

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED AIRLINES, INC.; UNITED
AIRLINES RETIREMENT PLANS
ADMINISTRATIVE COMMITTEE; and
UNITED AIRLINES PILOT
RETIREMENT ACCOUNT PLAN,

Case No.

COMPLAINT

Plaintiffs,

v.

KEEP SAFE INVESTMENTS, LLC, J&K
CONNECT LLC, and KRISTI BERGE,

Defendants.

Plaintiffs United Airlines, Inc. (“United”), United Airlines Retirement Plans Administrative Committee (the “Committee”), and the United Airlines Pilot Retirement Account Plan (the “Plan”) (collectively, “Plaintiffs”) for their Complaint against Defendants Keep Safe Investments, LLC (“KSI”), J&K Connect (“J&K”), and Kristi Berge (“Berge”) hereby allege as follows:

PRELIMINARY STATEMENT

1. This is an action brought in response to discovery of a scheme by and among Defendants to obtain control over Plan assets in violation of the governing Plan documents and by fraudulent means, and to improperly use those assets for personal gain.

2. Plaintiffs seek to enjoin Defendants, collectively and individually, from continuing to violate the Plan terms or otherwise perpetrating their fraudulent scheme. Plaintiffs further seek legal and equitable remedies to restore all Plan assets to the Plan,

punitive and/or treble damages as authorized by statute, and an award of fees and costs to make Plaintiffs whole for costs and damages incurred as a result of Defendants' actions.

THE PARTIES

3. United is a Delaware Corporation with its principal place of business in Chicago, Illinois.

4. The Committee is the Plan Administrator and Named Fiduciary of the Plan, as those terms are defined by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

5. The Plan is a defined contribution 401(k) profit sharing plan. The Plan is an employee pension benefit plan, and is subject to ERISA. United is the Plan Sponsor, as that term is defined by ERISA.

6. KSI is a limited liability company, organized under the laws of the State of Minnesota. KSI maintains a principal place of business in Edina, Minnesota.

7. J&K is a limited liability company, organized under the laws of the State of Minnesota. J&K maintains a principal place of business in Edina, Minnesota.

8. Berge is the Owner, CEO, and founder of KSI, and a co-owner of J&K.

JURISDICTION AND VENUE

9. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1131 & 1367. Plaintiffs' claims arise, in part, under federal statutes—specifically ERISA and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). To the extent Plaintiffs' claims do not arise under ERISA and/or RICO, the Court nonetheless has jurisdiction

over them because, as set out below, any claims arising under state law form part of the same case or controversy as those acts that give rise to Plaintiffs' ERISA and RICO claims.

10. The Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1332. United is a citizen of Delaware (the state of its incorporation) and Illinois (the state of its principal place of business). The Committee and the Plan are citizens of Illinois. Defendants are all citizens of Minnesota. As set out in detail below, the amount in controversy exceeds \$75,000, exclusive of interest and costs.

11. Venue is appropriate in this District, pursuant to 28 U.S.C. § 1391(b)(1), because the Defendants are residents of this District, and of the state in which this District is located.

STATEMENT OF FACTS

12. United is an airline, headquartered in Chicago, Illinois. United operates a large domestic route network across the United States, along with a global route network. In total, United operates more than 1,300 aircraft, with flights to more than 350 airports in 58 different countries. To support its operations, United employs more than 90,000 people worldwide.

13. In the United States, some of United's employees are members of a collective bargaining unit represented by the Air Line Pilots Association, International ("ALPA").

14. The Plan is maintained pursuant to a collective bargaining agreement between United and ALPA, for the benefit of certain employees who meet the definition of “Eligible Pilot” under the terms of the Plan document.

15. The Plan provides those Eligible Pilots an opportunity to accrue benefits as part of their retirement savings strategy. The Plan allows Eligible Pilots to contribute to the Plan through payroll deductions on a pre-tax, Roth 401(k) and/or post-tax basis for federal income taxes (and, if applicable, state taxes, too). Participants also receive contributions directly to their accounts from United.

16. Participants in the Plan are responsible for deciding how to invest their contributions and those United makes on their behalf.

17. The benefit each participant is entitled to under the Plan is the product of any contributions he or she has made, contributions made by United on his or her behalf, the performance of investments, and fees.

18. In deciding how to invest their Plan accounts, participants can elect to invest among a menu of pre-selected investment options offered to all participants, through a self-directed brokerage account, or in any combination thereof to meet their individual retirement goals.

19. To invest some or all of their accounts in the self-directed brokerage option, participants may elect to open one or more Personal Choice Retirement Accounts (“PCRA”) at Charles Schwab & Co., Inc. (“Schwab”), a registered broker-dealer.

20. Through a PCRA, participants can access a broader range of investment choices than are available in the Plan's default investment line-up.

21. PCRA's are administered by Schwab Retirement Plan Services, Inc. ("SRPS"), the Plan's institutional recordkeeper.

22. Distribution of assets from the Plan—including from PCRA's—is subject to the terms of the governing Plan documents, as well as provisions of ERISA and the Internal Revenue Code.

23. With the exception of certain qualifying hardships, distribution of assets in a participant's account is not permitted prior to age 59-1/2.

24. Assets invested in PCRA's remain Plan assets.

25. If a participant elects to open a PCRA, he or she may choose to hire an independent investment advisor to provide investment advice to the participant as to the investment of funds held in the PCRA.

26. If a participant wants their independent investment advisor to be able to charge its fees directly to the participant's account, they must choose an advisor who is part of the Schwab network of advisors. Those advisors are all required to separately agree with Schwab to abide by terms and conditions established by Schwab. In addition, the participant must execute a Supplemental Personal Choice Retirement Account Disclaimer ("PCRA Disclaimer") agreeing to certain terms and conditions established by the Committee.

27. Among the items a participant must agree to in the PCRA Disclaimer are acknowledgements that (1) their advisor will only be permitted to withdraw assets from their PCRA to pay advisory fees, and (2) any and all amounts deducted from the PCRA as advisory fees must be for advisory services related to assets in the participant's PCRA.

28. Upon information and belief, Berge and/or KSI—sometimes doing business under the name “KSI Financial”—entered into contracts with Plan participants, purportedly to provide investment advice in connection with those participants' PCRA's.

29. The Plan participants, in turn, each completed a PCRA Disclaimer, identifying Berge and/or KSI as their investment advisor, authorizing payment of advisory fees from their PCRA, and acknowledging that nothing other than advisory fees related to their PCRA could be paid from their PCRA to Berge or KSI.

30. Unbeknownst to Plaintiffs, and contrary to the terms of the Plan and PCRA disclaimer, some or all of the participants entered into agreements with J&K (including, in some instances, written agreements), under which the participants agreed to loan assets from their PCRA to J&K.

31. Specifically, those agreements provided that (1) KSI would charge an amount to the participant's PCRA, identifying the charge as a “management fee”; (2) the amount charged as a “management fee” would, in reality, be used to fund a loan from the participant to J&K; (3) other than the amount loaned to J&K, KSI would not take any management fee from the participant; (4) the loan to J&K would be for a term of up to five years (unless rolled to a longer term by subsequent agreement of the parties); (5) J&K would pay the participant 10% annual interest on the principal for the duration

of the loan; and (6) at the end of the loan period, the principal and all interest would be returned to the participant's PCRA as a "management fee reimbursement."

32. An example agreement entered into between J&K (as executed by Berge) and a Plan participant is included here as **Exhibit A**.

33. Defendants agreed to an arrangement by which KSI would charge amounts to the Plan (through participants' PCRA's), representing those amounts to be fees owed for investment advice, when they were instead intended to be used as a loan to J&K.

34. Through this arrangement, and by falsely representing the amounts to the Plan as fees, Berge, KSI, and J&K obtained control over Plan assets to which they were not entitled, with the intent to use those assets for their own gain.

35. Plaintiffs were not parties to the agreement between and among any participant, Berge, KSI, and J&K, and were not privy to the details of the arrangement reflected in it.

36. On or about December 6, 2022, SRPS, as the Plan's recordkeeper, alerted United and the Committee that it appeared KSI was charging abnormally high management fees to Plan participants' PCRA's.

37. By letter dated December 6, 2022, Schwab notified KSI that it was being terminated as an investment advisor on Schwab's platform—including, as relevant to the Plan—for PCRA accounts.

38. Schwab and SRPS also notified participants who had hired KSI that KSI was no longer eligible to serve as a PCRA investment advisor, or to receive payments of fees directly from the Plan or an applicable PCRA.

39. By letter dated December 12, 2022, United and the Committee notified Berge, KSI, and J&K that they had become aware that amounts charged to the Plan as management fees appeared excessive for those services, and that they had further been made aware that some or all of the “management fees” charged to the Plan had actually been used to fund loans to J&K in violation of the Plan’s terms.

40. In that letter, United and the Committee demanded that KSI and/or J&K restore to the Plan any and all fee amounts withdrawn from the Plan as part of any type of loan agreement. United and the Committee further demanded that KSI return to the Plan any investment earnings generated by those funds while in KSI’s (or any KSI-affiliated business’s) possession, and that KSI make United, the Committee, and the Plan whole for any damages or costs resulting from any and all loan agreements KSI entered into.

41. In total, KSI has obtained payment in excess of \$1.5 million from the Plan, charged as investment management fees related to Plan participants’ PCRAs.

42. Having now become aware of the details of KSI’s arrangement with participants, and the false representations made in order to wrongfully obtain control over Plan assets, United (as the Plan sponsor) has restored to the Plan from United’s general assets funds to make the Plan whole for the injuries suffered as a result of Defendants’ actions described herein.

43. Those funds were provided to the Plan specifically to address the losses described herein, and did not consist—in any part—of any participant’s elective contributions, or other contributions United was required to make to any participant’s account under the terms of the Plan.

COUNT I - Fraud
(United and the Plan v. all Defendants)

44. Plaintiffs repeat and reallege paragraphs 1 through 43, as if fully set forth herein.

45. Defendants obtained control over Plan assets by charging amounts to participants’ PCRAs, identified as “management fees” owed to KSI, when those assets were instead intended to be used as a loans to J&K.

46. Pursuant to that arrangement, and without Plaintiffs’ knowledge, Berge and/or KSI did, in fact, charge excessive purported management fees to participants’ accounts.

47. Upon information and belief, and based on arrangements such as the one outlined in Exhibit A—which was subsequently provided to Plaintiffs by a Plan participant—certain amounts charged as “fees” to the Plan (through participants’ PCRAs) were, in reality, used to fund loans to J&K.

48. At the time KSI charged those “fees” to the Plan, KSI, J&K, and Berge each knew that the amounts did not actually represent fees.

49. Nonetheless, KSI, J&K, and Berge each agreed that KSI would represent the amounts to Plaintiffs as fees, so that the amounts would be distributed from the Plan.

50. Based on KSI's representations as to fees it was owed, and in reliance on agreements previously signed by participants and KSI, Plan assets were distributed from PCRAAs to KSI.

51. As a result of KSI's misrepresentations to the Plan, KSI, J&K, and Berge obtained control over Plan assets.

52. In so doing, Defendants harmed the Plan, by obtaining control over assets that belonged to the Plan, and by improperly diminishing the assets held in the Plan's trust.

53. Defendants further caused harm to United, who acted—as Plan sponsor—to restore the value of those assets to the Plan's trust from United's general assets.

COUNT II – Unjust Enrichment
(United and the Plan v. all Defendants)

54. Plaintiffs repeat and reallege paragraphs 1 through 53, as if fully set forth herein.

55. KSI was not entitled to receive payments from the Plan for anything other than reasonable investment management fees associated with investment of participants' PCRAAs.

56. J&K and Berge had no entitlement to obtain Plan assets, or to use Plan assets in any way for their own benefit.

57. Due to the arrangement between and among KSI, J&K, and Berge, as identified above, Defendants have been enriched at the Plan's expense, and thus have been unjustly enriched in an amount to be proven, plus interest.

58. Defendants have further been unjustly enriched at United's expense, in light of United's reasonable and foreseeable response, as Plan sponsor, to restore to the Plan's trust assets lost as a direct result of Defendants' actions.

COUNT III – Conversion
(The Plan v. all Defendants)

59. Plaintiffs repeat and reallege paragraphs 1 through 58, as if fully set forth herein.

60. The governing terms of the Plan document, and of other agreements signed by KSI, made clear that only reasonable fees for investment advice related to participants' PCRAs could be paid to KSI from those PCRAs.

61. Any amounts in excess of reasonable fees paid for actual investment advisory services as to that PCRA are Plan assets and legally belong to the Plan.

62. By their actions, as described herein, Defendants have deprived the Plan of the use and possession of Plan assets.

63. In response to a demand letter from United and the Committee, KSI, J&K, and Berge have refused to return the Plan assets at issue to the Plan.

COUNT IV – Civil Theft in Violation of Minn. Stat. § 604.14
(The Plan v. all Defendants)

64. Plaintiffs repeat and reallege paragraphs 1 through 63, as if fully set forth herein.

65. Under Minn. Stat. § 604.14, "[a] person who steals personal property from another is civilly liable to the owner of the property for its value when stolen plus

punitive damages of either \$50 or up to 100 percent of its value when stolen, whichever is greater.”

66. By their actions, Defendants obtained possession of Plan assets—money belonging to the Plan—in a manner that manifested an indifference to the Plan’s rights to that property, and to restoration of it.

67. Defendants are liable to the Plan for restoration of the stolen Plan assets, plus punitive damages in an amount up to 100% of the value of the property taken.

COUNT V – Claim for Equitable Relief Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)
(The Committee v. all Defendants)

68. Plaintiffs repeat and reallege paragraphs 1 through 67, as if fully set forth herein.

69. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), empowers the Committee, as a Plan fiduciary, to seek (on behalf of the Plan) to enjoin any act or practice that violates provisions of ERISA or the terms of the Plan, as well as equitable relief to redress such violations.

70. By obtaining Plan assets in excess of reasonable fees to KSI for investment management services associated with investment of participants’ PCRAAs, Defendants obtained distribution of Plan assets in a manner that violated the terms of the Plan.

71. The Committee, on behalf of the Plan, is entitled to an injunction prohibiting Defendants from continuing to violate the Plan, or from further using Plan assets for their own benefit.

72. Further, ERISA § 406(a), 29 U.S.C. § 1106(a) prohibits, among other things, “lending of money or other extension of credit between the plan and a party in interest” and “transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.”

73. Defendants are “parties in interest,” with respect to the Plan, as the term is defined by ERISA. *See* 29 U.S.C. § 1002(14).

74. Defendants, by the actions described herein, knowingly participated in and caused the Plan to engage in a non-exempt prohibited transaction, in violation of ERISA § 406(a), 29 U.S.C. § 1106(a).

75. Section 502(a)(3)’s authorization of a civil action for “appropriate equitable relief” extends to a suit against a nonfiduciary “party in interest” to a prohibited transaction barred by § 406(a). *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000).

76. The Committee, on behalf of the Plan, is entitled to equitable relief based on Defendants’ knowing participation in a prohibited transaction, including rescission of the transaction, restitution of any and all assets obtained by Defendants through those transactions, and disgorgement of Defendants’ profits made from use of the plan assets transferred to them.

COUNT VI – Violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO), 18 U.S.C. § 1964(c)
(The Committee and the Plan v. all Defendants)

77. Plaintiffs repeat and reallege paragraphs 1 through 76, as if fully set forth herein.

78. Plaintiffs allege that Defendants' conduct, and the conduct of each Defendant named herein, constitutes racketeering as set forth in 18 U.S.C. § 1964(c).

79. Specifically, Congress has defined "racketeering" to include wire fraud, or committing fraud by means of electronic transmissions over wire.

80. The Defendants here engaged in multiple instances of wire fraud. Pursuant to the Defendants' arrangement, KSI submitted numerous, fraudulent electronic requests for payment of fees from the Plan, when the amounts requested were never meant to pay fees, and were instead intended to fund loans to J&K.

81. As detailed below, the Committee and the Plan allege that Defendants' fraudulent fee scheme involved three different RICO violations for which Defendants are civilly liable.

- a. Section 1962(a) provides relief against parties who use income generated through a pattern of racketeering activity;
- b. Section 1962(c) provides relief against parties who engage in a pattern of racketeering activity; and
- c. Section 1962(d) provides relief against those who conspire to violate the racketeering laws.

Defendants are liable under each of these three sections of the statute.

82. 18 U.S.C. § 1964(c) allows "any person injured in his business or property by reason of a violation of section 1962 of this chapter" to "sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"

83. 18 U.S.C. § 1962(a) makes it “unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” 18 U.S.C. § 1962(a).

84. 18 U.S.C. § 1962(c) makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity” 18 U.S.C. § 1962(c).

85. 18 U.S.C. § 1962(d) makes it “unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.”

86. Each Defendant, at all relevant times, is and has been a “person” within the meaning of 18 U.S.C. § 1961(3).

87. Defendants’ activities include at least two acts of racketeering activity. Accordingly, Defendants’ conduct constitutes a “pattern” of racketeering activity. 18 U.S.C. § 1961(5).

88. More specifically, on multiple occasions, and in furtherance of the arrangement between and among KSI, J&K, Berge, and various Plan participants, KSI falsely and fraudulently requested payment of Plan assets to cover advisory fees related to participants’ PCRAs.

89. Upon information and belief, once KSI received assets that had been charged as fees, it delivered those assets to J&K, in the form of a loan on behalf of the participants.

90. In exchange for that “loan,” Berge, on behalf of J&K, agreed to compensate participants through payment of interest in the amount of 10% per year on the principal.

91. At all times, the scheme to obtain Plan assets as fraudulently charged fees, and use those assets to fund loans required the participation of all Defendants.

92. By virtue of their agreement with each other, Defendants formed a group of “persons” associated for the common purpose of intentionally and willfully defrauding the Plan on an ongoing basis.

93. Pursuant to their agreement with each other, Defendants agreed to and did conduct their affairs through a pattern of racketeering activity, including wire fraud as defined by 18 U.S.C. § 1343, for the unlawful purpose of intentionally defrauding the Plan.

94. Defendants’ failure to disclose the true nature of their arrangement with each other, and the true purpose for the funds KSI was requesting from the Plan, was fraudulent.

95. By virtue of its electronic requests for payment from the Plan KSI (on behalf of all Defendants) used the wires for transmission of false or fraudulent representations to obtain money, with the intent to deceive the Plan and its fiduciaries

(including the Committee). Those wire transmissions were made in furtherance of Defendants' scheme and common course of conduct.

96. By virtue of their fraudulent scheme, each of the Defendants received income derived from KSI's fraudulent requests for fees from the Plan. Defendants further conspired to use those fraudulently obtained assets to fund loans to be used for the beneficial interest (including investments) of J&K.

97. As set out plainly in Exhibit A, since at least June 10, 2022, and continuing through December 6, 2022, Defendants agreed to and did conspire to violate 18 U.S.C. §§ 1962 (a) and (c), as alleged above and incorporated herein, in violation of 18 U.S.C. § 1962(d).

98. The object of Defendants' conspiracy was to participate in, directly or indirectly, the conduct of the affairs of the enterprise described above to fraudulently obtain monies charged to the Plan as fees; and to receive income derived from a pattern of racketeering activity.

99. Defendants have knowingly, willfully and intentionally conspired and agreed to conduct and participate in the conduct of the affairs of the enterprise described previously through a pattern of racketeering activity (wire fraud).

100. Defendants knew that their actions as alleged above were part of a pattern of racketeering activity and agreed to the commission of those acts to further the conspiratorial scheme described above, and as set out in Exhibit A.

101. By virtue of their fraudulent scheme, Defendants caused loss to the Plan, and further caused Plaintiffs to incur the costs of this suit, including reasonable attorneys' fees.

102. Defendants are liable to Plaintiffs in the amount of three times the money they fraudulently obtained, plus the cost of this suit, including attorneys' fees.

COUNT VII – Tortious Interference
(The Committee and the Plan v. all Defendants)

103. Plaintiffs repeat and reallege paragraphs 1 through 102, as if fully set forth herein.

104. With knowledge of the terms of the Plan, and of the PCRA Disclaimer allowing for distribution of fees for PCRA-related investment advice, Berge, KSI, and J&K developed and implemented an arrangement by which they would fraudulently claim fees from the Plan and use the resulting assets to fund loans to J&K.

105. Berge, KSI, and J&K knew that the loan transaction was not permitted under the terms of the Plan or the PCRA Disclaimer.

106. By fraudulently representing the amounts claimed from the Plan as fees, rather than loans, Berge, KSI, and J&K acted to cause participants to breach the terms of their agreements with the Plan, and caused harm to the Plan as described herein.

PRAYER FOR RELIEF

WHEREFORE, United, the Committee, and the Plan ask this Court to enter Judgment in their favor and against Berge, KSI, and J&K with respect to the foregoing claims and award relief as follows:

- a. Money damages relating to fraud, conversion, and/or theft, including reimbursement of United for amounts paid to the Plan to restore losses incurred due to Defendants' actions;
- b. Punitive damages of up to 100% of any and all amounts stolen from the Plan;
- c. Treble damages for civil RICO violations;
- d. Equitable relief based upon unjust enrichment to Defendants;
- e. Rescission of any transaction by which Defendants obtained control over Plan assets by misrepresenting them as fees owed;
- f. Restitution to the Plan of any wrongfully obtained Plan assets;
- g. All profits earned by Defendants through use of Plan assets for their own gain or in their own interest;
- h. Injunctive relief prohibiting continued or further violations of the Plan;
- i. Reasonable attorneys' fees;
- j. Interest and costs; and
- k. Such other relief as the Court deems just, proper, and equitable.

JURY DEMAND

Plaintiffs hereby request a trial by jury on all issues so triable.

Date: November 7, 2023

Respectfully submitted,

By: /s/ Amanda M. Cialkowski

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