

UNITED STATES DISTRICT COURT
FOR THE NORTH DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY R. SUMMERS and GEORGE T.
LENORMAND, 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 AND TRUST
COMPANY,

Defendants.

No. 03 C 1537

Judge Der-Yeghiayan

**[PROPOSED] SECOND AMENDED CLASS ACTION COMPLAINT FOR
VIOLATION OF ERISA**

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Plaintiffs, by their undersigned attorneys, for their Class Action Complaint, allege upon personal knowledge as to themselves and their own acts, and upon information and belief (based upon the investigation of their counsel) as to all other matters, as to which allegations they believe substantial evidentiary support will exist after a reasonable opportunity for further investigation and discovery as follows:

I. NATURE OF THE ACTION

1. This Class Action seeks relief on behalf of all persons who from the time period July 19, 2001 to the present are, or were, participants in or beneficiaries of the UAL Corporation Employee Stock Ownership Plan (“UAL ESOP”).

2. The UAL ESOP was formed in 1994 as the vehicle to “recapitalize” United Airlines (“the Recapitalization”) pursuant to a transaction whereby Plaintiffs and the members of the Class, acting through the UAL ESOP, invested no less than \$3.3 billion in exchange for 55% ownership of UAL Corporation (“UAL”). As part of the Recapitalization, the UAL ESOP committed to purchase approximately 17 million shares of UAL stock, with an initial purchase of approximately 1.8 million shares and the remaining stock purchases scheduled to occur during the next six years. In return, stock amounting to 55% of UAL was committed to be transferred to the UAL ESOP in installments during the same period. Part of the consideration for this transaction required Plaintiffs and the members of the Class to agree to substantial wage and benefit reductions and work rule changes.

3. The UAL ESOP plan document provides that the ESOP should be exclusively invested in UAL stock. And at the time the ESOP was created, this made financial sense, and was prudent. UAL stock had, over the years, been relatively stable and it was believed it would appreciate as a result of the wage concessions that were part of the transaction that gave employees an ownership interest in UAL.

4. However, under ERISA, the plan document's provision for exclusive investment in UAL stock was controlling only to the extent that it was consistent with ERISA. As explained below, during the period from July 19, 2001 to the present, UAL stock was of such a speculative and highly risky nature so as not to be an appropriate exclusive investment for the ESOP. In other words, the change in UAL's stability, which was dramatic and led it to bankruptcy, required a rigorous reexamination of UAL stock as a prudent investment for the ESOP, which comprised a substantial percentage of UAL employees' retirement savings.

5. Most decisions concerning the operation of the UAL ESOP were vested in the first instance in a six-person committee ("UAL ESOP Committee"). Under the Plan documents and under ERISA, the Committee members were by law fiduciaries and were required at all times to manage the ESOP investments prudently and solely in the best interests of the ESOP participants. As United pilots and machinists placed in charged of the multi-billion dollar ESOP, the Committee members of necessity relied on the counsel of professionals – including Defendant State Street Bank and Trust ("State Street") who was Trustee of the ESOP from its inception in 1994 until at least September of 2002. And, although State Street attended every ESOP Committee meeting throughout the Class period and was well-aware that UAL faced virtually certain bankruptcy, State Street did nothing until August 20, 2002 – when it informed the Committee for the first time that the Committee and State Street had fiduciary duties with respect to the investments of the ESOP in UAL stock. In short order, State Street was appointed Investment Manager, and, in late September of 2002, State Street began selling some the ESOP's UAL stock.

6. The ESOP's sale of UAL stock however, was too little and too late. A prudent fiduciary would have divested and diversified at a much earlier date due to the dire change in financial circumstances of UAL.

7. Defendant State Street is liable for failing to act more quickly to protect the ESOP and its participants and beneficiaries *prior* to the time its status changed from Trustee of the ESOP to Investment Manager. As State Street itself acknowledged in a meeting with the ESOP Committee, as Trustee of the ESOP it was an “independent fiduciary” and was “always” required “to be determining whether the investment is prudent.” Further, State Street recognized at this same meeting that ERISA could require State Street to diversify out of UAL stock when it became imprudent for *all* of the ESOP’s assets to be in UAL stock – *even if* the ESOP Committee did not order State Street to sell the stock.

8. In January 2001, UAL projected a loss for the fourth quarter of 2000 but expected a modest profit for 2001. By mid-July 2001, however, the slowing economy, specifically the drop in business travel which made up 55% of UAL’s revenue, and high labor costs, *caused UAL to post massive second quarter losses (\$292 million) and to project losses for the remainder of the year, possibly as high as \$1 billion for all of 2001*. On July 2, 2001, the Justice Department objected to a proposed merger with US Airways, and an analyst for UBS Warburg predicted that UAL would lose almost \$20/share for the year. At the time of this announcement, UAL stock was trading in the \$30/share range. To add to UAL’s uncertainty came the events of September 11, 2001. On September 10, 2001, UAL common stock closed at \$30.82 per share. When the market reopened on September 17, it closed at \$17.50 per share.

9. Confirming the gloomy and uncertain outlook for UAL that was apparent in July 2001, in mid-October 2001, UAL Chief Executive Officer James Goodwin, in a letter to employees stated, “Before September 11 we were not in a comfortable financial state, with costs exceeding revenue on a daily basis Today, the situation is exacerbated with costs exceeding revenues at four times the pre-September 11 rate. *Today, we are literally hemorrhaging money Clearly this bleeding has to be*

stopped – and soon – or United will perish sometime next year.” At the time of this announcement, UAL stock was in the \$12 to \$14 per share range.

10. Thus, even before September 11, 2001, by the admission of its own CEO, UAL was in a precarious financial condition. By mid-October 2001, CEO Goodwin was openly predicting bankruptcy. Hence, UAL’s condition was such that an independent, prudent and careful ESOP Committee could not have allowed the UAL ESOP to remain exclusively invested in UAL stock. Likewise, had State Street properly fulfilled its role as Trustee, it would *not* have followed the Committee’s directions to continue to hold all of the ESOPs’ in UAL stock, and would at a minimum have confronted the Committee. It was incumbent upon the Committee members and State Street to begin diversifying the ESOP when UAL’s financial condition and future became so speculative and risky that its own CEO was publicly (and correctly) predicting imminent bankruptcy. However, neither the ESOP Committee nor State Street took any action to protect the interests of the ESOP participants and did nothing to respond to UAL’s worsening financial crisis until UAL stock had lost nearly all of its value in September of 2002.

11. Especially in light of the Committee’s failure to act in patent breach of its fiduciary duties and the conflicted loyalties of its employee/owner members at a time when prudent and loyal fiduciaries would have diversified out of UAL stock in order to protect the Plan’s assets, it was incumbent upon State Street in its role as Trustee to act seasonably to protect the assets of the Plan, its participants and beneficiaries.

12. However, even after putting UAL stock on its “watch list” in February of 2002 when the stock continued to trade in the \$12 range, and even though State Street attended each and every meeting of the ESOP Committee, State Street did nothing for another six months while UAL stock lost more than two thirds of its value and dropped below \$4 a share. This continued inaction is especially troubling in light of the fact that State Street placed the stock on the “watch list” “due to the decreasing stock price

compared to its peers and the industry, the drop in sales and earnings and the analysts' remarks," and the real threat of bankruptcy.

13. During this period of fiduciary silence and inaction, the UAL ESOP lost hundreds of millions of dollars in value and UAL employees saw their retirement savings being diminished or wiped out, particularly those who by virtue of the Plan were not free to withdraw their funds from the ESOP. It was not until August 2002 that (as a result of State's Street belated expression of concern), the ESOP Committee determined to delegate its fiduciary responsibilities to an "independent" Investment Manager and appointed State Street Bank to assume that role in September of 2002. The ESOP Committee decided such an appointment was needed due to conflicts that prevented Committee members from acting in the best interests of the ESOP and as a result of State's Street's belated threat to act on its own if the Committee did not act. State Street had been well aware that these conflicts existed from the beginning of the Class period. State Street finally began selling shares on September 27, 2002. However, by that time UAL stock had already declined to a trading range of \$1.90 to \$2.00 per share.

14. As alleged herein, the ESOP Committee's failure to promptly act to protect the ESOP was the result of an inherent and disabling conflict and a reliance on the "professionals" from State Street who served in the role of Trustee. Although State Street was aware of the Committee Members' conflict and was aware that UAL faced bankruptcy, State Street did not take action until UAL Stock (and UAL employees' ESOP retirement savings) had drastically depreciated. In failing to act in a timely fashion, the ESOP Committee Members and State Street breached their fiduciary duties and co-fiduciary duties under ERISA.

15. Plaintiffs, on behalf of the ESOP and a class of ESOP participants and beneficiaries, seek to recover the damages they suffered as a result of the Defendants' breaches of fiduciary duty.

II. JURISDICTION AND VENUE

16. This action arises under Sections 404, 405, 406, 408, 409, and 502 of ERISA, 29 U.S.C §§ 1104, 1105, 1106, 1108, 1109, and 1132. This Court has subject matter jurisdiction over this class action under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

17. Many of the pertinent meetings and acts committed by Defendants that give rise to this Complaint occurred in this District. Venue is properly laid in this District under 29 U.S.C. § 1332(e)(2) because many of the breaches of duty alleged herein were committed in this District and, under § 1391(b), the causes of action asserted in this complaint arose in this District.

III. PARTIES

18. (a) Plaintiff, Jerry R. Summers, was an employee of United Airlines for over 36 years and retired as a 747-400 Captain in September 2001. Mr. Summers was at relevant times a participant in the UAL ESOP and was a beneficiary of the Trust Agreement.

(b) Plaintiff, George T. Lenormand, was an employee of United Airlines and retired as a 747/777 Captain in October 2002. Mr. Lenormand was at all relevant times a participant in the UAL ESOP and a beneficiary of the Trust Agreement.

19. At all relevant times, the UAL Corporation Employee Stock Ownership Plan (“UAL ESOP”) was governed by a Committee, and the Committee, to the extent it is a legal entity, is named as a Defendant herein (“UAL Corporation ESOP Committee” or “Committee”).

20. At all relevant times, the UAL ESOP Committee had six members. Defendants Barry Wilson, Doug Walsh, Ira Levy, Marty Torres, Don Clements and Craig Musa were members of the Committee. Each of these Defendants had fiduciary responsibilities to the ESOP, its participants and beneficiaries.

21. Under the terms of the ESOP, distribution of a participant's stock can only be made upon termination of employment, and in limited amounts for "qualified participants" who reached age 55 and had 10 or more years of participation in the Plan. Therefore, for non-terminated, non-qualified employees, only the Committee and State Street had the power to make a sell decision with respect to ESOP stock. Such a restriction further heightened the Defendants' duty to protect ESOP participants.

22. Defendant State Street Bank and Trust Company ("State Street") served at times relevant hereto and at least until September of 2002 as the Trustee to the Plan and acted as a fiduciary in that capacity in that it exercised authority or control with regard to the management or disposition of plan assets of the ESOP. State Street's corporate headquarters is located at 225 Franklin Street, Boston, Mass. 02110. Though at all times a fiduciary subject to the obligations to conform to the prudent person standard of care, and to attempt to remedy known breaches of duty by other fiduciaries, State Street declined to act to protect the ESOP and its participants until late August of 2002; as a result of its belated presentation to the Committee (whose meetings it routinely attended), State Street was appointed Investment Manager. Then, in late September of 2002 – after UAL stock had plummeted more than 80% since State Street had placed UAL stock on its "watch list" in February of 2002 – State Street finally began selling off UAL stock. State Street's actions were too little, too late, to satisfy its fiduciary duties under ERISA.

IV. CLASS ACTION ALLEGATIONS

23. Plaintiffs bring this action as a Class Action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons who are or were participants or beneficiaries of the UAL ESOP at any time between July 19, 2001 and the present.

24. The Class consists of thousands of persons located throughout the United States, thus, the members of the Class are so numerous that joinder of all Class members

is impracticable. The exact number of Class members is not presently known to Plaintiffs; however, as of July 12, 1994, the effective date of the Recapitalization, approximately 50,000 current or former employees of UAL were participants in the UAL ESOP and Supplemental ESOP. As of August 1, 2002, the UAL ESOP held approximately 47.5 million shares of UAL stock. The exact number of Class members can be determined by appropriate discovery.

25. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class actions and ERISA litigation. Plaintiffs have no interests that are adverse or antagonistic to those of the Class.

26. Plaintiffs' claims are typical of those of the Class because Plaintiffs and members of the Class suffered similar harm and damages as a result of Defendants' common course of acts and omissions described herein, and all seek to recoup their losses through the same remedial theories for breaches of fiduciary duty under ERISA.

27. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) Whether Defendants breached their fiduciary duties under ERISA by failing to prudently and loyally manage the assets of the ESOP, and instead maintained the Plan's assets exclusively in UAL stock under circumstances in which Defendants could not reasonably have believed that the continued maintenance of Plan assets was in keeping with how a prudent fiduciary would operate;

(b) Whether the ESOP Committee Defendants breached fiduciary duties owed to the Plan, Plaintiffs and the members of the Class by failing to act prudently and solely in the interest of the UAL ESOP participants and beneficiaries;

(c) Whether State Street breached fiduciary duties owed to the Plan, Plaintiffs and members of the Class by breaching its obligations to conform to the

prudent person standard of care, and failing to attempt to remedy known breaches of duty by other fiduciaries in continuing to maintain all Plan assets in UAL stock even after the Company's Chief Executive Officer stated his belief that the Company would "perish" in bankruptcy;

(d) Whether Defendants, by failing to comply with their fiduciary responsibilities under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), enabled co-fiduciaries to commit violations of ERISA and, with knowledge of such breaches, failed to make reasonable efforts to remedy the breaches; and

(e) Whether the Plan, Plaintiffs and the members of the Class have sustained injury by reason of Defendants' breaches of fiduciary duty.

28. This action is maintainable as a class action for the following independent reasons:

a. Given ERISA's imposition of a uniform standard of conduct on ERISA fiduciaries, the prosecution of separate actions by individual members of the Class would create the risk of inconsistent adjudications which would establish incompatible standards of conduct for the Defendants with respect to their obligations under ERISA and the ESOP. *See* Fed. R. Civ. P. 23(b)(1)(A).

b. The prosecution of separate actions by members of the Class would create a risk of different adjudications with respect to individual members of the Class that 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).

c. The Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole. Fed. R. Civ. P. 23(b)(2).

d. Questions of law and fact common to members of the Class predominate over any questions affecting only individual members. A class action is superior to other

available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by many individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members to individually seek redress for the wrongful conduct alleged herein. Plaintiffs envision no difficulty in the management of this litigation as a Class Action. Fed. R. Civ. P. 23(b)(3).

V. STATEMENT OF FACTS

A. The UAL Employee Stock Ownership Plan

29. The UAL Employee Stock Ownership Plan (“ESOP”) was established in July of 1994, and was designed to invest exclusively in Company Stock. Effective April 1, 2000, the Plan was a stock bonus plan which is an ESOP intended to be qualified under Internal Revenue Code (“Code”) Sections 401(a) and 4975(e)(7), and the Trust holding the assets was intended to be exempt from taxation under Code Section 501(a). At all relevant times the ESOP was an ESOP within the meaning of ERISA 407(d)(6), 29 U.S.C. § 1107(d)(6), in that it was “an individual account plan ... which is designed to invest primarily in qualifying employer securities.”

30. ESOPs are attractive to publicly traded companies such as UAL for a variety of reasons. An ESOP cuts the cost of raising capital because the company is able to take a federal income tax deduction for principal payments on the loan as well as interest. Dividends are also tax deductible on ESOP stock when they are passed through to participants as they were in the UAL ESOP. In addition, UAL used the promise of employee “ownership” through the ESOP to wrest major concessions from employees.

31. According to Department of Labor (“DOL”) rules concerning ESOPs, employees who turn 55 and have had ten years of service with their employer must be allowed to diversify up to 25% of their holdings. When employees with ten years of service turn 60 years old, they must be allowed to diversify up to 50% of their holdings.

These diversification requirements can be satisfied by distributing the stock or allowing transfer to another plan.

32. As of the effective date of the UAL ESOP in 1994, eligible employees¹ received 55% of the Company's equity and voting power through their ESOP holdings in the ESOP and Supplemental ESOP.² This percentage could increase through additional distributions so that eligible employees could have up to a total of 63% of the equity and voting power of the Company.

33. Of the overall employee holdings in the ESOP, 46.23% of the underlying shares were reserved for allocation to the ALPA (Airline Pilots Association) Employee Group, 37.13% were reserved for allocation to the IAM (International Association of Machinists) Employee Group, and 16.64% were reserved for allocation to the Management and Salaried Employee Group.

34. As of April 1, 2000, the ESOP consisted of two portions, a "leveraged" portion (Part A) and an "unleveraged" portion (Part B).

35. With respect to Part A, on the effective date and from time to time thereafter, the Trustee entered into loans on behalf of the Trust and used the proceeds of the loans to purchase shares of Preferred Stock representing approximately 42.9825% of the equity of the Company. These shares were Class 1 Non-Voting Preferred Stock, and were allocated amongst the ALPA Employee Group (roughly 32% of the Class 1 shares), the IAM Employee Group (roughly 47% of the Class 1 shares) and the Management and Salaried Employee Group (roughly 21% of the Class 1 shares). These shares were convertible into UAL common stock at the rate of four shares of common stock for one share of Class 1 Preferred Stock.

¹ Virtually all UAL employees (and their beneficiaries) were eligible and did participate in the ESOP.

² Because of tax code limitations on allocations, an eligible employee might from time to time receive share allocations in a separate account in the "Supplemental ESOP." Shares held in the Supplemental ESOP would then be converted into shares in the ESOP in subsequent years. "Flowback" occurred when the Company transferred shares from the Supplemental ESOP to the ESOP.

36. With respect to Part B (the “unleveraged” portion), the Company contributed (or caused the Company to contribute) both (i) Class 2 Non-Voting Preferred Stock from the Supplemental ESOP to the ESOP, for allocation to Participants who had not received their full entitlement under Part A (these shares were also convertible into UAL common stock at the rate of 4 shares of common stock for one share of Class 2 Preferred Stock) and (ii) shares of Voting Preferred Stock representing at least 55% of the voting power of the Company, that was allocated amongst the ALPA Employee Group, the IAM Employee Group and the Management and Employees Group.

37. All employer contributions, company stock acquired with employer contributions and with proceeds of acquisition loans, as well as dividends and distributions thereon were held in a Trust fund by State Street. The Trust fund was to “be held for the exclusive benefit of the Participants and their Beneficiaries, and . . . used solely to pay benefits to such persons” as provided in the Plan and the Trust agreement.

38. Through complex allocation formulae, Part A and Part B shares (and dividends flowing therefrom) were allocated annually to participants’ and beneficiaries’ ESOP Stock Accounts. All ESOP Stock Accounts (and ESOP Cash Accounts) were held in the Trust fund by State Street.

39. All ESOP accounts were fully vested at all times, and were to be distributed to the participants (or their beneficiaries) subject to the provisions detailed below.

40. Any participant who reached age 55 and had participated in the ESOP for 10 years or longer became a “qualified participant” who could diversify a portion of her ESOP account. Specifically, in each of the first 6 years beginning in the year such participant reached age 55, such participant could – within a 90 day “election period” at the close of the Plan year – request that up to 25% of the balance of her account be diversified out of UAL stock. Once a “qualified participant” reached age 60, the percentage subject to diversification increased to 50% per cent for each election period.

If such an election was made, the portion of the account to be diversified would be transferred to the Companies' 401(k) plan applicable to the electing employee.

41. Full distribution was also permitted (but not mandatory) when a participant's employment with UAL was terminated for any reason. At the election of the participant or beneficiary, such distributions could either be in a lump sum, or by payment in a series of five substantially equal annual installments. The participant could choose the form of these distributions to be either (a) cash; (b) Company Stock or a combination of the two.

42. UAL was the administrator of the Plan, but many administrative functions were allocated to the ESOP Committee.

43. The ESOP Committee was the "named fiduciary" with respect to the management and disposition of assets held within the ESOP Trust Fund within the meaning of ERISA § 402. However, the Trustee, State Street, was the "named fiduciary" "with respect to the Initial Acquisition Loan and Additional Acquisition Loans and the use of the proceeds thereof to purchase Preferred Stock."

44. The ESOP Committee consisted of six members – all of whom are defendants in this action. In particular, three members were appointed by ALPA, two members were appointed by the IAM and one member was appointed by the Company. Among the many enumerated duties of the ESOP Committee were "to establish an investment policy and objective for the Plan, except that it is understood that the Plan is designed to invest exclusively in Company Stock;" "to obtain an independent appraisal of the fair market value of the Company Stock held by the Trust from an independent appraiser" and to "perform any other acts . . . necessary or appropriate to the administration of the Plan and the discharge of its duties."

45. The Plan gave the ESOP Committee the ability to "delegat[e] the power to manage or control the assets of the Trust Fund" provided that such delegation was unanimously made to an "investment manager" as defined in ERISA, § 3(38).

46. The Plan explicitly recognized that “Notwithstanding anything in the Plan or the Trust Agreement to the contrary, every individual who is a fiduciary with respect to the Plan shall exercise his responsibilities with respect to the Plan in a manner consistent with ERISA and other applicable laws.”

47. From the inception of the Plan in 1994 until at least September of 2002, State Street was the Trustee of the Plan. In September of 2002, State Street became investment manager for the Plan.

48. In its role as Trustee, State Street attended each and every meeting of the ESOP Committee both prior to and throughout the Class Period.

49. The Trust Agreement explicitly recognized that “Notwithstanding any other provision of this Agreement or the Plan, ***the Trustee shall not be obligated to follow the direction of a named fiduciary unless such direction is . . . proper within the meaning of Section 403(a) of ERISA and is not contrary to ERISA.***”

50. The Trust Agreement also states:

Notwithstanding any other provisions of this Agreement or the Plan, the purchase of Qualifying Employer Securities pursuant to the ESOP Preferred Stock Purchase Agreement dated March 25, 1994, as amended, or pursuant to any Additional Acquisition Loans . . . among the Trustee and the Company ***shall be effected by the Trustee without direction from the ESOP Committee pursuant to the Trustee’s determination, in the exercise of its reasonable judgment after consultation with such advisors as it reasonably deems necessary, that such transaction is in the best interests of the Participants and Beneficiaries and that the purchase transaction and the terms and conditions of any Acquisition Loan entered into in connection with the above-described Purchase Agreement are in compliance with all applicable provisions of the Code and ERISA.***

51. Effective as of June 2003, the ESOP was terminated. No further contributions were made after December 31, 2002, and all cash and Company Stock held in Plan Accounts was (or is) to be distributed.

B. UAL's Financial Woes Predate September 11, 2001, Putting the ESOP Committee and State Street on Notice of the Changed Nature of the Appropriateness of UAL Stock as the Sole Retirement Asset of the ESOP

52. UAL's financial troubles and unstable outlook predate the September 11, 2001 tragedy. As early as the closing months of 2000, UAL was plagued by labor issues and cash flow concerns that had serious implications for UAL's future and which triggered a duty of the UAL ESOP Committee members and State Street to carefully consider diversification. One article from late 2000 cogently summarized some of the issues then facing UAL:

When they look back on it, United Airlines employees and passengers will undoubtedly remember it as "The Summer from Hell." And they won't be talking about the weather.

By far Denver's biggest carrier, United is taking a beating, *not only financially but in terms of its public image. Some experts say the problems and internal damage resulting from this summer of flight delays and labor disputes can never be fully repaired.*

* * *

"I don't know if you can ever fix it," said Bob McGowan, professor and chair of the department of management at Daniels College of Business at the University of Denver. "And customers suffer because there is very little competition at (Denver International Airport)."

* * *

United management has flip-flopped on its stories. First, cancellations were blamed on weather. Only last week did the airline officially acknowledge labor issues were behind most of the delays. [Emphasis added.]

53. On October 24, 2000, UAL pre-announced a Q3 2000 loss of \$1.29 per share. Analysts from Credit Suisse reported that the Q3 loss, higher than analysts had expected, contained favorable and unfavorable elements, with the latter winning out on a long-term basis. The analyst cited worsening labor costs as a long-term problem. The analyst noted:

It Just Keeps Getting More Discouraging

Just when we thought that the major incremental concern facing UAL shares was the risk surrounding its efforts to acquire US airways, we are forced to take a new stance on the company's basic earnings power – and it is lower. Unfortunately, we cannot ignore the real probability that United's [sic] to its employees will spill over into other airlines. The result is that industry profitability will be compromised unless some carrier manages to reach a better balance between its employees' W-2s and the interests of its shareholders. We have hopes that the combination of higher wages and reduced productivity that underlies United's future labor costs will be checked on at least the productivity front at some of the other carriers. But we believe the real cost of United's cannot help but discourage airline investors.

54. In its Form 10-K for 2000, UAL reported that it had earnings from operations of \$654 million, an amount that was less than half of the prior year's earnings. Furthermore, its net earnings had declined precipitously to only \$.04 per share in 2000, down from \$9.94 per share in 1999. According to UAL, these results reflected "significant operational disruptions, as a result of labor-related delays and cancellations, as well as weather and air traffic control limitations, which adversely affected both revenue and expense performance The Company estimates the revenue shortfall arising from these disruptions and associated schedule reductions and cancellations to be somewhere between \$700 and \$750 million for the year."

55. UAL's "Outlook for 2001" as reported in the Form 10-K for 2000 was bleak:

The softening of the U.S. economy has had an industry-wide effect on business travel; as a result, the Company has experienced a decrease in high-yield near-term bookings. In addition, passenger revenue performance is expected to be negatively impacted by the reduced capacity level put in place to improve operational reliability. Given these and other weaker-than-anticipated revenues, combined with higher labor costs and fuel prices, the Company expects first-quarter results to be substantially below the current First Call consensus of \$2.82 per share.

Moreover, UAL noted that "[t]he uncertainty surrounding key factors affecting the Company's financial performance, such as the breadth and length of the U.S. economic

slowdown, the outcome of the planned United and US Airways merger and the outcome of labor negotiations and the cost of fuel, among other factors, precludes the Company from providing any specific estimates on results at this time.”

56. Following the negative news of Q3 2000 and the 10-K for 2000, as well as the uncertainty reported in the year 2000 Form 10-K, UAL reported in Q1 2001 a net loss of \$305 million or \$5.82 per share for Q1 2001. According to its Form 10-Q for 1Q 2001, UAL then predicted that this was a trend that would continue and would result in a loss for the full year:

The Company expects the negative revenue trends that impacted first-quarter performance to continue during the second quarter. As compared to the second quarter of 2000, total unit costs are expected to increase twelve percent, primarily due to rising fuel costs and additional labor expense largely resulting from the ALPA and IAM contracts which became amendable in April and July of 2000, respectively. As a result, the Company is projecting a loss for the second quarter . . . [T]he Company also anticipates incurring a loss for the full year.

57. In May 2001, ABN – AMRO industry analysts reviewed UAL’s operations in a report on the airline industry titled “The Four Horsemen of the Apocalypse Plague the Airlines.” The report pointed out that UAL’s first quarter net loss had exceeded both ABN’s estimate and the “First Call consensus” and that for the “second quarter management anticipates that current trends will cause a significant year-over-year decline in unit revenue.” The report also included the following:

UAL’s financial results were adversely impacted by a decline in higher-yielding business travel and a slowing economy. In addition, management believes that there has been some booking away as a result of the possibility of a work stoppage. Since UAL has a high percentage of business travelers and many of these customers are based on the West Coast, the downturn in the technology sector significantly weakened revenue generation. In addition to top-line weakness, the carrier also was plagued with rising costs in labor and fuel. These expense line items were significantly above the 1Q00 levels and contributed to UAL’s large loss.

* * *

For the second quarter, management anticipates that current trends will cause a significant year-over-year decline in unit revenue as compared to the same period in 2000. The lower levels of projected revenues accompanied by higher labor and fuel costs have caused the company's management to project a second quarter loss. If revenue trends continue on a longer-term basis, the airline believes a loss will be posted for the full year. . . . We recently made adjustments to the remaining three quarters of 2001 to reflect the negative developments as outlined in management's guidance. *As a result, we would not be acquirers of UAL stock and maintain our Reduce rating.*

C. UAL's Declining Fortunes and the CEO's Prediction that the Company will "Perish" Trigger the Fiduciary Duties of The Committee Members and State Street

58. On July 18, 2001, UAL announced the results of Q2 2001. As the Company and stock analysts had projected, UAL reported yet another loss, this time \$365 million or \$6.87 per share, results that management noted in the Form 10-Q for 2Q 2001 to reflect "a challenging quarter for the airline industry and United in particular:"

The effects of the weaker economy have affected the airline industry more than other areas of the economy, as corporations reduce their business travel budgets and change their travel behavior. United has experienced a significant revenue decline as a result of the decrease in business traffic, which has impacted both unit revenues and yields.

At the same time, the Company again warned not only that it "expect[ed] the negative revenue trends that impacted the first six months to continue" but that it "anticipat[ed] incurring a loss for the full year." For the prior year's Q2, UAL had earnings of \$374 million, making the difference between the two quarters over \$600 million.

59. On August 13, 2001, Moody's issued a negative opinion on UAL's outlook.

60. In response to the financial effects of the events of September 11, 2001, Moody's further downgraded UAL from B2 to Ba1, noting that it believed "operating and

financial burdens for United and the rest of the airline industry” created a real issue as to future risk regardless of possible federal aid.

61. In testimony before the Senate Committee on Commerce, Science and Transportation on Thursday, September 20, 2001, R. Neidl, an airline analyst with ABN AMRO, noted that UAL had, given its cash burn rate, enough cash to survive only 110 days without government aid.

62. Further darkening UAL’s future was a letter sent to employees by CEO Goodwin in which he claimed that “this bleeding has to be stopped – and soon – or United *will perish sometime next year.*”

63. The full text of the letter sent to United Airlines employees by CEO James E. Goodwin on or about October 17, 2001 stated:

Dear Fellow United Employee:

This is the first of a series of letters to keep you abreast of what’s happening at United and our evolving financial situation.

Prior to Sept. 11, all of the major U.S. airlines were having financial difficulties as a result of the weakening economy. The economic pain was worse for us because we rely more heavily on frequent business travelers for our business than they do. But, while things were difficult, we were putting in place the cornerstones of a strategic plan to improve our revenue and profitability.

Then came Sept. 11.

In the wake of that day’s horrific events, *we are in nothing less than a fight for our life. Never in our 75-year history have we faced an economic challenge of this magnitude, where the drop-off in air travel has been so unexpected and prolonged.*

Our number one priority now is to get United into a financial position that will allow us to continue operating. We are not there yet. To get there, we must focus on break-even cash flow. That means being in the position where we have as much money coming into our bank account as we have streaming out of it. In the past, we struggled to make a profit. *Now we’re in a struggle just to survive.*

So getting ourselves back to a break-even cash flow – whatever it takes – is job one for the foreseeable future. Because if we don't succeed we'll eventually run out of money – it's that simple and that painful.

Let me illustrate the financial hole we're in. ***Before Sept. 11, we were not in a comfortable financial state, with costs exceeding our revenue on a daily basis.*** Today, the situation is exacerbated with costs exceeding revenue at four times the pre-Sept. 11 rate. ***Today, we are literally hemorrhaging money.***

Clearly, this bleeding has to be stopped – and soon – or United will perish sometime next year. We need to get this loss rate down to zero. ... That will give us the breather we need to regain our bearings and start crawling back to profitability and begin to rebuild our balance sheet.

While we do have a cushion from borrowing, government-guaranteed loans and other sources available to us, this leaves absolutely no room for complacency.

Pan Am and Eastern went too far down that trail and never returned. They borrowed to meet expenses – then borrowed some more against assets to pay off the initial loans – and then were forced to sell their assets to cover the second loans. In short, they borrowed their tomorrows to live just another few days.

We don't want to follow in those footsteps because we recognize that loans are merely crutches, not cures. I want to make it clear: Our top priority now must be to reduce costs and increase revenue to the point where what we spend (in all areas, including payroll and operations) equals what we take in (from sales of passenger tickets, cargo and other sources).

We've already done much to cut costs. We've immediately reduced our flying schedule by 20 to 25 percent; shut down nonaircraft capital projects (including JFK Terminal 6 and Dulles Tier 2); reduced supplier and discretionary pending, and – most difficult of all – decided to furlough 20,000 United employees.

I wish I could report that work in this area is completed. It isn't. We are continuing to look at all aspects of our business – from payroll and operations to examining the costs under our labor contracts. Nothing is sacred or off-limits.

We also are working hard to generate revenue. The first step is to get people comfortable about flying again. We and the rest of the industry – along with the U.S. President,

other elected officials and government agencies – are doing everything we can.

To get passengers back on our planes, we also need to convince them that airline travel is safe. We are joining with the rest of the industry and the government to implement a number of measures, including reinforced cockpit doors and placing responsibility for security under federal jurisdiction. We're also issuing special fares, Mileage Plus offers and new ads that will feature United employees encouraging our customers to return to the skies.

However, much of our success in generating revenue will depend upon you. Once we bring customers back to our ticket counters, gate areas and airplane cabins, it will be up to you to make them comfortable and provide them with the service they've come to expect from United.

I'm very proud of the work you're doing. In the wake of the Sept. 11 tragedies, I've seen a renewed spirit at United. People are giving more of themselves to this company than I've ever witnessed in the 35 years I've been here. This is the true fabric of United.

Thank you for your loyalty, for your hard work and for your service on behalf of our customers in these, the most difficult of times. Let's keep it up. The sooner we get to break even, the sooner we'll remove the doubts about our future.

Sincerely,

James E. Goodwin

Chairman and Chief Executive Officer [Emphasis added.]

64. On October 23, 2001, R. Thomas Buffenbarger, the President of the International Association of Machinists and Aerospace Workers, AFL-CIO, wrote to UAL's Board of Directors and underscored the importance of the letter when he noted that UAL's "management concluded that the [Goodwin] letter was so newsworthy from a financial point of view that the letter has been filed with the SEC and posted on EDGAR."

65. Mr. Goodwin's assessment, which turned out to be largely accurate, made it absolutely clear that even prior to September 11, 2001, UAL was a fundamentally

different company than when the ESOP was created. The references to Pan Am and Eastern should have been particularly troubling to the ESOP Committee members and State Street as employees of those companies had lost their retirement to the extent they had been invested in company stock. Further, Mr. Goodwin's evaluation of UAL was not news to the UAL ESOP Committee Defendants or to State Street. Yet these Defendants did nothing and made no effort to minimize or reduce the risk to ESOP participants.

66. The inaction of the Committee Members was, in part, the result of conflicted interests they had by virtue of their employment with the company. They believed that selling shares would be an act of disloyalty to the Company at a time the Company needed their loyalty. Indeed, under most circumstances, loyalty to the Company may well be a noble cause. However, rather than evaluating what action to take from the perspective of only the best interests of the ESOP, which was their duty as a matter of law, the Committee members were more concerned with their loyalty and support for UAL. Many employees had called Goodwin's letter the "Chicken Little" letter. Not wanting to be deemed "chicken," the Committee members did nothing. By this point, the Committee members' conflict arising from their divided loyalties and obligations was so significant that a prudent fiduciary would have either begun selling UAL stock immediately or appointed an independent Investment Manager.

67. Moreover, although State Street attended each and every meeting of the Committee, until August of 2002, it never once questioned the Committee Members' conduct or took any action to protect the assets of the Plan and its participants. This failure is particularly egregious in light of the facts that (i) State Street knew that the Committee Members were UAL employees with conflicted loyalties and little if any knowledge of their fiduciary duties under ERISA; (ii) State Street was well aware of the depth and severity of UAL's financial woes as outlined above; (iii) State Street knew that the lay Committee Members relied on professional fiduciaries such as State Street to manage the ESOP and (iv) State Street was well aware that it was bound by ERISA to

ensure that the allocation of the ESOP's assets was prudent and that the Committee Members were acting prudently and loyally.

68. At the time of Mr. Goodwin's letter, UAL stock traded in the range of \$18 to \$20 per share.

69. By October 2001, UAL knew that to survive it needed to have three critical issues facing the Company resolved in a positive way: (1) significant and unprecedented wage concessions were needed to reduce labor costs, (2) billions in loans would be needed from lenders or from the Air Transportation Stabilization Board, and (3) the decline in air traffic had to change. Each of these issues presented significant risk to UAL's stability and each needed to be resolved positively for UAL to survive. Members of the UAL ESOP Committee and State Street were aware of each of these issues and the high degree of risk in accomplishing all or any of them. All of these issues continued to transform UAL from a stable airline, which it was at the time the ESOP was created, to a completely different type of company, whose stock was not suitable as the exclusive investment vehicle for an ESOP.

D. The Looming Bankruptcy

70. Even before Goodwin's October 17, 2001 letter to employees, the possibility of a UAL bankruptcy was imminent and real and remained so up until the time UAL declared bankruptcy. In fact, as revealed by UAL spokesperson Joe Hopkins, the threat of insolvency was so real that UAL hired bankruptcy experts to give it advice shortly after September 11, 2001, and retained those attorneys thereafter.

71. In 2001, UAL reported a Q3 2001 loss of \$542 million. Without the exclusion of extraordinary one-time items, the loss would have been a staggering \$1.2 billion, or a loss per share of \$21.43. An article in the NEW YORK TIMES reviewed United's troubles:

The UAL Corporation, the parent of United Airlines, reported a record loss yesterday for the third quarter in the

wake of the terrorist attacks and predicted that the current quarter would be even worse.

The company said that it lost \$1.16 billion, or \$21.43 a share, compared with a loss of \$116 million, or \$2.30, in the corresponding period of 2000. Revenue fell 16.3 percent, to \$4.1 billion from \$4.9 billion.

United's troubles have *deepened since May 2000*, when a dispute with its pilots resulted in the cancellation of thousands of flights, alienating passengers and costing tens of millions of dollars. On Sunday, the board forced the chairman and chief executive, James E. Goodwin, to resign.

One of the key challenges for his successor, John W. Creighton, Jr., is regaining the confidence of investors, who have sent UAL's stock plunging to its lowest levels in 15 years.

But his debut was not an alloyed success. After reading a prepared statement to analysts during a teleconference yesterday, Mr. Creighton declined to answer questions, saying he had to leave for another appointment. A United spokesman would not say what was on Mr. Creighton's calendar.

"He ran for the hills," remarked Kevin Murphy, an analyst with Morgan Stanley. "What could be more important than speaking to shareholders at a time like this?"

* * *

Frederic F. Brace, UAL's chief financial officer, *said the airline was now losing about \$15 million a day*, less than previous estimates of \$20 million, and about the same as the daily loss at the rival American Airlines. United has \$2.7 billion in cash at the end of the quarter and expects to have \$2.3 billion at the end of the year.

But the airline warned that its operating losses this quarter would be substantially larger than in the third quarter. United has reduced passenger capacity by 21 percent, but like other airlines it cannot cut costs that much. [Emphasis added.]

72. On or about February 15, 2002, UAL announced a Q4 2001 loss of \$308 million, bringing its total loss for 2001 to an astounding \$2.1 billion or \$39.90 per share, the worst ever in airline history. Its loss from UAL operations was \$3.8 billion in 2001, compared to operating earnings of \$654 million in 2000, a net swing of over \$4.4

billion. In response to this, analysts renewed predictions that bankruptcy was an increasing risk. At this point, UAL stock was trading in the \$12 per share range.

73. In its Form 10-K for 2001, published on February 28, 2002, UAL summarized its “Results of Operations” and discussed the factors that accounted for its negative performance during the past two years:

During early 2001, the weakening U.S. economy had a significant impact on the airline industry as corporations reduced their business travel budgets and changed their travel behavior. During the first six months of the year, the industry experienced a significant revenue decline as a result of the decrease in business traffic, which impacted both unit revenues and yields, particularly in the domestic markets. Airline industry domestic unit revenues, as reported to the ATA, declined by 12% to 13% in each of the months from May through August, respectively. United, due to its significant reliance on high-yield business traffic, was disproportionately affected during this period.

In addition, United’s revenues, yield, revenue passenger miles and available passenger miles were significantly impacted by the events of September 11 and the resulting reduction in the Company’s operations. The Company estimates that the September 11 terrorist attacks negatively impacted the Company’s revenues by approximately \$1.7 billion.

During 2000, the Company experienced significant operational disruptions, as a result of labor-related delays and cancellations, as well as weather and air traffic control limitations, which adversely affected both revenue and expense performance. The Company attempted to mitigate the impact of these operational difficulties by reducing capacity, particularly in the domestic markets, where most of the problems were concentrated. The Company estimated the revenue shortfall arising from these disruptions and associated schedule reductions and cancellations to be somewhere between \$700 and \$750 million for the year.

74. The Form 10-K for 2001 also warned about the material adverse financial effects that were expected to continue into 2002:

At this point, due in part to the lack of predictability of future traffic, business mix and yields, United is unable to fully estimate the impact on it of the events of September

11, 2001 and their consequences and the sufficiency of its financial resources to absorb that impact, including the mitigating effects of the [Air Transportation Safety and System Stabilization] Act and the Company's aggressive actions to reduce its costs. However, given the magnitude of these unprecedented events and the possible subsequent effects, United expects that the adverse impact to its financial condition, its operations and its prospects will continue to be material.

* * *

While starting to see some positive revenue trends, the Company expects to report a significant loss in the first quarter of 2002.

75. In February of 2002, State Street put UAL stock on its "watch list," "due to the decreasing stock price compared to its peers and the industry, the drop in sales and earnings and the analysts' remarks." However, despite this move, State Street did nothing to protect the Plan and its participants – ***and did not even inform the Committee that UAL was on its "watch list" until August of 2002.***

76. The Company's prediction of a first quarter loss soon eventuated when, on or about March 15, 2002, UAL announced its first quarter results and reported losses from operations of \$711 million, as compared to \$391 million in operational losses from Q1 2001. Operating revenues had decreased \$1.1 billion between these periods. UAL stock was trading in the \$15 to \$16 per share range at this point. Still, however, the ESOP Committee and State Street did nothing to protect the ESOP and its participants.

77. When it was filed on April 29, 2002, UAL's Form 10-Q for 1Q 2002 included a variety of reasons for this continuing negative trend. For instance, the report noted that the primary source of cost savings that were necessary to offset UAL's severe revenue was not being realized in a timely manner:

[C]omplications with negotiating labor contracts have slowed the Company's progress on achieving further reductions to labor and other operating costs. Management continues to have discussions with the leadership of United's unions and to work towards a solution to increase productivity and reduce operating expenses, including labor

costs. The resolution of these issues is taking longer than anticipated.

78. Thus, the “Outlook for 2002” published in the 1Q 2002 Form 10-Q was replete with significant risk factors that accounted for the Company’s prediction that it would “report a significant second quarter loss, as well as a full loss for the year.” Those “risks and uncertainties” that “could significantly impact net earnings, revenues, expenses, unit costs, load factor, cash flow, and capacity” included:

... the economy and the demand for air travel; the ability to reduce operating costs and conserve financial resources, taking into account increased costs incurred as a consequence of the September 11 terrorist attacks to the Company; the higher costs associated with new airline security directives and any other increased regulation of air carriers; the significantly higher costs of aircraft insurance coverage for future claims caused by acts of war, terrorism, sabotage, hijacking and other similar perils, and the extent to which such insurance will continue to be available; the ability to raise and the cost of financing in light of the September 11 events and the possibility of any further credit downgrades of the Company; the cost of crude oil and jet fuel; the airline pricing environment; industry capacity decisions; competitors; route decisions; the success of the Company’s cost-reduction efforts; the success of the Company’s implementation of its financial recovery plan; results of union contract negotiations and cost-reduction discussions and their impact on labor costs and operations; actions of the U.S., foreign and local governments; foreign currency exchange rate fluctuations; the economic environment in general.

Again, however, the ESOP Committee and State Street took no action, and hence continued to breach their fiduciary duties to the ESOP and its participants.

79. On July 19, 2002, UAL announced yet another large quarterly net loss amounting to \$392 million or \$6.99 per share. According to the Company’s Form 10-Q for 2Q 2002, UAL had a net loss for the first six months of 2002 of \$850 million or \$15.27 per share compared to a net loss of \$670 million or \$12.70 per share the same period in 2001. The Form 10-Q provided the following explanation of the Company’s continued deterioration:

[B]eginning in 2001, the weakening U.S. economy had a significant impact on the airline industry as corporations reduced their business travel budgets and changed their travel behavior. During the first six months of 2001, the industry began experiencing significant revenue declines as a result of the decrease in business traffic, which impacted both unit revenues and yields, particularly in the domestic markets. Historically, there has been a strong correlation between airline revenues and corporate profitability. As corporate profitability dropped during this period, companies reduced spending on travel. Since approximately 65% to 75% of United's domestic revenues are derived from business travelers, United was disproportionately affected by this decline.

Subsequent to September 11, United's revenues, yield, revenue passenger miles and available seat miles were significantly impacted by the events of September 11 and the resulting reduction in the Company's operations. The Company continues to suffer from the weakened revenue environment resulting from the events of September 11 and a slowing U.S. economy. While year-over-year unit revenues had been improving each month in 2002 from a 14% decline in January to a 4% decline in May, June unit revenue performance was actually slightly worse than in May.

80. The bottom line of the 2Q 2002 Form 10-Q was management's "Outlook for 2002" – "The Company expects to report a significant third quarter and full year loss."

81. In fact, during the period August 2001 – August 2002 the shares of UAL fell over 80%, the largest drop of any airline other than US Airways Group Inc. In July 2002 alone, UAL's share value dropped 48% following its weak second quarter reported earnings and its bleak future outlook. Its cash balance was on a schedule to fall below the \$1 billion minimum required for liquidity. Its costs had continued to increase as the result of sizeable raises awarded its mechanics, flight attendants, and pilots.

82. According to its Chief Financial Officer, Frederic Brace, UAL's precarious financial condition had prevented it from accessing the capital markets for quite some time. Thus, in announcing the Company's 2Q 2002 results on July 19, 2002, Brace flatly stated that UAL was "dealt a major financial blow by the events of Sept. 11

and we do not have the access to the capital markets that we need.” He added, “In addition to our other cash needs, we have nearly \$900 million in debt coming due near the end of the year and are concerned about our ability to refinance it.” As a result, as of June 24, 2002, UAL belatedly submitted an application for a federal loan guarantee to the Air Transportation Stabilization Board, asking that the government back \$1.8 billion of a \$2 billion loan.

83. UAL’s Form 10-Q for 2Q 2002 spelled out the necessity for the loan guarantee in more detail and also warned of the consequences of rejection:

Given the Company’s substantial capital spending and debt repayment requirements for the remainder of 2002, the Company has been actively pursuing financing alternatives. However, since September 11, United has not been able to access the public capital markets and has had limited access to private capital markets. Therefore, in June 2002 the Company filed for federal loan guarantees with the Air Transportation Stabilization Board

In the absence of federal loan guarantees, the Company has insufficient access to the capital markets to refinance the debt due in the fourth quarter. While UAL’s current cash reserves are sufficient to repay these obligations, the cash reserves then remaining could be insufficient to support the Company’s ongoing obligations if it continues to generate negative cash flow from operations. In the absence of federal loan guarantees, and the cost reductions necessary to achieve them, there is no assurance that the Company will be able to raise sufficient liquidity to support obligations through the end of 2002.

84. More importantly, the Form 10-Q for 2Q 2002 also warned that the ATSB application was already in trouble:

It is within the discretion of the ATSB to decide whether to issue a guarantee in the amount and on the terms requested or at all. In evaluating the application, the ATSB may also consider whether an equity stake for the federal government in UAL is required and the extent of relief provided by the Company’s stakeholders that would improve United’s financial position. Although United has obtained relief from some employee groups and various other stakeholders, the reductions (as a percentage of total costs) achieved to date are significantly below those announced by US Airways Group, Inc. (“US Airways”) as

part of the conditional approval of its loan guarantee from the ATSB.

In other words, UAL admitted that the business plan it had initially submitted to support the application, one that had been formulated over a period of several months prior to submission, was deficient because the cost reductions were not deep enough to satisfy the ATSB. As a result, the Company announced that “after meetings with the staff of ATSB” it was preparing an “updated business plan” predicated on “broader, deeper and longer-term cost savings from the Company’s stakeholders” and warned that there was both no assurance that those stakeholders would be amenable to granting the concessions required to achieve those savings or that “even if it does reach such agreements, the Company will be able to get ATSB approval for loan guarantees.”

85. UAL’s precarious condition was underscored by the ATSB’s rejection of UAL’s application for that loan guarantee. On December 4, 2002, after almost six months of effort on UAL’s part to get Board approval, and despite UAL’s having recast its cost structure several times, the application was soundly turned down on grounds that UAL’s business plan was unsound. In a letter explaining its decision, the ATSB fully explained that conclusion:

Based on this information and applying the criteria set forth in the Act and Regulations, the Board cannot approve the proposal submitted by United. The Board believes that the business plan proposed by United is not financially sound. In the Board’s view, United’s management presented a business plan that does not position the company to meet the challenges of the current airline industry environment and to achieve long-term financial stability. The Board believes that, even if the company were to receive the proceeds of a guaranteed loan, there is a high probability that United would face another liquidity crisis within the next few years. The Board’s financial consultant assigned the proposed loan an extremely low credit rating, implying that United is more likely than not to default. The Board believes that the company’s proposal poses an unacceptably high risk to U.S. taxpayers and does not support the conclusion that there is a reasonable assurance of repayment of the proposed loan. The Board would like to make you aware

of the following fundamental deficiencies in United's proposal:

First, the Board has concluded that United's revenue projections are unreasonably optimistic.

- United's business plan is predicated upon a significant near-term rebound in revenue. In particular, United forecasts that its passenger unit revenue (revenue per available seat mile) will rise sharply in the near-term due to a significant increase in yields. This forecast for unit revenue growth in the next few years is substantially more optimistic than forecasts of industry observers and the Board's consultants. The Board does not concur with United's explanation for this divergence.
- The more conservative alternative projections submitted by United, which assume a delayed industry revenue recovery, anticipate near-term unit revenue growth that is still in excess of the base case expectations of industry observers.
- The Board also believes that the company's revenue forecast does not make sufficient allowance for the likely effects of continued expansion by low-cost carriers in United's markets as well as other potential structural changes affecting industry revenue.

Second, the Board believes that more reasonable revenue forecasts for United would not support the company's cost structure as presented in the business plan. The Board notes that even with the benefit of United's proposed cost reduction initiatives, United would remain among the highest cost carriers in the industry. If competitors are successful in achieving additional cost savings, United's relative cost position could weaken further.

Third, the Board has substantial concerns about the underfunded status of United's pension plan. Even if United obtains a waiver to reduce near-term funding requirements, required cash outflows will likely remain substantial over the term of the proposed loan. The Board is concerned about United's ability to generate sufficient cash flows to meet its pension funding obligations concurrent with other obligations, including repayment of the guaranteed loan.

Fourth, United has proposed that the loan be secured by a significant collection of assets. The proposed collateral package does not overcome the deficiencies of the business plan and associated default risk. Analysis by

the Board's consultants and staff indicates that the collateral package is likely to have substantially less value in the event of default than is estimated by United. The Board believes that there is a significant risk that the recovery value will be less than the outstanding amount of the loan.

86. The unsoundness of the UAL business plan was based on problems that had been facing the Company for at least a year and were well known to Committee members and State Street. In fact, UAL management had held a series of informational meetings with United's unions and had briefed them on the Company's efforts "toward financial stability," as reported in UAL's 10K for 2001. On information and belief, ESOP Committee members and State Street were aware of the information reported at those meetings or should have been made aware of the facts conveyed at these meetings.

87. All the information known to State Street and the Committee Members throughout the Class Period made it clear that UAL was not a financially stable company and was, in fact, facing imminent bankruptcy.

88. Yet, on information and belief, at no time prior to August 20, 2002 did the Committee *ever* consider whether the continued investment of all ESOP assets in UAL stock was loyal or prudent consistent with their fiduciary duties under ERISA, and at no time prior to that date did State Street ever raise those issues with the Committee.

E. State Street Belatedly Acts, Gets Itself Appointed Investment Manger and Begins Selling UAL Shares – Too Little, Too Late to Protect the ESOP and Its Participants

89. On August 14, 2002, UAL announced that it might file for bankruptcy protection.

90. According to ESOP Committee Meeting Minutes from August 20, 2002, on August 15, 2002, Kelly Driscoll of State Street contacted UAL's Law Department to "inquir[e] what the ESOP Committee was doing regarding its fiduciary duties" Also at that time, State Street informed UAL's Law Department that "State Street had put

United on a ‘watch list’ due to the decreasing stock price and the possible bankruptcy filing.”

91. On information and belief, the August 20, 2002 meeting was (a) the first time State Street brought up with the Committee the question of what ERISA required of the ESOP Committee and State Street in connection with the ESOP as a result of UAL’s declining fortunes; and (b) the first time the Committee learned that State Street had placed UAL Stock on a “watch list” as a result of the threat of bankruptcy – even though UAL Stock had been on State Street’s watch list since February of 2002.

92. At the August 20, 2002 meeting, attorney Robert Eccles told the Committee that “an ESOP fiduciary should generally continue to hold [company] stock as required by the plan document, but that it could sell the stock if it reasonably concluded that prudence required it to do so.” Hence, “[t]he duties of prudence and loyalty might require a fiduciary to do other than what the plan says.” Committee chair Barry Wilson:

then inquired if it was possible to diversify some share even though the Plan documents clearly state that they can’t currently be diversified. Mr. Eccles said *that if the Committee concluded it could not prudently continue to hold shares, it could sell them despite the document. Mr. Levy questioned whether that duty has always been applicable to the ESOP Committee. Mr. Eccles said the duty has always been the same.*

93. Also at the August 20, 2002 meeting, Kelly Driscoll from State Street addressed the Committee. According to the meeting minutes, she “reported that State Street bank had concerns about the investment after last week’s announcement about a possible bankruptcy filing. *As secondary fiduciary, State Street has been monitoring the stock as if it was the primary fiduciary.*”

94. Ms. Driscoll then disclosed that:

State Street bank put the United stock on the “watch list” in February 2002. She stated that United was added to the list due to the decreasing stock price compared to its peers and

the industry, the drop in sales and earnings and the analysts' remarks. Once a company is put on the "watch list," State Street's Fiduciary Committee then monitors the stock, for example, by watching the price of the stock, comparing the decline of shares with other companies in the industry, and bringing in additional analysts to offer their expertise. In addition, this Committee will contact a company's management to get another perspective on where it is headed. Ms. Driscoll stated that State Street Bank is very concerned about this investment and felt it was imperative to have this meeting.

Ms. Driscoll stated that State Street had its own legal counsel, Kirkpatrick & Lockhart, review the rights attached to the ESOP shares. State Street is aware that the 55% ESOP shareholder voting right is not affected until less than 20% of common shares is held by all company plans. In addition, she noted that if shares were sold, State Street Bank has an experienced trading desk that can sell the shares quietly, to be efficient, avoid a "run on the bank" and avoid moving the market.

95. Ms. Driscoll also acknowledged at the August 20, 2002 meeting that "*State Street is basically an independent fiduciary*" in its role as Trustee of the ESOP. Finally, Ms. Driscoll "confirmed" that "State Street would . . . reserve the right to override the ESOP Committee's decision" with regard to whether the ESOP should diversify out of UAL stock.

96. Towards the close of the August 20, 2002 meeting, attorney Eccles "advised the Committee that in making its decisions about sales [of company stock], it would all right not to sell if the analysts say to 'hold' or 'buy,' but that it would be different, perhaps, if the analysts advise to 'sell.'"

97. Finally, the Committee was advised at the August 20, 2002 meeting that it "might consider" whether "to turn the decision-making process over to an independent fiduciary."

98. At the next Committee meeting on August 22, 2002, the Committee learned that State Street was willing to take on the role of Investment Manager. At that meeting, attorney Eccles told the Committee that — in deciding whether to diversify the ESOP out of UAL stock — "the Committee should consider only the economic interests

of participants as participants. . . . ***Sunset, super voting, and governance should not be reasons for making a decision, unless they have a distinct economic value.***³

Mr. Eccles again reminded Committee Members that, although “the Plan document does not permit the Committee members to deviate from the investment policy of investing exclusively in Company stock, . . . ***the document could not be followed in all circumstances.***” Finally, Mr. Eccles “reminded the Committee that its decisions must be based solely on the interests of ESOP participants and beneficiaries, and that the existence of potential conflicts of interest support handing over investment management responsibility to State Street.”

99. At the next ESOP Committee meeting on August 27, 2002, outside counsel to the ESOP Committee announced that he was “recommending to the Committee that it delegate its investment management duties to State Street Global Advisors.” The “main reasons” for this recommendation were (1) “to eliminate any potential conflict of interests that may exist” and (2) “to ensure that investment decisions are made by an expert.” Later, at the August 29, 2002 meeting, outside counsel stated that if the Committee could not reach a decision, “it appeared likely that State Street would take over the investment management function in its role as Trustee.”

100. Outside counsel noted that that the ESOP Committee was already “demonstrating prudence by hiring consultants and experts for advice, such as . . . State Street Global Advisors. He also stated that delegating the investment management duties to a professional Investment Manager would also help to demonstrate prudence.” Outside counsel reiterated that ***ERISA may impose “a duty to consider sales of UAL stock held by the Plan, event though the Plan documents states that it will be exclusively invested in UAL stock.”***

³ Notwithstanding the language in Section 4 of the Plan, the Committee’s outside counsel was clear that the Committee could ***not*** consider “participants’ interests as employees, such as job security or wage and benefits concessions.”

101. At the August 27 meeting, the Committee again was told that, as Trustee, “State Street will follow the decision of the Committee unless it is clearly not prudent to do so. *If compliance with ERISA would necessitate selling the shares, State Street has a duty to sell.*” Again, a CitiStreet representative told the Committee that “State Street could override the decision of the ESOP Committee if the decision was not consistent with ERISA.”

102. The Committee was also re-assured that, if State Street were to sell off UAL stock, it would do so quietly with the goal of not impacting the market price. There would be no need to inform ESOP participants of these sales.

103. At the close of the August 29, 2002 Committee meeting, the Committee members voted unanimously in favor of appointing State Street as Investment Manager. Drafting of the relevant documents – already underway – proceeded apace. After August 29, but before the Investment Manager agreement was signed on September 13, 2002, “State Street said they have been doing what they would have done had the agreement been signed.”

104. Nonetheless, State Street waited until September 27, 2002 to begin selling the ESOP’s shares of UAL. Beginning on that date and carrying over to the following Monday, September 30, 2002, State Street converted approximately 100,000 ESOP shares, and sold 400,000 shares of UAL common stock. On October 1, State Street ordered the sale of an additional million converted shares, which took place throughout that week. On October 4, State Street ordered the sale of an additional three million converted shares beginning on the following Monday, October 7. The first of those shares were sold in range \$2.10.

105. At the October 10, 2002 Committee meeting, State Street informed the Committee that it was in “a trading program,” with a stated goal of limiting daily sales to “under 30% of daily volume” for UAL stock. The selling continued throughout October. By November 1, State Street had sold a total of 9,800,000 shares of common stock

attributable to ESOP convertible shares. By November 18, State Street had sold a total of 12 million such shares. Throughout this time, State Street's sales remained relatively quiet, and had no impact on the market price of the stock.

106. Eventually, State Street explained why UAL shares were being sold in a Question and Answer menu on the website of the Machinist's Union ("IAM"):

Why are the ESOP shares being sold?

The investment of the ESOP is governed by federal law, the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA has two investment requirements that have led to the selling of shares. First, when deciding how to manage the ESOP, only the interests of ESOP participants and beneficiaries *in their capacity as participants and beneficiaries* can be considered. This means that even though most ESOP participants are employees of United, and even though *as employees* they might prefer that the ESOP continue to hold only UAL stock, their preferences as employees cannot be considered. Second, ERISA requires that the ESOP be managed prudently. State Street Bank was appointed to independently determine how the ESOP's investments should be managed in light of these two requirements of ERISA. After a careful investigation, State Street determined that it was imprudent to continue to hold UAL stock, and commenced selling UAL stock. [Emphasis added.]

107. Once again this answer recognized that as UAL employees, the Committee members might not sell UAL stock due to a perceived disloyalty to the Company in taking such an action; this loyalty to UAL conflicted with the duty of a fiduciary to act solely in the best interests of the ESOP participants.

108. Elsewhere in the Q&A, the IAM makes reference to the need to ask State Street to "independently" review the ESOP – again, another admission of the conflict.

Why did the Committee decide to appoint State Street Bank as Investment Manager of the ESOP's assets?

Following the announcement on August 14, 2002, that the Company was considering a bankruptcy filing, the Committee reviewed whether *it should delegate the duty to manage the ESOP's investments to an independent expert to ensure that* all decisions regarding the investment of the

ESOP's assets are being made independently and will continue to be made solely based on the best interests of ESOP plan participants.

Acting in the best interests of plan participants, the Committee unanimously decided to appoint State Street as Investment Manager of the ESOP's assets. State Street, the trustee of the ESOP since its inception in 1994, is familiar with the UAL ESOP and has significant experience in managing and overseeing retirement plan investments. [Emphasis added.]

109. If the UAL ESOP Committee felt it needed an "independent" assessment, that need did not arise solely due to the belated instigation of State Street. Rather the need for an independent non-conflicted fiduciary was always required by ERISA.

110. This need should also have been recognized by State Street, and State Street should have: (a) made certain that the Committee undertook an objective, prudent, loyal and ongoing assessment of the propriety of UAL stock as the ESOP's sole investment; and (b) acted far earlier than August of 2002 to protect the ESOP and its assets.

111. The IAM Q&A also admits that the Plan document did not control in these circumstances:

The ESOP document says that ESOP should be exclusively invested in UAL stock. Why doesn't that prevent sales?

Under ERISA, a plan document is controlling only to the extent the plan document is consistent with ERISA. (Although this rule may seem surprising at first, without this rule, it would be easy to write a plan that would circumvent the law.) Thus, the ESOP document cannot override the ERISA investment requirements.

The United States Department of Labor has very clearly stated that a plan document may not be relied upon to avoid the ERISA investment requirements.

I have heard that ERISA says that an ESOP is not required to diversify its investments. Doesn't that mean the ESOP could continue to hold all of the stock?

For most retirement plans, ERISA requires diversified investments. Furthermore, ERISA prohibits most

retirement plans from ever having more than 10% of plan assets in stock of the employer. There is a limited exception to these diversification rules for certain types of plans, such as 401(k) plans and ESOPs. (Without this exception, it would be impossible to ever have an ESOP, since ESOPs are not invested for diversification.) However, this limited exception to the diversification rules is **not** an exception to the other ERISA investment rules described above. [Emphasis added.]

112. The IAM Q&A admitted that fiduciaries had an obligation to determine whether the ESOP's continued exclusive investment in UAL stock was prudent:

What is State Street's role going forward?

As Investment Manager, State Street has the responsibility to determine whether the ESOP's continued exclusive investment in UAL stock is consistent with the law governing retirement plans – the Employee Retirement Income Security Act of 1974 (ERISA). Following a thorough analysis, State Street determined that remaining exclusively invested in UAL stock at the present time was inconsistent with ERISA given the financial issues currently facing UAL, and they initiated action to commence sales of some stock.

State Street will continue to analyze whether ERISA requires them to continue to invest ESOP funds in UAL stock, or take other investment actions, on an ongoing basis. Although State Street has commenced sales of some stock, they are constantly reviewing that decision and can decide at any time to halt stock sales, buy back UAL stock, or make other investment decisions they feel are in the best interests of plan participants and required by ERISA. [Emphasis added.]

113. However, this duty under ERISA was always present and was breached as early as July 2001 by Defendants.

114. The duty of the ESOP Committee members to not follow the exclusivity provisions of the UAL ESOP, due to UAL's condition, was recognized (belatedly) in a letter sent to ESOP participants:

Dear ESOP Participant:

We are writing to advise you about an important decision made by the ESOP Committee for the UAL Corporation Employee Stock Ownership Plan. The Committee consists of six members appointed by ALPA, the IAM and the

Company. Following the announcement on August 14, 2002 that UAL was considering a bankruptcy filing, the Committee reviewed whether it should delegate the duty to manage the ESOPs investments to an independent expert to ensure that all decisions involving the management of the ESOPs assets remain above reproach. Acting solely in the best interests of ESOP participants and beneficiaries, the Committee unanimously decided to appoint State Street Bank and Trust State Street as Investment Manager of the ESOP's assets. In addition to serving as Investment Manager for the ESOP, State Street will continue to serve as Trustee for the ESOP, as it has done since the ESOP inception in 1994.

State Street is an industry leader in providing independent fiduciary services to employee retirement plans. State Street is familiar with the UAL ESOP, and has significant experience in managing, servicing and overseeing retirement plan investments. ***The Committee is confident State Street will act solely in the best interests of ESOP participants and beneficiaries.***

As Investment Manager, State Street has the responsibility to determine whether the ESOP's continued investment in UAL stock is consistent with the law governing retirement plans, the Employee Retirement Income Security Act of 1974 ("ERISA"). Following a thorough investigation, State Street determined that the ESOP's continued investment solely in UAL stock was inconsistent with ERISA and that it was in the best interests of participants and beneficiaries to commence sales of UAL stock held by the ESOP. In order to begin sales, State Street was required to file a form with the Securities and Exchange Commission. On September 27, 2002, State Street filed this form, allowing it to sell up to approximately 11 million shares of UAL stock on behalf of the ESOP within the next three months.

You should know that when State Street sells any shares of UAL stock in the ESOP, the shares are sold, pro rata, from all ESOP participants accounts. State Street is currently investing the proceeds from sales of UAL stock in the ESOP in a short-term investment fund. The proceeds and any investment earnings will be credited, pro rata, to all ESOP participants accounts.

In continuing to fulfill its investment management responsibilities under the ESOP, State Street must carefully analyze the prudence of UAL stock as an investment on an ongoing basis. Thus, although State Street decided September 27 that selling UAL stock was appropriate, it could decide at any time to stop selling UAL stock, buy back UAL stock, or take other actions it determines are appropriate.

You should also know that the delegation of investment management authority to State Street applies only to the tax-qualified ESOP; it does not apply to the Supplemental ESOP (also known as “ESOP 3”). No sales will be made with respect to the credits for stock that you may have in an account under ESOP 3. ESOP 3 will continue to operate without change.

Following the delegation to State Street, the Committee continues to have administrative responsibility for the ESOP, including an obligation to monitor State Street activities as Investment Manager. The Committee has and will continue to meet with State Street on a regular basis.

We recognize that this decision may generate questions, and we will work with all parties to provide additional information when appropriate.

Sincerely,

ESOP Committee [Emphasis added.]

115. In this letter, the Committee admitted it had a duty to act solely in the interests of the ESOP participants and that this duty extended to determining if UAL stock was appropriate for the ESOP notwithstanding any provisions of the Plan to the contrary.

116. In belated recognition of its duty, State Street finally began selling shares as detailed above.

F. American’s Trustees Sell AMR Shares – An Example of Prudent Conduct by Plan Fiduciaries

117. On February 4, 2003, the trustee of the American Airlines (“AMR”) 401(k) plan dropped AMR stock as an investment option on the grounds that it was too risky an investment. This is an example of how a prudent trustee acts promptly in response to changing financial circumstances.

VI. CLAIM FOR RELIEF

FAILURE TO PRUDENTLY MANAGE PLAN ASSETS

(Breaches Of Fiduciary And Co-Fiduciary Duties In Violation Of ERISA 29 U.S.C. § 1104(A)(1)(A)-(D), 29 U.S.C. § 1105)

118. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if set forth fully herein.

119. This claim is asserted against all Defendants.

120. The ESOP is governed by the provisions of ERISA, 29 U.S.C. §§ 1001, *et seq.*, and Plaintiffs are participants and/or beneficiaries in the Plan.

121. Each of the Defendants acted as a fiduciary under 29 U.S.C. § 1002(21)(A) with respect to the ESOP and its participants.

122. Each of the Defendants was also a co-fiduciary of the other Defendants, under 29 U.S.C. § 1105, with respect to the ESOP and its participants. As co-fiduciaries, each of the Defendants is liable for the others' conduct under the terms of ERISA § 405(a), 29 U.S.C. § 1005(a).

123. The Committee Member Defendants breached the fiduciary duties they owed the ESOP, Plaintiffs, and the Class when they: (1) failed until September of 2002 to appoint an independent fiduciary which was required due to their disabling conflict of interests; (2) failed until August of 2002 to conduct *any* assessment as to whether the continued allocation of all of the ESOP's assets to UAL stock was prudent and loyal under the circumstances; and (3) failed to move the ESOP's holdings of Company stock to the most profitable alternative and appropriate assets available – all at a time when they knew or should have known that the Company stock was no longer a prudent investment for the ESOP as a result of the Company's catastrophic losses and dubious prospects for the future which placed the Company at the brink of bankruptcy by the start of the Class Period. As CEO James Goodwin told employees in mid-October of 2001, the Company was “literally hemorrhaging money;” so bad was the situation that

Goodwin accurately predicted in October 2001 that the Company would “perish sometime next year.”

124. State Street is liable for failing to take *any* actions prior to August 20, 2002 to protect the ESOP and its participants and beneficiaries from the catastrophic depletion of the *sole* asset they held in the ESOP – UAL stock – despite State Street’s knowledge of the looming bankruptcy and of the conflicted Committee Members’ failure to act; hence, State Street’s handling of the Plan assets was contrary to ERISA.

125. As of the beginning of the Class period, UAL faced imminent bankruptcy; yet, although State Street attended every meeting of the ESOP Committee, State Street *never* questioned the actions of the ESOP Committee until August 20, 2002. By this time UAL stock had lost most of its value.

126. Even after placing UAL stock on its “watch list” in February of 2002 due to the Company’s precarious state and the risk of bankruptcy, State Street continued to hold and acquire UAL stock and did not question the Committee Members’ inaction or even inform the Committee that State Street had placed UAL stock on the watch list and that ERISA mandated an objective assessment as to the continued prudence of maintaining all of the Plan’s assets in UAL stock.

127. Significantly, once State Street belatedly informed Committee Members as to the scope of their duties under ERISA and informed them that ERISA required that the Plan requirement of 100% investment in UAL stock must be disregarded when such holdings became imprudent, the Committee Members were quick to appoint State Street as Investment Manager. ***Had State Street acted seasonably, at a minimum it would have been appointed Investment Manager at the start of the Class Period and would have systematically divested UAL stock beginning at that time.***

128. As State Street recognized, it was at all times under a duty to monitor the prudence of UAL stock as an investment, and to override any orders to buy or hold UAL stock if such order was itself disloyal, imprudent, or otherwise inconsistent with ERISA.

Throughout the Class Period, all orders to buy or hold UAL stock were imprudent and contrary to ERISA and should have been overridden by State Street.

129. As detailed above, throughout the Class period, State Street knew or should have known that the Committee members had conflicted loyalties and were breaching their fiduciary duties of prudence and loyalty under ERISA.

130. Moreover, as *the* “named fiduciary” with respect to purchased of UAL stock with acquisition loans, State Street breached its fiduciary duty in acquiring any such shares during the Class Period.

131. Regardless of the wording of the ESOP documents, *all* Defendants were bound by their duties of prudence and loyalty to disregard the Plan’s requirements when, as here, following the Plan’s requirements was itself disloyal and imprudent. Regardless of any terms of the Plan, *all* Defendants had a duty under 29 U.S.C. § 1104(a)(D) to: (1) cease making purchases of Company stock in the ESOP, and (2) sell all or large portions of the Company stock that was then in the ESOP.

132. Each of the Defendants knowingly participated in these fiduciary breaches by their co-fiduciaries, enabled the co-fiduciaries to commit such breaches by their failure to comply with the provisions of 29 U.S.C. § 1104(a), and had knowledge of the breaches of the co-fiduciaries and failed to make reasonable efforts to remedy such breaches.

133. The above described breaches of fiduciary duty give rise to the presumption that, but for the breaches of fiduciary duty, the Plan’s assets would not have been maintained and further invested in Company stock and would have instead been moved to the most profitable alternative asset available.

134. As a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly the Plaintiffs and the Plan’s other participants and beneficiaries lost hundreds of millions of dollars.

135. Pursuant to 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109(a), the Defendants are liable to restore the losses to the Plan and its participants caused by their violation of their fiduciary duties.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

A. That this Court certify this action as a class action under Rule 23(b)(1), 23(b)(2) and 23(b)(3);

B. That this Court declare that each of the Defendants have violated the duties, responsibilities and obligations imposed upon them as fiduciaries by ERISA;

C. That this Court order the Defendants to restore to the Plan on behalf of each member of the Plan the losses suffered as a result of Defendants' breaches of fiduciary duty;

E. That this Court award to Plaintiffs reasonable costs and attorneys' fees;

F. That this Court grant such further relief as may be just and proper.

DATED: June 24, 2004.

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