated ERISA and the Code by affording no actuarial equivalent to the variable annuity adjustment, the amount of additional benefits to which Class members would be due would depend upon the Court's ultimate determination of what should have been the actuarially-projected Plan returns. That is a complex factual question, not a mechanical legal one. For example, in *Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust*, 191 F. Supp. 2d 223 (D. Mass. 2002), following the

district court's ruling on the liability question, in which the court held that the pension plan had failed to include in lump sum payments the value of a COLA provided to those who received their benefits in the form of a life annuity, the parties differed on how to project and value the COLA and also differed on how to determine the present value of pension benefits for purposes of computing lump sum payments. The parties presented competing expert opinions, requiring the court to resolve the dispute, including which projection was "more theoretically sound." *Id.* 237-40. Here, the Court's determination of actuarially-projected Plan returns would depend on a host of factors, one of which is the historically-elevated stock market values that have existed in recent years.[28]

Were the Court to find, based on all of the evidence that would be presented on these issues, that projected plan investment returns would, for example, be only 7%[29]—or even less—the actuarial value of any lost variable adjustment would be

[28] Many investment studies establish that periods when stock prices reflect elevated price-to-earnings ("PE") ratios are followed by relatively poor stock returns for years as the PE ratios regress to the mean. In the 1990s and continuing to the stock market today, PE ratios have been unusually high.

[29] A conservative projection of a 7% or less return on Plan investments would be consistent with the assessment of many analysts. *See, e.g.*, Scott Burns, "The Pension Plan Time Bomb: Investment returns may fall well below the 9% to 10% corporate America has come to expect, turning pension funds from a cash cow to a drain" (available at <http: //moneycentral.msn.com.article/retire/

slight. That would follow because the present value of the actuarial projection of the variable adjustment would reflect not the overall Plan returns alone but, rather, the difference between the projected Plan returns and the 6.5% per year weighted average threshold under section 5.04 of the Retirement Plan.

To be sure, there is substantial uncertainty in the ultimate value of the Warrants that are to be issued to the Lump Sum Subclass under the Agreement. Lump Sum Subclass members may do very well if the economy is generally good and Delta recovers from its present financial predicament over the next five years. It is precisely for those reasons that the Warrants are an unusually appropriate remedy for the Lump Sum Claim. Just as retirees receiving a variable annuity

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basics/9459.asp>) (noting one leading investment manager's assessment that future plan returns are likely to be only 7% annually following 1990s "bull" market, rather than 9%-10% assumed by most plans, due to decline in dividend yields to 1.5%, low inflation rate of 2.5%, and unlikely expansion of PE ratios); News Release: "Pension Plan Funding Status Key Indicator of Plan Performance, Fidelity Study Reveals" (Dec. 1, 2004) (available at <http: //content.members.fidelity.com/ Inside_Fidelity/fullStory/1,,4404,00.html>) (noting that even majority of U.S. pension plans that are fully funded or overfunded have outperformed underfunded plans only to the extent of achieving average annual return of 5.45% versus 4.60% over preceding 5 years); Juan Calzada, "Accounting for Defined Benefit Pension Plans Can Be Tricky," Federal Reserve Bank of Cleveland, Supervision and Regulation Dep't, vol. 4, no.1 (available at <http: //www.clevelandfed.org/bsr/ /conditions/v4n1/pension.cfm>) ("During the rise of the bull market, high expected rates of return . . . exceeded the contributions necessary to meet projected obligations. After three annual declines in the major equity indexes, however, corporations have been ratcheting down some of their assumptions.").

benefit where: (1) the economy is doing well; (2) Plan investment returns do well; and (3) Delta does well, the fortunes of the Lump Sum Subclass members will vary depending on the same factors. If those factors are favorable over the next several years, the Lump Sum Subclass will do well; if not, their benefits will be of lesser value. Indeed, if Delta is unsuccessful as a company, Lump Sum Subclass members will find themselves in no worse position that those retirees who did not elect lump sum payments of pension benefits. Not only might the variable adjustment be lost completely, a substantial portion of all of the Lump Sum Subclass members' basic benefits could be impaired.[30]

The allocation of Warrants within the Lump Sum Subclass, as set forth in the charts at 16-18, *supra*, properly reflects the relative recovery that Plaintiffs might have obtained on behalf of those subclass members had they prevailed on Count I. Pilots who retired and elected the lump sum option received no monthly variable annuity enhancement. Count I alleges that they were not paid the actuarial

[30] The Warrant remedy for the Lump Sum Subclass also has a positive benefit for both the Subclass and Defendants (and all of Delta's current employees) because it provides real, meaningful, and appropriate relief for the Lump Sum Claim while making no additional cash demand on Delta. Again, this is a "win-win" result for the Lump Sum Subclass because the benefits that the Subclass receives do not put at further risk the viability of Delta or the Retirement Plan upon which their ongoing benefits depend.

equivalent of that lost benefit, contrary to law.[31] As a practical matter, the financial impact of being denied the variable annuity enhancement affected pilots who retired in the early and mid-1990s more so than later retirees—and much more so than active pilots, whose claims are comparatively attenuated. Earlier retirees' claims are greater because Plan returns were unusually high in the mid- and late-1990s, resulting in a relatively large increase in retirees' variable annuities. That is clear from an examination of the variable unit values over these years. Pursuant to section 5.04, the Plan adjusts retirees' variable annuity payments annually, as of April 1st, by a percentage representing the difference in the weighted average return for each of the preceding five years (using weights of 5, 4, 3, 2, and 1) minus the 6.5% threshold.[32] The variable unit values since 1989,[33] when the lump sum option first became available to participants, are as follows:

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[31] The Lump Sum Claim affects retired pilots irrespective of which of the two benefit formulas was used to compute their retirement benefits—the Minimum Benefit or FAE formula.

[32] Under section 5.04 of the Plan, the variable unit value is calculated each March 31st, and the new monthly variable annuity payment is effective as of April 1st and remains at that level until the next annual adjustment. While adjustments from a prior year can reduce the monthly payment, that payment can never go below the starting level of the variable component of the retiree's monthly annuity.

[33] Although section 5.04 of the Plan employs the term "Benefit Unit" for the variable annuity units, these variable units should not be confused with the

Year	Variable Unit Value	Year	Variable Unit Value
4/1/1989	15.54	4/1/1997	25.50
4/1/1990	16.92	4/1/1998	28.51
4/1/1991	17.31	4/1/1999	31.65
4/1/1992	18.66	4/1/2000	35.42
4/1/1993	19.80	4/1/2001	37.55
4/1/1994	21.19	4/1/2002	37.29
4/1/1995	21.66	4/1/2003	34.19
4/1/1996	23.39	4/1/2004	33.68

As the history of the variable unit value makes clear, those pilots who retired before the late 1990s and elected the lump sum option—and were thus deprived of their monthly annuity adjustment, assuming the merit of Count I—were affected significantly more than later retirees. By April 1, 1999, the variable unit value had

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Minimum Benefit formula's "Benefit Units" whose value was frozen in July 1996 and which are the subject of Count II. *See* 1989 Plan § 8.02(B)(v); 1996 Plan § 8.02(B)(ii)(c).

more than doubled its value of ten years earlier.[34] Pilots retiring from April 1, 1999 until the Plan was frozen suffered less financial impact as the variable unit value increased less—rising from 31.65 on April 1, 1999, for example, to 37.55 on April 1, 2003 and then receding.[35] Accordingly, twice as many Warrants are allocated under the Agreement to those pilots who retired on or before March 31, 1999.

Active pilots who had not retired (and consequently not elected the lump sum option) by the time the Plan was frozen have an even more diminished claim for additional pension benefits under Count I, and decreasingly less as their

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[34] The variable unit values in earlier years confirm the point noted above, see *supra* at 53-55 & nn.28-29, that Plan returns might not exceed an average of 6.5% per year over a long time. For example, the variable unit value on April 1, 1973 was 10.22, and it remained at less than that value for *eleven years*, not finally exceeding 10.22 again until the April 1, 1984 valuation.

[35] Because section 5.04 of the Plan provides that the variable unit value is based on the difference between the *weighted five-year average* Plan returns and the threshold level of 6.5% per year, the variable unit value in a given year does not necessarily track the preceding year's Plan performance. Thus, even if the Plan experiences a return above the 6.5% threshold in a given year, the overall effect of that performance on the following year's variable unit adjustment may be negligible if the return is only slightly more than 6.5%. A sustained return over several years above the threshold would be necessary in order for variable annuity recipients to see a significant increase in their benefits—hence the need for a long-term projection regarding future Plan performance in order to determine what, if any, additional benefits Class members would have been entitled to had they prevailed on Count I.

number of years of accrued service dwindles.[36] The Warrant allocation for active pilots reflects that fact: active pilots with 20 or more years of service receive more Warrants than active pilots with between 10 and 20 years of service, who, in turn, receive more Warrants than active pilots with less than 10 years' service.

Alternate Payees have an independent right to elect a lump sum payment, regardless of whether their former spouse elects a lump sum. Therefore, as with retired pilot Lump Sum Subclass members, twice as many Warrants are allocated to Alternate Payees who elected a lump sum before April 1, 1999 than are allocated to Alternate Payees who did so on or after April 1, 1999. Alternate Payees who never elected a lump sum but were not yet receiving any benefits from the Plan on the date that it was frozen have only a possible inchoate claim under Count I. Accordingly, they receive a smaller Warrant allocation under the Agreement.

In short, the issuance of the Warrants to the Lump Sum Subclass in settlement of Count I is a benefit having very real value and is an especially

[36] Part of the agreement reached between ALPA and Delta last year was to "freeze" the existing pilot Retirement Plan after December 31, 2004. The effect of "freezing" the Plan is that pilots accrue no further benefits under the Plan after that date. While future retirees will still have a lump sum option, it will apply only to those benefits already accrued under the Plan.

appropriate means for resolving Count I given the uncertainties in Plaintiffs' ability to establish both Defendants' liability and the quantum of additional benefits to which those subclass members would be entitled. Although no one can say today what the exact value of the Warrants might ultimately be, they afford the Lump Sum Subclass members potentially substantial economic benefit and an opportunity to participate in the economic future of Delta.

In sum, the overall settlement terms and considerations present not merely an appropriate settlement, but one that holds unique value and is particularly deserving of approval. In a very financially delicate situation, Plaintiffs and their counsel have been able to strike a bargain that provides the subclasses with genuine relief. They have done so in a way that maximizes the value to the subclasses while minimizing the adverse impact on the financial viability of Delta. The settlement is creative in many respects. But for that creatively constructed package—including, in particular, the provision of Warrants to resolve Count I—it would have been impossible to reach a settlement in this case.

(g) The Class Received Adequate Notice of the Settlement

Rule 23(e)(1)(B) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1)(B). The form of

notice should "be the best notice practicable under the circumstances." *Sanders v. Robinso Humphrey/American Exp., Inc.*, No. 1:85-CV-172RLV, 1990 WL 105894, at *3 (N.D. Ga. May 23, 1990). At the same time, however, the rule "leaves the form of the notice to the court's discretion." *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337 (1st Cir. 1991); *accord In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) ("While due process and Rule 23(e) require notice of a settlement to be given, the content and form of that notice are left to the court's discretion.") (citation and internal quotation marks omitted).

In the case at bar, the Court approved direct, actual notice of the proposed settlement to each Class member through an individual mailing. *See* Agreement ¶¶ 3.25, 6.1, 6.2. Because Class members, save those who are deceased,[37] are current recipients of monthly pension payments from the Plans, active Delta pilots, or Alternate Payees who are receiving (or eligible to receive) benefits, their identities and whereabouts were ascertainable from Defendants' records, ensuring that notice was distributed expeditiously, thus obviating any need for notice by publication. *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173 (1974) ("Individual notice

[37] Delta does not maintain names or contact information of the estates of deceased pilots, so Notice to those Class members was mailed to the last known address for the pilot that is in the company's Human Resources database. Agreement ¶ 6.1(c).

must be sent to all class members whose names and addresses may be ascertained through reasonable effort."). Constructive notice of the settlement notice—which has been characterized "'as a poor substitute for actual notice,'" *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1097 (5th Cir. 1977) (quoting *Eisen*, 417 U.S. at 175)—was therefore unnecessary in this case.

Specifically, the Agreement required Delta to provide a considerable amount of information about Class members for the purpose of identifying and mailing them Notice and Claim Forms. That information included, for example, Social Security number, last known address, and Delta employee number where applicable. For deceased pilots, Delta provided the names and similar information for surviving spouses who are receiving payments from the Plan. The same information was provided for Alternate Payees who are subclass members. Finally, so that the appropriate allocations can be made to the subclass members, the information called for in the Warrant allocation schedule was provided, and the retirement date provided for Minimum Benefit Subclass pilots so that it could be determined whether they retired before or after July 1, 1997. Agreement ¶ 6.1. In all, the Settlement Administrator—Garden City Group of Melville, New York (*see* Agreement ¶ 3.34), one of the leading firms in the field of class action settlement

administration[38]—mailed notice to 1,972 potential Minimum Benefit Subclass members and 10,955 members of the Lump Sum Subclass (*i.e.*, 12,927 Class members in all) that were identified by Delta. *See* Fraga Aff. ¶¶ 3, 5, 8. Based on information tabulated by the Settlement Administrator through August 15, 2005, 1,219 individuals claiming to be Minimum Benefit Subclass members have submitted Claim Forms (1,026 of whom, in turn, have been determined to be Minimum Benefit Subclass members).[39] This represents a remarkable 55% participation rate—with about a week still left for subclass members to tender claims.

Besides the Agreement's provisions designed to ensure the direct transmittal of notice to Class members, the Class Notice itself satisfied Rule 23(e) in that it

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[38] Garden City Group has served as settlement administrator in numerous cases, including many of the largest class action settlements. *See, e.g., In re Global Crossing Secs. and ERISA Litig.*, 225 F.R.D. 436, 446 (S.D.N.Y. 2004); *Strong v. BellSouth Telecomms., Inc.*, 173 F.R.D. 167, 169 (W.D. La. 1997), *aff'd*, 137 F.3d 844 (5th Cir. 1998); *In re WorldCom, Inc. Secs. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 1394679, at **2, 6 (S.D.N.Y. June 14, 2005); *In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *7 (C.D. Cal. June 10, 2005); *In re The St. Paul Cos. Secs. Litig.*, Master No. 023825, PAM/RLE, 2004 WL 1459426, at *2 (D. Minn. June 7, 2004); *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-5238, 2002 WL 31528478, at *3 (E.D.N.Y. June 21, 2002).

[39] 160 individuals who are not members of the Minimum Benefit Subclass submitted claims, and 33 of the 1,219 claims represent multiple claims relating to the same benefit record.

advised recipients in bold face to read the notice carefully because it would affect their rights; furnished a sufficiently detailed explanation of both the litigation and the settlement, including the claims being released; and advised Class members that they could obtain further information by contacting the Settlement Administrator through a toll-free "hotline" number (1-800-294-1319) or by accessing a dedicated website (www.deltapilotspensionbenefitssettelement.com) that contains information pertinent to the case and the Settlement (including copies of the Settlement Agreement and the Preliminary Approval Order of May 24, 2005) and from the Court's files. The Class Notice further advised Class members of the opportunity to lodge any objection to the Settlement—and, in bold face, of the need to do so by August 24, 2005—and of the right to personally appear at the September 6, 2005 Rule 23(e)(1)(C) fairness hearing. *See* Agreement, Ex. A; *In re Integra Realty Resources*, 262 F.3d at 1111 ("The standard for the settlement notice under Rule 23(e) is that it must fairly apprise the class members of the terms of the proposed settlement and of their options.") (citation and internal quotation marks omitted); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527 (D.N.J. 1997) ("Notice of a proposed settlement under Rule 23(e) must inform class members (1) of the nature of the pending litigation, (2) of the settlement's general terms, (3) that complete information is available from the

court files, and (4) that any class member may appear and be heard at the Fairness Hearing.") (citing treatise), *aff'd*, 148 F.3d 283 (3d Cir. 1998); *see generally Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (citing cases).

In short, the Class Notice and notice procedures in this case ensured that virtually all Class members received direct, expeditious notice of the Settlement; sufficient general information, including where they can obtain additional information; and an explanation of their rights and applicable deadlines. The Class Notice and procedures amply satisfied the Due Process concerns that underlie Rule 23(e)(1)(B); *see generally Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113 (2d Cir. 2005) ("The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness.") (citing cases).

Finally, given (i) the ability to identify all Class members and furnish direct notice, and (ii) the timetable for effectuation of the Settlement, a 35-day period for the submission of comments and objections to the Settlement and the holding of a

Rule 23(e)(1)(C) final approval hearing thirteen days after the conclusion of the objection deadline were adequate and reasonable. *See In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1379 (N.D. Ga. 1979) (notice that "described the foundations of the litigation, detailed the terms of settlement, and set the deadlines for claims and opt-outs" was "appropriate and adequate," and "timetable established in the notice (4-6 weeks for responses) was not inconsistent with the deadlines governing similar litigation") (citing cases in which from 19 to 29 days' notice was furnished), *aff'd in relevant part*, 645 F.2d 488 (5th Cir. 1981).

B. The Court Should Certify the Settlement Class and Appoint Class Counsel

1. The Proposed Settlement Class and Its Subclasses

To effectuate their Settlement Agreement, the parties seek certification of the Class, which is comprised of participants in the Plan and the Non-Qualified Plans. Specifically, the Class consists of two Subclasses, a Lump Sum Subclass and a Minimum Benefit Subclass, as defined above. Exempted from membership in the Class and the two Subclasses, however, are individuals who have already voluntarily dismissed their claims against one or more of the Defendants with prejudice: James B. Porter (a former Plaintiff in this litigation, who voluntarily dismissed his claims with prejudice last December), Darrell G. Aschbacher, Richard D. Cather, Lloyd C. Marshall, and Terrence P. O'Mahoney (the latter four

of whom were the plaintiffs in *Aschbacher v. The Delta Pilots Retirement Plan*, No. 1:00-CV-2127-JEC (N.D. Ga.)). *See* Agreement ¶ 3.10.

2. The Settlement Class and Subclasses Satisfy all of the Prerequisites of Rule 23 of the Federal Rules of Civil Procedure

As this Court has recognized, settlement classes must satisfy the criteria of Rule 23 of the Federal Rules of Civil Procedure, save that an inquiry into whether a class trial would be manageable is irrelevant. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.") (citation omitted); *Strube v. American Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 695 (M.D. Fla. 2005) (manageability of case is irrelevant to certification settlement classes); *Ingram*, 200 F.R.D. at 697 ("Under *Amchem*, manageability concerns are eliminated in the settlement class context, but the Court must address other aspects of Rule 23."); *Taylor v. Flagstar Bank, FSB*, 181 F.R.D. 509, 518 n.3 (M.D. Ala. 1998) ("Settlement classes do not have to meet the Rule 23(b)(3) requirement of

manageability.").[40]

Moreover, courts have repeatedly recognized that, as a general matter, "the requirements of Rule 23 are more easily satisfied for settlement purposes than for litigation purposes." *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 159 (S.D. Ohio 1992); *accord In re Beef Indus. Antitrust Litig.*, 507 F.2d 167, 178 (5th Cir. 1979) ("[I]t is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context.").

(a) Standards for Class Certification

An action may be maintained as a class action if: "(1) the class is so

[40] It is true that only Rule 23(b)(3) expressly requires a showing that class treatment would be superior and that one of the factors in the so-called "superiority" analysis is the manageability of the case. But while Rules 23(b)(1) and (2) do not explicitly include a manageability component, a number of courts have held that manageability is a consideration under those subsections as well. *See, e.g., Shook v. El Paso County*, 386 F.3d 963, 973 (10th Cir. 2004) ("Elements of manageability and efficiency are not categorically precluded in determining whether to certify a 23(b)(2) class."), *cert. denied*, 125 S. Ct. 1869 (2005); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 173 (N.D. Cal. 2004) ("While Rule 23(b)(2) does not expressly refer to manageability—in contrast to Rule 23(b)(3)—such a requirement is implicit in any type of class certification.") (citing cases); *Doe v. Guardian Life Ins. Co. of Am.*, 145 F.R.D. 466, 475 n.8 (N.D. Ill. 1992) (manageability factor under Rul3 23(b)(3) "also may affect" court's determination of whether class may be certified under Rule 23(b)91) or (2)). At any rate, because the instant motion seeks certification of a settlement, rather than a litigation, class, the question of the superiority of class vis-à-vis individual treatment is moot.

numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). These four requirements are commonly referred to as, respectively, the prerequisites or elements of "numerosity," "commonality," "typicality," and "adequacy" (or "adequacy of representation"). *See, e.g., Franze v. Equitable Assurance*, 296 F.3d 1250, 1253 (11th Cir. 2002); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346, 1351 (11th Cir. 2001).

In addition to satisfying the four elements of Rule 23(a), the class must satisfy the requirements of one of three subdivisions of Rule 23(b). As is relevant here, subsections (b)(1) and (2) require a showing that

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . . .

Fed. R. Civ. P. 23(b)(1)-(2).

(b) The Class Is So Numerous as to Make Joinder of All of Its Members Impracticable

"The numerosity requirement simply asks whether there are so many members of the class that joinder of them all is impracticable." *Begley v. Academy Life Ins. Co.*, 200 F.R.D. 489, 495 (N.D. Ga. 2001). A precise number need not be shown. *See Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983) (citing cases). A reasonable estimate of the number of class members suffices. *Anderson v. Garner*, 22 F. Supp. 2d 1379, 1384 (N.D. Ga. 1997); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 666 (N.D. Ga. 2001).

Moreover, while there is no specific threshold number of members that will automatically satisfy this element, classes numbering forty or more members generally satisfy it. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *see also Ingram*, 200 F.R.D. at 697 (class of 2,200 members was "well beyond that which courts accept as satisfying the numerosity requirement");

Martin v. Housing Auth. of Atlanta, 86 F.R.D. 320, 321 (N.D. Ga. 1980) (class of 100 held sufficient).

As to the "impracticability of joinder" component of the numerosity test, it need not be shown that joinder is impossible but, rather, "only . . . that it would be extremely difficult or inconvenient to join all members of the class." *Anderson v. Garner*, 22 F. Supp. 2d 1379, 1384 (N.D. Ga. 1997); (citation and internal quotation marks omitted); *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 612 (N.D. Ga. 1997) (same).

Here, the Class includes retired Pre-'72 Pilots who were eligible for the Minimum Benefit, as well as *any* Delta pilot who received or will be eligible to receive a lump sum distribution of pension benefits. The Class also includes the beneficiaries of deceased pilots who would otherwise be Class members, as well as Alternate Payees of pilot Class members. As the date furnished by Delta shows, the Settlement Class here, including both subclasses, numbers in the thousands. *See* Fraga Aff. ¶ 3. Moreover, because the Class is geographically dispersed—active and retired Delta pilots reside throughout the United States, and some Class members reside abroad—joinder of all Class members would be impracticable. Thus, Rule 23(a)'s numerosity element is easily satisfied.

(c) There Are Questions of Law or Fact Common to All Class Members and Those Questions Predominate Over Those Affecting Only Individual Members

The so-called "commonality" element of Rule 23(a) requires a showing that there are questions "susceptible to class-wide proof." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001); *accord Grimes v. Pitney Bowes Inc.*, 100 F.R.D. 265, 270 (N.D. Ga. 1983) ("The commonality prerequisite of the rule requires that the proponent of the class action show that the issues are subject to generalized proof and that such generalized proof will be applicable to the class as a whole.").

For purposes of the commonality test, it is only necessary to find at least one issue of law or fact common to all Class members. *Brown v. SCI Funeral Servs. of Fla., Inc.*, 212 F.R.D. 602, 604 (S.D. Fla. 2003) (citing cases); *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671, 675 (M.D. Ala. 1996); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 349 (S.D. Ga. 1996), *aff'd mem.*, 117 F.3d 1433 (11th Cir. 1987); *Davis v. Northside Realty Assocs.*, 95 F.R.D. 39, 43 (N.D. Ga. 1982).[41]

[41] *But see Sanders v. Robinson Humphrey/American Express, Inc.*, 634 F. Supp. 1048, 1056 (N.D. Ga. 1986) (more than one common question must be shown), *rev'd in part on other grounds sub nom. Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987).

Here, the commonality test is easily satisfied because there are many questions common to the members of each subclass, and these issues plainly overwhelm any individual questions.[42] These include:

- Whether Defendants' methodology for valuing and paying lump sums of pension benefits has given Plan participants the present value of the variable annuity enhancement.

- Whether the Minimum Benefit available to Pre-'72 Pilots was an "accrued" benefit within the meaning of ERISA prior to the July 1, 1996 Plan amendment that made early retirement benefits available under that formula.

- If the Minimum Benefit was not an accrued benefit prior to July 1, 1996, whether the Plan was excessively backloaded, in violation of ERISA § 204(b)(1), 29 29 U.S.C. § 1054(b)(1).

- Whether the July 1, 1996 freeze of the value of Benefit Units already earned by Class members constitutes a cutback of accrued pension benefits, in violation of ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1).

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[42] In the instant case, certification is sought under Rule 23(b)(1) and (2), which have no requirement that common questions predominate over questions affecting only individual class members. *See Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). Nevertheless, the following discussion, showing the existence of several common, core questions that tower over any individual questions, demonstrates the firm cohesion of the Class and both of its Subclasses, and also satisfies the more demanding predominance test of Rule 23(b)(3). *See also Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 300 (N.D. Ga. 2003) (classes seeking injunctive or declaratory relief "*by their very nature* present common questions of law or fact") (emphasis added).

- Whether Defendants furnished notice of the July 1, 1996 amendment that prospectively reduced the Earnings Multiplier component of the Minimum Benefit formula from 2% to 1% that comported with section 204(h) of ERISA, 29 U.S.C. § 1054(h).

- Whether the reduction of the Minimum Benefit of Pre-'72 Pilots' Minimum Benefit through the application of the J & S Factor violates either the anti-forfeiture or the anti-alienation provisions of ERISA, 29 U.S.C. §§ 1053(a)(1) and 1056(d)(1), respectively.

Besides these core issues, to which the Court and the parties would have to direct most of their efforts, the issues pertaining to both subclasses entail questions of Plan compliance with ERISA or Plan interpretation, thereby involving consideration of the *same* Plan documents or the *same* statutes. The Eleventh Circuit has noted that claims that can be determined on the basis of ERISA-governed benefit plan documents are amenable to class-wide proof. *See Hudson v. Delta Air Lines*, 90 F.3d 451, 457 (11th Cir. 1996).

Indeed, legions of courts have found common questions to exist in pension benefits cases that, like those at bar, involve interpretations of plan documents or statutes. *See, e.g., Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (whether defendant's alleged overestimation of Social Security benefits violated ERISA's anti-forfeiture provisions held common question); *Dameron v. Sinai Hosp. of Balt., Inc.*, 595 F. Supp. 1404, 1408 (D. Md. 1984) (legality of defendants' practice of using estimated Social Security benefits rather than actual

benefits received by class members to calculate benefits under pension plan held common question of law); *Kohl v. Ass'n of Trial Lawyers of Am.*, 183 F.R.D. 475, 484 (D. Md. 1998) (issue of whether defendants incorrectly excluded cost-of-living adjustment from lump sum payments of pension benefits presented common questions of law and fact in ERISA action); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 35 (W.D. Mo. 1979) (question in ERISA action of whether sale of facility where class members worked was permanent shutdown or layoff, entitling them to early retirement benefits held common question); *Morgan v. Laborers Pension Trust Fund for Northern Cal.*, 81 F.R.D. 669, 676 (N.D. Cal. 1979) (issue of whether operation of eligibility structure of pension plan violated ERISA or Taft-Hartley Act presented common question of law); *Souza v. Scalone*, 64 F.R.D. 654, 657 (N.D. Cal. 1974) (whether pension plan's age requirement was arbitrary and unreasonable and in violation of Labor Management Relations Act held common question), *vacated on other grounds*, 563 F.2d 385 (9th Cir. 1977); *LaFlamme v. Carpenters Local # 370 Pension Plan*, 212 F.R.D. 448, 457 (N.D.N.Y. 2003) (common questions predominated where "underlying yet forefront issue" was whether pension plan's "freezing" rule violated ERISA); *Koch v. Dwyer*, No. 98 Civ. 5519 (RPP), 2001 WL 289972, at *3 (S.D.N.Y. Mar. 23, 2001) (questions of law and fact held common where "[t]he relationships among the parties . . . [we]re governed by written plan documents under the standards set forth in ERISA");

White v. Sundstrand Corp., No. 98 C 50070, 1999 WL 787455, at *7 (N.D. Ill. Sept. 30, 1999) (ERISA claim involving interpretation of pension plan language held common question); *Helms v. Local 705 Int'l Bhd. of Teamsters Pension Plan*, No. 97 C 4788, 1998 WL 182513, at *1 (N.D. Ill. Apr. 16, 1998) (common legal issues included whether ERISA permitted defendant pension plans to exclude reciprocal service credits and partial year credit during final year of covered employment from calculation of early retirement pension benefits); *Breedlove v. Tele-Trip Co.*, No. 91 C 5702, 1993 WL 284327, at *4 (N.D. Ill. July 27, 1993) (issue of whether defendant misinterpreted plan in denying benefits to independent operators held common question).

Indeed, because *all* of the aforementioned questions would focus on *Defendants'* conduct rather than actions of individual Plaintiffs or Class members, the inquiry would be necessarily class-wide. *See Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 570 (S.D. Ohio 1983) (claims in ERISA action that arose from defendant's acts directed towards all plaintiffs presented common question of law).

(d) Plaintiffs' Claims Are Typical of Those of Absent Class Members

The so-called "typicality" test "directs the district court to focus on whether named representatives' claims have the same essential characteristics as the claims

of the class at large." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (citation and internal quotation marks omitted).

The Eleventh Circuit has explained that:

> [a] sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event *or pattern or practice and are based on the same legal theory*. Typicality, however, does not require identical claims or defenses. A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class.

Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984) (citing cases; emphasis added); *accord Murray*, 244 F.3d at 811 ("The typicality requirement may be satisfied despite substantial factual differences . . . when there is a strong similarity of legal theories.") (citation and internal quotation marks omitted); *Ingram*, 200 F.R.D. at 698 ("There is no requirement that the named plaintiffs each personally experience every difficulty outlined in the complaint. Rather, it is sufficient that the claims of the named Plaintiffs are substantially similar to the claims of the class."); *Begley v. Academy Life Ins. Co.*, 200 F.R.D. 489, 496 (N.D. Ga. 2001) ("Typicality . . . does not require identical claims or defenses, and minor factual variations will not render a class representative's claim atypical."); *Wells v. HBO & Co.*, No. 1:87CV657JTC, 1991 WL 131177, at *3 (N.D. Ga. Apr. 24, 1991) ("strong similarity in legal theories" satisfies typicality test).

In the instant case, Plaintiffs' claims are indisputably typical of the members of the Class and its two subclasses. All four Plaintiffs received lump sum payments of pension benefits in lieu of the variable annuity portion of their pension benefits, and have challenged Defendants' lump sum methodology in Count I of their respective Complaints. Also, all four Plaintiffs were Pre-'72 Pilots eligible for the Minimum Benefit, and they were each affected by one or more of the claims that are the subject of Counts II-V, such as the Benefit Unit freeze (Count II, asserted by Plaintiffs Berger, Gamble, and MacAulay); the Notice claim (Count III, also asserted by Berger, Gamble, and MacAulay); the Timing Claim (Count IV, asserted by Braun and Gamble); and the J & S Factor Claim (Count V, asserted by Berger and Gamble, both of whom were married Pre-'72 Pilots at retirement).[43] Their claims being typical of those of absent Class members, Plaintiffs have had every incentive to vigorously pursue these claims on their behalf, and the Settlement is, therefore, anything but collusive. *See Stirman v. Exxon Corp*., 280 F.3d 554, 563 n.7 (5th Cir. 2002) ("[I]n the absence of typical claims, the class

[43] Moreover, although Alternate Payees have independent Class membership by reason of their statutorily-conferred entitlements, *see* 29 U.S.C. §§ 1056(d)(3), (3)(J)-(K), 1132(a)(1)(B) & (3), any statutory or plan violation claim that could be asserted by those individuals is purely derivative of the claims of the pilot plan participants' claims. *See, e.g., Gaudet v. Sheet Metal Workers' Nat'l Pension Fund*, 216 F. Supp. 2d 582, 585 (E.D. La. 2002) ("Audrey's rights under the QDRO are purely derivative of Stanley's rights to receive pension funds from the plan."), *aff'd*, 71 Fed. Appx. 441, 2003 WL 21417518 (5th Cir. June 6, 2003). Hence, Plaintiffs' claims are typical of Alternate Payees' claims as well.

representative has no incentives to pursue the claims of the other class members.") (citation and internal quotation marks omitted); *In re Terazosin Hydrochloride*, 220 F.R.D. 672, 693 n.35 (S.D. Fla. 2004) (same).

(e) **Plaintiffs Will Fairly and Adequately Represent the Interests of Absent Class Members**

"The adequacy-of-representation requirement tend[s] to merge with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether . . . whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 597, 626 n.20 (1997) (citation and internal quotation marks omitted); *accord Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) ("'Adequacy of representation' means that the class representative has common interests with unnamed class members and will vigorously prosecute the interests of the class through qualified counsel."); *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (adequacy test looks to "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class") (citation and internal quotation marks omitted).

Here, as noted above, Plaintiffs' claims are illustrative of those of the absent members of both subclasses, and they sought the same forms of relief on behalf of absent members as they did for themselves. Thus, they have had every incentive to pursue those claims vigorously on behalf of Class members. Indeed, given the absence of any suggestion (let alone evidence) to the contrary, Plaintiffs' adequacy of representation should be presumed. *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 464 (S.D. Fla. 2002); *Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd.*, 197 F.R.D. 522, 528 (S.D. Fla. 2000); *accord Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 330 (W.D. Mich. 2000) (citations omitted); *Walton v. Franklin Collection Agency, Inc.*, 190 F.R.D. 404, 410 (N.D. Miss. 2000).

The adequacy test also looks to the competency of proposed class counsel. *Amchem Prods.*, 521 U.S. at 626 n.20; *accord Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) ("[t]he inquiry into whether named plaintiffs will represent the potential class with sufficient vigor to satisfy the adequacy requirement" includes "questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation") (citation and internal quotation marks omitted); *North Am. Acceptance Corp. Sec. Cases v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir. 1979) (courts "focus on the attorney, as well as the named parties, because they realize the important role

the attorney plays in protecting the interests of the class").[44]

Here, Plaintiffs are represented by counsel who are eminently qualified and possess substantial experience in the conduct of litigation of the size, scope, and complexity of class actions in general and this case in particular. Plaintiffs' counsel have been Seeger Weiss LLP; Parks, Chesin & Walbert, P.C.; Gilman & Pastor, LLP; the Gaddy Law Firm; Parry Deering Futscher & Sparks, P.S.C.; and The Rossbacher Firm, which have extensive experience and expertise in class action and complex civil litigation, including ERISA litigation. These firms have successfully prosecuted numerous class actions and other cases on behalf of insureds, investors, consumers, and other injured persons in courts throughout the United States.[45] The firms have demonstrated their abilities through the conscientious and dogged prosecution of this litigation over the past four years, in the face of Defendants' spirited defense (itself presented through a prominent "national" law firm of high reputation), and through the difficult and carefully-

[44] *See also Sheftelman v. Jones*, 667 F. Supp. 859, 864 (N.D. Ga. 1987) (adequacy test "mandates an examination of the adequacy of plaintiffs' attorneys as well as a determination about the adequacy of the named plaintiffs"); *Waldrip v. Motorola, Inc.*, 85 F.R.D. 349, 351 (N.D. Ga. 1980) (adequacy element "includes both a showing that the named Plaintiff is in a position to provide vigorous prosecution of the within action, and that her attorneys will provide adequate representation").

[45] Firm resumes or a summary of counsel's experience are included in the declarations submitted in support of Plaintiffs' counsel's concurrent application for an award of fees and expenses.

crafted compromises they have reached with Defendants in order to achieve a fair, reasonable, adequate, and honorable settlement that works justice for all sides in this case.

(f) The Court Should Certify the Class under Rule 23(b)(1)

Certification under Rule 23(b)(1) is appropriate where "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B).

Although they have markedly different opinions about the prospects of success of Plaintiffs' claims, the parties do agree that, if fully successful, those claims could result in a judgment requiring Defendants to pay at least hundreds of millions of dollars. Given the present under-funding of the Plan (which was frozen as of January 1, 2005) and the current financial straits of its sponsor, Delta—its entire market capitalization today is only about $230 million, it skirted a Chapter 11 bankruptcy filing last fall only through an eleventh-hour agreement with ALPA[46]; has had to resort to bold steps to bolster its liquidity, including the sale of

[46] *See, e.g.*, "Delta dodges bankruptcy with labor deal," Oct. 28, 2004, *available at* http://money.cnn.com/2004/10/28/news/fortune500/delta_pilots.

a regional subsidiary[47]; and still faces the specter of bankruptcy if oil prices remain at their current levels (let alone if they continue to climb)—Defendants would have insufficient assets to satisfy in full all of the claims of Class members if Plaintiffs recovered everything they sought. Moreover, the Settlement creates a total package that would be plainly insufficient to pay the full value of individual Class members' claims, even assuming the most optimistic valuation of the Warrant component of that package.

Under these circumstances, a "limited fund" certification under Rule 23(b)(1)(B) is appropriate. *See generally Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) ("One recurring type" of cases contemplated by Rule 23(b)(1)(B) is "the limited fund class action, aggregating 'claims . . . made by numerous persons against a fund insufficient to satisfy all claims.") (citation and internal quotation marks omitted); *id.* at 841 (class treatment under limited fund theory is "justified with reference to a 'fund' with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution"); *Cutler v. 65 Sec. Plan*, 831 F. Supp. 1008, 1020 (E.D.N.Y. 1993) (Rule 23(b)(1)(B) certification appropriate

[47] *See, e.g.*, Kevin Allison, "Delta to sell regional unit for $425m," *Financial Times*, Aug. 16, 2005**,** *available at* http: //us.ft.com/ftsuperpage/superpage.php?news_id=fto08162005103549644&referrer_id=yahoofinance (describing Delta's sale of Atlantic Southeast Airlines as a "long-awaited move that will provide the legacy carrier with desperately needed short-term liquidity").

where there are "limited . . . assets available" to satisfy claims); *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 584 (N.D. Ill. 2005) ("The Advisory Committee Notes to Rule 23(b)(1)(B) discuss situations where the rule may be applicable, including actions by shareholders to compel the declaration of a dividend, or when claims are made by numerous persons against a fund insufficient to satisfy all claims."), *reconsideration denied*, No. 04 C 3596, 2005 WL 670522 (Mar. 16, 2005); *Collins v. Int'l Dairy Queen, Inc.*, 168 F.R.D. 668, 675 (M.D. Ga. 1996) ("Class certification under Rule 23(b)(1)(A) or (B) is primarily for cases seeking injunctive and declaratory relief or payment from a limited fund."), *modified on other grounds*, 169 F.R.D. 690 (1997); *Waldron v. Raymark Indus., Inc.*, 124 F.R.D. 235, 237 (N.D. Ga. 1989) ("A Rule 23(b)(1)(B) class action is commonly referred to as a 'limited fund' since such an action is based upon the theory that there is only a limited fund to satisfy the claims of potential plaintiffs and that individuals who sue first could exhaust the fund, leaving subsequent plaintiffs with no remedy."); *id.* at 238 n.1 ("A Rule 23(b)(1)(B) class action is designed to preserve the limited fund for the entire class against the individual claims of class members prosecuted through separate suits.").

In sum, given the current financial posture of Defendants and their likely inability to satisfy all of the claims alleged in this case, a Rule 23(b)(1) "limited fund" certification of the Settlement Class is appropriate.

(g) The Court Should Also Certify the Class under Rule 23(b)(2)

Certification of a class under Rule 23(b)(2) is appropriate where a defendant has "acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Here, Plaintiffs' claims are paradigmatic ERISA claims suitable for 23(b)(2) certification. The Class challenges Plan provisions or methodologies that Defendants have *uniformly* employed. For example, Count I challenges Defendants' valuation and payment of lump sums of the variable portion of *all* Delta pilots' pension benefits, irrespective of which pension formula is employed. Similarly, the Minimum Benefit Subclass consists of all Pre-'72 Pilots eligible for the Minimum Benefit and challenges Defendants' across-the-board freeze, as of July 1, 1996, of Pre-'72 Pilots' Benefit Units at their December 31, 1995 value of $240.31; Defendants' pre-July 1, 1996 practice of valuing Benefit Units only once annually; the reduction of the Minimum Benefit of *all* married Pre-'72 Pilots under the J & S Factor; and the legal sufficiency of notice of the July 1, 1996 amendment that reduced the earnings multiplier component of the Minimum Benefit. Simply put, there is no dispute in this case that—setting aside the question of whether they were proper or comported with ERISA—Defendants' plan provisions, methodologies, and plan interpretations were uniform.

Courts have routinely certified classes under Rule 23(b)(2) where the ERISA claims involve such challenged policies or practices. *See, e.g., Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 763-64 (7th Cir. 2003) (Rule 23(b)(2) certification appropriate where ERISA plan participants sue to recover benefits, "[a]s long as the concrete follow-on relief that is envisaged" from declaratory judgment that plan does not comport with ERISA "will if ordered (that is, if negotiations for relief consistent with the declaration break down) be the direct, anticipated consequence of the declaration, rather than something unrelated to it"); *Forbush*, 994 F.2d at 1106 (23(b)(2) certification warranted where plaintiff alleged that defendant's overestimation of Social Security benefits violated ERISA's anti-forfeiture provisions); *LaFlamme*, 212 F.R.D. at 456 (23(b)(2) certification appropriate where plaintiff claimed that pension plan's "freezing rule" violated ERISA's minimum accrual standards); *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 603 (E.D. Mich. 1996) (noting that Rule 23(b)(2) "frequently has been invoked by courts confronted with ERISA claims" involving alleged denials of benefits to all retirees in violation of statute); *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397 (E.D. Pa. 2001) (certifying class under 23(b)(2) in ERISA action where plaintiffs alleged that defendants had "uniformly interpreted the plan documents"); *Kohl*, 183 F.R.D. at 486 (certifying ERISA class under

23(b)(2) where defendants had calculated all lump sum payments without including cost-of-living adjustment).

Moreover, Plaintiffs sought primarily injunctive and declaratory relief, including a declaration that Defendants' Plan provisions, methodologies, or actions violated ERISA or that Defendants' interpretation of the Plan ran afoul of clear plan language, and an injunction against future violations. *See* MacAulay and Berger Compls. at 17-18 (Wherefore Clause); Braun Compl. at 14 (same); Gamble Compl. at 19 (same). That they also sought recovery of pension benefits in no way lessens the amenability of their claims to 23(b)(2) certification. To the contrary, recovery of benefits in an ERISA action has long been considered to be equitable relief, not damages at law. *See generally Hunt v. Hawthorne Assocs.*, 119 F.3d 888, 907 (11th Cir. 1997) ("the relief provided in an action to recover benefits under ERISA is equitable, not legal").

Indeed, any monetary relief here would have "flow[ed] directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Murray*, 244 F.3d at 812; *accord LaFlamme*, 212 F.R.D. at 456 (certifying class under 23(b)(2) because plaintiff's request for recalculation of benefits was "relief . . . [that] can only be said to be incidental to the declaration that defendants' pension plan is in violation of the law"); *Bublitz v. E.I. du Pont de Nemours and Co.*, 202 F.R.D. 251, 259 (S.D. Iowa 2001) (plaintiffs' ERISA

claims held suitable for 23(b)(2) certification because payment of benefits "would flow directly and incidentally" from declaratory and injunctive relief that plaintiffs sought).

Thus, numerous courts have certified ERISA claims under Rule 23(b)(2) where the relief sought included payment of additional benefits. *See Jansen v. Greyhound Corp.*, 692 F. Supp. 1022, 1028 (N.D. Iowa 1986) (certifying ERISA action under 23(b)(2) where plaintiffs sought "retroactive payment of welfare benefits to the class members"); *Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.*, 212 F.R.D. 350, 359 (W.D. Mich. 2002) (claims for injunction requiring recalculation of benefits in accordance with ERISA and constructive trust to secure payment of additional benefits to class members was suitable for certification under 23(b)(2)) (collecting cases approving 23(b)(2) certification of ERISA claims); *Coleman v. Pension Benefit Guar. Corp.*, 196 F.R.D. 193, 199 (D.D.C. 2000) (plaintiffs' claim for benefits, flowing from their request for declaratory judgment that plan amendment was invalid, was really equitable in nature and hence was suitable for 23(b)(2) certification); *Berger v. Nazametz*, No. 00-CV-0584-DRH, 2002 WL 1774744, at *1 (S.D. Ill. July 22, 2002) (claim for retroactive benefits in ERISA action amounted to equitable relief of restitution, not claim for money damages, making 23(b)(2) certification appropriate); *Breedlove v. Tele-Trip Co.*, No. 91 C 5702, 1993 WL 284327, at *9

(N.D. Ill. July 27, 1993) (noting that several cases have held that certification of ERISA claims is proper under 23(b)(2) where monetary relief, in conjunction with injunctive relief, is sought) (citing cases).

In sum, certification of the Settlement Class is appropriate under Rules 23(b)(1) and (2).

(h) The Court Should Appoint Plaintiffs' Counsel as Counsel for the Class

Unless provided otherwise by statute, when a court certifies a class, it must appoint class counsel. Fed. R. Civ. P. 23(g)(1)(A). In the instant case, Plaintiffs' counsel's competence and performance in this litigation and in helping to achieve this carefully-balanced settlement makes it appropriate that the Court appoint them as counsel for the Class. The appointed counsel must fairly and adequately represent the class's interests. Fed. R. Civ. P. 23(g)(1)(B). Here, as discussed above, Plaintiffs' counsel have expertise in complex and class action litigation. Moreover, Plaintiffs' counsel are intimately acquainted with the facts and the law relating to the claims at issue, having pursued these five claims vigorously at both the administrative and judicial level for four years. Furthermore, Plaintiffs' counsel have ably acted in the best interests of the Class by forging the Settlement, one that is remarkable because it achieves meaningful relief for Class members during economically difficult times for Defendants and without unduly taxing

Defendants' limited resources. *See generally* Fed. R. Civ. P. 23(g)(1)(C) (among factors that court is to consider is "the work counsel has done in identifying or investigating potential claims in the action"; "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action"; "counsel's knowledge of the applicable law"; and "the resources counsel will commit to representing the class").

Finally, without compromising their clients' interests one iota, Plaintiffs' counsel have managed to maintain a cordial and professional working relationship with counsel for the Defendants over the course of the spirited litigation, as well as in the course of the arm's length discussions during the mediation and more recently.

IV. CONCLUSION

For the foregoing reasons, the Court should give final approval to the Settlement; certify the Class (including the two Subclasses), appoint Plaintiffs' counsel as counsel for the Class; enter the proposed Final Order and Judgment; and enter such other relief as may be appropriate.

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2005, I electronically filed the foregoing **Plaintiffs' Memorandum of Law in Support of Joint Motion for Final Approval of Class Settlement, Certification of Settlement Class, and Plaintiffs' Motion for Appointment of Class Counsel** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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