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

JERRY R. SUMMERS, GEORGE T. LENORMAND, JEFFREY D. CRITES, LOUISE VAN RENSBURG and JAMES E. SHAMBO, individually and on behalf of all others similarly situated, Plaintiffs, v. UAL CORPORATION ESOP COMMITTEE, MARTY TORRES, BARRY WILSON, DOUG WALSH, IRA LEVY, DON CLEMENTS, CRAIG MUSA, and STATE STREET BANK & TRUST COMPANY, Defendants.	Case No. 03 C 1537 Honorable Samuel Der-Yeghiayan

DECLARATION OF ANDREW M. VOLK IN SUPPORT OF PLAINTFFS' MOTION FOR FINAL APPROVAL OF PARTIAL SETTLEMENT

1. I, Andrew M. Volk, do hereby declare as follows under penalty of perjury of the laws of the United States and the State of Illinois:

2. I am a partner at the law firm of Hagens Berman Sobol Shapiro LLP, and am one of the attorneys for Jerry R. Summers, George T. Lenormand, Jeffrey D. Crites, Louise Van Rensburg and James E. Shambo, Plaintiffs in Jerry R. Summers, *et. al.* v. UAL Corporation Employee Stock Ownership Plan, *et al.*, No. 03 C 1537 (N.D. Ill.).

3. Terms that are italicized and capitalized herein have the meaning as defined in the Class Action Settlement Agreement ("*Settlement Agreement*") executed on August 16, 2005. *See* Ex. A hereto.

4. The terms of the *Settlement Agreement* were reached after arduous arms'-length negotiations that began in the bankruptcy court in the summer of 2003.

5. Plaintiffs filed the original complaint in this Court in early 2003. However, on July 21, 2003 and over Plaintiffs' objection, the bankruptcy court granted UAL's motion and enjoined Plaintiffs from prosecuting the *Summers Action* in this Court.

6. Commencing shortly thereafter, *Class Counsel*, the *Settling Defendants* and UAL had discussions concerning the best manner in which the *Summers Action* could be resolved, consistent with efficiency and judicial economy. Those negotiations were protracted and hotly contested, and led to the Amended Stipulation of Dismissal ("Amended Stipulation"). As a result of the Amended Stipulation, the bankruptcy court entered the Order Granting the Joint Motion to Approve Stipulation and Settlement of (1) Adversary Complaint No. 03A0901; (2) Proofs of Claim of Summers and Lenormand (Nos. 42923 and 42924); (3) Proofs of Claim of Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, and all Other Current, Former and Future Members of the UAL Corporation ESOP Committee (No. 035437); and (4) Debtors' Motion to

Establish Claims Estimation Procedures ("Bankruptcy Order") on June 18, 2004. *See* Ex. H hereto.

7. Pursuant to the Amended Stipulation and the Bankruptcy Order, *Class Counsel* received a variety of relevant documents from the *Settling Defendants* and from UAL (Amended Stipulation at 10, ¶ 9). These documents revealed to *Class Counsel* for the first time that State Street was liable under ERISA for the damages suffered by the ESOP and its participants.

8. As a condition of the Amended Stipulation, Plaintiffs Summers and Lenormand agreed that, if they prevail in this action on the merits of their claims, any recovery against the *Settling Defendants* would be capped by, and limited to the proceeds, if any, available under insurance policies. At that time, the *Named Plaintiffs* were in possession of the *Insurance Policy,* namely, Zurich American Insurance Company Policy No.: FLC 8086839, a self-depleting policy in the amount of $10 million. *See* Ex. G. Subsequent discovery revealed that this was the only available policy with respect to the *Settling Defendants.*

9. Plaintiffs Summers and Lenormand agreed to limit the *Settling Defendants'* exposure to available insurance proceeds because, as the bankruptcy court found, the *Settling Defendants* "are parties without significant assets." *See* Ex. H.

10. After the stay was lifted some 15 months ago, the case proceeded through discovery, class certification, and summary judgment briefing in this Court. Meanwhile, the *Named Plaintiffs* and the *Settling Defendants* continued to negotiate. While some progress was made with respect to key terms of the *Settlement,* the parties remained far apart on the financial component of the *Settlement.* Finally, the parties agreed to mediation. After a full day-long mediation, the parties and the *Underwriter* were able to reach a tentative agreement, and, eventually, agreed on the terms of the proposed *Settlement Agreement.*

11. Class *Counsel* believes that the *Principal Class Settlement Amount* of $5.25 million represents a greater recovery than the *Named Plaintiffs* could have obtained from the *Settling Defendants* had the *Named Plaintiffs* prevailed against the *Settling Defendants* after trial. That is because, of the $10 million self-depleting *Insurance Policy* with a $1 million deductible, the *Settling Defendants* have already incurred approximately $2.75 million in legal fees and costs. That leaves approximately $6.25 million left in the policy as of the date of the tentative agreement was reached. Of course, the *Settling Defendants* needed to keep some money in reserve to complete the Settlement process including any appeals therefrom, and the costs of representing the *Settling Defendants* who will testify at trial, as well as the potential *Additional Administration Costs*.

12. Since the time they entered into the *Settlement Agreement*, the Court granted *Preliminary Approval,* and *Mailed Notice* and *Publication Notice* issued (*see* Affidavit of Richard Cody Bland, submitted together with this motion), Plaintiffs have learned that the Administrative Manual of the Airline Pilots Association ("ALPA") provides that ALPA, may, in its discretion, indemnify ALPA members who serve as fiduciaries of ERISA plans. *See* Ex. K hereto.

13. ALPA produced no documents to Plaintiffs in this case before the Court's March 9, 2005 discovery cutoff. On March 3, it produced a written response, stating specifically that there were no documents concerning indemnification. *See* Ex. L at 6-7 (Response to Request No. 7). Only later, at some point subsequent after March 23, 2005, did Plaintiffs receive a production which included the Manual. *See* Ex. N hereto (March 23, 2005 cover letter from Travis Mastroddi to IKON Office Solutions transmitting ALPA Supplemental Production for copying; at some later date, Plaintiffs receive the original March 3 written response plus the

Supplemental production from IKON). Because all these documents were produced well after the close of discovery, and are therefore inadmissible in this case, Plaintiffs had no occasion to review the production.

14. Only later, in preparing for the upcoming trial, did Plaintiffs review the production in detail. At that time we were surprised to learn that – contrary to the written response and ALPA's original production, the Administrative Manual did, indeed, contain provisions concerning indemnification.

15. Plaintiffs' counsel immediately conducted a thorough analysis as to whether the indemnification provisions altered their initial conclusion that the *Settlement* is fair, reasonable and adequate to all concerned. For the reasons outlined below, we concluded unequivocally that the indemnification right was unlikely to be of any value to the *Settlement Class,* and certainly not of sufficient value to alter our conclusion that the *Settlement* is fair, reasonable and adequate.

16. As stated in the Declaration of Jalmer Johnson ("Jalmer Decl."), provided herewith, ALPA views the indemnity provision as "not automatic," because it "must be authorized by the ALPA executive counsel." Jalmer Decl. at ¶ 4. Further, "the ALPA Executive Council would determine whether indemnity is available for liability only after a judgment has been rendered." *Id.* at ¶ 5. Only then would "the ALPA Executive Council . . . look at the facts and circumstances underlying the judgment to determine whether indemnity is available." *Id.*

17. Moreover, "the ALPA insurance policies exclude coverage for fiduciaries of stock ownership plans." *Id.* at ¶ 8. This significantly reduces the hypothetical value of ALPA-appointed ESOP Committee members' indemnification right to the *Settlement Class*.

18. In addition, Plaintiffs do not believe that the ALPA-appointed ESOP Committee members ("ALPA members") would seek indemnity from their union in the event of a judgment

against them in this case, since the effect would be to bankrupt their union. And, should the ALPA members not choose to do so, Plaintiffs and the Class would be unable to obtain any funds from ALPA. *See, e.g., United States v. Paxton Landfill Corp.*, 1985 U.S. Dist. Lexis 13339, at *7 (N.D. Ill. 1985). The same result would obtain if the ALPA members sought indemnification but ALPA refused – again, Plaintiffs and the Class would be powerless to attempt to enforce any indemnity claim the Committee members might have against ALPA.

19. Finally, *Class Counsel* have determined that ALPA lacks significant assets that would be available to fund any indemnification remedy in the event that ALPA members sought and obtained such remedy after a judgment against them. That is because the only significant asset of ALPA is in the form of the Major Contingency Fund. *See* ALPA Constitution and By-laws ("ALPA Constitution"), Section 14. *See* Ex. M hereto.

20. According to the ALPA Constitution, the Contingency Fund could not be used for the purposes of indemnifying ALPA members. *See* ALPA Constitution, Section 14 B. The Administrative Manual cannot alter this provision, since the Constitution provides that the Executive Board (which enacted the indemnification provisions in the Manual) "shall not have the power to change the Constitution and By-Laws, the dues structure of the Association, or to levy assessments." Thus, the Major Contingency Fund could not possibly be reached in any judgment against the *Settling Defendants*.

21. Accordingly, *Class Counsel* believe that the chance of the *Settlement Class* ever obtaining any meaningful remedy deriving from the ALPA members' indemnification rights are highly remote at best. Hence, they continue to believe that the *Settlement* is fair and reasonable to the *Settlement Class* as they are obtaining more from the *Settling Defendants* than they likely would have gotten in the event of a judgment at trial against the *Settling Defendants*.

22. The *Settling Defendants* have caused the *Principal Class Settlement Amount* of $5.25 million to be paid into an interest bearing escrow account maintained by *Class Counsel* consistent with SA ¶ 7.1.

23. Attached hereto as Ex. A is a true and correct copy of the *Settlement Agreement*.

24. Attached hereto as Ex. B is a true and correct copy of the Minute Order Preliminary Approving Settlement.

25. Attached hereto as Exs. C and D are true and correct copies of the Form of Notices.

26. Attached hereto as Ex. E is a true and correct copy of the Final [Proposed] Order of Judgment and Dismissal.

27. Attached hereto as Ex. F is a true and correct copy of the Declaration of Daniel R. Fischel, Plaintiffs' Damages Expert dated April 5, 2005 (without exhibits).

28. Attached hereto as Ex. G is a true and correct copy of the Zurich American Insurance Company Policy No.: FLC 8086839.

29. Attached hereto as Ex. H is a true and correct copy of the Bankruptcy Order, including the Amended Stipulation dated June 18, 2004.

30. Attached hereto as Ex. I is a true and correct copy of an excerpt from the transcript of proceedings held before bankruptcy Judge Eugene R. Wedoff on July 18, 2003.

31. Attached hereto as Ex. J are true and correct copies of the 11 objections to the proposed *Settlement*.

32. Attached hereto as Ex. K is a true and correct copy of a portion of the Airline Pilots Association Administrative Manual.

33. Attached hereto as Ex. L is a true and correct copy ALPA's response to a subpoena dated March 3, 2005.

34. Attached hereto as Ex. M is a true and correct copy of the ALPA Constitution and By-laws.

35. Attached hereto as Ex. N is a true and correct copy of a cover letter dated March 23, 2005 from Travis Mastroddi to IKON Office Solutions transmitting ALPA Supplemental Production for copying.

36. Attached hereto as Ex. O is a true and correct copy of the UAL Corporation Employee Stock Ownership Plan Trust Agreement Between UAL Corporation and State Street Bank and Trust Company dated July 12, 1994.

37. Attached hereto as Ex. P is a true and correct copy of the Investment Management Agreement.

Andrew M. Volk

10/7/05 Seattle, WA.

Date and Place of Execution

CERTIFICATE OF SERVICE

I, Andrew M. Volk, affirm that we caused copies of the ***DECLARATION OF ANDREW M. VOLK IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PARTIAL SETTLEMENT***, to be electronically filed with the Clerk of the Court on October 7, 2005 using the CM/ECF system which will send notification of such filing upon the following ECF participants:

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I further certify that I sent a hard copy by UPS Next Day Air to the following attorney:

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Counsel for Defendants UAL Corporation ESOP Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa

Dated: October 7, 2005

/s/ Andrew M. Volk
Andrew M. Volk