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# Slight Turbulence Ahead: The Chapter 11 Bankruptcy of Republic Airways

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**Cast of Characters**

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|---|---|
| **American Airlines Inc.** ("American" or collectively with United and Delta, "Codeshare Partners") | American is Republic's largest Codeshare Partner, accounting for over 50 percent of its revenues. It was also the last Codeshare Partner to agree to amended terms on the companies' agreements. Under the approved plan American will have a 25 percent ownership stake in the reorganized Republic. |
| **Ad Hoc Committee of Equity Holders** ("Equity Committee" or "Committee") | Shortly after the Petition Date, certain holders of common stock in Republic Airways Holdings Inc., one of the Debtors, formed the Ad Hoc Committee and retained counsel to represent their common interests in the Chapter 11 Cases. |
| **Bombardier, Inc.** ("Bombardier") | Manufacturer of the Q400 fleet and replacement parts; also provided services for its purchased planes. Held large claims against Republic for contract defaults related to the surrender of the Q400 fleet. Also manufactured the CS300 fleet. |
| **Bryan K. Bedford** | President and Chief Executive Officer of Republic Airways Holdings Inc. and its wholly-owned direct and indirect debtor subsidiaries, 1999 – present; Chairman of the RAH Board of Directors from 2001 – present. |
| **The Official Committee of Unsecured Creditors.** ("Creditor Committee" or the "Committee") | The Official Committee of Unsecured Creditors. The Committee was appointed by the U.S. Trustee on March 4, 2016 (ECF No. 89). The Committee represents the interests of all unsecured creditors in the bankruptcy case and was comprised of GE Engine Services, Pratt & Whitney Component Services, Embraer S.A., United Airlines Inc., American Airlines Inc., NAC Aviation 23 Ltd., and International Brotherhood of Teamsters Airline Division. The Committee was amended on June 3, 2016 (ECF No. 630) to replace NAC Aviation with Residco (ALF IV, Inc). |
| **Debtors** | Republic Airways Holdings, Inc. and its direct and indirect subsidiaries, jointly administered in the chapter 11 proceedings under Docket No. 16-20429 |
| **Delta Air Lines Inc.** ("Delta" or collectively with United and American, "Codeshare Partners") | Delta plays a key role in pushing Republic into bankruptcy and in moving the restructuring process along during the bankruptcy. It serves as the debtor in possession ("DIP") financier and is the first of Republic's Codeshare Partners to reach an agreement with Republic. Under the approved plan, Delta has a 17.35 percent ownership stake in the reorganized Republic. |
| **Embraer S.A. & Affiliates** ("Embraer") | Manufacturer of the ERJ-140/145 fleet and the E170/175 fleet; also provided maintenance services for its purchased aircraft. Held large claims against Republic for contract defaults related to the surrender of the ERJ-140/145 fleet and the reduction of the E170/175 fleet. |

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|---|---|
| **Agencia Especial de Financiamento Industrial** ("FINAME") | Secured lender with security interests in Many of Republic's owned ERJ-140/145 aircraft and Republic's E170/175 aircraft. |
| **General Electric & Affiliates** ("GE") | Manufacturer of the engines used in several of Republic's aircraft; also provided maintenance services for its purchased engines. Held large claims against Republic for contract defaults related to the reduction of the E170/175 fleet and the accompanying engines. |
| **Hughes Hubbard & Reed LLP** | Attorneys for Debtors and Debtors in Possession. |
| **International Brotherhood of Teamsters, Airline Division** ("IBT") | The IBT is the labor union that Republic's pilots belong too. Republic and the IBT had prolonged negotiations that were resolved prior to the bankruptcy proceedings. The higher wages required under the new agreement played a significant role in necessitating these bankruptcy proceedings. |
| **Judge Sean Lane** | Is the Judge who administered the case in the Southern District of New York. |
| **Midwest Air Group, Inc.** ("MAG") **16-10430** | A wholly owned subsidiary of RAH and holding company for its direct subsidiary Midwest Airlines, Inc. and indirect subsidiary Skyway Airlines, Inc. which constructed and are the lessees of two hangers and maintenance facilities located at General Mitchell International Airport in Milwaukee, Wisconsin.[1] RAH purchased Midwest Air Group from TPG Capital in 2009. |
| **Midwest Airlines, Inc.** ("Midwest") **16-10431** | A subsidiary of RAH. RAH purchased Midwest Airlines, Inc. along with its holding company, Midwest Air Group, Inc. from TPG Capital in 2009. |
| **Morrison & Foerster LLP** | Legal counsel to the Official Committee of Unsecured Creditors. |
| **Prime Clerk LLC** | Claims and Noticing Agent to the Debtors; Administrative Agent to the Debtors. |
| **Republic Airline Inc.** ("RAI") **16-10428** | A subsidiary of RAH, created in 1999 was Part 121 certified in 2005. Currently operates as American Eagle, Delta Connection, and United Express. |
| **Republic Airways Holdings Inc.** ("RAH" or "Republic") **16-10429** | The company was originally formed as a holding company in 1996 and went public in 2004 trading on NASDAQ under the symbol "RJET." Wexford Capital is the majority shareholder. It is a Delaware corporation with its headquarters in Indianapolis, Indiana. |
| **Republic Airways Services, Inc.** ("RAS") **16-10426** | A wholly-owned subsidiary of RAH that was incorporated in New York in 2008. It is the owner of building leasehold improvements, along with maintenance and station ground |

1 Declaration of Bryan K. Bedford, ECF No. 4.

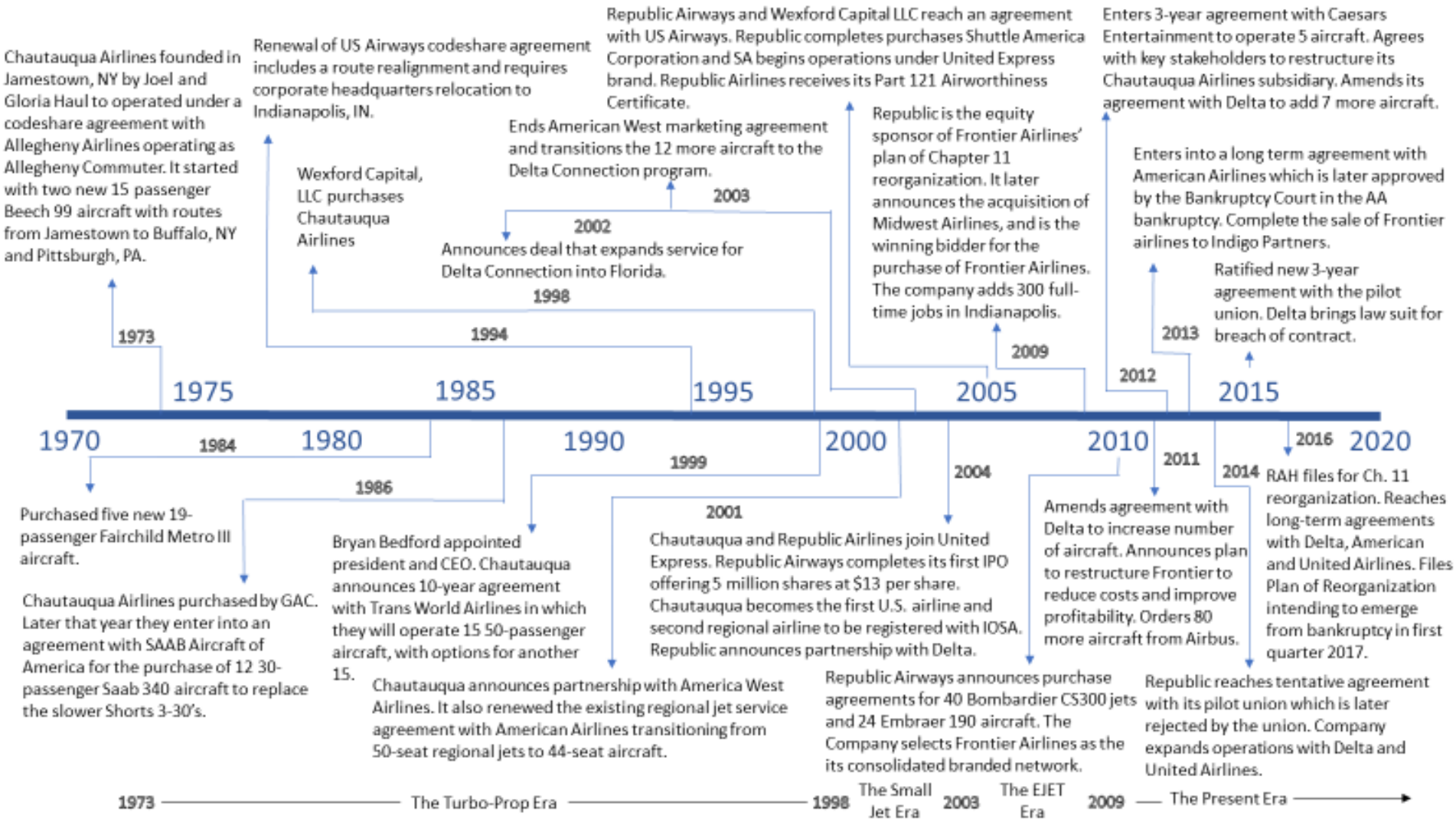
| | |
|---|---|
| | equipment, vehicles, and office equipment used in Republic's operations throughout the country. |
| **Residco** | The operating name for ALF VI, Inc. Residco was a secured lender for several of Republic's ERJ-140/145 aircraft and was responsible for holding up the confirmation of Republic's Second Amended Joint Plan of Reorganization. |
| **Shuttle America Corporation** ("Shuttle") **16-10427** | A subsidiary of RAH, purchased in 2005. Merged into Republic Airline Inc. in early 2017. |
| **Skyway Airlines, Inc.** ("Skyway") **16-10432** | A subsidiary of RAH, it was purchased by RAH along with its parent, Midwest Air Group, Inc. from TPG Capital in 2009. It was in the process of being merged into Midwest Airlines, Inc. when RAH acquired the entities. |
| **United Airlines, Inc.** ("United" or collectively with American and Delta "Codeshare Partners") | United settled its claims and amended its agreements with Republic shortly after Republic and Delta agreed to terms. Under the approved plan United has a 19.16 percent ownership interest in the reorganized Republic. |
| **Zirinsky Law Partners PLLC** | Attorneys for Debtors and Debtors in Possession. |

**Key Dates of Republic's Chapter 11 Proceedings**

| | |
|---|---|
| February 25, 2016 | Commencement Date—Filing of bankruptcy petition and first day motions |
| March 4, 2016 | Formation of the Official Committee of Unsecured Creditors |
| April 26, 2016 | 1110 Deadline |
| May 3, 2016 | Approval of DIP Financing / Credit Agreement |
| May 3, 2016 | First Approval of Amended Delta Codeshare Agreement |
| June 3, 2016 | Creditor Committee amended to replace NAC Aviation with Residco |
| June 16, 2016 | Approval of Amended United Codeshare Agreement |
| June 24, 2016 | Initial Exclusive Filing Period: The date before which only the debtor can file a plan of reorganization. |
| July 22, 2016 | Claims Bar Date (General): The deadline for persons and entities to file proofs of claims in the chapter 11 cases. |
| August 23, 2016 | Government Bar Date: The deadline for governmental units to file proofs of claims. |
| September 22, 2016 | Approval of Amended American Codeshare Agreement |
| October 2016 | Creditor Committee granted Delta ex officio status |
| November 15, 2016 | First Joint Plan of Reorganization Submitted |
| November 28, 2016 | Approval of Merger of Shuttle and Republic Airline and Surrender of Shuttle's Air Carrier Certificate |
| December 12, 2016 | First Amended Joint Plan of Reorganization Submitted |
| December 14, 2016 | Second Approval of Amended United Codeshare Agreement |
| December 16, 2016 | Second Amended Joint Plan of Reorganization Submitted |
| January 31, 2017 | Effective Date of Merger of Shuttle and Republic Airline |
| February 17, 2017 | Surrender of Shuttle's Air Carrier Certificate |
| February 23, 2017 | Residco's Objection to the Plan |
| March 8, 2017 | First Confirmation Hearing Date; Continued on March 16, April 13, and April 20. |
| April 10, 2017 | Court Overruled Residco's Objection |
| April 20, 2017 | Confirmation of the Second Amended Joint Plan of Reorganization |

## Company History[2]

### *A. Company Timeline*




[2] Republic Airlines, Inc., http://rjet.com/en/Who_We_Are/History.aspx (last visited Apr. 22, 2017).

### *B. Republic's Business Model*

#### *1. Revenue Diversity*

CEO Brian Bedford said[3] "[t]he foundation of our business model is revenue diversity, if we can draw revenue from a wide variety of sources, regardless what the broader industry conditions are, we'll likely do better."[4] This was the strategy that led Republic to become one of the most successful regional airlines in the mid 2000's, but also contributed to the issues prompting its reorganization. At its core, Republic provides scheduled regional passenger services through its wholly owned subsidiaries Shuttle and RAI.[5] The company primarily focuses on key markets in the Northeast, Mid-Atlantic, and Midwest regions of the United States, and offers approximately 1,000 daily flights to 105 cities in 38 states, Canada, the Caribbean, and the Bahamas.

#### *2. Codeshare Agreements*

Most of Republic's revenue comes through codeshare agreements it has in place with American, Delta and United. There are two major types of code-share agreements in the airline industry. The first type is a pro-rate agreement. These are essentially revenue sharing agreements between legacy carriers and regional airlines where ticket revenues are distributed per an agreed upon formula and the regional airline is responsible for the costs of the flights it operates. The second type, and the type RAH exclusively uses, is known as a capacity purchase agreement which is a fixed fee arrangement. These codeshare agreements require Republic to maintain specified performance and minimum aircraft utilization at fixed rates.

For their part in the agreement, the Codeshare Partners control the revenue, pricing and scheduling of the aircraft as well as all ticket issuance, ground support facilities, commuter slot rights and airport facilities. As a result, they obtain the full value of all ancillary passenger charges and revenues, and the passengers on these flights participate in the Codeshare Partner's frequent flier programs. The Codeshare Partners also absorb the risk from fare competition, increased fuel prices and fluctuations in passenger volumes.

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[3] In the discussion on Republic's business prior to entering chapter 11 bankruptcy, we used both the past and present tenses because many of the facts describing Republic's business before bankruptcy remain true at the present time.

[4] ABC News, http://abcnews.go.com/Business/story?id=8132597&page=1 (last visited Apr. 22, 2017).

[5] ECF No. 4 (Shuttle and Republic have since merged with Republic being the surviving entity.)

Republic on the other hand, is responsible for providing the labor, aircraft, aircraft maintenance, safety and compliance oversight and aircraft financing to cover the agreed upon routes. It is authorized to paint its aircraft using the Codeshare Partners service markers and to market itself as a carrier for the Codeshare Partners. The agreements provide a fixed fee for Republic, limiting its risk on the downside (lack of passengers in the seats) and its upside (when demand exceeds supply and prices charged can be raised).

*3. Other Revenue Raising Activities*

In addition to the codeshare agreements discussed above, Republic contracts with smaller airlines and with various other entities to provide regional flights. In 2012, Republic and Caesars Entertainment Corporation entered into a three-year agreement to operate five aircraft and provide 1,500 flights annually to Caesars.[6] These smaller agreements serve to diversify the company's revenue, but are far from sufficient to support the business without the anchor agreements with the Codeshare Partners discussed above.

Another move to help diversify and protect its revenue streams was Republic's acquisition of Frontier and Midwest in 2009.[7] Bedford sold it as a move to make Republic less reliant on its larger conventional airline partners.[8] However, some argue that purchasing these entities was as much about protecting the company's existing financial stake as a major creditor of both airlines as it was to expand its operations. Regardless of the reasoning, it was a move that took Republic out of its traditional role as a contractor and tasked the company with learning to manage all aspects of an airline amid intense competition. After struggling along for a few years Republic announced a plan to restructure Frontier in 2011 in an attempt to make it more profitable. Ultimately Republic sold Frontier in December of 2013 to Indigo Partners.[9] Republic still owns Midwest, but the

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[6] PR Newswire, http://www.prnewswire.com/news-releases/republic-airways-caesars-entertainment-sign-three-year-flight-agreement-175848891.html (last visited Apr. 22, 2017)

[7] ABC News, http://abcnews.go.com/Business/story?id=8132597&page=1 (last visited Apr. 22, 2017); Republic Airlines, Inc., http://rjet.com/en/Who_We_Are/History.aspx (last visited Apr. 22, 2017).

[8] ABC News, http://abcnews.go.com/Business/story?id=8132597&page=1 (last visited Apr. 22, 2017).

[9] Republic Airlines, Inc., http://rjet.com/en/Who_We_Are/History.aspx (last visited Apr. 22, 2017).

company is now a shell of its former self. We discuss the decision to purchase these airlines in more depth in the next section.

### *C. The Events Leading to Bankruptcy*

When most people think of bankruptcy they think of seeking relief from overwhelming debt. That was not the case with Republic's decision to file. The primary purpose of the filing was to streamline its operations and renegotiate its burdensome codeshare agreements and aircraft obligations.[10] There were four primary issues that led to Republic filing for relief under chapter 11 of the code. First, the prolonged labor dispute with its pilot labor union, the IBT. Second, the national pilot shortage. Third, increased costs and the inability to perform under its codeshare agreements. Lastly, management's decisions to step outside of Republic's core competency as a regional airline that operated as a contractor for major airlines.

#### *1. Labor Dispute with the International Brotherhood of Teamsters*

The dispute with the IBT was a case of the wrong thing happening at the right time, with disastrous results for Republic. A perfect storm of new regulations that limited the hiring pool, the increased financial pressure on the industry resulting from the great recession of December 2007-2009, and Republic's position in the industry as a regional airline turned a bad situation worse. The collective bargaining agreement ("CBA") with the IBT became amendable in October 2007, marking the beginning of eight years of frustration and break downs that started Republic in a tailspin.[11]

Negotiations began shortly after October 2007, and tentative agreements were reached on several sections of a new agreement by 2009. The progress fell apart when complaints were made against Local 747[12] claiming it had failed to maintain proper financial controls. Eventually IBT placed Local 747 into trusteeship and revoked the tentative agreements in place.[13] Talks did not resume until a year later when IBT Local 357 was established. By July 2011 no agreement was reached and the parties, seeing no end in sight, began supervised negotiations before the National Mediation Board ("NMB") and later in November 2013 under the guidance of a private mediator.

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[10] Seeking Alpha, http://seekingalpha.com/article/3961053-republic-airways-look-delta-air-lines-agreement (last visited Apr. 22, 2017).

[11] ECF No. 4.

[12] The local chapter of the IBT.

[13] ECF No. 4.

This seemed to help progress as another tentative agreement was reached by February 2014, but again that agreement fell apart and was never ratified by the union membership.

While negotiations were failing, so was Republic's business. As more time without an updated agreement passed its compensation package fell further behind industry standards and an exodus of its pilots began. As Republic watched its pilots leave[14] management felt the pressure to increase pay turn up with each grounded aircraft.[15] It wasn't long before Republic was unable to meet service requirements under its codeshare agreements and its operations were frustrated.[16] To combat this they began to offer premium pay for those willing to take on off-hour flights, and offered signing bonuses to attract new pilots. This seemed like a logical thing to do, but it was in violation of the Railway Labor Act which requires that employers continue the status quo under the old CBA until a new CBA is in place.[17]

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[14] The negotiations between the parties were turning sour. RAH felt the union was publishing false information and using coercive tactics with prospective pilots that was preventing RAH from attracting new pilots to replace those leaving. In 2012 RAH filed suit against the union in Federal Court alleging the same. *See* Indianapolis Business Journal, http://www.ibj.com/articles/33538-republic-airlines-file-federal-suit-against-pilots-union (last visited Apr. 22, 2017).

[15] *See* Fox News Network, LLC, http://www.foxbusiness.com/markets/2015/07/14/in-rare-move-teamsters-union-sues-republic-airways-over-signing-bonuses-for-new.html (last visited Apr. 22, 2017) (Republic grounded 27 aircraft the prior year due to pilot shortages).

[16] ECF No. 4.

[17] "In Detroit & T.S.L. R.R. v. UTU, 396 U.S. 142, 153 (1969), the Supreme Court defined the status quo as "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose . . . ." Neither side can change current practice under the prior agreement, whether or not the practice is reflected in the terms of the written agreement, until all of the bargaining procedures of the Act have been exhausted. The expiration date of the agreement, if any, makes no difference; the parties remain locked in the status quo. Where the past practice has been to allow management to make changes, however, that right continues to be available. Consolidated Rail Corp. v. RLEA, 491 U.S. 299, 311-12 (1989). Paul, Hastings, Janofsky & Walker LLP http://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v2/012.pdf (last visited Apr. 22, 2017).

In a somewhat unconventional move the IBT filed a complaint against RAH, Shuttle, and RAI in the Southern District of Indiana on July 9, 2015, for paying its Pilots too much.[18] The complaint alleged Republic had unilaterally increased compensation for pilots and new hires in violation of the Railway Labor Act and in turn undercut the union's bargaining position.[19] Republic disputed the allegations and filed a motion to dismiss later that month.[20] This case would drag on and eventually be dismissed with prejudice when the parties reached a new CBA in October of 2015. Though it was eventually dismissed the display of the bad blood between the two sides did more damage.

Republic hurt its reputation among pilots during this time period. Regardless of the business reasons behind the moves, Republic did many things during this period to frustrate the pilot community beyond the disastrous negotiations above. For example, Bedford cites the shortage of pilots as the company's major downfall, yet he furloughed the 400 pilots employed by Midwest shortly after they purchased the company.[21] Only a handful of pilots were retained by Republic, many sought employment at other airlines, some international, but others had to transition to driving trucks. Roughly 18 months after furloughing these pilots Republic discontinued a health care plan for retired Midwest pilots and their spouses and refused to resolve lingering contract issues, leading to another lawsuit in 2014.

Eventually Republic reached a tentative agreement with IBT in September of 2015 negotiating in front of the NMB.[22] The IBT presented, and the pilots ratified the new three-year agreement one month later, on October 27, 2015. Republic believes the agreement "respects the role of its pilots in its long-term success and puts its pilots at the forefront of the regional airline

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[18] Teamsters Local Union No. 357 v. Republic Airline Inc., et al., Civ. No. 15-ev-1066; Fox News Network, LLC, http://www.foxbusiness.com/markets/2015/07/14/in-rare-move-teamsters-union-sues-republic-airways-over-signing-bonuses-for-new.html (last visited Apr. 22, 2017).

[19] ECF No. 4.; Fox News Network, LLC, http://www.foxbusiness.com/markets/2015/07/14/in-rare-move-teamsters-union-sues-republic-airways-over-signing-bonuses-for-new.html (last visited Apr. 22, 2017).

[20] ECF No. 4.

[21] Indianapolis Business Journal, http://www.ibj.com/articles/26872-uncertain-pilot-labor-situation-creates-turbulence-at-republic (last visited Apr. 22, 2017).

[22] ECF No. 4.

industry." This may have been true, but it didn't resolve Republic's problems because the pilot shortage was, and continues to be, an industry wide issue.

*2. Pilot Shortage*

Although the events discussed above amplified the issues for Republic, the pilot shortage is felt by airlines worldwide.[23] In an article published by the Wall Street Journal, Dan Elwell, president of Elwell & Associates, an aviation consulting firm, explains the plight of the industry.

> Here's how the pilot ecosystem is supposed to work. At the top of the food chain sit the major carriers. Typically, they hire experienced pilots from the military and regional carriers. The regionals and the Pentagon, in turn, train inexperienced pilots looking to move up the ranks. But that base of the pyramid has been shrinking for decades. In 1980 there were 610,490 people in the U.S. with private, commercial or airline transport pilot certificates. By 2014 the number had withered to 432,138. In 1980, there were 557,312 student and private pilots; in 2014 there were about 240,000.

Congress further restricted the flow of incoming pilots when it enacted the Airline Safety and FAA Extension Act of 2010, which went into effect in 2013 and 2014.[24] The new law increased time and duty rest periods and increased the minimum flight hour requirements for new pilots from 250 to 1,500. These changes hurt Republic in two ways. First, there are even fewer people becoming pilots, worsening the trends described by Elwell above.[25] Elwell estimates that the new regulations increase costs by roughly $100,000 and adds several years to the process of becoming an airline pilot. That is a tough sell when you consider the average starting wages for regional airline pilots is $23,000. With the mandatory retirement age of 65 there needs to be a steady stream of pilots coming into the profession to replace those who leave, something that is not currently happening.[26] Second, it also increases the number of pilots Republic needs to operate its schedule. The new rest and duty periods increased the pilots needed by Republic by five to seven percent over its historic numbers.

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[23] Dow Jones & Company, Inc., https://www.wsj.com/articles/a-looming-pilot-shortage-means-a-bumpy-ride-for-airlines-1437522047?mg=id-wsj (last visited Apr. 22, 2017).

[24] *See* ECF No. 4.

[25] Dow Jones & Company, Inc., https://www.wsj.com/articles/a-looming-pilot-shortage-means-a-bumpy-ride-for-airlines-1437522047?mg=id-wsj (last visited Apr. 22, 2017).

[26] *See* ECF No. 4.

All this to say that Republic was in a tough situation with regards to its pilots. Its qualified pilots leave for the higher salaries and more extensive benefits available from mainline, low cost and cargo carriers. The shortage of qualified candidates prevents them from replacing those who leave.[27] And to top it off, the reputation they have developed, whether deserved or not, make them less attractive than similarly situated airlines.[28] They had to shut down 27 planes in 2014 alone due to lack of pilots,[29] and were no longer able to meet the service requirements of their codeshare agreements.[30] The significant cost of unproductive assets and unprofitable agreements became too much for Republic to sustain.

*3. Increased Costs and Inability to Perform Under the Codeshare Agreements.*

Republic's costs have risen significantly because of its pilot shortage. The new agreement they struck with the IBT saw a significant increase in pilot wages, especially early on in their

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[27] ECF No. 4.; Aerotime, https://www.aerotime.aero/en/civil/10742-republic-airways-pilot-shortage-is-the-cause-of-bankruptcy (Estimating that RAH is losing as many as 40 aviators per month while only adding 30) (last visited Apr. 22, 2017).

[28] *See* Indianapolis Business Journal, http://www.ibj.com/articles/33538 (describing a website published by a pilot's union during negotiations with the IBT that RAH claims led to pilots not calling back for interviews and dropped out of the application process) (last visited Apr. 22, 2017); The Motley Fool, https://www.fool.com/investing/general/2015/10/06/new-pilot-contract-could-save-republic-airways-but.aspx (stating that wages at regional competitor Skywest were raised to $30/hour for the first year and up to $41/hour in the second year compared to RAH's $22.95/hour for the first year rising to $30.88/hour in the second year, also stating that the constant union-management fighting at RAH is a turn-off for most pilots) (last visited Apr. 22, 2017).

[29] "New first officers will now start at $40/hour: up 74% from the previous contract, and 33% more than they would get at SkyWest. Second-year first officers will receive $41/hour: up 33% from the previous contract and at the top of the range for SkyWest's second-year first officers. The most senior pilots will also get raises, albeit more modest ones. Captain's pay for the E170 and E175 (which represent the vast majority of Republic's fleet) will top out at $110.85/hour after 20 years: up from $108.47 previously." Fox News Network, LLC, http://www.foxbusiness.com/markets/2015/07/14/in-rare-move-teamsters-union-sues-republic-airways-over-signing-bonuses-for-new.html (last visited Apr. 22, 2017).

[30] *See* ECF No. 4.

careers.[31] It is estimated that the cost of these changes alone could reach $35 million-$40million annually. A significant increase when you consider Republic's pretax income in 2014 (the year prior to the agreement) was a modest $120.2 million. The code share agreements do provide for annual increases in reimbursement costs but those are tied to the Consumer Price Index which, in recent years, has proven inadequate to cover skyrocketing operating costs.[32]

The pilot shortage also caused Republic to ground aircraft.[33] The aircraft become a drain on the company's cash, as well as prevent it from meeting its obligations under the codeshare agreements. Republic did its best to inform its Codeshare Partners of its situation and attempted to negotiate changes in terms, but new agreements did not seem likely in a reasonable timeframe.[34] Any hopes of resolving its contractual issues outside of bankruptcy were squashed by Delta when it sued Republic in October 2015 for breach of the companies' agreement. Republic denied the claim, citing force majeure based on the pilot shortage. Regardless, the pending litigation and potential significant judgment against Republic made any resolution outside bankruptcy highly unlikely.

*4. Stepping Outside Its Core Competencies.*

One of the key issues leading to Republic's filing that is not discussed in Bedford's declaration filed at the inception of its Chapter 11 case in support of its first day motions are the apparent mistakes management made. By partnering with some of the biggest names in the industry Republic had carved out a nice niche for itself as a regional carrier. Republic lost sight of who it was by buying up Frontier, and to a lesser extent Midwest. The move forced Republic to step outside of the regional carrier world and into the mainline industry. As a regional airline working through primarily codeshare agreements there is a significant portion of the business they

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[31] The Motley Fool, https://www.fool.com/investing/general/2015/10/06/new-pilot-contract-could-save-republic-airways-but.aspx (Apr. 22, 2017).

[32] ECF No. 4.

[33] *See* Fox News Network, LLC, http://www.foxbusiness.com/markets/2015/07/14/in-rare-move-teamsters-union-sues-republic-airways-over-signing-bonuses-for-new.html (Republic had grounded 27 aircraft the prior year due to pilot shortages) (last visited Apr. 22, 2017).

[34] ECF No. 4.

do not need to manage.[35] The Codeshare Partners control the revenue, pricing, and scheduling of the aircraft as well as all ticket issuance, ground support facilities, commuter slot rights, and airport facilities.[36] Republic found itself having to learn these aspects of the business in the face of stiff competition, in some instances with its Codeshare Partners.

Many in the industry questioned management's decision to acquire the airlines and how they managed the brand afterward.[37] Management delayed choosing the Frontier brand over Midwest, moved Frontier's headquarters to Indiana, underestimated the strain Frontier would put on its cash flows, and overestimated the synergies that would be available with its core business.[38] Republic experimented with different business models for Frontier and didn't see much success until bringing in former US Airways executive David Stiegel who adopted a low-cost approach in preparation for dumping the money losing venture.[39] Looking back on the period before hiring Stiegel, Boyd remarked: "Three years ago, it was like they were shooting in the dark. What they were doing at that point didn't make sense for anyone."[40] All the while they were doing damage to their core business in multiple ways.

Purchasing Frontier confused Wall Street and investors alike.[41] They were a regional airline that purchased a low-cost airline. This had not been done before. How big was the impact? The

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[35] Digital First Media, http://www.denverpost.com/2011/06/17/republic-airways-brace-for-financial-turbulence-brought-on-by-frontier-and-rising-fuel-prices/ (last visited Apr. 22, 2017).

[36] ECF No. 4.

[37] Digital First Media, http://www.denverpost.com/2011/06/17/republic-airways-brace-for-financial-turbulence-brought-on-by-frontier-and-rising-fuel-prices/ (last visited Apr. 22, 2017).

[38] Digital First Media, http://www.denverpost.com/2011/06/17/republic-airways-brace-for-financial-turbulence-brought-on-by-frontier-and-rising-fuel-prices/ (last visited Apr. 22, 2017); *See also*, AOL Inc., https://www.aol.com/article/2013/09/27/the-most-frustrating-airline-for-investors/20731935/ (last visited Apr. 22, 2017).

[39] Indiana Business Journal, http://www.ibj.com/articles/32509-republic-airlines-unit-frontier-wants-to-look-more-like-spirit (last visited Apr. 22, 2017).

[40] Colorado Springs Gazette, http://gazette.com/its-a-different-frontier-thats-coming-back-to-colorado-springs/article/1568876 (last visited Apr. 22, 2017).

[41] Indiana Business Journal, http://www.ibj.com/articles/32509-republic-airlines-unit-frontier-wants-to-look-more-like-spirit (last visited Apr. 22, 2017).

day Republic announced it would unload Frontier its stock jumped more than 60 percent. But purchasing Frontier wasn't the only bad part of the story for management. They also dropped the ball when unloading it. More than two years passed from the time Bedford announced Republic's plans to sell or spin-off Frontier until they successfully did so.[42] Along the way, they missed many promised deadlines, losing credibility.

Each of these factors pushed Republic along the path to bankruptcy. During this period, "pilot attrition doubled, recruiting efforts suffered severely, and Republic was forced to ground significant portions of its operating fleet due to lack of qualified pilots, generating losses in revenue, higher costs, diminished cash flows, and an inability to meet minimum flying levels under its fixed-fee agreements."[43] Bankruptcy under chapter 11 provided the time the company needed to restructure its agreements with its Codeshare Partners and key suppliers without draining company resources.

### *D. RAH at the Time of Filing.*

The issues outlined above necessitated Republic filing its petition for relief under Chapter 11 of the bankruptcy code. Management filed early with the intentions of avoiding any unnecessary drain on the company's financials. Even though there were signs of improvement and steps taken to remedy its issues, progress was not being made fast enough to prevent lasting damage to the company's financial health.

#### *1. Operations.*

Republic was the 10th largest U.S.-based airline in 2015, when measured by scheduled domestic and international enplanements, with 13,908,000 enplaned passengers, up 6.6 percent from 2014.[44] In total Republic carried 21,900,000[45] passengers an average of 479 miles per

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[42] AOL Inc., https://www.aol.com/article/2013/09/27/the-most-frustrating-airline-for-investors/20731935/ (last visited Apr. 22, 2017).

[43] ECF No. 4.

[44] United States Department of Transportation, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/bts18_16.pdf, (last visited Apr. 22, 2017).

[45] *See* ECF No. 4.; United States Department of Transportation, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/bts18_16.pdf, (roughly .26 percent of passengers in the airline industry in total) (last visited Apr. 22, 2017).

passenger.[46] The company was slightly less efficient than the industry average of 82.7, with load factor of 79.2.[47] It had operating revenues of $1,343,900,000, operating expenses of $1,259,200,000 and a net operating loss of $27,117,000.[48] As of January 31, 2016, Republic was providing over 1,000 flights daily under various operating designations.

*2. Summary of Capital Structure at the Time of Filing.*

As of January 31, 2016, Republic had assets of $3,561,000,000 and liabilities of $2,971,000,000 with unrestricted cash and short-term investments of $132,300,000 and stockholders' equity of $590,000,000. Republic's debt and significant operating leases are summarized in Table 1 below.

| Table 1 | | | |
|---|---|---|---|
| Credit Facilities | | | |
| **Agreement Type/ Amounts** | **Lender** | **Guarantors** | **Collateral** |
| Revolving Credit Facility and Letters of Credit<br>- $60 million aggregate revolving credit facility<br>  ○ $60 million outstanding<br>- $10 million in letters of credit.<br>  ○ $8.8 million issues and outstanding | - DB AG New York Branch: as administrative agent, revolving lender, and revolving facility issuing lender.<br>- Key Bank National Association: revolving lender<br>- Morgan Stanley Bank, N.A.: revolving lender | - Republic Airways Holdings<br>- Shuttle America<br>- Republic Services | Certain spare parts and spare engines. |
| Revolving Credit Facility.<br>- $25 million in revolving credit.<br>  ○ $23 million outstanding | - Citibank, N.A.: administrative agent and lender<br>- Other lenders party thereto. | - Republic Airways Holdings<br>- Republic Services<br>- Shuttle America | Certain aircraft and engines. |
| Financed Aircraft and Equipment -Related Obligations | | | |
| **Obligation** | | **Collateral** | |
| Approximately $2.318 billion in principal amount of notes amortized through 2027, bearing interest at fixed rates ranging from 2.04% to 8.49%. | | Secured by aircraft | |

[46] *See* ECF No. 4.

[47] Load factor is a measure of an airlines efficiency. It is measured in demand (calculated as Revenue Passenger Miles) divided by capacity (calculated as Available Seat-Miles). United States Department of Transportation, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/bts18_16.pdf, (last visited Apr. 22, 2017).

[48] ECF No. 4.

| | |
|---|---|
| Approximately $56.7 million in principal amount of notes amortized through 2022, bearing interest at fixed rates ranging from 5.13% to 8.38%. | Secured by spare parts and equipment |
| Approximately $1.7 million in principal amount of notes amortized through 2017, bearing interest at variable rates based on LIBOR plus a margin ranging from 3.18% to 3.66%. | Secure by spare parts and equipment |
| Republic's financed aircraft obligations at the time of filing, including the foregoing commitments, aggregate approximately $3.461 billion, payable (assuming delivery dates as projected) as follows:<br>- $1.211 billion in 2016,<br>- $1.471 billion in 2017, and<br>- $778.4 million in 2018 | |

| Other Obligations | | |
|---|---|---|
| **Agreement Type/ Amounts** | **Lender** | **Guarantors** |
| Consignment Agreement<br>- Under this agreement DASI advances payment for surplus aircraft and parts and when the parts sell the advance is reduced.<br>o RAH outstanding balance of $1.5 million<br>o DASI has approximately $8 million of consignment parts. | Diversified Aero Services Inc. ("DASI") | RAH |
| The Milwaukee Bonds<br>- $15.3 million and $1.1 million annually.<br>o These bonds were issued to fund construction of two hangars and maintenance facilities at General Mitchell International Airport in Milwaukee for use by Midwest and later by Frontier Airlines. They were excluded from the sale of Frontier in 2013 and are secured by letters of credit issued by U.S. Bank National Association and Milwaukee County. | Milwaukee, Wisconsin | Midwest Airlines and Skyway Airlines. |
| Unsecured Trade Payables<br>- $25.7 million as of February 16, 2016. | | |

| Operating Leases (not on the balance sheet) | |
|---|---|
| **Type of Operating Lease** | **Estimated Minimum Rental Payments Due Next Year** |
| Aircraft operating leases expiring between 2016 and 2023 | $97.3 million |
| Other operating leases for engines, terminal space, operating facilities, office space, and office equipment expiring between 2016 and 2033 | $15.9 million |

*3. Initial Restructuring Plan*

Republic went into bankruptcy with significant operational issues that needed to be addressed. Its fleet was filled with out of favor and expensive to maintain aircraft, its primary revenue stream, the codeshare agreements, were not profitable and it did not have the number of pilots needed to fulfill its contractual obligations. These were the issues on Bryan Bedford's mind

when he laid out the company's plan to restructure through the bankruptcy process. That plan included:

- Obtaining modified agreements from Codeshare Partners to reimburse the increased costs from the new collective bargaining agreement with its pilots and allow an orderly restoration of service.

- Agreeing to an early return/settlement of claims relating to out of favor aircraft (Q400 and ERJ-145).

- Streamlining operations by operating a single aircraft type (E170/175) and under a single operating certificate.

- Securing additional liquidity to fund future operations and growth.

**First-Day Motions**

Bryan Bedford asserted that "the relief requested in the First-Day Pleadings is necessary to enable the Debtors to operate with minimal disruption to Republic, the Codeshare Partners and the traveling public during the pendency of their chapter 11 cases…."[49] Each of the First-Day Pleadings served to carry out this objective by either aiding in the administration of the bankruptcy proceedings, or by helping the company continue to operate through the bankruptcy process.

***A. Motions re Bankruptcy Administration and Notice***

*1. Motion for Joint Administration of Chapter 11 Cases*

On February 25, 2016, The Debtors[50] filed Chapter 11 voluntary petitions for bankruptcy. While each subsidiary filed separately,[51] Republic filed a Motion for Joint Administration pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure ("FRBP") on the same day

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[49] ECF No. 4.

[50] Corporate Ownership Statement, ECF No. 2.

[51] Each subsidiary began administration under its own docket, as follows: Republic Airways Services, Inc. (Docket No. 16-10426-shl); Shuttle America Corporation (Docket No. 16-10427-shl); Republic Airline, Inc. (Docket No. 16-10428-shl); Republic Airways Holdings, Inc. (Docket No. 16-10429-shl); Midwest Air Group, Inc. (Docket No. 16-10430-shl); Midwest Airlines, Inc. (Docket No. 16-10431-shl); and Skyway Airlines, Inc. (Docket No. 16-10432-shl).

that each subsidiary filed its petition.[52] Following the initial hearing on Feb. 26, 2016, Judge Lane granted the motion on Feb. 29, 2016, and ordered the consolidation of each of the cases into RAH's docket (Docket No. 16-10429).[53] This was in the best interests of Debtors, their estates, the creditors, and all interested parties.

*2. Motion to Extend Deadline to File Schedules or Provide Required Information*

On Feb. 25, 2016, Debtors filed a motion to (1) Extend the time to file schedules of assets and liabilities, schedules of executory contracts and unexpired leases, and statements of financial affairs, (2) grant additional time to file its 2015.3 Report, (3) waive the requirement to file with the court a list of creditors, and (4) waive the requirement to file an equity list and modify the provision of notice to equity security holders.[54]

The bankruptcy rules place heavy disclosure and notice requirements on the Debtor. For example, Section 521 of the Code[55] requires debtors to file a list of creditors, a schedule of assets and liabilities, and a statement of the debtor's financial affairs. Section 342(a) requires the debtor to provide notice of the bankruptcy proceeding to any holder of a community claim.[56] Rule 1007 of the FRBP[57] require corporate debtors to file a corporate ownership statement with the petition or 14 days thereafter,[58] that "identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests,"[59] or else state that there are no such entities. Rule 2015.3 requires the Trustee or Debtor in Possession ("DIP") to file a report of the value, operations, and profitability of each non-debtor, non-public entity in which the debtor's estate holds a substantial or controlling interest.[60] Rule 2002 governs

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52 Motion for Joint Administration, ECF No. 3.

53 Order Granting Motion for Joint Administration, ECF No. 39.

54 Motion to Extend Deadline to File Schedules or Provide Required Information, ECF No. 5.

55 11 U.S.C. § 521.

56 11 U.S.C. § 342.

57 FED. R. BANKR. P. 1007(a).

58 FED. R. BANKR. P. 1007(c).

59 FED. R. BANKR. P. 7007.1.

60 FED. R. BANKR. P. 2015.3 (referred to as "2015.3 Reports.").

notice to creditors.[61] Finally, Rule 1007(c) authorizes the bankruptcy court to grant extensions of time for filing required schedules and statements if cause is shown and sufficient notice is provided to relevant parties.[62]

Despite all these requirements, section 105(a) of the bankruptcy code[63] grants the bankruptcy court broad power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Thus, Republic appealed to the bankruptcy court's power to grant an extension of time and a waiver of certain requirements found in the code. Because Republic's stated reasons for seeking this request were not unreasonable,[64] following the Feb. 26, 2016 hearing, Judge Lane signed the proposed order on Feb. 29, 2016.[65] Republic would later request a further extension,[66] which the court would grant following no objections.[67] The remaining required schedules and statements of financial affairs that were not waived were filed on May 26, 2016.[68]

*3. Motion to Establish and Implement Exclusive and Global Procedures for Treatment of Reclamation Claims*[69]

The UCC provides reclamation rights for sellers who discover that a buyer has received goods on credit while insolvent.[70] "Reclamation refers to the right of a seller of goods on credit to

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61 FED. R. BANKR. P. 2002.

62 FED. R. BANKR. P. 1007(C).

63 11 U.S.C. § 105(a) (commonly referred to as the "all writs" provision).

64 For an explanation of Debtors' reasoning behind this motion and the other First-Day Motions, see ECF No. 4.

65 Order Signed, ECF No. 49.

66 Motion to Extend Time, ECF No. 271.

67 Order Signed, ECF No. 330.

68 These were filed for each individual debtor under the joint docket, ECF Nos. 595 (RAH), 596 (RAH), 598 (RAS), 599 (RAS), 600 (Republic Airline), 601 (Republic Airline), 602 (Shuttle), 603 (Shuttle), 604 (MAG), 605 (MAG), 606 (Midwest), 607 (Midwest), 608 (Skyway), 609 (Skyway).

69 Debtors' Motion to Approve, ECF No. 15.

70 U.C.C. § 2-702(b).

obtain a return of those goods under certain circumstances if the buyer is insolvent."[71] While a bankruptcy trustee would normally have power to avoid certain of the debtor's transactions made shortly before commencing bankruptcy proceedings, section 346(c) limits the trustee's avoiding powers:

> [T]he rights and powers of the trustee . . . are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods--
>
> (A) not later than 45 days after the date of receipt of such goods by the debtor; or
>
> (B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.[72]

The code goes on to provide a vague process for sellers who wish to assert their reclamation right. In large bankruptcy cases, however, the debtor will typically ask the court to implement a universal reclamation procedure to streamline the process.[73]

The reclamation claims are limited to the sale of *goods* in the ordinary course of business. "Goods" are defined in section 2-105(1) of the UCC as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." Courts generally use this definition.[74] Therefore, a reclamation claim seeking to reclaim services, rather than goods, is invalid.

Shortly before filing for bankruptcy, Debtors purchased on credit a variety of aircraft parts, consumable materials, and other goods used in the ordinary course of its operation.[75] Thus,

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[71] MICHAEL L BERNSTEIN & GEORGE W KUNEY, BANKRUPTCY IN PRACTICE, 399 (5 ed. 2015).

[72] 11 U.S.C. § 346(c).

[73] Bernstein & Kuney at 400.

[74] Debtors' Reclamation Notice, ECF No. 721 (citing *In re GIC Gov't Sec.*, 64 B.R. 161, 162 (Bankr. M.D. Fla. 1986)).

[75] ECF No. 4.

Debtors proposed reclamation procedures in order to "avoid piecemeal litigation that would interfere with Republic's efforts to preserve enterprise value and successfully reorganize." Debtors' proposed procedures follow the statutory time limits and provide that Republic will provide the court with Reclamation Notice of all the reclamation claims that Republic determines to be valid. The claim will be deemed valid if the court fails to timely object to it.

Judge Lane signed the proposed order on February 29, 2016.[76] Pursuant to this Order, Republic filed Reclamation Notice with the court on June 28, 2016,[77] for which objections would be due by July 18, and a hearing would be held on July 20. In Exhibit A of that document, Republic reported that 16 reclamation claims had been submitted for a total amount claimed of $7,555,094.63. Of that total, Republic only deemed valid $1,317,642.47. Republic deemed the remainder invalid for many reasons. Some of the claimants improperly included amounts that should have been filed as section 503(b)(9) claims.[78] Others were improper reclamation claims for services provided rather than goods. Some claims were not timely filed, and some were for goods received outside of the reclamation period. Finally, some of the claims could not be verified by Republic or lacked supporting information.

Ultimately, seven of the reclamation claimants objected to Republic's determination of claims.[79] Because of the close ties between reclamation claims and section 503(b)(9) claims, Republic and the Court addressed Republic's notice and objections together, as further discussed in Section (4) below.

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[76] This Signed Order contains the detailed reclamation procedures. Order Establishing and Implementing Exclusive and Global Procedures for Treatment of Reclamation Claims, ECF No. 50..

[77] ECF No. 721.

[78] *See* Section (A)(4) below.

[79] *See* Response of Meggit Aircraft Braking Systems Inc., ECF No. 783; Objection/Response of C&D Zodiac, Inc., ECF No. 788; Objection/Response of Zodiac Seats California LLC Inc., ECF No. 789; and Preliminary Notice of Objection by Embraer Aircraft Maintenance Services, Inc., Embraer S.A., Embraer Asia Pacific PTE Ltd., and Embraer Aviation International, ECF No. 790.

*4. Motion (i) Establishing Deadline and Approving Procedures for the Assertion, Resolution, and Satisfaction of Claims Asserted Pursuant to 11 U.S.C. § 503(b)(9) and (ii) Prohibiting Vendors from Pursuing Such Claims Outside the Procedures*[80]

Similar to the reclamation claims discussed above, an entity that sells goods to the debtor in the ordinary course of business within 20 days before the date of commencement of a bankruptcy case may recover an administrative claim from the debtor for the value of the goods sold.[81] These are referred to as "503(b)(9) claims." Like reclamation claims, 503(b)(9) claims are also limited to the sale of *goods*. While sellers holding 503(b)(9) claims do not need to make a reclamation claim (because they would likely rather be paid in full for the goods sold than get the goods back), such administrative repayments may be deferred until the effective date of the plan of reorganization.[82] Thus, it may be worth it for them to seek to reclaim the goods sold – or assert a reclamation claim unless immediate payment is forthcoming -- rather than wait for approval and implementation of a plan of reorganization.

To avoid uncertainty among vendors over the procedures and methods for properly asserting 503(b)(9) claims, Republic filed a motion to establish procedures governing these claims. According to the CEO, such uncertainty "could result in numerous inquiries and demands on Republic's employees and professionals or the initiation of piecemeal litigation, both of which would divert the attention of Republic and its professionals from the more pressing task of administering the chapter 11 cases."[83]

The proposed procedures would require a party asserting a 503(b)(9) claim to submit a proof of claim within 75 days of the commencement of the bankruptcy case. In other words, the claim was to have been received by May 10, 2016.[84] Republic then would have 75 days after the claim filing deadline to object to the claim. If Republic were to object, the claimant would then have 30 days to reply. If the claim was allowed, it would be satisfied as set forth in the chapter 11 plan of reorganization confirmed by the Court, or as set forth in an agreement between Republic

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[80] Debtors' Motion to Approve, ECF Nos. 16 and 30 (duplicates).

[81] 11 U.S.C. § 503(b)(9).

[82] Bernstein & Kuney at 400 (referencing *In re Global Home Products LLC*, 2006 WL 3791955 (Bankr. D. Del. Dec. 21, 2006)).

[83] ECF No. 4.

[84] ECF No. 30.

and the holder of the claim, or as otherwise ordered by the Court. No one objected to the proposed order, and Judge Lane signed it on Feb. 29, 2016.

Republic filed its report of claims received and objections to those claims on July 25, 2016.[85] It received 224 503(b)(9) claims, the majority of which it found invalid for at least one of the following reasons: (1) the claim was for the sale of services rather than goods; (2) the claims were delivered on a date outside the claim period; (3) the goods were never delivered to the Debtors because the goods were returned to the vendor; (4) the submitted claims contained insufficient information for the Debtors to evaluate them; (5) the claims were duplicative; (6) the claims were already satisfied or partially paid by the Debtors. Exhibit A of that document lists the individual claim, whether it was valid or invalid, and why. This document was given as notice to each of the claimant sellers, whose responses were then due by August 24, 2016.

Seven creditors objected to Republic's 503(b)(9) report. Some asserted that Republic had failed to meet its burden of proof by simply stating that a claim was a duplicate or was supported by "insufficient documentation."[86] These parties either (i) asserted that they had submitted sufficient documentation when they originally filed their claims, or (ii) submitted additional documentation as proof that their claims were legitimate. Other parties relied on equitable arguments, asserting that because Republic denied their reclamation claims because they were misplaced 503(b)(9) claims that would be allowed instead, Republic should be equitably estopped from then denying that claimant's 503(b)(9) claims in their entirety.[87] Republic would eventually enter into settlement stipulations with several of these parties either allowing a portion of their claims under 503(b)(9), reclassifying all or a portion of the claims to general unsecured claims, or denying the claims altogether.

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[85] Notice of Filing of Debtors' Report and Objections to Claims Asserted Pursuant to 11 U.S.C. § 503(b)(9), ECF No. 829.

[86] *See, e.g.* Pratt & Whitney's Response to Debtors Report and Objection to Claims, ECF No. 1228. Embraer objected on the same grounds (ECF No. 927).

[87] *See, e.g.*, Meggit Aircraft Braking Systems Corporation's Response to Debtors' Objection to Claims, ECF No. 924.

*5. Motion Enforcing and Restating Automatic Stay and Ipso Facto Provisions*[88]

Section 362 of the Code imposes the automatic stay, immediately effective upon the debtor's filing of the bankruptcy petition.[89] The automatic stay protects the debtor by preventing creditors from pre-petition and post-petition judicial actions to recover the debtor's property, enforce any lien, or offset any debt owing to the debtor. Section 365(e)(1) provides further protection to the debtor by invalidating *ipso facto* provisions in executory contracts with the debtor that would otherwise trigger rights of the non-debtor or obligations of the debtor in the event of the debtor's insolvency or bankruptcy.[90]

These protections are statutory in nature and are not dependent on a court order. The proposed order that the debtor sought here is not asking anything extraordinary of the court; rather it merely asks the court to issue an order embodying and restating what is already provided by law. The order will be a means of enforcing the law, especially to those international creditors that may be unfamiliar with bankruptcy and reorganizations. Republic states its reasoning for the proposed order as follows:

> The granting of the relief requested will help ensure that (i) the nondebtor parties to unexpired leases and executory contracts with Republic will continue to perform and will not unilaterally terminate its contracts and (ii) creditors do not seize Republic's assets, or take any other action in violation of the automatic stay. Republic submits that the relief requested herein will facilitate a smooth and orderly transition into chapter 11 and minimize the disruption of Republic's business affairs.[91]

With no objections, the court granted this motion on Feb. 29, 2016.[92] However, the Debtors also sought relief from the automatic stay in other first-day motions to pay certain pre-petition compensation claims and settlement obligations. The court would ultimately grant these requests as well.

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88 Motion to Impose Automatic Stay, ECF No. 17.

89 11 U.S.C. § 362(a).

90 Bernstein and Kuney at 211.

91 ECF No. 17.

92 Order Enforcing and Restating Automatic Stay and Ipso Facto Provisions, ECF No. 51.

*6. Motion Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Claims Against and Interests in the Debtors*[93]

A tax benefit, including a loss that decreases one's tax liability, is property of the estate that qualifies for protection under the automatic stay.[94] One such tax benefit is a net operating loss carryover ("NOL").[95] Section 172 of the Internal Revenue Code allows corporations to use NOLs to reduce the corporation's tax liability for the two years prior to the taxable year of the loss or up to 20 years after the taxable year of the loss.[96] However, when ownership of the corporation changes (such as when a corporation merges into a different corporation), the successor corporation is limited in the amount of NOLs it can use from the target/loss corporation.[97]

Section 382(l)(5) contains an exception applicable to entities emerging from bankruptcy. It provides that the NOL limitation in section 382(a) does not apply to an ownership change if (i) the carryover loss is from a corporation that was in chapter 11 bankruptcy immediately before the ownership change, and (ii) the shareholders and creditors of the old corporation own 50 percent of the stock (i.e. has 50 percent voting power and 50 percent of the total value of the stock) of the new corporation. In determining ownership, "Shareholders owning less than a 5 percent interest during the testing period are aggregated and treated as one shareholder for determining an owner shift. Thus, transfers between shareholders who own less than 5 percent do not influence the percentage-point ownership change computation."[98]

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[93] Motion for Orders Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Claims Against and Interests in the Debtors, ECF No. 18.

[94] 11 U.S.C. § 362(a)(3).

[95] 26 U.S.C. § 1398(g).

[96] 26 U.S.C. § 172(a), (b).

[97] 26 U.S.C. § 382(a). *See* William H. Hoffman, et al, CORPORATIONS: REORGANIZATIONS, 2006 WL 4560432 (2007), which provides, "Due to the beneficial nature of NOLs, the Code limits the NOL amount that can be utilized each year by the successor corporation in § 382. The § 382 limitation applies when there is an ownership change for the target's (loss corporation's) common shareholders of more than 50 percentage points (by value)."

[98] William H. Hoffman, et al, CORPORATIONS: REORGANIZATIONS, 2006 WL 4560432 (2007).

Republic had estimated consolidated NOLs of $1.4 billion[99] which, if used to offset Republic's realized income, would save Republic hundreds of millions of dollars in tax liability. This prompted Republic to protect itself against any ownership changes that would trigger the limitation of section 382(a), which would likely result in a substantial portion of Republic's NOLs expiring unused. To prevent this, Republic asked the court to restrict transfers of stock that would cause an ownership shift, or to require shareholders who have increased their ownership interests to "sell-down" to reestablish the status quo. The proposed procedures require any person who has or who acquires a substantial ownership interest in Republic,[100] or any person who wishes to no longer be a substantial owner, to give notice to Republic and the court of its ownership interest and intent to buy or sell.

The court signed an interim trading order on March 4, 2016, in which it adopted Republic's proposed order.[101] Pursuant to this order, four entities submitted the required notice of their intent to obtain tax ownership of stock[102] before the final order approving the revised procedures[103] was signed on March 23, 2016.[104] Republic proposed an amendment to the final order on July 13, 2016.[105] The proposed amendment tweaked the procedures to ensure that those substantial owners of Republic's stock remained as qualified shareholders in order to maintain the exception provided for in section 382(l)(5) of the Tax Code.[106] It also increased the threshold amount of the trade for providing notice to Republic and the court. No one objected to the amended order, and Judge Lane signed it on July 26, 2016.[107]

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[99] ECF No. 18.

[100] Specifically, 4.75 percent (at least 2,420,048 shares of Republic's stock).

[101] Interim Trading Order, ECF No. 88.

[102] Notice of Intent to Purchase, ECF Nos. 84 (Axar), 85 (GLG), 98 (Trishield Capital Management LLC), and 99 (SOLA Ltd).

[103] This revised proposed order contained no substantive revisions from the proposed interim order. Notice of Revised Proposed Order, ECF No. 177.

[104] Final Trading Order, ECF No. 206.

[105] Notice of Presentment of Proposed Amended Final Trading Order, ECF No. 767.

[106] *See* Debtors' Statement Regarding Proposed Amended Final Trading Order, ECF No. 768.

[107] Amended Final Trading Order, ECF No. 835.

*7. Motion to Appoint Prime Clerk LLC as Claims and Noticing Agent*[108]

Title 28, Chapter 6 of the U.S. Code governs the judiciary and judicial procedure of bankruptcy judges. Section 156(c) of that Chapter comprises the "Claims Agent Protocol," which lists out the requirements for employing claims and noticing agents.[109] Specifically, the Claims Agent Protocol permits bankruptcy courts to utilize services for the provision of notices, dockets, calendars, and other administrative information to parties where the costs of those services are paid for out of the bankruptcy estate. Rule 5075-1(b) of the Southern District of New York's Local Bankruptcy Rules ("Local Bankruptcy Rule") requires that when the number of aggregate creditors and equity security holders is 250 or more, "the estate shall retain, subject to approval of the Court, a claims and noticing agent in accordance with the [Claims Agent Protocol] under 28 U.S.C. §156(c)."[110]

Republic estimated that there would be over 10,000 creditors and equity security holders, which would requir the appointment of a claims and noticing agent. Republic actually entered into an agreement with Prime Clerk on September 3, 2015[111] (long before this motion was filed) and requested that the Court appoint Prime Clerk as the claims and noticing agent *nunc pro tunc* to the Commencement Date. "*Nunc pro tunc*" relief makes court approval retroactive to the requested date of engagement. This is important because without it, any payments to Prime Clerk within the 90 days prior to the Commencement Date could be avoided by the trustee/DIP,[112] and any claims by Prime Clerk against the Debtors would be unsecured. By obtaining the Court's approval, however, Prime Clerk could retain payments received before the Commencement Date, and could be paid throughout the course of the bankruptcy from the estate's funds. Further, Republic sought authorization to employ Prime Clerk as an administrative advisor pursuant to 11 U.S.C. §327(a) for duties performed outside the scope of 28 U.S.C. §156(c). This authorization would protect Prime Clerk when it would later provide these other services by allowing it to continue to be paid throughout the bankruptcy proceeding following court approval.

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[108] Motion to Appoint Prime Clerk LLC as Claims and Noticing Agent, ECF No. 19.

[109] 28 U.S.C. § 156(c).

[110] S.D.N.Y. BANKR. R. 5075(b).

[111] ECF No. 19.

[112] 11 U.S.C. §547(b).

The Court signed the proposed order on February 20, 2016, approving Prime Clerk as claims and noticing agent *nunc pro tunc* to the Commencement Date.[113] Prime Clerk appears to have diligently fulfilled the duties listed in Republic's motion.[114] An orderly record of the case can be found on its website,[115] where Prime Clerk provides a helpful overview of the docket, relevant parties, and important phases of the bankruptcy proceedings.

*8. Case Management Procedures*[116]

Rules 9007 and 2002(m) give the bankruptcy court "general authority to regulate the manner in which notices required under the FRBP are provided."[117] Rule 1015(c) further provides that when cases are being jointly administered, the Court may enter orders to avoid unnecessary costs and delay.[118] Pursuant to this authority, Republic proposed an order to approve and implement notice and case management procedures (collectively, "Case Management Procedures") to ensure the efficient and economical administration of the case.

Republic proposes procedures that it believes "will facilitate service of Documents that will be less burdensome and costly than serving such pleadings on every potentially interested party, which, in turn, will maximize the efficiency and orderly administration of these chapter 11 cases, while at the same time ensuring that appropriate notice is provided. . . ."[119] The proposed procedures will do this by, most importantly, (1) providing for omnibus hearings to consider motions, pleadings, applications, objections, and responses (rather than each motion having its own timeline), and (2) allowing for electronic notice through the Court's electronic filing system. Republic promises to provide the Case Management Procedures to those parties on the Master Service List (as defined in the Case Management Procedures), to publish the procedures on

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113 Order Granting Motion, *In re* Republic Airways Holdings Inc., et al, No. 1:16-bk-10429 (Bankr. S.D.N.Y. Feb. 29, 2016), ECF No. 40.

114 ECF No. 19.

115 Prime Clerk, https://cases.primeclerk.com/RJET/Home-Index (last visited 4/25/2017).

116 Debtors' Motion for Entry of Order Implementing Certain Notice and Case Management Procedures, ECF No. 20.

117 Referencing FED. R. BANKR. P. 9007 & 2002(m)).

118 FED. R. BANKR. P. 1015(C).

119 ECF No. 20.

Republic's restructuring website, and to make them available on request to Prime Clerk, its proposed noticing and claims agent.

Pursuant to the hearing on February 26th, Judge Lane signed the proposed order on March 2, 2016.[120] The order authorized Prime Clerk to establish a case website where key dates and information about the case would be posted. It also authorized the electronic filing of case documents, required a "Notice of Hearing" containing the hearing date and objection deadline to be submitted with all pleadings; provided instructions for those wishing to receive notice (may do so by filing a Notice of Appearance); limited the length of supporting memoranda; authorized the scheduling of omnibus hearings to hear pleadings, such that certain types of motions would be heard at the first scheduled omnibus hearing after a specified period that depends on the type of motion; and establishing procedures for hearings, evidence and discovery, and sealing.

*9. Motion for Authorization to Enter into Agreements under §1110 of the Code*[121]

Section 1110 of the Code addresses the rights of aircraft lessors and lenders, as well as a DIP's or trustee's rights to cure defaults under agreements with aircraft lessors and lenders. Specifically, section 1110(a) provides protection for secured parties with security interests in "an aircraft, aircraft engine, propeller, appliance, or spare part ("Aircraft Equipment") that is subject to a security interest granted by, leased to, or conditionally sold to a debtor. . . ."[122] The secured party protection is provided in section 1110(a)(1), which states:

> [T]he right of a secured party with a security interest in [Aircraft Equipment], or of a lessor or conditional vendor of such equipment, to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract ("Aircraft Agreements"), and to enforce any of its other rights or remedies, under such [Aircraft Agreements] to sell, lease, or otherwise retain or dispose of such equipment, *is not limited or otherwise affected by any other provision of this title or by any power of the court*."[123]

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[120] Order Signed, ECF No. 70.

[121] Debtors' Motion to (i) Enter into Agreements Under 11 U.S.C. § 1110(a), (ii) Enter into Stipulations to Extend the Time to Comply with 11 U.S.C. § 1110, and (ii) File Redacted Section 1110 Election Notices and Section 1110(b) Stipulations, ECF No. 23.

[122] 11 U.S.C. § 1110(a)(1), (3). § 1110(a)(1) provides the protection for parties with a security interest in equipment described in (a)(3), which is quoted above.

[123] 11 U.S.C. § 1110(a)(1) (emphasis added).

In other words, secured parties with security interests in aircraft agreements ("Aircraft Parties") are not subject to the protections of the automatic stay.[124]

The debtor's automatic stay protections are reinstated, however, if the debtor complies with section 1110(a)(2). According to this section, the debtor will again enjoy automatic stay protection with regards to Aircraft Agreements if (1) within 60 days of the Commencement Date, the DIP or trustee, "subject to the approval of the court, agrees to perform all obligations of the debtor under such [Aircraft Agreement],"[125] and (2) the debtor cures any default under the agreement within the stated time period.[126] Defaults occurring before the Commencement Date must be cured within 60 days of the Commencement Date unless the parties agree otherwise. Defaults occurring after the Commencement Date but within the first 60 days of the bankruptcy proceedings may be cured before the later of (i) 30 days after the date of default, or (ii) 60 days after the Commencement Date. The strict time periods of section 1110(a)(2) may be extended by an agreement between the debtor and the relevant Aircraft Parties, subject to approval of the court.[127]

While a debtor does not need the consent of the Aircraft Party to agree to perform the Aircraft Agreement obligations or to cure defaults under the Aircraft Agreement, the debtor does need the court's approval to do so. Extending the time period to cure defaults, however, requires both court approval and an agreement with the Aircraft Party.

As of the Commencement Date, Republic had 230 aircraft and a large amount of Aircraft Equipment in its operating fleet, virtually all of which were subject to Aircraft Agreements.[128] Recall that a central part of Republic's plan of reorganization involves "divesting itself of burdensome, underutilized aircraft and equipment, and simplifying its operational fleet by transitioning to a single, larger regional jet fleet. . . ."[129] Due to the size of Republic's fleet, Republic needed more time to analyze its aircraft agreements to determine which ones it would need to reject to effectively implement its plan of restructure. In taking this extra time, it was

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[124] Automatic stay protections are found in 11 U.S.C. § 362.

[125] 11 U.S.C. § 1110(a)(2)(A).

[126] 11 U.S.C. § 1110(a)(2)(B)

[127] 11 U.S.C. § 1110(b).

[128] ECF No. 23.

[129] ECF No. 4.

crucial that Republic preserve its automatic stay protection.[130] Otherwise, the Aircraft Parties could have sought repossession of the Aircraft Equipment, and section 1110(c) would require that Republic surrender it immediately. This could have resulted in Republic losing Aircraft Equipment necessary to its eventual single, larger regional jet fleet.

Republic sought court approval to (i) enter into agreements under section 1110 to perform its respective obligations under Aircraft Agreements; (ii) cure defaults under those agreements; and (iii) enter into stipulations with Aircraft Parties to extend the 60-day period for reaffirming its contractual obligations and curing defaults. By obtaining the court's required approval and acting accordingly, Republic would retain automatic stay protection with respect to Aircraft Equipment subject to Aircraft Agreements. The motion also included a request for approval of procedures to implement these orders. If Republic ultimately determined that it should perform under an Aircraft Agreement relating to specific Aircraft Equipment, it would file with the Court a Notice of Election Pursuant to Section 1110(a) ("1110 Election Notice") and serve relevant notice. If no objection was made, and if the court did not order otherwise, then upon the filing of the 1110 Election Notice and the timely payment of the cure amounts, the defaults should be deemed cured, the 1110 Election Notice effective, and (if Republic and the Aircraft Parties agree) the time period should be deemed to have been extended.

Republic also sought authority to enter into stipulations under section 1110(b) ("1110(b) Stipulations") with Aircraft Parties to extend the time for making an 1110 Election. This additional time was needed so that Republic could retain its Aircraft Equipment while renegotiating Aircraft Agreements to be more closely aligned with current market conditions.

Neither Republic's reaffirmation of its contractual duties nor its 1110 Election Notice could be deemed to constitute an assumption of an executory contract under section 365 of the Bankruptcy Code. Just because a debtor reaffirms its duties and cures defaults in order to retain automatic stay protection does not mean it sacrifices its right to ultimately reject the executory contract. In its motion, Republic quoted the Congressional Record and an 11th Circuit case to support its authority to make an 1110 Election and later reject a contract.[131] Indeed, preserving the rejection right was necessary to carrying out Republic's ultimate plan of reorganization—it just needed protection while it took time to figure out which contracts to accept and which to reject.

The documents that Republic would file related to this motion would contain vast amounts of confidential and commercially sensitive information that, if open to the public, would be used

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130 ECF No. 23.

131 Quoting 124 Cong. Rec. H11, 102-03 (daily ed. Sept. 28, 1978) and GATX Leasing Corp. v. Airlift Int'l Inc., 761 F.2d 1503, 1508 (11th Cir. 1985).

by Republic's competitors and the Aircraft Parties to improve their own position to the Republic's detriment. To prevent this, Republic also sought a protective order from the Court allowing Republic to redact confidential commercial information before making sensitive documents available to third parties. Section 107(b) of the Code authorizes a court to protect a party's trade secrets, confidential research, and development or commercial information. The court is required to issue the protective order if the party demonstrates that the information is "commercial" and "confidential."[132] Here, the Court later found that Republic had met this burden.

After the March 22 hearing, the motion was granted and the order signed by Judge Lane on March 23, 2016.[133] Pursuant to this order, Republic would make 1110 Elections and 1110(b) Stipulations throughout the duration of the case, the earliest being filed on April 22, 2016,[134] with the latest being filed on October 10, 2016.[135] All of these documents, as well as many other documents throughout the bankruptcy proceedings, would be redacted to protect Republic's and others' sensitive commercial information.

*10. Motions Involving Employment for Professional Services*

A chapter 11 reorganization requires services of several professionals and ultimately costs a lot of money. Section 327(a) of the bankruptcy code permits debtors to employ professionals for administration of the bankruptcy process. It states:

> [T]he trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons,[136] to represent or assist the trustee in carrying out the trustee's duties under this title.[137]

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[132] Referencing *Video Software Dealers Ass'n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994).

[133] Section 1110 Order Signed, ECF No. 212.

[134] Notice of Presentment of Stipulation and Order Approving Section 1110(b) Extension, ECF No. 415.

[135] Notice of Presentment of Stipulation and Order Approving Section 1110(b) Extension, ECF No. 1079.

[136] "Disinterested person" is defined in 11 U.S.C. § 101(14) and modified by § 1107(b).

[137] 11 U.S.C. § 327 (entitled "Employment of Professional Persons").

Section 1103 of the bankruptcy code permits committees to employ professionals to perform services for the committee.[138] If a trustee or a committee wishes to employ a professional, Rule 2014 requires the trustee or committee to apply to the court for an order of employment, accompanied by a declaration of the professional of its connections with the debtor, any creditors, and any other party in interest.[139] Local Rule 2014-1 further requires the application to state "specific facts showing the reasonableness of the terms and conditions of the employment, including the terms of any retainer, hourly fee, or contingent fee arrangement."

The Code provides the process for payment in sections 330 and 331, which provide for reasonable compensation for actual and necessary services, as well as the professionals' ability to apply for interim compensation every 120 days, respectively.[140] Rule 2016 requires entities seeking compensation for services or reimbursement of expenses from the estate to file with the court an application containing a statement of services rendered, fees incurred, and the amounts requested.[141] Local Rule 2016-1 provides guidelines with which a person requesting an award of compensation or reimbursement must comply. It also provides forms to be used in the application.

To protect those providing professional services for the debtor during the debtor's bankruptcy, sections 364(a) and 503(b)(2) allow the court to grant those professionals administrative expense priority. This gives these professionals, who lend their services post-petition, priority over pre-bankruptcy lenders.[142]

Pursuant to and in compliance with these rules, Republic filed with the Court applications to employ professionals as attorneys, financial advisors, investment bankers, and an administrative advisor. Specifically, Republic sought to employ Zirinsky Law Partners PLLC as its lead

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[138] 11 U.S.C. § 1103.

[139] FED. R. BANKR. P. 2014.

[140] 11 U.S.C. §§ 330 (entitled "Compensation of Officers") and 331 (entitled "Interim Compensation").

[141] FED. R. BANKR. P. 2016.

[142] Bernstein and Kuney at 260; *see generally* 11 U.S.C. § 507(a).

bankruptcy attorneys;[143] Hughes Hubbard & Reed LLP as supporting attorneys;[144] Seabury Corporate Advisors LLC and Seabury Securities LLC as financial advisor and investment banker;[145] and Prime Clerk LLC as administrative advisor.[146] While these applications were filed on the first day, Republic would later file applications to employ KPMG LLP as tax consultant,[147] Norton Rose Fulbright US LLP as special transactional DIP and aircraft finance attorneys,[148] and Deloitte & Touche LLP as Republic's independent auditor.[149]

The only objection filed was by the Official Committee of Unsecured Creditors. It objected to the employment of Seabury as investment banker to the Debtors, arguing that the terms of the engagement agreement were unreasonable[150] and seeking an adjournment of the hearing to review and engage in discovery as to Seabury's fees.[151] Pursuant to the Committee's objection, Republic and Seabury conceded, inter alia, to an aggregate fee cap of $11 million, to a discount of 10% off its hourly rates for hourly billings, to a cap of $500,000 for hourly fees, and to Seabury not paying any additional fee if one transaction converts into another. Republic urged that "[the] Court's expeditious approval of Republic's professionals is critical to furthering Republic's restructuring

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[143] Application to Retain and Employ Zirinsky Law Partners PLLC as Lead Bankruptcy Attorneys for the Debtors, ECF No. 24.

[144] Application to Retain and Employ Hughes Hubbard & Reed LLP as Attorneys for the Debtors, ECF No. 25.

[145] Application to Employ and Retain Seabury Corporate Advisors LLC and Seabury Securities LLC as Financial Advisor and Investment Banker to the Debtors, ECF No. 26.

[146] Application to Employ and Retain Prime Clerk LLC as Administrative Advisor, ECF No. 27.

[147] Application to Employ and Retain KPMG LLP as Tax Consultant to the Debtors, ECF No. 97.

[148] Application to Employ and Retain Norton Rose Fulbright US LLP as Special Transactional DIP and Aircraft Finance Attorneys for the Debtors, ECF No. 220.

[149] Application to Employ and Retain Deloitte & Touche LLP as Independent Auditor to the Debtors, ECF No. 335.

[150] Investment bankers are typically retained solely pursuant to section 328 of the bankruptcy code, which employs a "reasonableness" standard—a low threshold for approval.

[151] Debtors' Reply to Objection, ECF No. 176.

efforts, and does not require an evidentiary hearing." The Court agreed and signed the proposed order authorizing the retention and employment of Seabury on March 23, 2016.[152]

The Official Committee of Unsecured Creditors also filed applications to employ professionals as attorneys, financial advisors, bankers, and consultants. Specifically, the Committee sought to employ Morrison & Foerster LLP as its attorneys; Skyworks Capital LLC as a co-financial advisor; Imperial Capital LLC as its investment banker and co-financial advisor, and eventually Korn Ferry International, Inc., as its board search consultant.

In accordance with Local Rule 2016, Republic also filed a Motion to establish interim compensation procedures,[153] setting out the "Interim Compensation Procedures." For each monthly statement submitted pursuant to the procedures, Republic will pay 80% of the fees and 100% of the expenses identified in the monthly statement. "The remaining 20% of the Retained Professional's fees for each Monthly Statement shall be withheld from payment until further order of [the] Court (the 'Monthly Fee Holdback')." The monthly fees will be paid to the professionals after an interim fee hearing for each 120-day period of the bankruptcy.

Table 2 below provides Republic's unaudited disbursements for professional services provided to Republic, the Official Committee of Unsecured Creditors, and to Ordinary Course Professionals.[154] The table also shows the aggregate remaining claim after each month's disbursement (the aggregate Monthly Fee Holdback). As of the end of February, Republic had paid around $26.8 million for professional services through the course of the restructure, with an aggregate Monthly Fee Holdback of around $8.6 million.

| Table 2 | | | | | |
|---|---|---|---|---|---|
| **Month** | **Disbursed to Debtors' Professionals** | **Disbursed to Creditor's Committee's Advisors** | **Disbursed to Ordinary Course Professionals** | **Total Disbursed** | **Remaining Claim** |
| Feb-Mar | -- | -- | -- | -- | $3,500,000 |
| April | $200,000 | -- | -- | $200,000 | $10,700,000 |
| May | $3,400,000 | -- | -- | $3,400,000 | $14,600,000 |

[152] Order Authorizing the Employment and Retention of Seabury, ECF No. 209.

[153] Motion for Entry of Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals, ECF No. 29.

[154] Employment and compensation for Ordinary Course Professionals is discussed further in section (B)(1) below.

| | | | | | |
|---|---|---|---|---|---|
| June | $2,000,000 | $1,700,000 | -- | $3,700,000 | $15,400,000 |
| July | $3,400,000 | $700,000 | $100,000 | $4,200,000 | $12,700,000 |
| Aug | $1,200,000 | $500,000 | $100,000 | $1,800,000 | $9,500,000 |
| Sep | $1,400,000 | $300,000 | $300,000 | $2,000,000 | $7,800,000 |
| Oct | $1,400,000 | $300,000 | $600,000 | $2,300,000 | $10,900,000 |
| Nov | $1,500,000 | $600,000 | $100,000 | $2,200,000 | $11,700,000 |
| Dec | $1,500,000 | $900,000 | $500,000 | $2,900,000 | $8,800,000 |
| Jan | $1,300,000 | $400,000 | $200,000 | $1,900,000 | $8,700,000 |
| Feb | $1,300,000 | $800,000 | $100,000 | $2,200,000 | $8,600,000 |
| Mar | -- | -- | -- | -- | -- |
| Total | $18,600,000 | $6,200,000 | $2,000,000 | $26,800,000 | -- |

### *B. Keeping the Plane in the Air*

While each of the above motions were necessary to help Republic navigate through the Chapter 11 bankruptcy process, the motions discussed in this section were necessary for Republic to carry on its business with as little disruption as possible. Each of these will help Republic continue to bring in revenue while working toward a plan of reorganization.

#### *1. Employment of Professionals Used in the Ordinary Course of Business*

Pursuant to the same authority discussed for employing bankruptcy professionals, debtors may, with court approval, employ professionals used in the ordinary course of business. The code specifically provides, "if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business."[155] Sections 330 and 331 of the bankruptcy code also authorizes compensation for an ordinary course professional ("OCP"), and sections 364(a) and 503(b)(2) permit the court to grant administrative expense priority to OCP compensation claims.

Republic specifically sought authority to employ these OCPs without requiring them to submit separate employment applications or to file individual fee applications.[156] Instead, Republic suggested that each OCP submit a declaration stating its services provided and certifying that it does not hold any adverse interests to Republic. If no one objected, the retention and employment of the OCP would be deemed approved by the Court. Republic could then pay the OCP 100% of the fees and disbursements incurred up to $50,000 per month, and up to $500,000 for the entire period of bankruptcy. Any amount sought by the OCP above the monthly cap or

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[155] 11 U.S.C. § 327(b).

[156] Debtors' Motion for Authority to Employ Professionals Used in the Ordinary Course of Business, ECF No. 28.

above the entire period would require the OCP to file a fee application with the court and file a separate retention application, respectively. Republic would file a quarterly statement of compliance with these terms, including a list of the OCPs and how much they were paid. Republic submitted that these procedures would substantially reduce the administrative fees associated with requiring OCPs to draft and submit employment applications and monthly fee statements and applications.

The Court signed the proposed order the day after the March 22, 2016 omnibus hearing.[157] The motion and order identified 21 OCPs, only 12 of which would file declarations. Republic later filed two supplemental OCP notices, both of whom filed the required declarations. No objections were ever filed to any of the declarations. Table 3 below lists the proposed OCPs and the services they would provide for the Debtors to help maintain operations as the bankruptcy case proceeded.[158] From the date of the order through December 31, 2016, Republic paid a total of $993,744.75 to the compliant OCPs.[159]

**TABLE 3**

| **Professional** | **Services Performed by Professional** | **Submitted Declaration** |
|---|---|---|
| Abagados Sierra y Vazquez | Legal Services related to sublease of aircraft to Aerolitoral; Republic's interests in Mexico | 4-25-16 (ECF No. 443) |
| Adler Murphy & McQuillen LLP* | Passenger Personal Injury and Airplane Accident Law | 3-31-16 (ECF No. 295) |
| Argueta and Partners | Legal Services related to operations in Honduras | -- |
| Aviation Support, S.A. de C.V. | Legal Services related to operations in Mexico | -- |
| Baker, Donelson, Bearman, Caldwell & Berkowitz, PC | Litigation—Contract (CPA) Law | 12-22-16 (ECF No. 1352) |
| Brigard & Urrutia | Legal Services related to operations in Columbia | -- |

[157] Order Signed, ECF No. 213.

[158] Information in this table was pulled from ECF 213, and from the individual declarations filed by the OCPs.

[159] Statements of the Debtors Certifying Compliance with Order, ECF Nos. 858, 1160, and 1451.

| | | |
|---|---|---|
| Daugherty, Fowler, Peregrin, Haught & Jenson | FAA and International Registry services | 3-24-16 (ECF No. 236) |
| Dentons US LLP | NTSB, Accident Response | 3-24-16 (ECF No. 238) |
| Ford & Harrison LLP | Labor Law | 3-25-16 (ECF No. 252) |
| Haynes and Boone, LLP* | Cuban Regulatory Approval | 1-26-17 (ECF No. 1446) |
| Hogan Lovells US LLP | Aviation Regulatory Matters | 3-25-16 (ECF No. 251) |
| Holland & Hart LLP | Trademark Matters | |
| Ice Miller LLP | Labor and Employment, Immigration, Real Estate, Employee Benefits, Corporate, Litigation, and general Indiana legal advice | 3-24-16 (ECF No. 240) |
| Jimenez Cruz Pena | Legal Services relating to operations in Dominican Republic | -- |
| Katz & Korin, PC | Real Estate matters (lease dispute) | 3-24-16 (ECF No. 237) |
| McKay, Culmer & Associates | Legal Services relating to operations in the Bahamas | -- |
| Morgan & Morgan | Legal Services relating to operations in Panama | -- |
| Norton Rose Fulbright US LLP | Aircraft Transactions—finance, leasing, capacity, and codeshare agreements | 3-25-16 (ECF No. 253) |
| Ogletree, Deakins, Nash, Smoak & Stewart, P.C. | Employee Benefits Law | 4-25-16 (ECF No. 443) |
| O'Melveny & Myers LLP | Labor Law | 3-31-16 (ECF No. 289) |
| Winslett Studnicky McCormick & Bomser LLP | Litigation—Contract (CPA) Law—Commercial Disputs, including *Delta Airlines, Inc. v. Republic Airways Holdings, Inc. and Shuttle America Corp.* (N.D. Ga.) | 3-24-16 (ECF No. 239) |
| Young Law Firm | Legal Services relating to operations in Belize | -- |
| Zurcher Odio & Ravin | Legal Services re operations in Costa Rica | -- |

* Party not included in original List of Ordinary Course Professionals.

*2. Continuation of Systems and Operations*

a. Cash Management System

Section 363(c)(4) of the bankruptcy code requires the trustee to "segregate and account for any cash collateral in the trustee's possession, custody, or control," unless the court authorizes the

use of such cash collateral in the ordinary course.[160] As of the Commencement Date, Republic held 32 bank accounts maintained at 30 different banks in the United States, as well as two banks in Canada.[161] Rather than undergo the massive expenses associated with opening new bank accounts, transferring funds, and restructuring its entire cash management system, Republic requested the court to allow it to continue using its existing cash management system and bank accounts.[162] Because Republic has a complex and efficient policy for investing its excess cash, Republic also requested the Court for a waiver of the requirements of § 345(b) of the bankruptcy code. This section requires each entity with which the trustee deposits or invests money that is not insured or guaranteed by the United States to provide a secured bond in favor of the United States, "unless the court for cause orders otherwise."[163] Republic contended that granting this motion would avoid substantial disruption, delay, and associated expenses.

After the Court granted an interim order, the U.S. Trustee objected to the § 345(b) waiver on grounds that Republic did not establish the requisite cause, contending that the waiver would result in insufficient protection of Republic's investments of over $138 million should the banks crash and fail.[164] Republic responded that the U.S. Trustee's argument involved "a strained reading of section 345(b) . . . contrary to the very purpose of section 345(a)."[165] Such a reading, Republic argued, would "needlessly handcuff larger, more sophisticated debtors" and would provide no additional financial benefit to Republic.[166] The Court overruled the objection and granted the final order and waiver on March 24, 2016.[167]

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[160] 11 U.S.C. § 363(c).

[161] ECF No. 4.

[162] Debtors' Motion to Continue to Use Existing Cash Management System, ECF No. 6.

[163] 11 U.S.C. § 345(b).

[164] Objection to Motion, ECF No. 149.

[165] Reply to Objection, ECF No. 159.

[166] *Q*uoting 140 Cong. Rec. H 10,767 (Oct. 4, 1994), WL 545773.

[167] Final Order, ECF No. 228.

b. Clearinghouse Agreements

Clearinghouse agreements are "complex agreements governing virtually all aspects of air travel and airline operations."[168] Their purpose is to "facilitate cooperation among airlines with respect to transactions for providing and obtaining essentials such as maintenance services and critical parts." Specifically, the agreements provide for payment of clearinghouse participants based on each participant's use of other participants' services. These agreements are essential to the continued operation of Republic's business, and "any disruption in continuity may well result in irreparable harm to Republic's ability to maintain its essential relationships with its Codeshare Partners and other airlines."

Republic also sought (1) to honor its prepetition obligations under the agreements, and (2) modification of the automatic stay in order to enable the other participants to continue billing Republic in accordance with the agreements. Pursuant to the Court's power to allow the trustee to assume a debtor's executory contracts,[169] the Court provided immediate relief through an interim order, and no objections were filed before the Court issued a final order granting the motion.[170]

c. Utilities

It is not difficult to imagine how an interruption in the supply of water, electricity, natural gas, waste management, telephone, or other utility services, could quickly cause catastrophe in a business's operations. While utility providers are prohibited from discontinuing their services to a debtor or trustee solely on the basis of the commencement of bankruptcy, they are permitted to discontinue their services to a debtor or trustee if the trustee or debtor fails to furnish adequate assurance of payment within 30 days of the Commencement Date.[171] Permissible assurance includes a cash deposit, letter of credit, or other form of security agreed on by the parties.

To protect against an expensive disruption in its operations, Republic sought the statutory protection from the Court and proposed as adequate assurance of payment in the form of a cash deposit of $122,000—an amount equal to Republic's cost of two weeks of aggregate Utility Services.[172] Republic would continue to pay its utility bills through the bankruptcy while the cash

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168 Motion to Assume Clearinghouse Agreements, ECF No. 11.

169 11 U.S.C. § 365(a).

170 Final Order, ECF No. 202.

171 11 U.S.C. § 366.

172 ECF No. 4.

deposit remains in a separate account. The deposit would be returned to Republic upon the earlier of a court order authorizing its return or the effective date of a plan of reorganization.[173] In its motion, Republic also sought to establish procedures for a utility provider to seek additional adequate assurance.

The only objection to the motion came from Waste Connections of North Carolina, Inc. ("WCNC"), which contended that (1) it was not a utility, (2) Republic was using section 366 as a means of taking advantage of contractual service rates without assuming the contract under section 365, and (3) if the Court found that WCNC was a utility, then Republic's proposed cash deposit as assurance of payment was inadequate.[174] Apparently unwilling to fight WCNC on this issue, and WCNC appearing prepared to fight tooth and nail, Republic submitted a revised proposed order with an explicit finding that WCNC was not a utility.[175] The Court signed the revised proposed interim order and, there being no later objections, issued a final order on March 23, 2016, approving the proposed assurance of payment.[176]

d. Insurance

Republic carries insurance policies covering "workers' compensation, commercial property, crime, aviation war and hijacking, officers and directors, aviation hull, and various other property-related and general liabilities."[177] As of the Commencement Date, Republic owed approximately $3.4 million for prepetition insurance obligations. Airlines and other business are required by various regulations, laws, and contracts to maintain insurance coverage in many or all of these areas. Failure to maintain insurance would expose Republic to substantial liability to the detriment of all parties in interest and could result in insurance carriers declining to renew. Therefore, Republic sought authorization from the Court to satisfy outstanding insurance obligations and continue its insurance programs.[178]

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[173] Motion to Approve Debtors' Proposed Form of Adequate Assurance of Payment to Utilities, ECF No. 12.

[174] Opposition to Debtors' Motion, ECF No. 81.

[175] Revised Proposed Interim Order, ECF No. 110.

[176] Final Order, ECF No. 203.

[177] ECF No. 4.

[178] Motion to Authorize Debtors to Continue Their Insurance Programs and Satisfy Insurance Obligations, ECF No. 13.

Section 503(b)(1) of the bankruptcy code allows the Court to grant administrative expense status to "the actual, necessary costs and expenses of preserving the estate," which enables a debtor to use estate funds to satisfy post-petition obligations.[179] Section 363(b) permits the trustee to use property of the estate to pay prepetition obligations other than in the ordinary course, subject to the Court finding that a "good business reason" exists.[180] Rule 6003(b) prohibits the Court from using property of the estate to pay prepetition claims within 21 days of the Commencement date, *unless doing so is necessary to avoid immediate and irreparable harm*.[181] Republic relied on these statutory provisions in its motion, as well as the "all writs" provision of section 105(a)[182] and the "Doctrine of Necessity."[183] Republic argued that maintaining all insurance obligations as they came due in the ordinary course of business would be essential to preserving its business and the value of the estates for all interested parties.[184] It also contended that the exception in Rule 6003 was satisfied. The Court agreed and granted an interim order on February 29, 2016. No objections were filed before the Court granted a final order on March 23.[185]

*3. Other Pre-Petition Payment Obligations*

While the obligations discussed in Part (B)(2) above related to maintaining systems and operations Republic employed to efficiently run its business, this part will address payment obligations not necessarily tied to a formal system of operations. These payment obligations, however, are at least as important as those discussed above.

a. Obligations to Employees

In order to continue running its business, Republic sought court approval to keep paying its employees.[186] Not only would this keep the employees working, but it would also avoid

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[179] Quoting 11 U.S.C. § 503(b)(1).

[180] ECF No. 13.

[181] FED. R. BANKR. P. 6003.

[182] Discussed in Part (A)(2) above.

[183] Discussed in Part (B)(3)(d) below; also discussed in ECF No. 13.

[184] ECF No. 13.

[185] Final Order, ECF No. 204.

[186] Motion to Authorize Payment of Prepetition Wages, Salaries and Other Compensation and Employee Benefits, ECF No. 7.

unnecessary litigation from those employees which would undoubtedly ensue if they were not paid. In its motion, Republic described its workforce as follows:

> Collectively, Republic employs approximately 5,980 full- and part-time employees as of January 31, 2016 on both an hourly and salaried basis, including pilots, flight attendants, dispatchers, mechanics, aviation maintenance support personnel, supervisors, managers, administrative support staff, and other personnel (collectively, the "Employees"). As of January 31, 2016, approximately 71% of Republic's workforce is represented by unions and is subject to collective bargaining agreements (collectively, the "CBAs") with Republic, including: approximately 2,077 pilots, approximately 2,074 flight attendants, and approximately 87 unionized dispatchers (collectively, the "Union Employees").
>
> In addition to the Employees, from time-to-time, Republic uses the services of independent contractors (the "Independent Contractors") to provide aircraft maintenance support and assistance with administrative services. As of the Commencement Date, 4 individuals perform such services.

Pursuant to section 363(b) of the Bankruptcy Code, as well as other authority discussed in part (B)(2) above, Republic sought to pay all prepetition employee obligations,[187] which it estimated would total around $16.5 million. No individual employee would be paid more than $12,475 in wages in violation of section 507(a)(4) of the Bankruptcy Code. The Court found that Republic had met the relevant standards (i.e. that Republic had a sound business judgment for requesting the payment of prepetition obligations) and issued and interim order granting the requested relief. No objections were made before the Court issued its final order in favor of Republic on March 23, 2016.[188]

b. Obligations to Foreign Creditors

While the majority of Republic's business is conducted in the United States, it also extends to Canada, Mexico, the Caribbean, Central America, and Brazil.[189] Republic is required to offer

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[187] Defined as "all prepetition amounts owed with respect to Wages, Independent Contractor Obligations, Incentive Program Obligations, Reimbursement Obligations, Withholding Obligations, Payroll Maintenance Fees, Severance Obligations, Relocation Obligations, Leave Obligations, Payroll Maintenance Fees, Severance Obligations, Relocation Obligations, Leave Obligations, Employee Benefit Obligations, and Other Employee Programs . . . collectively with any related fees, costs, or expenses. . . ."

[188] Final Order, ECF No. 198.

[189] Motion for Authorization to Pay Prepetition Obligations Owed to Foreign Creditors, ECF No. 8.

flights to and from these locations pursuant to its codeshare agreements, and these routes comprise an important source of revenue for Republic. As such, Republic contends that these foreign operations are an essential component of its airline business. Republic estimated that it owed around $500,000 in prepetition obligations to foreign creditors for repairs and maintenance services, flight communications and data, crew services, access to foreign airspace and airports, international air traffic control, and foreign taxes. Half of this amount was due within 30 days of the Commencement Date.

While the automatic stay is universal, the bankruptcy courts have no jurisdiction to enforce the automatic stay upon foreign creditors lacking sufficient minimum contacts in the United States. As such, if Republic were to fail to pay the foreign creditors, or else fail to maintain its obligations to them, the foreign creditors "likely would be able to immediately pursue remedies and seek to collect prepetition amounts owed to them." Failure to pay the foreign creditors would result in their ceasing to supply Republic with the specialized goods and services necessary to maintain Republic's foreign operations. Any such disruption "could generate instability and thus jeopardize Republic's ability to service its Codeshare Partners going forward."

Therefore, pursuant to sections 363(b), 105(a), and 503(b)(9) of the Code, as well as the other authority relied on for the prepetition obligations discussed above, Republic sought the Court to authorize Republic to satisfy these prepetition obligations to its foreign creditors. The Court granted an interim order permitting Republic to pay the $250,000 to the foreign creditors; no further amount was permitted until after the entry of a final order.[190] No objections were filed before the Court issued a final order authorizing the continued payment of prepetition obligations to foreign creditors and continued foreign operations.[191]

c. Customs Duties and Obligations to Shippers, Warehousemen, and Other Lien Claimants

As of the Commencement Date, Republic had ordered domestic and foreign products and parts necessary to carry on its business. These transactions require Republic to pay for shipment and storage of the goods before they are ultimately used. Shippers and warehousemen currently possessing the purchased goods may refuse to release the goods if they are not paid for their prepetition services. In some states, they have a lien on the goods in their possession to secure the charges or expenses incurred for their services. Thus, If Republic wishes to carry on its business,

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[190] Interim Order, ECF No. 43.

[191] Final Order, ECF No. 199.

it needs products and parts. If Republic wants the products and parts, it must pay the shippers and warehousemen.[192]

Similar to the shippers and warehousemen, Republic routinely employs service technicians, building contractors, materialmen, and other service providers that may assert liens against Republic if it fails to pay for their services rendered (collectively with shippers and warehousemen, "Lien Claimants"). As discussed above, aircraft equipment lienholders are not bound by the automatic stay unless Republic complies with section 1110(a)(2). If Republic fails to pay the Lien Claimants now, their claims qualify under section 1110. To remain protected, and to keep the needed goods and services flowing, Republic would then have to (1) agree to perform all obligations under the contracts with the individual Lien Claimants, and (2) cure any defaults. In other words, Republic would be required to do what it is already requesting to do in its motion.

To protect against this outcome, Republic sought authorization to pay its prepetition obligations to the Lien Claimants that will agree to remove their liens upon receipt of Republic's payment. If the Lien Claimant should fail to remove the lien, Republic could recover from the Lien Claimant the payment from Republic as a voidable post-petition transfer under section 549(a) of the Bankruptcy Code.

When Republic imports foreign products necessary to its continued operation, it makes payments through customs brokers who cover the cost of Customs Duties to the U.S. Customs and Border Protection Agency. If these Customs Duties are not timely paid, the Customs authorities may demand liquidated damages or assert liens against the imported goods. This would result in the same problems discussed with regards to Lien Claimants above. To protect against this, Republic also sought authority to pay the Customs Duties. As of the Commencement Date, Republic owed an approximate aggregate amount of $3,590,000 to Lien Claimants and Customs Duties, all of which would be due within 30 days after the Commencement Date.[193]

The Court granted an interim order on February 29, 2016, allowing Republic to pay the prepetition obligations and to continue paying the Lien Claimants and Customs Duties needed to maintain Republic's operations. No objections were filed before the Court issued the final order granting Republic's motion on March 23, 2016.[194]

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[192] Motion for Authorization to Pay Charges of Shippers, Warehousemen, and Other Lien Claimants and Customs Duties, ECF No. 9.

[193] ECF No. 4.

[194] Final Order, ECF No. 200.

d. Obligations to Critical Vendors

The airline industry is highly specialized, regulated, and competitive. They have few options with respect to certain vendors and service providers, and "Federal Aviation Administration ("FAA") regulations inhibit an airline's ability to switch expeditiously from one supplier of goods or services to another."[195] Several of the providers of goods or services to airlines are "sole- or limited-source suppliers without which the company could not operate." They are irreplaceable, and Republic may lose their services if it fails to pay their prepetition claims.

Republic identified eight categories of critical vendors, any of which, if lost, would impair Republic's going concern viability: "(i) safety and security providers, (ii) maintenance service providers, (iii) flight training providers, (iv) customer amenity providers, (v) passenger and cargo handling and ground support service providers, (vi) fuel providers, (vii) crew services providers, and (viii) information technology suppliers and service providers." Republic estimated that it owed an aggregate of $310,000 for prepetition goods and services, and it requested authority to pay up to $155,000 prior to the final hearing scheduled on March 22, 2016.

In identifying critical vendors, Republic excluded vendors that were a party to an executory contract with Republic because the bankruptcy code precludes them from unilaterally ceasing to comply with the terms of their contracts. Republic also considered seven other factors in determining who qualified as a critical vendor:

> (i) which suppliers are sole-source or limited-source suppliers, without which Republic could not continue to operate, (ii) which suppliers would be prohibitively expensive to replace, (iii) which suppliers are at risk of ceasing the provision of truly critical services or supplies, (iv) the financial condition of each supplier, to the extent such information was known, and whether the supplier might face its own liquidity crisis, due to such supplier's operational or cash flow issues, if Republic does not promptly pay its prepetition claim, (v) whether the goods or services the vendor provides could be replaced without interruption to Republic's operations, (vi) whether failure to pay the claim would result in Republic paying substantially more for the same goods or services, and (vii) whether failure to pay the claim would interrupt Republic's operations or cause a loss of revenue and the ability to perform its own contractual commitments.

Republic also proposed conditions with which the critical vendors must comply before they could accept payment. Primarily, the critical vendor must agree "to continue to supply goods or services to Republic on terms no less favorable to Republic [than] those in effect prior to the

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[195] Motion to Authorize Debtors to Pay Prepetition Obligations of Critical Vendors, ECF No. 10.

Commencement Date." This and the other proposed conditions were virtually identical to those required of the Lien Claimants discussed above.

Republic again cited sections 105(a), 363(b), and 503(b)(9) as authority authorizing the Court to grant the motion. Republic also again relied on the "doctrine of necessity." This deserves separate treatment here. The "doctrine of necessity" is used in chapter 11 reorganizations "as a mechanism by which the Court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Code."[196] This power is exercised where the debtors' continued operation and eventual reorganization hinges on the payment of these prepetition obligations.

Normally, estate assets and cash can only be distributed in accordance with section 507 of the Bankruptcy Code, which sets out the priorities of creditors' expenses and claims. Through the doctrine of necessity, however, bankruptcy courts have disrupted the section 507 priorities for years by allowing debtors to pay prepetition obligations of critical vendors.[197] The Court granted an interim order on February 29 and a final order on March 23.

e. Taxes and Assessments

As of the Commencement Date, Republic incurred prepetition tax and assessment liability of approximately $4.3 million, which had not yet become due and payable, but $399,000 of which

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[196] *R*eferencing *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981); *In re Boston & Me. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980); *In re Quality Interiors, Inc.*, 127 B.R. 391, 396; *In re Structurelite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988).

[197] In a very recent decision, however, the Fifth Circuit rejected this use of the doctrine of necessity, asserting in a footnote that "Section 507 fixes the priority order of claims and expenses against the bankruptcy estate and does not carve out a priority status for prepetition, general unsecured claims based on the 'critical' status of the creditor." *In re* Pioneer Health Servs., No. 16-01119-NPO, 2017 Bankr. LEXIS 939, at n.6 (U.S. Bankr. S.D. Miss. Apr. 4, 2017)) The Fifth Circuit relied on a U.S. Supreme Court decision that came down just days earlier in which the Court held that "a bankruptcy court [cannot] approve a structured dismissal that provides for distributions that that do not follow ordinary priority rules without the affected creditors' consent." (Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983 (2017)). Future DIPs should consider these rulings when seeking authorization to pay prepetition obligations, at least until the U.S. Supreme Court clarifies its position or until Congress amends the Code to provide for these "necessary" expenses.

would become payable within 30 days of the Commencement Date.[198] Certain jurisdictions required Republic to continue to pay these tax and assessment obligations in order to continue its operations. Republic's failure to pay these obligations would also result in governmental authorities asserting liens on Republic's property, asserting penalties on past-due taxes, or bringing personal liability actions against Republic's directors and officers for the tax and assessment liability.[199]

To avoid this, Republic sought authorization to make payments for pre- and post-petition tax and assessment obligations as they became due. Republic relied on the same authority discussed in the above motions for payment of prepetition obligations, also noting that section 507(a)(8) of the Bankruptcy Code already grants priority status to most tax and assessments. Because such claims must be paid in full before any general unsecured obligations may be satisfied, the rights of unsecured creditors would not be prejudiced.[200] The Court agreed and issued an interim order on February 29 and the final order on March 23.

f. Obligations to PK AirFinance US, Inc.

In 2014, Republic[201] entered into a credit agreement with PK AirFinance US, Inc. and Wells Fargo Bank Northwest, N.A.[202] The loan allowed Republic to purchase an aircraft and its engines[203], and in return Republic granted a first-priority lien on the aircraft and engines, which were valued at over $10 million as of the Commencement Date.[204] Republic only owed $4.6 million. Because the collateral was worth more than twice the loan balance, Republic decided to pay off the loan so the aircraft and engines would be free to be used as collateral to secure debtor-in-possession financing.

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198 Motion to Pay Prepetition Taxes and Assessments, ECF No. 14.

199 ECF No. 4.

200 ECF No. 14.

201 It was actually one of RAH's subsidiaries, Shuttle America Corporation—also a debtor in this case—that entered into the 2014 credit agreement.

202 Motion to Pay Prepayment Obligations to PK AirFinance US, Inc., ECF No. 22.

203 The aircraft was an Embraer ERJ 170-100 SE (Aircraft Security Agreement N638RW, Serial No. 17000053) and two General Electric CF34-8E5 Engines (Serial Nos. GE-E193239 and GE-E193240).

204 ECF No. 4.

The credit agreement with PK AirFinance and Wells Fargo permitted Republic to prepay the full amount of the loan by giving them irrevocable notice not less than ten days before the payment was due.[205] Accordingly, Republic submitted irrevocable notice on February 10, 2016, of its intent to pay the balance of the loan on March 1, 2016. The credit agreement provided that non-payment of the prepayment obligation would constitute an event of default if not remedied within five days. As such, Republic sought authorization from the Court to pay the balance of the loan, and to do it on an expedited basis in order to "preclude the possibility of PK AirFinance asserting additional claims and or penalties based on late payment to the detriment of the Debtors' estates and creditors."[206]

Despite Republic making its circumstances worse immediately before bankruptcy[207] in order to manipulate the Court, the Court granted Republic's request to expedite the hearing and notice periods. However, the Court later extended the deadline such that the payment was not made until after the final order was issued on March 22, 2016.

**DIP Financing and Republic's Deal with Delta**

***A. Summary of the Agreements***

The first day motions discussed above provided Republic with the necessary time to implement its plan of restructure without doing lasting harm to the company. To this point, Republic had not agreed to terms with any of its Codeshare Partners and there was no viable path out of bankruptcy without those agreements in place. This section discusses the agreements with Delta, the unlikely first Codeshare Partner to settle with Republic. Delta filing suit against Republic for breach of their codeshare agreement played a key role in pushing Republic into the bankruptcy process, and as things turned out, it's concessions as part of the package deal with Republic played a key role in moving the restructuring process forward while in bankruptcy.[208] Reaching consensus on the DIP Financing Agreement, Amended Codeshare Agreements, Amended LaGuardia Slot Lease Agreements, Amended Ground Support Services Agreements, and resolving the pending litigation between the parties was a significant first step towards

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205 ECF No. 22.

206 ECF No. 4.

207 Republic essentially accelerated the loan, and the terms of the credit agreement were not blocked by the automatic stay due to the applicability of U.S.C. § 1110.

208 Disclosure Statement for Debtor's Second Amended Plan of Reorganization, ECF No. 1312.

Republic restructuring its operations with each of its codeshare partners in a profitable manner. Key concessions by Delta included:

- Amendments to the codeshare agreements allowing Republic to receive higher compensation for its services retroactively from January 1, 2016;

- Restoration of E170 and E175 flying for Delta;

- Orderly wind-down to Republic's ERJ-145 flying (allowing Republic to transition to one type of airplane and reduce its operations to a single certificate);

- Limiting its allowed claims to RAH and Shuttle rather than against all debtors

In exchange for the above-mentioned concessions, Republic agreed that Delta would receive:[209]

- $170 million[210] prepetition general unsecured claims against each of RAH and Shuttle;

- First priority liens on one Embraer E170 regional jet aircraft equipped with two General Electric CF34-8 engines; Ten CFM34-8 engines; and all other unencumbered assets of the Debtors subject to the carve out pursuant to section 364(c)(2) of the Bankruptcy Code;

- A first priority priming lien on 15 specified individual LaGuardia Airport arrival and departure slots pursuant to section 364(d) of the Bankruptcy Court;[211]

- Junior liens on all tangible and intangible property of the Debtors that is subject to valid, perfected and unavoidable liens in existence on the Commencement Date when permissible under law or contract. Provided that in all events the collateral shall include all proceeds or replacements of excluded collateral unless such proceeds or replacements are themselves excluded collateral;

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[209] Debtors' motion for entry of an order (I) Authorizing Debtors to obtain postpetition financing, (II) granting liens and providing superpriority administrative expense status, (III) modifying the automatic stay and (iv) granting related relief, ECF No. 246.

[210] This was later increased to $173.5 million under the most favored nations clause (Settlement Motion at ¶ 7) after Republic's settlement with United was on better terms. The claim against Shuttle was also split as close to even as possible between Shuttle and Republic Airline in accordance with the United settlement and the subsequent merger between Shuttle and Republic.

[211] Delta had first priority liens prepetition and consented to the priming liens so there were no issues of adequate protection.

- Superpriority administrative expense claims to Delta, subject to the carve-out, on the terms and conditions in the DIP Term Sheet.

*1. Procedural History*

Republic filed the cross-conditioned motions on March 24, 2016. It sought entry of an order (1) authorizing debtors to obtain post-petition financing, (2) granting liens and providing superpriority administrative expense status, (3) modifying the automatic stay and (4) granting related relief.[212] Contemporaneously with that motion, Republic filed an interdependent motion to (1) assume codeshare and related agreements with Delta, (2) lease property of the estate, and (3) settle claims between Delta and the Debtors.[213] The key terms and objections are set forth in the following sections.

The timing of these filings began the drama. The original hearing on these motions was set for April 14, 2016 with a deadline for objections of April 7, 2016, however, with Easter weekend during this time it afforded the parties just eight business days to review the documents and object.[214] The Ad Hoc Committee filed an emergency objection seeking an extension under Bankruptcy Rule 9006(b)(1) claiming among other things that the Debtors had filed the motion without prior discussion with creditors, equity holders or their attorneys, failed to file the financing agreement, and appeared to have staged a process to deny stakeholders a fair and meaningful opportunity to evaluate the relief sought. The Committee sought to delay the objection period until May 10, 2016, and the hearing date until May 17, 2017. However, the Court moved the hearing and objection dates back just one week to April 21, and April 14 respectively.[215]

Republic filed its DIP credit agreement on April 6, 2016.[216] The terms of the credit agreement and the contemporaneously filed motions invoked multiple objections. The United

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[212] ECF No. 246.

[213] Debtor's Motion for Authorization to (I) Assumer Codeshare and Related Agreements, as Amended, with Delta Air Lines, Inc., (II) Lease Certain Property of the Estate, and (III) Settle Claims Between Delta Air Lines, Inc., and the Debtors, ECF No. 244.

[214] Emergency Motion of Ad Hoc Committee of Equity Holders to Adjourn Hearing, ECF No. 278.

[215] Notice of Adjournment, ECF No. 321.

[216] Notice of Filing of Debtor in Possession Credit Agreement, ECF No. 308.

States of America,[217] Equity Holders Committee,[218] and the Unsecured Creditors Committee[219] (joined by the IBT[220]) each filed objections. Reservation of rights motions were also filed by the ITB sion and the Banco Naciaonal de Desenvolvimento Economico e Social Bndes and Agencia Especial de Financiamento Industrial FINAME.[221]

Delta[222] and Republic[223] each filed responses to the objections on April 18, 2016, and the parties filed a revised credit agreement[224] and revised proposed order granting Debtor's motion for DIP financing[225] on April 20, 2016. The hearing was held April 21, 2016 and the order was signed granting the requested relief on May 3, 2016.[226]

The issues surrounding the DIP financing agreement and the interdependent agreements entered into with Delta are central to the disposition of Republic's Chapter 11 restructuring and were not well received by the other parties to the bankruptcy proceeding. Many stakeholders felt Delta leveraged its pending litigation and role as one of Republic's key codeshare partners to significantly improve its financial position and gain control of Republic under the guise of the DIP financing rules. One thing is for sure, Delta significantly improved its positions through these agreements.

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[217] Objection of the United States of America to Debtors' Motion, ECF No. 358.

[218] Objection of Ad Hoc Committee of Equity Holders to Debtors' Motion, ECF No. 359.

[219] Limited Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtors' Motions, ECF No. 364.

[220] Objection Joinder and Reservation of Rights of the International Brotherhood of Teamsters, Airline Division, ECF No. 365.

[221] Reservation of Rights of Banco Nacional De Desenvolvimento Economico E Social – BNDES and Agencia Especial De Financiamento Industrial – Finame, ECF No. 334.

[222] Omnibus Response of Delta Air Lines, Inc. to the Objections of the Ad Hoc Equity Committee and the Unsecured Creditors' Committee, ECF No. 384.

[223] Debtors' Omnibus Reply to Objections, ECF No. 379.

[224] Notice of Revised Debtor in Possession Credit Agreement, ECF No. 406.

[225] Notice of Second Revised Proposed Order, ECF No. 407.

[226] Signed Order, ECF No. 507.

*2. Applicable Code Provisions*

Republic is authorized to continue to operate its business and manage its properties as a DIP under sections 1107(a) and 1108 of the Code. However, to obtain post-petition financing, assume the proposed contracts, or execute the contemplated leases with Delta, Republic needed the approval of the court under section 364, 365[227], and 363[228] respectively. Section 364 provides the means for a DIP to entice lenders to offer capital to it even while in bankruptcy by granting administrative claim status, superpriority over administrative claims, liens on unencumbered assets, and at times priming liens of prepetition debts.[229] For the Court to grant the priorities listed above the DIP must show that it was unable to obtain financing on more favorable terms.[230]

Courts also consider other factors when evaluating the terms of DIP financing. It will look to see if the DIP was able to obtain unsecured credit (administrative claim only), whether the credit transaction benefits and is necessary to preserve the assets of the estate, and whether the terms are fair, reasonable and adequate given the circumstances of the debtor and the proposed lender.[231] The objections to the financing agreement focused mostly on the necessity of Delta serving as the DIP lender, that the terms were far reaching and overly restrictive, and that Republic was able to obtain financing under less burdensome terms.

***B. Republic's Process in Obtaining DIP Financing***

Republic partnered with Seabury as its investment banker and restructuring advisor to help obtain DIP financing. Seabury has knowledge of the intricacies of financing aircraft and related

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[227] For a more complete discussion of 11 U.S.C. § 365*see* First-Day Motions section (A)(5) above.

[228] For a discussion of 11 U.S.C. § 363 *see* First-Day Motions section (B)(2) above.

[229] 11 U.S.C. § 364

[230] 11 U.S.C. § 364(c) of the Bankruptcy Code provides that, if a debtor is unable to obtain unsecured credit allowable under section 503(b)(1) as an administrative expense, then the Court, after notice and hearing, may authorize the debtor to obtain credit or incur debt: (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of [the Bankruptcy Code]; (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or (3) secured by a junior lien on property of the estate that is subject to a lien.

[231] Debtors' Motion for Entry Authorizing (I) Debtors to Obtain Postpetition Financing, (II) Liens and Providing Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay and (IV) Granting Related Relief. ECF No. 246.

assets, and was familiar with the universe of potential transaction partners. Seabury reached out to a list of potential partners including banks, private equity firms, hedge funds and each of Republic's Codeshare Partners. The initial solicitations yielded five qualifying offers. After the offers were received Republic began negotiations and eventually narrowed the pool to three finalists. Republic provided each of the finalists with proposed terms and conditions and invited them to comment.

After reviewing the bids and consulting with Seabury, Republic selected Delta's proposal based on the strength of the following factors:

- Size and certainty of the committed amount,
- Flexibility to draw or not draw the commitment,
- Applicable upfront fees and commitment fees on any undrawn amount,
- Applicable interest rate on drawn amounts,
- Reasonableness of conditions precedent and applicable financial covenants
- Delta's pre-existing relationship with Republic and the reaffirmance of its commitment to that relationship, as evidenced by both the terms of its financing bid and Delta's concessions in amending the Amended Flying Agreements, including the schedule adjustments, substitutions, maintenance, and product modification delays it agreed to in connection therewith,
- Because Delta was already a secured lessee with respect to the Slots, and any pledge of that collateral would be subject to Delta's existing lien and interest, Delta was in a unique position to provide financing with respect to that collateral that would be less valuable to any other lender,
- Delta agreed to provide this postpetition financing at very low cost as part of an integrated set of transactions that are of great value to Republic.

In the proposed order to grant Republic's motion (written by Republic) it states that Republic has a need to obtain DIP financing to pay employees, maintain business relationships with vendors, suppliers and customers, satisfy other working capital needs related to aircraft and operational needs, and maintain adequate liquidity levels for the prudent operation of their business. It further stated that Republic was unable to find financing on more favorable terms. The relief sought in the motion is outlined in the following table.

### *C. Summary of Debtor's Motions, Financing Agreement, and Related Objections.*

*1. Motion to obtain DIP Financing*

| Table 4 | |
|---|---|
| Debtors' motion for entry of an order pursuant to 11 U.S.C. §§ 105, 361, 362(d)(1), 363(b), 364(c)(1-3), 364(d), 364(e), 503(b)(1) and 507(b) and Fed. R. Bankr. P. 4001 and 6004 (I) Authorizing Debtors to obtain postpetition financing, (II) granting liens and providing superpriority administrative expense status, (III) modifying the automatic stay and (iv) granting related relief.[232]<br>Filed 03/24/16<br>Hearing Date and Time: April 21, 2016<br>Objection Deadline: April 14, 2016 | |
| **Relief Sought** | **Objection** |
| Obtain post-petition financing in the aggregate amount of $75 million from Delta | The Official Committee of Unsecured Creditors Objected:<br>The committee objected to Republic pursuing a settlement with Delta on a standalone basis when it represents less than 20 percent of Republic's business and could not sustain a viable business coming out of bankruptcy on its own.[233] The committee worried that Republic's "first come first serve"[234] approach is risky and could be prohibitive of Republic reaching agreements with United and American. |

[232] ECF No. 246.

[233] ECF No. 364.

[234] The Committee appreciates the Debtors' desire to inspire their other Code Share Partners to come to the negotiating table quickly by pursuing a "first come, first served" approach. However, the relief being sought in the Delta Motions will necessarily impact the Debtors' ability to reach satisfactory agreements with American Airlines and United—not least as a result of the proposed most-favored-nation clause in the proposed Settlement Order, which entitles Delta to an increase in the amount or priority of its allowed claim to the extent the other two Code Share Partners strike deals on more favorable terms. See proposed order annexed to the Settlement Motion (the "Settlement Order") at ¶ 7.

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| | Result:<br>The order was signed with no other agreements in place.[235] The issues in contention are discussed further in Republic's response to objections outlined below. |
| Grant first priority liens on:<br>• One Embraer E170 regional jet aircraft equipped with two General Electric CF34-8 engines;<br>• Ten CFM34-8 engines; and<br>• All other unencumbered assets of the Debtors<br>Subject to the carve out pursuant to section 364(c)(2) of the Bankruptcy Code | |
| Grant a first priority priming lien on 15 specified individual LaGuardia Airport arrival and departure slots pursuant to section 364(d) of the Bankruptcy Court. | |
| Grant junior liens on all tangible and intangible property of the Debtors that is subject to valid, perfected and unavoidable liens in existence on the Commencement Date when permissible under law or contract. Provided that in all events the collateral shall include all proceeds or replacements of excluded collateral unless such proceeds or replacements are themselves excluded collateral. | |
| Use the proceeds of the financing to:<br>Provide working capital and for other general corporate purposes of Republic<br>Pay the costs and expenses of the administration of these chapter 11 cases. | |
| Grant superpriority administrative expense claims to Delta, subject to the carve-out, on the terms and conditions in the DIP Term Sheet | |
| Modify the automatic stay to the extent necessary to implement and effectuate the terms and provisions of the DIP Term Sheet and the DIP order. | |

235 ECF No. 507.

*2. Credit Agreement*

| Table 5 | | |
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| Revised Credit Agreement[236] | | |
| **Section** | **Terms** | **Objections[237]** |
| DIP Parties<br>BR 4001(c)(1)(B) | DIP Borrower:<br>RAH<br><br>DIP Guarantors:<br>Republic Airways Services, Inc.;<br>Republic Airline Inc. ("RAL");<br>Shuttle America Corporation;<br>Midwest Air Group, Inc.;<br>Midwest Airlines, Inc.; and | Ad Hoc Committee of Equity Holders Objected:<br>"Granting Delta the rights contemplated by the DIP Motion and the DIP Credit Agreement will result in Delta – a party whose interests are clearly adverse to the Debtors and their estates, and go far beyond those of a traditional lender – having enormous power in these Chapter |

[236] ECF No. 406.

[237] ECF No. 364. Delta agreed to the following changes prior to the objections being filed:

**DIP Order:**

- Providing the Committee with advance notice of any material amendments, waivers, consents or other modifications to and under the DIP Credit Agreement agreed to by the Debtors pursuant to paragraph 3(b) of the DIP Order;
- Providing the Committee's professionals with copies of any reporting or notices that are required to be provided to the Lender or by the Lender pursuant to the DIP Credit Agreement.

**Settlement Order:**

- Clarifying that the Delta Claim will only be allowed against RAH and Shuttle, as the Debtors against whom Delta has actually asserted claims;
- Clarifying that, notwithstanding any change of control provisions in the Assumed Agreements, an equity transaction in the context of a plan that does not result in single person or entity obtaining a majority interest in the Debtors will not be deemed an event of default under the Assumed Agreements.

**DIP Credit Agreement:**

- Limiting the cross-default between the DIP Credit Agreement and the Delta Connection Agreements to material defaults;
- Limiting the waiver of the right to seek relief under Bankruptcy Code section 105 upon the occurrence of an event of default to the Debtors.

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| | Skyway Airlines, Inc.<br><br>DIP Lender:<br>Delta Air Lines, Inc.<br><br>See DIP Term Sheet Pg. 1 | 11 cases. Granting that power to Delta should not be considered lightly. In proposing the DIP Motion, the Debtors argue that, together with the Delta Settlement Motion, the Debtors and Delta are entering into a series of transactions that "represents a comprehensive change in the circumstances, transactions and business relationships between the parties." DIP Motion, ¶ 3. While that may be true, the DIP Motion fails to provide any rationale as to why Delta must be the debtor in possession lender in order to proceed with the balance of the transactions. This question is particularly relevant given that the Debtors were provided with a debtor-in-possession financing proposal from a subset of the Ad Hoc Committee having economic terms more favorable to the Debtors. The only plausible explanation is that Delta perceives there to be a benefit in being the DIP Lender by virtue of the rights afforded under the terms of the DIP Credit Agreement and the DIP Order, particularly if the Chapter 11 cases do not proceed in the manner anticipated by the Debtors."[238]<br><br>Result: |

[238] ECF No. 359.

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| | | The order was signed stating that the terms are fair and reasonable and reflect the exercise of prudent business judgment consistent with their fiduciary duties.[239] It further states that the Debtors are unable to obtain financing on better terms is signed by the court. |
| Use of Proceeds<br>BR 4001(c)(1)(B), LBR 4001-2(a)(7) | Consistent with the provisions of the DIP Order and the terms and conditions of the DIP Term Sheet,<br>(i) To provide working capital and for other general corporate purposes of Republic and<br>(ii) To pay fees and expenses for the administration of these chapter 11 cases.<br><br>See DIP Term Sheet Pg. 1; DIP Order ¶ 2.<br><br>§ 5.17 (prohibiting use of the term loan proceeds other than pursuant to a budget approved by the lenders, or for payment of the lenders' fees and expenses);<br><br>§ 6.18(c) (prohibiting the Debtors from even seeking the Court's authorization to take actions inconsistent with the DIP Credit Agreement).[240] | The United States of America Objected: The DIP Credit Agreement precludes the Debtors from expending funds other than pursuant to a budget approved by Delta—except, of course, for payments that the Debtors may owe Delta, which can be extra-budgetary. See, e.g., DIP Credit Agreement § 5.17. It also broadly prohibits the Debtors even from seeking the Court's leave to expend money inconsistently with the budget. See id. § 6.18(c) (prohibiting Debtors from even seeking the Court's authorization to take actions inconsistent with the DIP Credit Agreement). This arrangement allows Delta to take from the Debtors and the Court the authority to determine whether expenditures by the estate are necessary pursuant to Section 959(b), and as such may improperly serve to immunize the Debtors from their obligations under non-bankruptcy law. |

[239] ECF No. 507.

[240] ECF No. 358.

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| | | Result:<br>The parties limited the restrictions and granted more flexibility for the Debtors to make necessary expenditures and granting necessary liens.[241] |
| DIP Commitment<br>BR 4001(c)(1)(B),<br>LBR 4001-2(a)(1) | A senior secured debtor-in-possession multiple draw term loan facility in an aggregate principal amount of Seventy-Five Million US Dollars ($75,000,000.00).<br><br>See DIP Term Sheet Pg. 1; DIP Order ¶ 2. | Ad Hoc Committee of Equity Holders Objected:<br>"The terms of the proposed DIP Loan Facility do not reflect the best terms available to the Debtors. The DIP proposal submitted to the Debtors by certain members of the Ad Hoc Committee provided for a lower cost of borrowing and more flexibility in borrowing and repayment. The interests of the Ad Hoc Committee and the Debtors are also completely aligned (unlike the interests of Delta, which are purely parochial and adverse to both the Debtors and their other codeshare partners). Despite these facts, the Debtors made no effort to finalize the terms of the Ad Hoc Committee member's proposal. Rather, the Debtors simply succumbed to Delta's demand that, as part of their "global settlement," Delta has to be the DIP Lender."[242] |
| Maturity Date<br>BR 4001(c)(1)(B) | The earliest of:<br>(i) One year from the date of entry of the DIP Order,<br>(ii) The consummation of a sale of substantially all the assets of RAH, subject to the approval by the DIP Lender or<br>(iii) The date of substantial consummation of a plan of reorganization that is confirmed pursuant to an order of the Bankruptcy Court.<br><br>All amounts outstanding under the DIP Agreements shall be payable in full in cash at maturity.<br><br>See DIP Term Sheet Pg. 2. | |
| Fees<br>BR 4001(c)(1)(B),<br>LBR 4001-2(a)(3) | The Debtors agree to pay to the DIP Lender:<br>(i) An upfront fee in an amount equal to one percent (1.0%) of the commitment and<br>(ii) A commitment fee in an amount equal to one percent (1.0%) per annum on the undrawn portion of the committed amount of the financing, calculated and paid monthly in arrears. | |

[241] ECF No. 507.

[242] ECF No. 359.

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| | See DIP Term Sheet Pg. 2. | Result:<br>The order was signed stating that the terms are fair and reasonable and reflect the exercise of prudent business judgment consistent with their fiduciary duties.[243] It further states that the Debtors are unable to obtain financing on better terms is signed by the court. |
| Interest Rate<br>BR 4001(c)(1)(B), LBR 4001-2(a)(3) | 5.75% per annum, paid monthly in arrears, subject to a 2.00% increase during the continuation of an Event of Default.<br><br>See DIP Term Sheet Pg. 2. | |
| Prepayments<br>LBR 4001(2)(a)(13) | The Debtors may voluntarily repay the Loans at any time without premium or penalty upon three (3) business days' prior written notice. Mandatory prepayments will be required upon receipt of proceeds from asset sales subject to reinvestment rights as described in the DIP Term Sheet or the issuance of debt or equity.<br><br>See DIP Term Sheet Pg. 2. | |
| Collateral and Priority<br>BR 4001(c)(1)(B)(i), BR 4001(c)(1)(B)(xi), LBR 4001-2(a)(4) | All amounts outstanding under the DIP Agreements shall be secured by the following liens, subject to the Carve-Out:<br><br>Liens on Unencumbered Property: a perfected first priority lien on (i) one (1) Embraer E170 regional jet aircraft, equipped with two (2) General Electric CF34-8 engines, (ii) ten (10) CFM34-8 engines, and (iii) all other unencumbered assets,<br><br>Priming Liens: a perfected first priority priming lien on fifteen (15) specified LaGuardia Airport arrival and departure slots.[244]<br><br>Junior Liens: a perfected junior lien on all tangible and intangible property of the Debtors that is subject to valid, perfected and unavoidable liens in existence on the Commencement Date, except that the Collateral shall not include the | The Official Committee of Unsecured Creditors Objected:<br>"The Debtors are scheduled to start taking delivery of additional aircraft at the end of this summer, which will likely require third party financing, and is anticipated to form an integral part of the Debtors' flying for United going forward. However, the DIP Financing—for which the Debtors have no imminent need and may never be drawn— contains terms that may very well be unacceptable to third party financiers. Here again, the Committee is unable to evaluate the full |

[243] ECF No. 507.

[244] Delta held a first-priority claim on the Slots prepetition and consented to the priming lien so there are no adequate protection concerns.

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| | Excluded Collateral; provided in all events that Collateral shall include all proceeds or replacements of Excluded Collateral (unless such proceeds or replacements would otherwise constitute Excluded Collateral).<br><br>See DIP Term Sheet Pgs. 2-4; DIP Order ¶ 6. | impact of the proposed Delta deal without more information about where other code share negotiations will land and how the new aircraft will be financed."[245]<br><br>Result:<br>The order was signed granting the priorities as listed.[246] |
| Carve Out<br>LBR 4001-2(a)(5) | "Carve Out" is an amount equal to the sum of:<br>All fees required to be paid to the clerk of the Bankruptcy Court, any agent thereof, including without limitation, the fees and expenses of any claims and noticing agent retained in the Chapter 11 Cases pursuant to section 156(c) of title 28 and acting in such capacity and to the Office of the United States Trustee under section 1930(a) of title 28 of the United States Code plus interest at the statutory rate; (ii) fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code in an amount not to exceed $50,000;<br><br>The reasonable expenses of members of the UCC allowed pursuant to section 503(b)(3)(F) of the Bankruptcy Code whether earned before or after an Event of Default (but excluding fees and expenses of any professionals employed individually by members of the UCC);<br><br>To the extent allowed by the Bankruptcy Court, all claims for unpaid fees, costs and expenses (the "Professional Fees") incurred by persons or firms retained by the Debtors or the official committee of unsecured creditors in these Chapter 11 Cases (the "UCC") (but excluding fees and expenses of any professionals employed individually by members of the UCC and any restructuring fee, sale fee or other success fee of any investment banker or financial advisor of the | |

245 ECF No. 364.

246 ECF No. 507.

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| | UCC) whose retention is approved by the Bankruptcy Court pursuant to sections 327, 328 and 1103 of the Bankruptcy Code (collectively, the "Professional Persons")<br><br>Earned at any time prior to the occurrence of an Event of Default (as defined in the DIP Credit Agreement) unless such Event of Default is waived or cured as provided in the DIP Credit Agreement (the "Pre-EoD Date Fees"), and<br><br>After the occurrence and during the continuation of an Event of Default, if any, (x) excluding any restructuring fee, sale fee or other success fee of any investment banker or financial advisor and (y) in an aggregate amount not to exceed $5,000,000 (the amount set forth in this clause (iii)(B) being the "Post-EoD Carve-Out Amount"); provided that<br><br>As long as no Event of Default shall have occurred and be continuing, the Debtors shall be permitted to pay all fees, expenses, compensation and reimbursement of expenses allowed and payable, including under any order entered in these Chapter 11 Cases establishing procedures for interim monthly compensation and reimbursement of Professional Fees, or sections 330 and 331 of the Bankruptcy Code, as the same may be due and payable, and the same shall not reduce the Carve-Out,<br><br>In the event the Carve-Out is reduced by any amount during an Event of Default, upon the effectiveness of a cure of such Event of Default, the Carve Out shall be increased by such amount, and (c) nothing herein shall be construed to impair the ability of any party to object to the fees, expenses, reimbursement or compensation described in clauses (i), (ii) or (iii) above, on any grounds. The Carve Out shall be senior to the DIP Lender's first priority liens on the Collateral and any other adequate protection, pre-petition or post-petition liens or claims.<br><br>See DIP Term Sheet Pg. 3-4; DIP Order ¶ 5(b). | |
| Conditions to Borrowing<br>BR 4001(c)(1)(B)<br>LBR 4001-2(a)(2) | Prior written notice of borrowing of at least three (3) business days and the following conditions:<br>Compliance with the Consolidated Liquidity covenant, which shall be certified by a 16-10429-shl Doc 246 Filed 03/24/16 Entered 03/24/16 20:35:51 Main | |

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| | Document Pg 12 of 106 9 68940336_5 responsible officer of RAH in a certificate setting forth the Consolidated Liquidity on the date of each borrowing;<br>Each of the DIP Order and the Assumption Order shall be in full force and effect, and shall not have been vacated, reversed, modified, amended, or stayed;<br>Representations and warranties shall be true and correct in all material respects (except where qualified by materiality, then just the accuracy thereof); and<br>No default or Event of Default shall exist or arise immediately after giving effect to the borrowing.<br><br>See DIP Term Sheet Pg. 7. | |
| Covenants<br>BR 4001(c)(1)(B), LBR 4001-2(a)(8) | The DIP Term Sheet contains representations and warranties, and affirmative, negative, and reporting covenants, customary for financings of this type and other covenants appropriate to this specific transaction as agreed to by the Debtors and the DIP Lender. In addition:<br><br>• The Consolidated Liquidity, as determined on a daily basis and reported on a weekly basis for the preceding week, shall at all times be no less $50,000,000, provided that the Unrestricted Cash shall at all times be no less than $30,000,000,<br>• For each Test Period, the aggregate amount of actual operating disbursements and capital expenditures of the type set forth in the Budget line item "Total Cash Out" of the Borrower and its subsidiaries for such Test Period, as compared to the amount of operating disbursements and capital expenditures set forth in the Budget line item "Total Cash Out" for such Test Period, shall not be in excess of 115% of the amount set forth in the applicable Budget.<br><br>See DIP Term Sheet Pgs. 8-10 | |
| Events of Default<br>BR 4001(c)(1)(B), LBR 4001-2(a)(10) | As more particularly described in the DIP Term Sheet, Events of Default include the occurrence of any one or more of the following and other events of default as mutually agreed between the Debtors and the DIP Lender:<br>• Failure to pay principal (with no grace period), interest (with 2 days grace period), fees, expenses or other obligations when due (with 5 day grace period); | The Official Committee of Unsecured Creditors Objected:<br>The cross-default provisions between the different agreements would provide an avenue for Delta to have its prepetition unsecured claims of uncertain value |

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| | • Inaccuracy of representations or warranties in any material respect when made or deemed made;<br>• Violation of covenants;<br>• Change of control;<br>• Customary ERISA defaults;<br>• Any Debtor's allegation in any pleading or other writing, or the finding or conclusion by the Bankruptcy Court, that any loan or security document or other agreement or any Bankruptcy Court order pertaining to the DIP Credit Agreement or the Delta Connection Agreements is not valid, binding or enforceable, or any other event occurs or circumstance exists which causes such loan or security document or other agreement to not be valid, binding and enforceable;<br>• An order for dismissal of any Case or conversion to a chapter 7 case or the Debtors propose or support an application for conversion to a chapter 7 case, in each case, without the consent of the DIP Lender;<br>• Appointment of a chapter 11 trustee or an examiner with enlarged powers relating to the operation of the business of any Debtor,<br>• Granting of relief from automatic stay to permit foreclosure on any material assets of any Debtor (other than Section 1110 Assets and other exceptions to be agreed);<br>• Any Debtor shall file any motion to stay, reverse, amend, vacate or modify the DIP Order, Assumption Order, the DIP Agreement or the Delta Connection Agreements without the DIP Lender's prior consent or the entry of any order staying, amending, vacating or reversing the DIP Order, the Assumption Order, the DIP Agreements or the Delta Connection Agreements without DIP Lender's prior consent,<br>• Failure to achieve the Chapter 11 Milestone set forth in the DIP Term Sheet, | converted into massive post-petition administrative claims if the Debtors are unable to provide Delta with all of the agreed upon flying due to unforeseen developments during these cases.[247]<br><br>Result:<br>Delta agreed to limit events of default that would be included in the cross-default provisions. The order was signed with the cross-default provisions substantially intact.[248] |

[247] ECF No. 364.

[248] Doc 507 pages 15-16

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| | • Any Debtor shall bring or consent to any motion or application in the Cases or an order shall have been entered:<br>• To grant any lien on Collateral that is pari passu or senior to any lien granted to the DIP Lender under the DIP Agreements or the DIP Order unless the DIP Credit Agreement shall have been indefeasibly paid in full in cash or<br>• To recover from the Collateral any costs or expenses of preserving or disposing of such Collateral under Section 506(c) of the Bankruptcy Code,<br>• Any other party shall both seek and obtain allowance of any order in the Cases to recover from any portions of the Collateral any costs or expenses of preserving or disposing of such Collateral under section 506(c) of the Bankruptcy Code,<br>• An order shall be entered by the Bankruptcy Court confirming a plan of reorganization or liquidation in any of the Cases other than an Acceptable Plan of Reorganization unless the DIP Lender shall have approved the terms of such plan,<br>• Unstayed monetary judgment defaults with administrative priority status in the amount of $5 million and material non-monetary judgment defaults,<br>• Payment of prepetition debt (other than payments (A) authorized by the Bankruptcy Court prior to the Closing & Funding Date or, if reasonably satisfactory to the DIP Lender, on or after the Closing & Funding Date, (B) set forth in the Budget approved by the DIP Lender) or (C) constituting the refinancing of existing prepetition secured indebtedness so long as the terms of such refinancing indebtedness are no less favorable to the Debtors than the terms of the indebtedness being refinanced;<br>• The existence of any material lien in connection with any ERISA plan of any Debtor, excluding any lien arising after the filing of the Cases that is unperfected and junior to the liens securing the DIP Loan Facility;<br>• Unstayed or postpetition monetary judgment defaults in excess of $5,000,000,<br>• Cross-default to the Delta Connection Agreements, | |

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| | • Cross-default and crossacceleration to material post-petition indebtedness in excess of $5,000,000 and<br>• The filing by any of the Loan Parties of any motion to reject any of the Delta Connection Agreements, objecting to any claim, seeking to invalidate any of the Delta Connection Agreements or challenging the security interests of the DIP Lender or Delta under the 13 Slot Lease and the 2 Slot Lease.<br><br>See DIP Term Sheet Pg. 10-12; DIP Order ¶ 9. | |
| Automatic Stay<br>BR 4001(c)(1)(B)(iv) | The automatic stay provisions of section 362 of the Bankruptcy Code are hereby vacated and modified to the extent necessary to permit the Lender to enforce all of its rights under the Agreements, including to<br>• Immediately upon the occurrence of an Event of Default (as defined in the DIP Credit Agreement or as provided in paragraph 9 of the DIP Order),<br>• Declare the termination, reduction, or restriction of any further Commitment to the extent any such Commitment remains,<br>• Declare all Obligations to be immediately due and payable, without presentment, demand, protest or other notice of any kind, all of which are expressly waived by the Debtors,<br>• Charge a default rate of interest as set forth in the Agreements and<br>• Terminate the Agreements as to any future liability or obligation of the Lender (but, for the avoidance of doubt, without affecting any of the DIP Liens or the Obligations) and<br>• Upon the occurrence of an Event of Default and the giving of five days' prior written notice (which shall run concurrently with any notice required to be provided under the Agreements) via email to the Debtors and counsel to the Debtors (and, upon receipt, the Debtors shall promptly provide a copy of such notice to counsel to each of the UCC and the U.S. Trustee) to exercise all other rights and remedies provided for in the Agreements and under applicable law. In any hearing regarding any exercise of rights or remedies under the Agreements, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing and the Debtors and other parties in interest hereby waive their right to and shall not be | |

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| | entitled to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent that such relief would in any way impair or restrict the rights and remedies of the Lender set forth in the DIP Order or the Agreements. If any Debtor or any other person challenges the occurrence of an Event of Default, any such objector's remedy shall be, and hereby is, limited to requesting a hearing before this Court on two business days' written notice to the Lender for the purpose of seeking relief consistent with the DIP Order and the DIP Credit Agreement and, at such hearing, seeking such relief. In no event shall the Lender be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to the Collateral.<br><br>See DIP Order ¶ 10. | |
| Equities of the Case<br>BR<br>4001(c)(1)(B)(viii) | In no event shall the "equities of the case" exception in section 552(b) of the Bankruptcy Code apply to the Lender or the Lessee.<br><br>See DIP Order ¶ 10. | |
| Limitation on Charging Expenses Against Collateral<br>BR<br>4001(c)(1)(B)(x) | Except to the extent of the Carve-Out, no costs or expenses of administration of these Chapter 11 Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Collateral pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of the Lender and, with respect to the Slot Collateral, the Lessee, and no such consent shall be implied from any other action, inaction or acquiescence by the Lender or the Lessee, and nothing contained in this Order shall be deemed to be a consent by the Lender to any charge, lien, assessment or claim against the Collateral under section 506(c) of the Bankruptcy Code or otherwise.<br><br>See DIP Order ¶ 11. | |
| Case Milestones<br>BR<br>4001(c)(1)(B)(vi) | Within 60 days of the Maturity Date, a motion shall have been filed for the approval of<br>• A plan of reorganization in the Cases that (A) provides for the repayment in full in cash of all Obligations then due under the DIP Loan Facility | |

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| | upon consummation thereof and (B) includes customary releases of the Lender (an "Acceptable Plan of Reorganization") or<br>• The repayment in full in cash of the DIP Loan Facility by the Maturity Date.<br><br>See DIP Term Sheet Pg. 10. | |
| Indemnification Provisions<br>BR 4001(c)(1)(B)(ix) | The Loan Parties shall jointly and severally indemnify and hold harmless the Lender and each of its affiliates and each of their respective officers, directors, employees, agents, advisors, attorneys and representatives (each an "Indemnified Party") from and against (and will reimburse each Indemnified Party as the same are incurred for) any and all claims, damages, losses, liabilities and expenses (including, without limitation, reasonable fees and disbursements of counsel), joint or several, that may be incurred by or asserted or awarded against any Indemnified Party, in each case arising out of or in connection with or relating to any investigation, litigation or proceeding or the preparation of any defense with respect thereto, arising out of or in connection with or relating to the Commitment Letter, the DIP Loan Facility, the Loan Documents or the transactions contemplated thereby, or any actual or proposed use to be made with the proceeds of the DIP Loan Facility, whether or not such investigation, litigation or proceeding is brought by any Loan Party, any shareholders or creditors of any Loan Party, an Indemnified Party or any other person, and whether or not the transactions contemplated hereby are consummated, except to the extent such claim, damage, loss, liability or expense is found in a final judgment by a court of competent jurisdiction to have resulted from any Indemnified Party's gross negligence or willful misconduct or material breach of any Indemnified Party's obligations under the Commitment Letter, the DIP Loan | United States of America Objected:<br>"The proposed DIP Financing Order would impermissibly protect Delta, as lender, from liability in those circumstances where the law authorizes lender liability[249] for the conduct of the borrower. It also goes beyond that and would protect Delta from liability it might face as a result of having the status of lessee of property. Neither is proper."[250]<br><br>Result:<br>Delta added a carveout for rights or causes of action held by the United States or any Governmental Unit.[251] |

[249] The United States cites CERCLA as an area where lender liability is possible and states the issues with the limitation on liability and the budgetary restrictions noted under the agreements between the problems.

[250] ECF No. 358.

[251] ECF No. 507.

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| | Facility or the Loan Documents. To the extent permitted by law, the Loan Parties shall not assert, and will waive, any claim against any Indemnified Party, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of or in connection with the DIP Loan Facility.<br><br>See DIP Term Sheet Pg. 12-13. | |

*3. Motion to Assume Codeshare and Related Agreements*

| Table 6 | |
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| DEBTORS' MOTION PURSUANT TO SECTIONS 363(b), 363(m), AND 365(a) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 6004, 6006 AND 9019 FOR AUTHORIZATION TO (I) ASSUME CODESHARE AND RELATED AGREEMENTS, AS AMENDED, WITH DELTA AIR LINES, INC., (II) LEASE CERTAIN PROPERTY OF THE ESTATE AND (III) SETTLE CLAIMS BETWEEN DELTA AIR LINES, INC. AND THE DEBTORS[252]<br>Filed 03/24/17 | |
| **Relief Sought** | **Objections** |
| An order authorizing the Debtors to:<br>Enter into, and perform all obligations under,<br>• That certain Amendment Number Fourteen dated as of March 23, 2016 (the "Single Class Amendment 14") to the Delta Connection Agreement dated and effective June 7, 2002 by and among Delta, Shuttle America and Republic (as amended, restated, supplemented or otherwise modified, the "Single Class Agreement" and as amended by Single Class Amendment 14, the "Amended Single Class Agreement") and<br>• That certain Amendment Number Eight dated as of March 23, 2016 ("Dual Class DCA Amendment 8") to the Delta Connection Agreement dated and effective January 13, 2005 by and among Delta, Shuttle America and Republic (as amended, restated, supplemented or otherwise modified, the "Dual Class Agreement" and as amended by the Dual Class DCA Amendment 8, the "Amended Dual Class Agreement"); | |

252 ECF No. 244.

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| An order authorizing the Debtors to assume under Section 365 of the Bankruptcy Code the Amended Single Class Agreement and the Amended Dual Class Agreement (together, the "Amended Flying Agreements"); | |
| An order authorizing the Debtors to assume under Section 365 of the Bankruptcy Code that certain LaGuardia Slot Agreement dated as of April 15, 2015 by and between Delta and Republic Airline Inc. (the "LGA 2 Slot Lease"); | |
| An order authorizing the Debtors under section 363(b) of the Bankruptcy Code, to enter into and perform all obligations under that certain Amended and Restated LaGuardia Slot Agreement dated as of March 23, 2016 (the "A&R Slot Lease") and lease the Leased Slots (as defined in the A&R Slot Lease) to Delta thereunder with entitlement to the full protection of section 363(m) of the Bankruptcy Code; | Ad Hoc Equity Committee Objected:<br>"The legal and practical effect of this protection would be that "in the event that the Court's authorization or approval of the entry into and performance under, or assumption of, any of the Amended Flying Agreements or any provision thereof is appealed, or vacated, reversed or modified, on appeal or otherwise, the validity of the A&R Slot Lease will not be affected." Delta Settlement Motion, at 44"[253]<br><br>Result:<br>The court ultimately granted Delta section 363(m) protection.[254] |
| An order authorizing the Debtors to enter into and perform under that certain Amendment dated as of March 23, 2016 (the "Ground Handling Amendment") to the Connection Carrier Ground Handling Agreement (ASM Buys) dated as of March 1, 2006 between Delta and Shuttle America (as successor in interest of Chautauqua Airlines, Inc. ("Chautauqua") (as amended, restated, supplemented or otherwise modified, the "Ground Handling Agreement" and as amended by the Ground Handling Amendment, the "Amended Ground Handing Agreement"); and | |
| An order authorizing the Debtors to assume under Section 365 of the Bankruptcy Code the Ground Handling Agreement and | |

[253] Objection of Ad Hoc Equity Committee to Debtors' Motion, ECF No. 360.

[254] ECF No. 506.

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|---|---|
| An order allowing Delta a prepetition general unsecured claim in the amount of $170,000,000, not subject to objection, subordination or other challenge as part of a global resolution between Delta and Republic that includes both a settlement of the Delta Litigation (defined below) and the new agreements that provide Republic with substantially enhanced economics. | Ad Hoc Equity Committee Objected:<br>That Delta took unfair advantage of the leverage it had over the Debtors and acted opportunistically.[255] The settlement was not negotiated in good faith and is not fair and equitable. The Committee also objected to the MFN clause[256] and disputes whether the damages sought by Delta have merit and the size of the proposed settlement given the defenses available to Republic should the litigation continue.[257]<br><br>Result:<br>Delta was ultimately granted an unsecured claim of $170,000,000 not subject to offset, subordination, attack or other challenge.[258] |

[255] ECF No. 360.

[256] Debtors' Omnibus Response to Objections, ECF No. 400. Delta and Republic amended the clause with the following amendments:

- The Debtors and Delta have agreed that the MFN Clause will apply only in the event of a settlement of another Codeshare Partner's claim, and will not apply in the event another Codeshare Partner obtains a claim through litigation.
- The Debtors and Delta have established in writing an agreed methodology upon which the parties will determine whether the MFN Clause is triggered and the amount of increase in the Delta Claim should that occur.
- The Debtors and Delta have clarified that (i) any adjustment of the Delta Claim pursuant to the MFN Clause will be subject to a further review and approval process, and (ii) the Delta Claim will be allowed only against RAH and Shuttle, who are the parties to the existing agreements.

[257] ECF No. 360.

[258] ECF No. 400.

*4. Hundred Cent Dollars – The Response from Delta and Republic.*

a. Delta

Delta filed its heavily redacted response to the objections on April 18, 2016. It appealed to the court to view the proposed global settlement as a package deal rather than isolating and scrutinizing individual documents or provisions within the agreements as the Ad Hoc and Creditor's committees had with their objections.[259] The airline focused on its position as the first of Republic's codeshare partners to come to the bargaining table with Republic to amend the parties' agreements, its willingness to settle the pending litigation between the parties for "pennies on the dollar," and how its interests are aligned with Republic's in the restructuring process. It further noted that the proposed global settlement, of which the DIP Financing Agreement is an integral part, would provide the estate with substantial value in "100-cent dollars" unlike the unsecured claims granted Delta.

The major objections include those to the MFN clause on the litigations settlement, Budget approval rights, limitations on aircraft financing, and the cross-default provisions.

*MFN Clause*

Delta states that the MFN clause that was objected to by multiple parties was simply to protect it in its position as the first of the codeshare agreements to settle with Republic.

*Budget Approval Rights*

Delta stated that this provision was common in DIP financing agreements and that Delta had a legitimate self interest in the health and long-term viability of Republic, and that if the Debtors are unable to meet their legitimate obligations they would not survive.

*Limitations on Aircraft Financing*

After continued negotiation with the Debtors, Delta expressly agreed to permit the Debtors to grant liens senior to the DIP liens on Section 1110 assets. Delta argued the permitted liens were "precisely what purchase-money financiers rely upon every day to finance aircraft purchases." In addition, Delta permitted the Debtors to issue grant superpriority administrative claims junior to Delta's superpriority administrative claims on such debt. Delta argued that these provisions were as, or more, generous than financing orders and credit agreements in similar airline bankruptcy cases.

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259 ECF No. 384.

*Cross Default Provisions*

Delta's objectives with these provisions was to protect the entirety of the agreement between the parties and that none of the events of default demonstrate that it is seeking undue or improper protections.

Despite the numerous objections, the motions were granted with relatively few revisions.

b. Republic[260]

Republic also filed its response on April 18, 2016. In Republic's response the company focused on the benefits it would receive when looking at the agreements as a whole. It would see significant improvement in revenues and profitability and access to liquidity at "an impressively low rate."[261] Perhaps most important, with the new agreement it would be able to wind down the use of its costly smaller jets, which would allow the company to transition to the single aircraft and single operating certificate—one of its stated objectives at the outset of these bankruptcy proceedings.

The major objections addressed in Republic's response included those questioning (i) the need for postpetition financing, (ii) Delta as the first codeshare partner to agree to terms, and (iii) whether the Debtors selected the most favorable terms. Additional responses to objections are shown in the table below.

*The Need for Postpetition Financing*

Republic focused on the timing[262] in an attempt to substantiate its statement that "there is no legitimate dispute" that Republic would require postpetition financing.[263] It went on to attack the motive of the Ad Hoc Group of Equity Holders objection by bringing up that it was a disgruntled failed bidder and that if the group thought postpetition financing was unnecessary, why would it put forth a bid? Republic stated that the court showed the objection for what it really was:

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[260] Debtors' Omnibus Response to Objections (Filed Under Seal), ECF No. 381.

[261] Debtors' Omnibus Response to Objections, ECF No. 379.

[262] At the time of filing the motions the company was coming up on its deadline to accept or reject aircraft under [Section 1110]. In addition to the statutory deadline the busy summer flying season was fast approaching and the need to have its fleet plan fixed was imminent.

[263] With the benefit of hindsight this statement looks even worse considering Republic never ends up drawing on its postpetition financing.

a plea to substitute the business judgment of a group of investors for that of a DIP exercising its fiduciary duties.

*Settling with Delta before United or American*

Republic claimed that delaying the agreement would shift the balance of bargaining power in favor of its codeshare partners and bring its current momentum and progress to a halt. The first-come first-serve negotiating tactic employed by the Debtors with its codeshare partners played a key role in inducing the codeshare partners to come to a speedy resolution with Republic, and delaying this agreement would undermine that strategy.

*Were they the Most Favorable Terms Available?*

The Ad Hoc Group of Equity Holders claimed that it knew there were more favorable terms available to the Debtors because its own bid offered better terms. Republic argued however that the terms of the Equity Holders bid would have impeded, rather than promoted the restructuring process. Republic also noted that the unsecured creditors committee recognized the terms of the proposed financing as fair. Additionally, Republic produced evidence that the terms were market-based and reasonable.

Republic claimed that the global settlement of all outstanding issues as well as favorable amendments between Delta and Republic provided more benefit to Republic's business and long-term operations than the equity holders offer did or could have. It stated the agreements with Delta were arm's length transactions, and both sides consulted with professional advisors during the process. Even if the financing proposals were considered in isolation Republic contended that Delta's offer was still superior because the ad hoc group required Republic to execute and deliver amended codeshare agreements with at least two of Republic's codeshare agreements prior to borrowing any funds. A condition which Republic argued would have reduced its bargaining power with its codeshare partners if it was even possible.

Table 7

| Objection[264] | Response |
|---|---|
| Delta's right to approve the Budget and the occurrence of an Event of Default if at any time the Delta-approved Budget is | This is typical for postpetition financing facilities. See, e.g., Exhibit A (In re Hostess Brands, Inc., 12-22052 (RDD) (Bankr. S.D.N.Y. Feb. 3, 2012) (ECF No. 254) ¶ 12(a) (requiring debtor to submit monthly supplements to initially approved budget and requiring lender to approve the new budget, but requiring such approval not to be unreasonably withheld or delayed, but not containing any provision creating an event of default if a budget is not in effect); In re Flat Out Crazy, LLC, (Bankr. S.D.N.Y. March 21, 2013) [ECF |

264 Information is pulled directly from Debtors response to objections. ECF No. 379.

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|---|---|
| not in effect. Ad Hoc Objection ¶ 3(b)(i). | No. 234] ¶¶ I, 16(b) (budget must be approved by lender on a weekly basis, failure to adhere to the budget is an event of default)). |
| Delta's ability to exercise certain rights and remedies upon the occurrence of an Event of Default, including terminating the commitments and declaring all Obligations to be immediately due and payable) and, upon the expiration of five business days' notice, exercise all other rights and remedies, including foreclosing on collateral. Ad Hoc Objection ¶ 3(b)(iv). | This, too, is typical in postpetition financing facilities. See, e.g., Exhibit A (In re Northwest Airlines Corp., No. 05-17930 (ALG) (Bankr. S.D.N.Y. Aug. 8, 2006) [ECF No. 327] ¶ 14 (in the event of a default lenders may terminate the commitment, declare all amounts immediately due and payable, and charge default interest, and with five days written notice set off any amounts owed or enforce collateral rights, or exercise any other right under the loan documents); In re Frontier Airlines Holdings, Inc., No. 08-11298 (RDD) (Bankr. S.D.N.Y. Mar. 20, 2009) [ECF No. 802] ¶ 13 (in the event of default lender may immediately accelerate all obligations and, with five days' notice, exercise any rights in collateral or other rights under the loan documents, including charging default rate of interest); In re Eastman Kodak Company, 12-10202 (ALG) (Bankr. S.D.N.Y. Feb. 16, 2012) [ECF No. 375] ¶ 8(b) (in the event of default upon seven days written notice, lenders may exercise any right and remedy under the DIP, including the application of cash collateral to the debt); In re MSR Resort Golf Course LLC, 11-10372 (SHL) (Bankr. S.D.N.Y. Apr. 15, 2011) [ECF No. 254] ¶ 14 (on default any obligation to provide any loan terminates, and upon default and five days written notice, lender may exercise any rights under the DIP)). |
| An event of default arising from any of the Debtors objecting to a claim of Delta. Committee Objection ¶ 32 | This provision relates to the comprehensive settlement between the Debtors and Delta and the rights granted thereunder, including the allowance of Delta's general unsecured claim in a fraction of the asserted amount. Furthermore, the prohibition on an objection applies only to Republic, not to third parties. As a result, Republic fails to see the basis for the committee's objection to this provision. |
| The reliance on a 13-week budget that cannot take into account future aircraft deliveries and potential changes in delivery dates. Committee Objection ¶ 32. | A 13-week budget is standard in a postpetition financing facility; indeed due to the variations in potential fleet composition and delivery dates identified by the creditors' committee in the its objection, it is unrealistic to presume that each such budgeted expense can be projected accurately beyond the 13-week period. Neither would it be reasonable to compel a lender to approve such a broad spectrum of potential significant transactions on day-one of its commitment to lend. Nevertheless, consistent with standard practice, the DIP Credit Agreement identifies categories of permitted transactions that are not subject to Lender approval, which include the ability of the Debtor to incur indebtedness to acquire aircraft. DIP Credit Agreement § 6.03(a)(xii), (xiv) |
| Cross-default provisions between the agreements that are the subject of the Assumption Motion and the DIP Credit Agreement. Committee Objection ¶ 32; Ad Hoc | The Objections suggest that the cross-default provisions are somehow extraordinary. However, while the DIP facility is a critical component of the Delta Transaction for Republic, it contemplates only a financing arrangement for a limited term; in contrast, the other agreements with Delta establish the terms on which Republic and Delta will continue to do business in the long term -- far beyond the pendency of the financing arrangement or these cases. There can be no question that an event of default under those agreements would be an event of the type that typically triggers default provisions in virtually every postpetition financing arrangement. |

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| Objection ¶¶ 3(b)(ii), (iii). | |

### *D. The Orders are Signed*

On May 3, 2016, modified bench rulings were filed under seal and the orders were signed granting the relief outlined above.[265] The Ad Hoc Committee of Equity Holders of RAH

[265] Signed Order, ECF No. 506; Amended Signed Order, ECF No. 507.

immediately appealed[266] but ultimately withdrew its appeal for reasons not clear in the record.[267] With the orders signed and the appeal withdrawn Republic now had one codeshare agreement in place and was in a good position to carry out the rest of its objectives in the bankruptcy process.

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[266] Notice of Appeal, ECF No. 508; Designation of Items, ECF No. 568.

The questions the committee planned on raising on appeal included:

- Did the lower court err, as a matter of law, by authorizing RAH and Shuttle America Corp. to grant an allowed pre-petition claim to Delta pursuant to 11 U.S.C. §§ 363, 365 and Fed. R. Bankr. P. 9019 as consideration for, among other things, Delta's post-petition agreement to modify certain executory contracts when applicable law does not expressly permit a debtor to create a pre-petition allowed claim in exchange for post -petition contractual modifications?

- Did the lower court err, as a matter of law, in evaluating the transaction as a single global litigation settlement despite the fact that a worksheet prepared by the Debtors summarizing information provided by Delta, a "most favored nations" clause inuring to Delta's benefit. and other evidence undeniably showed that [redacted amount] of the $170 million prepetition claim granted to Delta was admittedly in consideration for post-petition contract modifications (as opposed to settlement of prepetition litigation claims)?

- Did the lower court err by approving a settlement between the Debtors and Delta where [redacted information] of liability alleged by Delta lacked a credible evidentiary basis when such alleged liability was on account of lost profits to be realized by Delta during a year "extension period, the uncontroverted evidence shows that (a) Delta purported to unilaterally extend the term of the applicable agreements only 44 days after the Debtors advised Delta that they would unable to perform its obligations such agreements; (b) the applicable agreements contained no right in favor of Delta to unilaterally extend the term of such agreements; and (c) the Debtors never publicly disclosed in any filing with the Securities and Exchange Commission (the "SEC") that its potential liability to Delta was in the range of "hundreds of millions of dollars" or in excess of $1 billion?

- Did the lower court err by finding that the Debtors and Delta acted in good faith in connection with the settlement when [redacted information] of the alleged liability was based on (a) Delta's purported unilateral extension of the applicable agreements only 44 days after the Debtors advised Delta that they would be unable to perform its obligations thereunder and (b) the applicable agreements contained no right for a unilateral extension by Delta?

[267] Stipulations and Orders Dismissing Appeals with Prejudice, ECF No. 1007.

**United and American Codeshare Agreements**

Shortly after the motions for DIP financing and assumptions of the related agreements with Delta were approved by the court, Republic reached agreements with its remaining codeshare partners, United and American, just as it had hoped. Of Republic's stated goals at the outset of its Chapter 11 case, reaching profitable agreements with its codeshare partners was the most important.[268] There was simply no profitable path forward without key concessions by its codeshare partners. That was finally beginning to take shape.

***A. United Airlines***

In June 2016 Republic filed a motion for authorization to assume its codeshare and related agreements under Bankruptcy Rule 365(a) and to settle its claims under Bankruptcy Rule 9019(a) with United. With the exception of the DIP financing component, the issues before the court were similar to those discussed above in regards to the assumption of the codeshare and related agreements and settlement of Delta's claims. Republic's integrated transaction with United involved the following components:

- Assumption of the Restructured United Express Agreement (the codeshare agreement).
- Assumption of the slot lease between United f/k/a Continental Airlines, Inc., and Republic for slots at Newark Liberty International Airport.
- Assumption of the EWR Slot Lease agreement between Republic and United for slots also at Newark Liberty International Airport.
- Settlement of United's claims against debtor including a waiver of all prepetition claims and certain post-petition claims for breach of performance, lost profits, disruption and transition costs, among other claims.
- On April 24, 2016, the Debtors filed the Notice of Election Pursuant to Section 1110(a) in which they agreed to cure all defaults and perform all obligations under the Credit Agreement and security documents related to aircraft that were used as collateral for a loan from Wells Fargo Bank and United in which United was granted a lien on under the credit agreement.

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[268] Debtors' Motion to (I) Assume Codeshare and Related Agreements, as Amended, with United Airlines, Inc., and (II) Settle Claims Between United Airlines, Inc. and the Debtors, ECF No. 614.

Key concessions made by United included agreeing to increased rates retroactively, reducing the number of required scheduled flights, permitting either Shuttle or Republic Airline to operate its flights during the transition to a single carrier, and extending the term of the agreement. For its part, United received a $193 million[269] unsecured prepetition claim against RAH, Republic Airline, and Shuttle America.[270]

Additionally, United agreed to purchase E175 aircraft from Embraer that Republic had previously contracted to purchase but for which it was unable to obtain financing while in bankruptcy.[271] United then agreed to lease the purchased aircraft to Republic for fulfillment of its contractual obligations under the codeshare agreement between the parties. Republic agreed to pay a one-time fee to United for the transaction.

### *B. American Airlines*

The motion to assume and enter into the codeshare and related agreements and settle claims with American followed in September of 2016.[272] American represented nearly half of Republic's revenues and was a key player in the restructuring process. The amended agreement with American merged the two agreements Republic had with American and US Airways[273] into one agreement which would greatly simplify the administration of the agreement for both parties.[274] It also called for commercial and claim settlements between the parties.

#### *1. The Commercial Settlement*

The commercial settlement included entering the following three agreements:

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269 Notice of Appeal, ECF No. 714 (Ad Hoc Committee of Equity Holders appealed on the same grounds as it did the Delta settlement and was later dismissed as well. ECF No. 1007).

270 ECF No. 614.

271 Debtor's Motion to Authorize Assumption of Agreements with United Airlines Inc., ECF No. 1183.

272 Debtors' Motion to Assume Agreements with American Airlines, Inc., ECF No. 957.

273 US Airways was merged into American as of December 30, 2015 but the parties had, prior to this amendment, been operating under two standalone codeshare agreements with Republic.

274 ECF No. 957.

- Entry into the Amended and assumption of the Restructured American CPA (the codeshare agreement)
- Entry into the letter agreement and the guarantee.[275]

- Assumption of the Emergency Assistance Agreement[276]

Similar to the concessions made by Delta and United, American agreed to (i) a single style of aircraft,[277] (ii) a reduction in the required number of flights under the agreement, and (iii) allow Republic to maintain its rights with respect to landing slots at Ronald Reagan Washington National Airport allocated by the FAA for American's benefit so long as American committed to schedule certain flying utilizing such slots. The agreement also provided an option for increased flying, which would give Republic some operational flexibility.

*2. The Claim Settlement.*

American asserted claims against Republic based on a number of alleged breaches under the agreement with American and US Airways. Additionally, it claimed damages on account of the concessions and benefits provided to Republic under the restructured deal reached by the parties. To settle these claims American would receive a general unsecured claim of $250 million against RAH and a single general unsecured claim in the amount of $250 million to be split into

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[275] The letter agreement and guarantee set forth the detail of the Claim Settlement and outlines the timeline and steps American and the Debtors have agreed to take in connection with obtaining court approval of the comprehensive resolution between the parties (i.e. the claim settlement and the commercial settlement) The guarantee is meant to replace the original guarantee that RAH agreed to with regard to Republic's performance under the codeshare agreement.

[276] This agreement governs the procedures under which American and Republic Airline may request assistance of the other in the event of an accident, incident, or aircraft emergency.

[277] Republic had previously operated E175s with 80-seat configurations for American, in order to operate under a single certificate Republic would need to reconfigure the 80-seat aircraft to 76-seat aircraft. If they were to continue to operate 80-seat aircraft they would have to maintain multiple certificates. American agreed to bear the costs of the reconfiguration up to a capped amount for each aircraft. This was the last hurdle for Republic to operate under one certificate.

two claims and allocated against Shuttle and Republic Airlines.[278] The settlement also contained a MFN clause that guaranteed American to have at least 25 percent of the total allowed general unsecured claims against RAH in the event the general unsecured claims against RAH would be greater than $1 billion.

*3. The Official Committee of Unsecured Creditors Objection*

The order was signed September 22, 2016, but it did not authorize the settlement of claims between the parties.[279] The Official Committee of Unsecured Creditors objected to the most favored nation clause and the severability of the Commercial and Claim settlements.[280] Specifically, the committee objected that the most favored nation clause failed to satisfy the standards for approval of a settlement under Bankruptcy Rule 9019, which requires the court to evaluate the future benefits versus the outcome of litigation and determine whether the claim settlement "falls below the lowest point in the range of reasonableness." The Committee claimed that the clause was prejudicial to the Debtor's non-airline creditors because it guaranteed American 25 percent (19.16 percent for United and 17.35 percent for Delta) and the codeshare partners collectively roughly 62 percent of distributions of the sums allocated to general unsecured claims before Republic's claim exposure was even calculated.[281] The provision had potentially catastrophic ramifications for the estate. In fact, as discussed in the final section of the paper addressing the plan, this provision was written to protect the equity interest the Codeshare Partners were to receive in exchange for their unsecured claims from being diluted rather than any cash they were to receive.

Republic[282] claimed American would not agree to the settlement without the most favored nation clause included so as to protect its claim from being unduly diluted by future events.[283] Republic argued that it was substantially similar to those granted to Delta and United and that settlement without the clause would have been for a much higher dollar amount. Consequently, it

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[278] Essentially American agreed, as did Delta and United, to have its claim split between Shuttle and Republic Airline such that the percentage recoveries in respect of such distributions to such unsecured claims are as equal.

[279] Signed Order, ECF No.1028.

[280] Limited Objection of the Official Committee of Unsecured Creditors, ECF No. 994.

[281] ECF Nos. 957, and 994.

[282] Joinder of Delta Air Lines, Inc. to Debtor's Response, ECF No. 1055.

[283] Debtors' Response, ECF No. 1052.

would have created a ripple effect by triggering the most favored nation clauses in both United and Delta's contracts. Republic also argued that the dilution risks under the most favored nation clause were substantially less than they would have been litigating American's claims. Ultimately the court signed the order without altering the most favored nations clause.[284]

**Fleet Restructure and Related Claims**

***A. Fleet Restructuring and Related Claims Settlements***

The agreements reached with Republic's Codeshare Partners opened the door for Republic to accomplish the remainder of its restructuring plan. The next step toward its planned restructure involved Republic streamlining its operations by restructuring its fleet. The restructured Republic could then become profitable again as it kept up with realistic codeshare agreements that took the pilot shortage problem into consideration. Republic began the restructuring of its fleet and operations contemporaneously with its efforts to amend its codeshare agreements.

Republic's fleet restructuring involved three main goals: (i) Streamline Republic's operations by operating a single aircraft type; (ii) operate the single aircraft type under a single aircraft certificate; and (iii) retire out-of-favor aircraft.[285] More specifically, Republic sought to reduce its fleet down to a single aircraft type—the E170/175 fleet—and return out-of-favor aircraft—the Q400 and ERJ-140/145 fleet – to the secured lenders, lessors, and manufacturers. Each of the amended codeshare agreements made this possible.

First, the amended codeshare agreement between Republic and Delta "provid[ed] for the restoration of E170 and E175 flying for Delta and the orderly wind-down to Republic's ERJ-145 flying, which would allow Republic to train and transition pilots into the duel class aircraft that are the future of Republic's operations. . . ." Second, the amended codeshare agreement with United "comprehensively restructure[d] the parties' relationship to provide Republic with increased revenues and to accelerate the removal of Q400 aircraft." The codeshare agreement was later amended again to allow Republic to lease additional aircraft owned by United to carry out its obligations under the codeshare agreement with United.[286] Finally, the amended codeshare agreement with American also facilitated Republic's fleet restructuring:

> The amended codeshare agreement consolidates all of Republic's flying for American under a single codeshare agreement, provides for American to continue

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[284] Signed Order, ECF No. 1196.

[285] ECF No. 1312.

[286] Referencing ECF No. 1183.

> to pay Republic market-competitive rates, facilitates Republic's fleet restructuring by allowing for a reduction in the aircraft Republic is required to allocate to American, extends the terms of the agreement with respect to certain aircraft, and provides for a two-phase transition regarding the configuration of seats in certain aircraft."[287]

Republic's plan to simplify its business by operating fewer fleet types on fewer certificates began over a year before the Commencement Date when Republic consolidated Chautauqua Airlines, one of its smaller platforms, into the Shuttle America operating certificate.[288] Immediately before bankruptcy, Republic's fleet consisted of approximately 300 aircraft, most of which were leased or subject to secured financing arrangements.[289] This large regional fleet consisted of 80 financed or leased ERJ-140/145 aircraft, 27 leased Q-400 Aircraft, and 192 financed or leased E170/175 aircraft. Having been enabled by the Code, and further enabled by the amended codeshare agreements, Republic could expeditiously restructure its fleet and simplify its operations through (1) section 1110 agreements, (2) the early return of out-of-favor aircraft and related claims settlements, and (3) settlements with the original equipment manufacturers.

*1. Section 1110 Agreements*

Recall that under section 1110 of the Code, 60 days after the Commencement date, certain secured parties and lessors with regard to aircraft equipment are not prevented by the automatic stay from seeking to recover aircraft equipment that is collateral for their secured claim or the subject of their leases.[290] The automatic stay will apply, however, if within that 60-day period the debtor agrees either to perform under the agreement with the lender/lessor and cure any existing default, or else the debtor and lender/lessor agree to extend the 60-day period. Either option is subject to court approval.[291]

The initial 60-day period expired on April 26, 2016. But Republic received blanket approval from the Court to either (1) agree to perform and cure defaults, and thus reinstate the automatic stay; or (2) enter into an agreement with the aircraft party to extend the time for Republic

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287 ECF No. 1312.

288 ECF No. 4.

289 ECF No. 1312.

290 11 U.S.C. § 1110(a)(1); *see* First-Day Motions (A)(9) of this document.

291 11 U.S.C. § 1110(a)(2)

to agree to perform and cure defaults.[292] Pursuant to this order, Republic "entered into agreements to extend the automatic stay or agreed to perform and cure defaults under financing agreements with respect to substantially all aircraft equipment in its fleet."[293] Table 9 below breaks down Republic's treatment of its aircraft equipment in its effort to restructure its fleet.

*2. Early Return of Out-of-Favor Aircraft and Related Claims Settlements*

a. The Law

Republic did not waste any time before it started using the chapter 11 process to get rid of its out-of-favor aircraft. The first motion Republic would file after its First-Day Motions was the First Omnibus Motion for an Order (i) Authorizing Debtors to Transfer Title To and Abandon Certain Owned Aircraft and Engines and Reject Related Aircraft Lease and (ii) (A) Authorize Debtors to Fulfill Their Obligations Under a Certain Engine Purchase Agreement and (B) Direct Citibank to Take All Steps to Cooperate with the Closing of Same.[294] Republic stated in that motion that in furtherance of its business strategy (to streamline its operations by reducing its fleet to a single aircraft type and return out-of-favor aircraft), "Republic intends to utilize the chapter 11 process to retire underutilized and idle aircraft and engines from its fleet through rejection or abandonment. This motion is the first step in that process." Republic would file similar motions to assume or reject purchase and lease agreements, or to abandon or sell its aircraft equipment, throughout the chapter 11 proceedings.[295]

Section 363(b)(1) of the Code authorizes the trustee, upon court approval, to "use, sell, or lease, other than in the ordinary course of business, property of the estate." The court will usually grant approval if the debtor shows sound business judgment in its motion requesting the approval. Section 554 of the Code authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." The court must afford the DIP "significant discretion in determining the value and benefits of particular property for the purposes of the decision to abandon it."[296] Republic would assert in its motions

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[292] ECF No. 212.

[293] ECF No. 1312.

[294] Notice of Hearing, ECF No. 100.

[295] Republic's latest motion for rejecting an aircraft lease agreement was filed on February 22, 2017 (ECF No. 1528).

[296] EFC. No. 100 (referencing *In re Interpictures Inc.*, 168 B.R. 526, 535 (Bankr. E.D.N.Y. 1994)).

to abandon aircraft equipment that because it would no longer be required under Republic's restructured business plan, and because Republic likely had no equity in much of the aircraft equipment, the aircraft equipment was burdensome to Republic's estates.

Section 365(a) of the Code permits a DIP to "assume or reject any executory contract or unexpired lease of the debtor." If the DIP wishes to assume an executory contract or unexpired lease, it is generally required to cure any defaults under the contract or lease, compensate any party to the contract or lease for actual pecuniary losses resulting from the debtor's default, and provide adequate assurance of future performance under the contract or lease.[297] Executory contracts are treated differently from unsecured claims (which receive pro-rata distribution after the reorganization) and secured claims (which may be rewritten, bifurcated, or subject to cramdown). Executory contracts do not have such leeway.[298] Hence, if the DIP chooses to assume the executory contract or lease, it is obligated to pay the entire amount under the original terms of the contract or lease. If the DIP rejects the contract or lease, the counterparty is left with an unsecured claim for the full amount. Thus, Republic's rejection of unexpired leases and other executory contracts would ultimately result in ever-increasing unsecured claims against Republic.

b. Terms of Surrender

Republic's early return of out-of-favor leased aircraft indeed resulted in significant claims for lost rent, deficiency claims, and "Republic's inability to return the aircraft in the condition required under the applicable leases."[299] In fact, Republic proposed that in abandoning the property, each aircraft secured party must remove its equipment (abandoned by Republic) from where Republic was storing it. The secured party's failure to do so would result in the secured party's liability for the costs of storing, maintaining, and insuring the equipment incurred after the 15-day deadline.[300] Republic sought a finding from the Court that these conditions satisfied the "surrender and return" requirements of section 1110(c) of the Code. That section requires that if the DIP fails to make an 1110(a)(2) election,[301] it must immediately surrender and return to the

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[297] 11 U.S.C. § 365(b)(1).

[298] Bernstein & Kuney, at 287 (relying on the Countryman definition of an executory contract).

[299] ECF No. 1312.

[300] ECF No. 100.

[301] *First Day Motions*, Part (A)(9) of this document.

secured party or lessor the aircraft equipment upon written demand by the secured party or lessor. Furthermore, if the abandoned equipment was unserviceable, Republic would be under no obligation to repair it to make it serviceable. In essence, Republic would "return" the aircraft and engines "as is, where is."

Citibank objected to these terms of surrender and return of the aircraft equipment, claiming they were unreasonable.[302] Under Republic's credit agreement with Citibank, Republic still owed Citibank around $23 million, secured by six ERJ-145 aircraft, one Rolls-Royce engine, one GE engine, and all records and documents related to the collateral.[303] Citibank objected after learning that "not only were the engines that belonged in the airframes not at the same location as the aircraft, but that some of the engines that are in the airframes belong to unidentified third-parties and that those engines must be removed before the aircraft may be returned to Citibank."[304] Citibank did not ask Republic to repair the aircraft equipment before returning it; it just wanted Republic to return the aircraft with the matching engines subject to the same security agreement as the airframe. Citibank cited multiple sources where the court required the return of the aircraft with the matching engines.

The Court rejected Citibank's objection and granted all of Republic's proposed conditions except for the insurance requirement, setting a harsh precedent (harsh for secured parties; favorable to Republic) for the rest of the chapter 11 proceeding.[305] The Court issued a memorandum of decision two weeks later explaining its decision.[306] The Court noted that because section 1110 fails to specify (i) the conditions for the surrender and return of the aircraft equipment, or (ii) whether a debtor must comply with any conditions of return in the underlying agreement, the terms of return are often disputed in airline bankruptcy cases. The Court quoted Collier on Bankruptcy,

> [T]here is no reported authority . . . as to whether a debtor has an obligation to do more than make the aircraft immediately available to the lessor or secured party at its location and in its condition on the applicable date, or as to whether the costs of repair and repositioning are administrative expenses. . . .

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[302] Limited Objection of Citibank, ECF No. 147.

[303] Memorandum of Decision, ECF No. 323.

[304] Supplemental Objection of Citibank, ECF No. 179.

[305] Order, ECF No. 215.

[306] ECF No. 323.

In rejecting Citibank's objection and arguments, the Court ultimately relied on the few courts that had spoken on the issue, holding that debtors who surrender aircraft equipment need not comply with the contractual requirements of the credit agreement. Instead, the aircraft lenders and lessors "were not foreclosed from asserting a claim arising from non-compliance with such requirements."[307] The purpose of section 1110 is speed. It would be unreasonable to require a debtor to return airline equipment under the terms of the underlying credit agreement within the 60-day period after the Commencement Date. "The statute does not give lenders and lessors a 'miracle right to have [the debtors] put it all back together again.'"[308] It would be counterintuitive to require the immediate return of aircraft equipment while also imposing conditions on its return. Therefore, while Republic was not required to return the secured party's aircraft and engines together, the secured party was still permitted to assert a claim against Republic for the cost of acquiring the aircraft equipment from where Republic left it, as well as the cost of putting the secured party's collateral back together.

c. The Out-of-Favor Aircraft

The sections below discuss Republic's relinquishing of its out-of-favor aircraft. Table 8 below provides figures for Republic's treatment of each class of aircraft involved in its fleet restructure.

*The Q-400 Aircraft*

As of the Commencement Date, Republic was using only four of the 27 Bombardier Q-400s (and related Pratt & Whitney engines) it was leasing from Nordic Aviation Capital ("NAC"). Republic actually began transitioning the Q-400 fleet out of its operations over a year before the Commencement Date. Of the 27 aircraft leases, 24 of the leases still had over four years remaining.[309] The longer the unused Q-400s remained leased and unused by Republic, the greater NAC's claims against Republic. To mitigate this, Republic entered into an agreement with Flybe Limited ("Flybe") in late 2014 wherein Republic agreed to sublease the 24 unused Q-400s to Flybe. But at the time of commencement of chapter 11 proceedings, only four of the 24 Q-400s had been delivered to Flybe. Rather than continue its plan of subleasing the aircraft, Republic began

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[307] *R*eferencing *US Airways Group, Inc.*, 287 B.R. 643, 645 (Bankr. E.D. Va. 2002).

[308] Quoting *In re Delta Air Lines, Inc.*, Case No. 05-17923, Hearing Transcript of October 17, 2005 at 17:2-3.

[309] ECF No. 1312.

negotiating with NAC shortly after the Commencement Date for a consensual early return of the excess Q-400s.[310]

After nearly a month of settlement negotiations, Republic and NAC entered into an agreement wherein Republic would reject the leases of the Q-400s and return the aircraft to NAC in "AS-IS" condition. The parties agreed to share the costs of storage, ferry flight, insurance, and maintenance in the interim. To mitigate NAC's damages and potential damages to Flybe and other third parties resulting from the rejection of the sublease and vendor contracts relating to the Q-400s, the agreement provided that NAC would step into Republic's shoes on the sublease and vendor contracts. NAC also agreed to pay all cure amounts and assume all contractual obligations of the sublease and vendor contracts. In exchange, Republic would grant NAC "(i) an allowed administrative expense claim against Republic Airline in the amount of $374,000 and (ii) allowed unsecured rejection damages claims against each of Republic Airline and RAH in the amount of $47.9 million."[311]

The Court authorized the conditions of the agreement and the rejection of the related leases on April 18, 2016. For the remaining four aircraft that Republic had been using, Republic entered into an agreement on October 27, 2015, which provided for the early termination of the leases and delivery of the aircraft to the owners. As of the Commencement Date, Republic had returned one of the four aircraft to its owner, and Republic was scheduled to return the remaining three aircraft by March 20, 2016.[312] Thus, Republic cleansed itself of the Bombardier Q-400 aircraft entirely.

*The ERJ-140/145 Aircraft*

As of the Commencement Date, Republic held a fleet of 80 ERJ-140/145 aircraft. As discussed above, Republic surrendered title to six ERJ-140/145s to Citibank near the beginning of the chapter 11 proceedings.[313] Republic leased 28 ERJ-140/145s from GE Capital Aviation Services ("GECAS"), several of which were parked due to lack of sufficient flight crew. GECAS also leased 26 E170/175 aircraft to Republic and asserted that Republic's rejection of the 28 out-of-favor ERJ-140/145s would trigger cross-default and cross-collateralization provisions on the E170/175s.[314] On April 25, 2016, after extensive negotiations, GECAS agreed to Republic's early

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[310] Motion to Approve Settlement Agreement, ECF No. 249.

[311] ECF No. 1312.

[312] ECF No. 249.

[313] *See* "Terms of Surrender"; *see also* ECF Nos. 100 and 215.

[314] ECF No. 1312.

return of the leased ERJ-140/145 aircraft by stipulation.[315] Republic then filed a motion to reject the ERJ-140/145 leases on May 31, which the Court granted on June 17. The parties continued to negotiate a settlement of GECAS's claims, which was ultimately reached and submitted to the Court on October 27. The parties entered into a stipulation "settling GECAS's claims with respect to, among other things, lost rent and return conditions on the returned ERJ-140/145 aircraft and related spare engines by allowing general unsecured claims against each of Shuttle and RAH in the amount of $53.8 million."[316] GECAS also negotiated for a claim regarding Republic's rejection of 17 leases for E170/175 aircraft, increasing GECAS's total claim against Republic to $112.3 million.[317] No one objected to the stipulation, and the Court signed the order on November 29.[318]

Agencia Especial de Financiamento Industrial-FINAME ("FINAME") held security interests in 15 of Republic's owned ERJ-140/145 aircraft and asserted that Republic's surrender of the collateral would trigger cross-default provisions on 65 of Republic's E170/175 aircraft.[319] After extensive negotiations, Republic, FINAME, and Embraer S.A. ("Embraer") entered into agreement on July 26 to cancel Republic's obligations to make payments for the ERJ-140/145s, terminate the mortgage documents, and waive cross-defaults relating to the aircraft. In exchange, Republic would convey to Embraer its right, title, and interest to the ERJ-140/145 aircraft, and Embraer would maintain its right to assert prepetition claims with respect to Republic's now-cancelled obligations.[320] The Court approved the agreement on August 18, and the agreement was consummated on August 30, 2016.[321]

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[315] *R*eferencing Stipulation and Order Approving Section 1110(b) Extension for GECAS Leased and Financed Aircraft, ECF No. 461.

[316] *R*eferencing Motion to Approve Stipulation for Settlement of Claims Between the Debtors and GECAS, ECF No. 1148.

[317] ECF No. 1312; *See also* Debtor's Motion to Reject Certain Aircraft Leases with Gecas, ECF No. 1058; Signed Order, ECF No. 1135 (for Republic's motion to reject its E170/175 leases with GECAS and the accompanying order, respectively).

[318] Order Signed, ECF No. 1239.

[319] ECF No. 1312.

[320] Motion to Authorize the Debtors to Transfer Title to Certain Aircraft, ECF No. 837.

[321] Order Signed, ECF No. 902.

Republic also returned 14 additional ERJ-140/145 aircraft for which Embraer had an interest as a lender or post-Commencement Date transferee of other lender's rights.[322] Embraer and Republic engaged in extensive negotiations regarding claims arising from these aircraft and the FINAME aircraft. The Court finally approved their settlement agreement on March 23, 2017.[323] Finally, "[o]ther lenders and lessors, including CIT, Citibank, N.A., Dougherty Equipment Finance, LLC, DVB Bank SE, ALF VI, Inc. and Norddeutsche Landesbank Girozentrale have asserted claims against the Debtors with respect to the early return of ERJ-140/145 aircraft." Table 8 shows the settlement claims tied to the early return of the ERJ-140/145 fleet. It is also worthy to note that the fleet reduction resulted in claims for other parties not receiving the aircraft, including parties with a security interest in the engines and spare parts as well as parties providing service and maintenance to the aircraft equipment.[324]

| Table 8: ERJ-140/145 Claimants | | |
|---|---|---|
| **Lender/Lessor** | **Aircraft Returned/ Surrendered** | **Resulting Claim** |
| GECAS (Lessor) | 28 | $53.8 million unsecured claim against each of Shuttle and RAH |
| FINAME (Lender) | 15 | |
| Embraer (Lender) | 14 | ECF 1181 |
| Citibank (Lender) | 6 | |
| Dougherty (Lender/Lessor) | 3/1 | Unsecured claims of $1,288,711.19 for the 3 owned ERJ-145s and $1,947,184.87 for the 1 rejected lease.[325] |
| DVB Bank (Lender) | 1 | |
| CIT (Lender) | ½ (w/ NLG)[326] | |
| ALF VI | | |
| NLG | ½ (w/ CIT) | |

[322] ECF No. 1312.

[323] *See* Section (3)(b) below.

[324] *See, e.g.* Motion to Authorize the Debtors to Enter into Settlement Agreement with Honeywell International Inc., ECF No. 1250.

[325] Order Approving Settlement Agreements, ECF No. 1607.

[326] *See* Debtors' Third Omnibus Motion for Order Authorizing Debtors to Transfer Title to and Surrender Certain Owned Aircraft, ECF No. 464.

*The E170/175 Aircraft*

The amended codeshare agreement with American substantially reduced the number of E170/175 aircraft Republic would need to meet its obligations. Pursuant to this, Republic (i) rejected leases on one E170/175 aircraft leased from Dougherty Air Trustee, LLC ("Dougherty");[327] (ii) rejected leases on 17 E170/175 aircraft leased from GECAS;[328] (iii) surrendered one E170/175 aircraft subject to loan from NXT Capital, LLC;[329] (iv) surrendered five E-175 aircraft to FMS Wertmanagement ("FMS"); and (v) sold three of its owned E170/175 aircraft to Aerolitoral, S.A. de C.V. ("Aerolitoral"), which was leasing the three aircraft from Republic as of the Commencement Date.[330]

Each of Republic's actions in reducing its E170/175 fleet to meet its new codeshare obligations resulted in additional claims against Republic. Dougherty initially filed a proof of claim for $12.7 million against both RAH and Republic Airline. After negotiations, Dougherty agreed to reduce its claims to $3.5 million against each of RAH and Republic Airline, and to provide a general release and waiver of all other aircraft claims against Republic.[331] Republic and GECAS agreed to settle GECAS's rejection damages claim (for lost rent, return conditions, etc.) with respect to the rejection of the 17 E170/175 aircraft by allowing GECAS aggregate unsecured claims against each of RAH and Republic Airline in the amount of $60 million.[332] NXT initially filed proofs of claims for $15,540,850.65 against RAH and Republic Airline. Through settlement negotiations, NXT agreed to reduce its claims to general unsecured claims of $4,000,000 against

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[327] Order Authorizing Debtors to Reject Aircraft Lease with Dougherty Air Trustee, LLC, ECF No. 690.

[328] ECF No. 1135.

[329] Order Authorizing Debtors to Transfer Title to and Surrender Certain Owned Aircraft, ECF No. 1038.

[330] Order Authorizing the Debtors to Sell Certain Aircraft and Consensually Terminate Related Aircraft Leases and Approve Allowed Claims, ECF No. 1284.

[331] Motion to Approve Settlement Agreement Regarding Rejected Aircraft Lease, ECF No. 1453.

[332] ECF No. 1312 (referencing ECF No. 1148). Recall that GECAS's combined unsecured claim for Republic's rejection of the 28 ERJ-140/145 leases and Republic's rejection of the 17 E170/175 leases aggregates to $112.3 million.

RAH and Republic Airline.[333] FMS filed claims against RAH and Republic Airline each in the amount of $50,782,389.79 before Republic surrendered the five E-175 aircraft.[334] It is unclear whether FMS and Republic are negotiating a settlement. Finally, Aerolitoral reduced its claims against Republic from an aggregate unsecured claim of $12.6 million to an aggregate unsecured claim of $10.3 million.[335]

Republic also filed a motion to reject the leases of three E-175 aircraft leased from Metropolitan Life Insurance Company ("Metlife");[336] however, Republic would later resume negotiations with Metlife. This ultimately led to amending and assuming the leases and granting Metlife prepetition unsecured claims in the aggregate amount of $14,881,130.28.[337]

Table 9[338]

| **Chapter 11 Event** | **Bankruptcy Code Section** | **Retained / Returned / Sold** | **Owned / Leased** | **Quantity** | **Fleet / Equipment Type** |
|---|---|---|---|---|---|
| ***E170/175 Fleet*** | | | | | |
| Rejected Leases | 365 and 1110 | Returned | Leased | 18 | E170 Aircraft |
| Surrendered and Returned | 363 and 1110 | Returned | Owned | 1 | E175 |
| Assumed Amended Leases | 363, 365 and 1110(a) | Retained | Leased | 5 | E170/175 Aircraft |
| Secured | 1110(a) | Retained | Owned | 81 | E170/175 Aircraft |
| Amended Aircraft Agreements | 363, 1110(a) and 1110(b) | Retained | Owned | 86 | E170/175 aircraft |
| Payoff of Aircraft Debt | 105 and 363 | Retained | Owned | 1 | E170 Aircraft |
| Aerolitoral Sale | 363 | Sold | Owned | 3 | E170 Aircraft |

[333] Motion to Approve Settlement Agreement, ECF No. 1535. The Motion was approved in ECF No. 1608.

[334] Prime Clerk, https://cases.primeclerk.com/rjet/Home-ClaimInfo (last visited April 25, 2017)

[335] ECF No. 1284.

[336] Motion to Authorize Debtors to Reject Certain Aircraft Leases, ECF No. 960.

[337] Order Authorizing Assumption of Aircraft Leases as Amended and Approving Allowed Unsecured Claim, ECF No. 1131.

[338] This Table was taken in full from the February Corporate Monthly Operating Report, ECF No. 1617.

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|---|---|---|---|---|---|
| ***E145 Fleet*** | | | | | |
| Rejected Leases | 365 and 1110 | Returned | Leased | 29 | E145 Aircraft |
| Reached Stipulations with Secured Parties | 1110(b) | Returned | Leased | 7 | E140/145 Aircraft |
| Surrendered and Returned | 363 and 1110(a) | Returned | Owned | 11 | E140/145 Aircraft |
| Transferred Title of Aircraft Previously Subject to an 1110(a) Election | 363 and 1110(a) | Returned | Owned | 15 | E140/145 Aircraft |
| Reached Stipulations with Secured Parties | 1110(b) | Returned | Owned | 16 | E140/145 Aircraft |
| ***Q400 Fleet*** | | | | | |
| Rejected Leases | 365 and 1110 | Returned | Leased | 27 | Q400 Aircraft |
| ***E190 Fleet*** | | | | | |
| Transfer Title | 105 and 363 | Sold | Owned | 1 | E190 Aircraft |
| ***Spare Engines and Spare Parts*** | | | | | |
| Rejected Leases | 365 and 1110 | Returned | Leased | 11 | Spare Engines (E145) |
| Surrendered and Returned | 363 and 1110 | Returned | Owned | 2 | Spare Engines (E145, E190) |
| Rejected Leases | 365 and 1110 | Returned | Leased | 6 | Spare Engines (Q400) |
| Secured | 1110(a) | Retained | Owned | 10 | Spare Engines and Spare Parts Collateral (E170/175) |
| Secured | 1110(a) | Retained | Leased | 9 | Spare Engines and Spare Parts Collateral (E170/175) |

*3. Settlements with Original Equipment Manufacturers*

Republic's early return of so many aircraft did not just affect its secured lenders and maintenance providers. Perhaps the parties most affected by the early returns were the original equipment manufacturers relying on contracts to produce aircraft and engines and perform maintenance. These parties racked up damages against Republic under contract rights pursuant to purchase agreements, maintenance agreements, and spare parts agreements. Fortunately, Republic was able to negotiate and muster court approval for settlement agreements with each of the manufacturers that substantially reduced their claims against Republic's bankruptcy estates.

a. Bombardier's Asserted Claims and Settlement Agreement

Bombardier Inc. ("Bombardier") manufactured the Q400 fleet and replacement parts. Hence, it was negatively impacted by Republic's early return of its entire Q400 fleet. In addition, Republic had entered into a prepetition purchase agreement with Bombardier on February 24, 2010 wherein Republic agreed to purchase from Bombardier 40 CS300 aircraft.[339] Rather than (a) assuming the purchase agreement outright and stockpiling aircraft without sufficient crews to fly them, or (b) rejecting the purchase agreement outright, Republic engaged in negotiations with Bombardier to amend the terms of the purchase agreement. Because several of the terms of the purchase agreement, including amounts still owed and delivery dates, were redacted, all we really know about the amendment is that it "provided for deferral of scheduled aircraft payments to Bombardier and scheduled aircraft deliveries."[340] This raises the question: What does Republic intend to do with these CS300 aircraft? If Republic's goal was to streamline its operations by reducing its fleet down to one type of aircraft, why renegotiate a purchase agreement for a different type of aircraft rather than reject it outright? Perhaps Republic was already planning for future expansion.

Bombardier initially asserted a claim against Republic for $2,237,662 pursuant to the early return of the Q400 aircraft, including $950,435.75 for post-petition services rendered or goods sold within 20 days prior to the Commencement Date.[341] Bombardier also asserted a claim for $70 million pursuant to Republic's failure to perform under the purchase agreement. After negotiations, however, Bombardier agreed with Republic to "an administrative expense claim in the amount of $700,000[342] and a general unsecured claim in the amount of approximately $1.5 million, and [to] withdraw claims asserted in amounts exceeding $72 million."[343] Needless to say,

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339 Motion to Enter Into Settlement Agreement with Bombardier and Assume Purchase Agreement, as Amended, ECF No. 1126.

340 ECF No. 1312.

341 Debtor's Motion to (I) Enter into Settlement Agreement with Bombardier Inc., Learjet, Inc., and C Series Aircraft Limited Partnership…, ECF No. 1126.

342 The $700,000 administrative expense claim was to be paid within 14 days of the entry of the order of approval.

343 ECF No. 1312.

the Court found "good and sufficient reason" to approve the settlement agreement and the amended purchase agreement.[344]

While General Electric, as manufacturer and maintenance provider for engines used in the Embraer aircraft, will receive ample treatment below, Pratt & Whitney ("P&W"), as manufacturer and maintenance provider for engines used in the Bombardier CS300 aircraft, only deserves to be mentioned in passing. Under P&W's settlement agreement, Republic sought to restructure the purchase agreement for P&W's engines related to the purchase of the 40 CS300 aircraft. Then, "In full settlement of P&W's prepetition and postpetition claims . . . P&W will be entitled to a cure payment in the amount of $1 million and will be permitted to set off $1 million. . . ."[345] This settlement would resolve more than $5.7 million in claims asserted by P&W in connection with the agreements related to the CS300s.

b. Embraer's Asserted Claims and Settlement Agreement

Embraer S.A. and its affiliates (individually or collectively, "Embraer") manufactured and provided maintenance for Republic's entire E170/175 aircraft fleet, as well as Republic's entire ERJ-140/145 fleet.[346] Because Republic's streamlined fleet of E170/175 aircraft are all manufactured and maintained by Embraer, Republic's agreements with Embraer were an essential component to Republic's successful restructuring.

Republic entered into a purchase agreement with Embraer for the purchase of new E175 aircraft, commencing in 2013.[347] The E175s not yet delivered under the agreement were scheduled for delivery between August 2016 and August 2017. After the Commencement Date, Embraer filed two unliquidated claims pursuant to Republic's inability to perform under the purchase agreement. Further, pursuant to Republic's removal of all ERJ-140/145 aircraft from its fleet, Embraer asserted claims or purchased claims with respect to 29 of the returned ERJ 140/145

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[344] Order Authorizing Settlement Agreement with Bombardier, ECF No. 1288.

[345] Motion to Approve Settlement Agreement and Assume Amended Engine Purchase Agreement and Maintenance Agreement, ECF No. 1242.

[346] ECF No. 1312.

[347] Motion to (i) Approve the Letter of Intent Between Certain Debtors and Embraer, (ii) Authorize the Debtors to Assume Amended Purchase Agreement, EAMS Maintenance Agreement, and Amended EPool Agreement, (ii) Approve Allowed Claims, and (iv) Grant Related Relief, ECF No. 1181.

aircraft, including one ERJ-145 financed by Embraer, 15 ERJ-140/145 aircraft financed by FINAME,[348] and 13 ERJ-140/145 aircraft for which Embraer acquired the existing loans.[349]

Embraer and Shuttle entered into a master agreement in October 2012 wherein Embraer agreed to make payments to Shuttle to reimburse Shuttle for certain loan payments, and upon expiration of certain loans, Shuttle would deliver certain aircraft to Embraer. Pursuant to this master agreement, Embraer asserted a claim against Republic for damages in the amount of $84,029,538 for money advanced to Shuttle under the master agreement, plus interest. Embraer also asserted seven claims related to the return of individual ERJ aircraft for an aggregate amount of $98,330,573. The Court also issued an order on October 21, 2016 approving a general unsecured claim to Embraer in the amount of $6,869,458.65 for the restructuring of five junior loans related to certain E170/175 aircraft.

Embraer and Republic entered into an EPool Agreement on March 1, 2013 wherein Embraer agreed to provide to Republic certain spare parts necessary to service Republic's E170/175 fleet. Embraer filed general unsecured claims on July 22, 2016, in the aggregate amount of $8,606,336.27 for pre- and postpetition unpaid invoices. Republic and Embraer also entered into a maintenance agreement wherein Embraer would perform repairs on Republic's Embraer aircraft fleet and sell certain aircraft parts to Republic. Pursuant to this maintenance agreement, Embraer would file a general unsecured claim against Republic Airline for $3,312,789.91, and a general unsecured claim against Shuttle for $1,849,114.56. Embraer would also assert 26 statutory repairman's liens against several of Republic's owned and leased aircraft for unpaid invoices for repairs. These repairman's liens would aggregate over $5 million. Embraer also asserted other claims pursuant to invoices, as well as section 503(b)(9) claims,[350] all aggregating to under $10 million.

In total, Embraer asserted over 30 claims against Republic in the aggregate amount of over $360 million. On November 15, 2016, Republic sought approval from the Court for "a comprehensive settlement with Embraer, pursuant to which Republic agreed to amend and assume an existing purchase agreement with Embraer and two agreements related to maintenance and spare parts."[351] Specifically, the settlement would amend the purchase agreement to terminate Republic's obligation to purchase the remaining E175 aircraft. Instead, Republic would return

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[348] See section (2)(c) above re "The ERJ-140/145 Aircraft."

[349] ECF No. 1181.

[350] *See* First Day Motions, section (A)(4).

[351] ECF No. 1312.

some of Embraer's pre-delivery deposits, and United would purchase the remaining E175 aircraft and lease them to Republic, thus reducing Republic's financial liability while increasing Republic's revenue under its codeshare agreement with United.[352] The settlement would also amend the EPool Agreement and "enable Republic to wind down its spare parts program with Embraer for its aircraft fleet." This would save Republic approximately $10 million annually. Under the settlement agreement, Republic would assume the maintenance agreement, ensuring that Republic's aircraft fleet would be properly maintained at competitive rates.

Finally, the settlement would provide for the resolution of more than $360 million of asserted claims relating to returned Embraer aircraft, in exchange for a general unsecured claim of $99 million and "modifying the automatic stay to permit Embraer to apply a portion of pre-delivery payments to its damages under the agreements."[353] The Court approved the settlement agreement on December 14, 2016.[354]

c. GE Engine Services' Claims and Settlement Agreement

General Electric and its affiliates (individually or collectively, "GE") manufactured and provided maintenance for all of Republic's owned and leased engines. Because Republic will continue to use GE engines in its streamlined E170/175 fleet, Republic's agreements with GE are an essential component to Republic's successful restructuring.[355]

Republic and GE entered into a Maintenance Cost Per Hour Engine Services Agreement ("MCPH Agreement") on June 21, 2005, wherein GE would provide maintenance services for GE engines held by Republic. The MCPH Agreement required that Republic maintain a minimum number of engines covered. As a result of Republic's fleet restructure and reduction in the number of E170/175 aircraft, the number of covered engines in the MCPH Agreement was reduced by 38 engines. GE asserted that the removal of these engines resulted in damages under the MCPH Agreement (amount redacted).

Pursuant to a purchase agreement between Embraer and Republic, GE and Republic entered into Letter Agreement No. 4 on September 18, 2014, to reflect the purchase by Republic of new E175 aircraft with installed GE engines and spare engines, which would commence in July 2015 and continue through mid-2017. GE and Republic would enter into Letter Agreement No. 5

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352 ECF No. 1181.

353 ECF No. 1312.

354 Order of Approval, ECF No. 1292.

355 Motion to Approve the Restructuring Agreements with General Electric, ECF No. 1185.

on March 12, 2015, to reflect the purchase by Republic of new E175 aircraft with installed GE engines and spare engines, which would commence in November 2015 and continue through late 2017. Because of the amendment of Republic's purchase obligations with Embraer, Republic's order of GE engines was reduced, which GE asserted would result in millions of dollars of damages (exact number redacted).

GE asserted reclamation claims and section 503(b)(9) claims in the aggregate amount of $1,608,908.50. GE also asserted a claim for prepetition goods and services provided in the aggregate amount of $27,167,571.52.

Through negotiations, GE and Republic agreed to restructure the letter agreements and the MCPH Agreement, to provide a cure amount, and to provide an allowed claim as final settlement of all pre- and post-petition claims of GE against Republic. The letter agreements would be amended to "[t]erminate[] Republic's obligations with respect to future deliveries of GE engines other than five additional spare engines. . . ." The MCPH Agreement would be restructured to (i) remove from the MCPH Agreement the engines installed on surrendered aircraft and engines installed on aircraft that will not be delivered to Republic; (ii) add to the MCPH Agreement engines installed on recently delivered aircraft; (iii) extend the term for coverage for the covered engines to align with Republic's codeshare agreements; (iv) revise the rates for the covered engines; and (v) revise the scope of services.

Under the settlement agreement, Republic would pay a cure amount of $37 million within 15 days of the approval of the restructure of the letter agreements. Finally, Republic would grant GE an allowed claim of $10 million.[356] This settlement would resolve more than $180 million of GE's claims. As such, the Court approved the settlement and restructure agreements on December 14, 2016.[357]

### *B. The Shuttle Merger and Single Operating Certificate*

#### *1. Taking the Initiative: Planning for the Merger and Its Consequential Benefits*

Republic's air carrier subsidiaries before its chapter 11 restructure were Republic Airline and Shuttle, which operated under separate air carrier certificates. The Federal Aviation Administration requires airlines operating under multiple certificates "to employ independent staff, including directors of safety, flight operations, and maintenance, for each of its air carrier

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[356] ECF No. 1312.

[357] Order Approving the Restructuring Agreements with General Electric, ECF No. 1290.

certificates."[358] As discussed, to facilitate more cost-efficient operations, Republic aimed to streamline its operations by restructuring its aircraft fleet down to a single, duel-class aircraft type (E170/175) under a single air carrier certificate ("ACC").

The merger and "consolidation under a single air carrier certificate was one of the four pillars of the Debtors' restructuring efforts that began before the commencement of the chapter 11 cases and continued during their pendency." Republic has effectively used the chapter 11 process to "grow back its business by restructuring its flight schedules, divest[] itself of burdensome, underutilized aircraft, equipment, and facilities, simplify[] its operational fleet by transitioning to a single, larger regional jet fleet,[359] and assur[e] sufficient liquidity to support its operational stability and future growth, including through the restructuring of its aircraft indebtedness."[360] In other words, by the time Republic sought court approval for the merger, each of the other three pillars had been substantially implemented in preparation for the merger and consolidation to a single ACC. Without this fourth pillar, each of the other three would have led to no purposeful end.

Indeed, the merger and consolidation were contemplated by Republic and the necessary parties all along in the restructuring process and even beforehand:

> Republic's collective bargaining agreement with its pilots as well as its amended codeshare agreements contemplate the transition to a single air carrier certificate, and Republic's ongoing transition of flying for United from Shuttle America to Republic Airline, along with the claims settlements with all three Codeshare Partners, implicitly recognize and acknowledge the benefits to all creditors of a merger of Shuttle America and Republic Airline. Accordingly, Republic's three Codeshare Partners, as well as the Creditors' Committee, unanimously support the proposed merger and consolidation.

In fact, the pilot labor agreement between Republic and IBT as of September 2015 required Republic to permit an increasing number of pilots to transfer between Shuttle and Republic Airline ACCs and required Republic to eliminate all transfer restrictions by April 2018.[361] This would be

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358 ECF No. 1312.

359 *See* Declaration of Paul Kinstedt in Support of Debtors' Motion to Merge Shuttle America Corporation Into Republic Airline Inc. and Surrender the Shuttle Air Carrier Certificate, ECF No. 1213 (stating that at the time Republic filed its motion for the merger, Republic had reduced its operational fleet from 300 aircraft to 170 aircraft).

360 ECF No. 1312.

361 ECF No. 1213.

extremely burdensome to Republic without the planned merger and consolidation. Thus, the merger and consolidation were critical to Republic's ability to comply with the new pilot labor agreement.

Republic began transitioning its flying operations from Shuttle to Republic Airline long before the Commencement Date through "comprehensive collaboration among the Debtors, the FAA and outside industry experts to align Shuttle America's and Republic Airline's procedures and operations." This was critical to Republic's negotiations with its Codeshare Partners in amending the codeshare agreements. Republic's 2006 codeshare agreement with United provided for Shuttle America to operate 32 aircraft for United. United and Republic's restructured agreement required Shuttle to assign the agreement to Republic Airline and begin transitioning its flight operations beginning in summer 2015. That transition would be complete by January 31, 2017. Delta's initial codeshare agreement also provided for operations by Shuttle. Under the amended agreement, "Delta agreed that Shuttle America may assign all of its rights, title, interest, and obligations under the Agreement to Republic Airline." At the time Republic filed its motion to approve the merger and consolidation, Shuttle operated 38 aircraft, 30 of which were dedicated to flying for Delta, seven of which were dedicated to flying for United, and one of which was an unassigned spare. Republic Airline already operated all the aircraft for American.[362]

Republic asserted that the merger and consolidation would result in significant economic benefits and operational efficiencies for Republic that would begin to accrue immediately upon the merger and were essential to Republic's critical goal of optimizing crew resources and recruiting and retaining new pilots. Republic's business plan "anticipates cost savings and efficiencies associated with reduced human capital requirements, the elimination of costly training events for crews transitioning between ACCs, and other operational efficiencies and cost avoidances. . . ." The consolidation would also eliminate inefficiencies that occur when transitioning aircraft between ACCs (as required under the restructured United codeshare agreement).

Republic also asserted that the merger and consolidations would not harm either Shuttle's or Republic Airline's creditors, whose ultimate recoveries would not be prejudiced by the merger of the two entities. "To the contrary, the value of the cost savings and efficiencies that will result from the Merger will accrue to the benefit of all creditors. . . ." In other words, because Republic had long prepared for the merger and consolidation, Republic and its creditors had nothing to lose and everything to gain by following through with those plans.

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[362] Motion to Approve Merger, ECF No. 1165.

*2. The Merger and Consolidation Motion and Approval.*

Republic filed the Motion for Approval of (i) Merger of Shuttle America Corporation into Republic Airline Inc., and (ii) Surrender of the Shuttle America Corporation Air Carrier Certificate[363] on November 3, 2016. Republic asserted that the merger and consolidation should be completed on January 31, 2017, "[t]o obtain the maximum benefit for [the] estates."[364] If, however, the Court did not approve the Merger and Consolidation Motion, "Republic Airline and Shuttle [would] be merged pursuant to the Plan on the Effective Date."[365] In its motion, Republic asserted all the benefits and reasoning discussed above as the basis for why the Court should approve the motion. Republic also noted that pursuant to the merger, it would transfer Shuttle's current workforce of approximately 470 pilots, 500 flight attendants, and 140 other employees to Republic Airline.[366]

Deutsche Bank AG New York Branch ("DBNY"), as one of Republic's lenders/creditors, filed a limited objection to the Merger and Consolidation Motion.[367] In April 2015 DBNY had entered into a Credit and Guarantee Agreement with Republic Airline as borrower and Shuttle and RAH as guarantors, secured by spare parts owned by Republic Airline and Shuttle. Pursuant to this agreement, DBNY asserted claims totaling over $60 million. DBNY's collateral constitutes "aircraft equipment" under section 1110(a) of the Bankruptcy Code, and Republic filed a section 1110(a) election relating to the DBNY agreement.[368] DBNY objected solely to preserve its rights under the DBNY agreements and under section 1110 of the Bankruptcy Code. Further, the DBNY agreements contained a promise by Republic not to merge without satisfying certain conditions, and those conditions were not satisfied as of the date of the Merger and Consolidation Motion.[369]

FINAME also filed a limited objection on essentially the same grounds as DBNY, but on a much larger scale: "FINAME has aggregate claims in excess of $1 billion against Republic Airline and Shuttle America secured by sixty-five (65) Embraer-manufactured aircraft . . . and

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363 ECF No. 1165.

364 ECF No. 1213.

365 ECF No. 1312.

366 ECF No. 1165.

367 Limited Objection of Deutsche Bank AG New York Branch, ECF No. 1209.

368 Statement of Election, ECF No. 437.

369 ECF No. 1209.

related assets of the Debtors' estates constituting "equipment" as described in section 1110. . . ." [370] FINAME also expressed that it did not wish to object to the merger or consolidation to a single ACC, as long as the order made clear that FINAME did not waive its rights with respect to its claims under the relevant agreements or section 1110.

Pursuant to these objections Republic revised the language of the proposed order on the next day to include two additional paragraphs which the objecting parties and other aircraft finance counterparties agreed resolved their concerns.[371] The revisions stated that after the merger,

> any claim against Shuttle or Republic Airline will be treated substantially similarly and shall be a claim only against Republic Airline, the surviving entity; such claim will be entitled to a single distribution from Republic Airline . . .and no holder of any claim will have any entitlement for an administrative claim or other priority status due to any alleged damages arising from such merger.
>
> For the avoidance of doubt, the relief granted in this Order does not affect or create a waiver of the rights or remedies of the Debtors' aircraft finance counterparties, including [DBNY] and [FINAME] (or the relevant security trustees) under their contracts with the Debtors or under section 1110 of the Bankruptcy Code.

The Court agreed that the objections were resolved and (1) approved the merger to go into effect on January 31, 2017, and (2) authorized Shuttle to surrender its ACC within 30 days[372] of the consolidation of operations under the single Republic Airline ACC.[373] Pursuant to the order, Shuttle ceased operations on January 31, 2017,[374] and Republic formally cancelled Shuttle's ACC on Friday, February 17.[375] As the dust has begun to settle, Republic Airline's fleet, as of February 20, 2017, consists of 54 E170s and 117 E175s and serves Delta, United, and American.

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[370] Limited Objection of Agencia Especial De Financiamento Industrial-FINAME, ECF No. 1206.

[371] Debtors' Omnibus Response to the Limited Objections, ECF No. 1222.

[372] FAA regulations require the surrender of the ACC within 30 days of the consolidation of operations under a different ACC. ECF No. 1165.

[373] Order Approving Merger of Shuttle America Corporation Into Republic Airline Inc. and Surrender of the Shuttle America Corporation Air Carrier Certificate, ECF No. 1236.

[374] http://www.airliners.net/forum/viewtopic.php?t=1354369.

[375] https://www.ch-aviation.com/portal/news/53406-shuttle-americas-operators-certificates-formally-cancelled.

The confirmation of the merger and subsequent surrendering of Shuttle's ACC Republic had completed its four main goals entering bankruptcy:

- Obtaining modified agreements from Codeshare Partners to reimburse the increased costs from the new collective bargaining agreement with its pilots and allow an orderly restoration of service.

- Agreeing to an early return/settlement of claims relating to out of favor aircraft (Q400 and ERJ-145).

- Streamlining operations by operating a single aircraft type (E170/175) and under a single operating certificate.

- Securing additional liquidity to fund future operations and growth.

In this regard the restructuring process was a success. There were still challenges ahead for Republic to be sure, but it had successfully navigated the bankruptcy storm. With long-term agreements in place with its Codeshare Partners and a streamlined fleet and operations, blue skies were on the horizon. The last step was to get its plan of reorganization confirmed.

**Republic Introduces Its Plan of Reorganization**

***A. The Law***

Consensual confirmation of a plan requires each impaired class to accept the plan.[376] A plan is accepted by a class when it is accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims of the class.[377] For a class to be unimpaired, the plan must either (1) leave unaltered the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest, or (2) decelerate and reinstate the pre-petition contract, and cure any default.[378] Otherwise, the class is impaired.[379]

The debtor enjoys a right of exclusivity at the beginning of a chapter 11 case, meaning that the debtor alone may file a plan of reorganization in the first 120 days following commencement

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[376] 11 U.S.C. § 1129(a)(8).

[377] 11 U.S.C. § 1126(c).

[378] Bernstein & Kuney, at 520.

[379] 11 U.S.C. § 1124

of the chapter 11 proceeding.[380] If the debtor files a plan within the first 120 days, then no other party may submit a plan of reorganization unless the debtor's plan is not accepted within 180 days of the commencement date.[381] But the court may, for cause, reduce or extend the 120-day exclusive filing period, but not beyond 18 months from the commencement date.[382] The court may also, for cause, reduce or extend the 180-day exclusive solicitation period, but not beyond 20 months from the commencement date.

Republic's initial exclusive filing period would have expired on June 24, 2016, and its exclusive solicitation period would have expired on August 23, 2016.[383] Republic requested, and the Court subsequently extended the exclusive filing period through December 31, 2016, and the exclusive solicitation period through March 1, 2017. [384] The Court found that sufficient cause existed in the form of (a) Republic's case being large and complex, (b) Republic had not had sufficient time to negotiate a chapter 11 plan, and (c) Republic had made substantial good faith progress toward its reorganization.[385]

Republic filed its first plan of reorganization on November 16, 2016.[386] Republic soon amended its original plan to reflect the drastic increase in the number of reinstated aircraft secured claims.[387] Pursuant to an objection regarding its disclosure statement, Republic filed the Second Amended Joint Plan of Reorganization on December 19, 2016, with an accompanying disclosure statement.[388]

Realizing that it would need more time to muster approval for the Plan from the other unsecured creditors, Republic again requested an extension of its exclusivity periods on December

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[380] 11 U.S.C. § 1121(b).

[381] 11 U.S.C. § 1121(c)(3).

[382] 11 U.S.C. § 1121(d).

[383] Motion to Extend Debtors' Exclusive Periods in Which to File a Chapter 11 Plan and Solicit Acceptances Thereof, ECF No. 610.

[384] Order Extending Debtors' Exclusive Periods, ECF No. 687.

[385] ECF No. 610.

[386] Debtors' Joint Chapter 11 Plan of Reorganization, ECF No. 1189.

[387] Debtors' First Amended Joint Plan of Reorganization, ECF No. 1277.

[388] ECF Nos. 1311 and 1312.

21, which the Court granted on January 25th after no objections. The Court moved the exclusive filing deadline to March 31 and the exclusive solicitation deadline to June 1.[389] The Court set the initial voting deadline for the Second Amended Plan for February 14, 2017, and the confirmation hearing for February 28, 2017.[390] Once the objections started coming in, the Court rescheduled the confirmation hearing to March 8.[391]

### *B. The Plan*

The Second Amended Joint Plan of Reorganization (the "Plan") was the version that was eventually confirmed.[392] The key provisions of the Plan included consolidation and liquidation of various debtors and the summary of treatment of claims and equity interests.

*1. Liquidation of MAGI, Midwest and Skyway.*

Another step in streamlining Republic's operations called for the orderly wind-down and dissolution of its nonoperating subsidiaries MAGI, Midwest, and Skyway. From the Effective Date forward these debtors would only engage in business to the extent necessary for an orderly wind-down and distribution provided for in the plan. Payout for each class of claimants is shown in Table 10 below.

*2. Consolidation of RAH, RAS, RAI and Shuttle for Purposes Specified in the Plan*

The Plan called for substantive consolidation of the Debtors other than the liquidating debtors discussed above.[393] The consolidation was solely for the following purposes:

- All assets and liabilities of the Consolidated Debtors would be treated as though they were merged;

- All guarantees of any Consolidated Debtor of the obligations of any other Consolidated Debtor would be eliminated so that any Claim against any

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[389] Order Extending Exclusive Periods, ECF No. 1435.

[390] Supplemental Order Rescheduling Hearing on Confirmation of Debtors' Second Amended Joint Plan of Reorganization, ECF No. 1432.

[391] Second Supplemental Order Rescheduling Confirmation Hearing, ECF No. 1472.

[392] Order Confirming Second Amended Joint Plan of Reorganization, ECF No. 1722.

[393] Modified Disclosure Statement, ECF No. 1360.

Consolidated Debtor, any guarantee thereof executed by any other Consolidated Debtor, and any joint or several liability of any of the Consolidated Debtors would be one obligation of the Consolidated Debtors, and

- Each Claim filed or to be filed in the Chapter 11 Cases against any of the Consolidated Debtors would be deemed filed against the Consolidated Debtors collectively and would be one Claim against and one obligation of the Consolidated Debtors.

The Codeshare Partner's settlement agreements contemplated treating these Debtors as consolidated for purposes of the Plan. They each agreed that should the Debtors be consolidated for purposes of the Plan, each Codeshare Partner would agree to a single claim and recovery from the consolidated entity, essentially cutting their claims in half.[394]

The consolidation was strictly limited to those purposes and should not affect the legal or organizational structure of any of the entities, pre- or post-Commencement Date liens, security interests, or the like.

*3. Classes of Claims and Amendments to the Plan*

Table 10
Summary of Classifications and Claims

| Class | Designation | Treatment | Estimated Recovery | Voting Rights |
|---|---|---|---|---|
| Unclassified | DIP Facility Claims | Paid in Full in Cash | 100% | Not Entitled to Vote |
| Unclassified | Administrative Claims | Paid in Full in Cash | 100% | Not Entitled to Vote |
| Unclassified | Priority Tax Claims | Paid in Full in Cash | 100% | Not Entitled to Vote |
| 1(a) | Other Priority Claims (Consolidated Debtors) | Paid in Full in Cash | 100% | Unimpaired (Presumed to Accept); Not Entitled to Vote |
| 1(b) | Other Priority Claims (MAGI) | Paid in Full in Cash | 100% | Unimpaired (Presumed to Accept); Not Entitled to Vote |

[394] For a more in-depth discussion of the Codeshare Partners' settlement agreements see the United and American Codeshare Agreement section above.

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|---|---|---|---|---|
| 1(c) | Other Priority Claims (Midwest) | Paid in Full in Cash | 100% | Unimpaired (Presumed to Accept); Not Entitled to Vote |
| 1(d) | Other Priority Claims (Skyway) | Paid in Full in Cash | 100% | Unimpaired (Presumed to Accept); Not Entitled to Vote |
| 2(a) | Reinstated Aircraft Secured Claims (Consolidated Debtors) | Reinstated and Rendered Unimpaired | 100% | Unimpaired (Presumed to Accept); Not Entitled to Vote |
| 2(b) | Other Secured Claims (Consolidated Debtors) | Paid in Full in Cash, Reinstated, or Otherwise Rendered Unimpaired | 100% | Unimpaired (Presumed to Accept); Not Entitled to Vote |
| 3(a) | General Unsecured Claims (Consolidated Debtors) | New Common Stock; Cash Election | <$500,000<br>Cash payout of 45% of its allowed claim up to $225,000 unless it elects to receive pro-rata share of common stock<br><br>>$500,000<br>Will receive a pro-rata share of common stock unless it agrees to reduce its allowed claim to $500,000, in which case it will receive $225,000 in cash. | Impaired; Entitled to Vote |
| 3(b) | General Unsecured Claims (MAGI) | No Distribution | 0% | Impaired (Deemed to Reject); Not Entitled to Vote |
| 3(c) | General Unsecured Claims (Midwest) | No Distribution | 0% | Impaired (Deemed to Reject); Not Entitled to Vote |
| 3(d) | General Unsecured Claims (Skyway) | No Distribution | 0% | Impaired (Deemed to Reject); Not Entitled to Vote |

| | | | | |
|---|---|---|---|---|
| 4 | Section 510(b) Claims | No Distribution | 0% | Impaired (Deemed to Reject); Not Entitled to Vote |
| 5 | Interests in RAH | Canceled; No Distribution | 0% | Impaired (Deemed to Reject); Not Entitled to Vote |
| 6 | Subsidiary Interests | Canceled or Reinstated at Debtors' Election; No Distribution | 0% | Impaired (Deemed to Reject); Not Entitled to Vote |

The treatment of Class 3(a) general unsecured claims was a point of contention and was clearly the intention of Republic and its Codeshare Partners from early in the case. This distribution shaped the structure of each of the amended codeshare agreements and the contemporaneous "concessions." Perhaps the most obvious sign that the parties intended this all along were the most favored nations clauses in each of their settlements.[395] The Creditors Committee and the Equity Committee both fought the provisions heavily throughout the case and could likely see the writing on the wall as their interests were diluted. Equity holders ended up with nothing, and the unsecured creditors ended up with a fraction of what they could have recovered without the huge settlements and accompanying most favored nations clauses approved by the court. Once the most favored nations clauses were approved, the Codeshare Partners were guaranteed 61.25 percent ownership of the new parent corporation's stock.

In addition to the classes and claims distributions, the Amended Plan also reflected amendments to the United codeshare agreement,[396] the approval of the sale of three aircraft to Aeroliterol, and the approval of the GECAS settlement,[397] the Bombardier settlement, the Embraer settlement, and the GE settlement. It also accounted for the estimated unpaid allowed professional

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[395] *See* the United and American Codeshare Agreements section above.

[396] The agreements between the parties was amended to reflect that United agreed to purchase E175 aircraft from Embraer that Republic had previously contracted to purchase but for which it was unable to obtain financing while in bankruptcy. United then agreed to lease the purchased aircraft to Republic for fulfillment of its contractual obligations under the codeshare agreement between the parties. Republic agreed to pay a onetime fee to United for the transaction.

[397] *See* the discussion in the Fleet Restructuring and Related Claims section above for discussion of the GECAS, Bombardier, Embraer, and GE settlements. *See also*, The ECF No. 1360 (for a detailed disclosure of the listed agreements).

fee claims increase from $12 million to $16 million.[398] The Plan provided for perfection of aircraft secured claims upon the Effective Date but reduced the estimated payout on the Effective Date to holders of reinstated aircraft secured claims from $680 million to $0. It also reduced the estimated payout on the Effective Date to holders of other secured claims from $1.5 billion to $0. The Plan waived certain of Republic's rights under the DB Credit Agreement. The Plan disclosure statement was also updated to reflect Seabury's valuation of the reorganized Debtors, as well as financial projections and liquidation analyses.[399]

### *C. Defending the Plan*

The first objection to the Plan came from the New York State Department of Taxation and Finance ("New York").[400] New York held an unsecured claim under section 507(a)(8) for unpaid corporate taxes in the aggregate of around $65,000. Under 11 U.S.C. section 1129(a)(9)(C) a plan must provide that section 507(a)(8) claims will receive regular installment payments equal to the allowed amount of the claim over a period of not more than five years and not to be less favorable than any nonpriority unsecured claim provided for by the plan.[401] While the Plan provided for regular installment payments, it did not provide the relevant dates, installment intervals, term or duration, or interest.[402]

Most of the other objections related to Schedule 9.1 of the Plan, which contained a list of assumed executory contracts and unexpired leases, as well as proposed cure amounts. The objecting parties either disagreed to the cure amounts or else objected to Republic not assuming their executory contracts despite Republic's previous assurances of its intent to assume. It is unclear from the record how Republic dealt with each of these objection, but it is likely that it

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[398] *See* First-Day Motion (A)(10) above.

[399] While most of the substantive amendments to the original plan came in the First Amended Plan, several dates and numbers had yet to be inserted. The Second Amended Plan filled in the blanks. For convenience, the substantive changes are discussed as being made under the Second Amended Plan. *See* Notice of Filing of Blackline of Proposed Disclosure Statement for Debtors' Second Amended Joint Chapter 11 Plan, ECF No. 1314. *See also*, ECF No. 1360 (for a detailed disclosure of the listed agreements).

[400] Objection to Confirmation, ECF No. 1463.

[401] 11 U.S.C. § 1129(a)(9)(C).

[402] ECF No. 1432.

either amended Schedule 9.1 to include the objecting party or adjust the cure amounts,[403] or else negotiated a settlement with the objecting party. In addition, a few parties also filed a Reservation of Rights requesting that clarification concerning the treatment of their claims be included in the proposed order confirming the plan.

*The Residco Objection*

The only objection of significance came from Residco—one of the members of the Creditors Committee who had already voted to confirm the Plan and had already had ample opportunity to raise its concerns. On February 23, 2017, Wells Fargo Bank Northwest, N.A. as owner trustee, and ALF VI, Inc. as owner participant (collectively, "Residco") objected to confirmation of the Plan.[404] Residco leased seven ERJ-145 aircraft to Shuttle through an agreement executed in December 2013. RAH guaranteed Shuttle's obligations. Pursuant to Republic's fleet restructuring, it rejected the leases and returned the aircraft to Residco. Pursuant to this, Residco asserted rejection damages claims against Shuttle in the aggregate amount of $72,323,546 and claims against RAH as guarantor in the aggregate amount of $75,847,298.

The objection was founded on Residco's worry that due to the substantive consolidation provisions of the Plan, its claims could be treated in one of two ways, resulting in a claims differential of over $50 million—and Republic was using the substantive consolidation provisions to ensure Residco would receive the lesser treatment. Therefore, Residco requested that its claims be averaged, or in the alternative, clarification that substantive consolidation provisions of the Plan were not being used as an offensive litigation tactic against the Residco Parties' Claims.

In its reply, Republic asserted that Residco's actual damages (for Shuttle's failure to make monthly rental payments) only amounted to $6.4 million and that the liquidated damages clauses in the lease agreements were unenforceable.[405] Therefore, it asserted that Residco's claims were over $50 million more than its actual damages. Republic asserted that all the other counterparties to its rejected leases calculated their claims based on actual damages, but it was unable to negotiate a settlement with Residco due to Residco's refusal to give up its unenforceable claim. Residco refused to give up its liquidated damages claims because it asserted that they would be enforceable

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[403] Republic filed four amendments to its original Schedule 9.1.

[404] Objection to Confirmation, ECF No. 1534.

[405] Republic showed that Residco's liquidated damages provisions were indistinguishable from countless other unenforceable provisions in other rejected leases in these chapter 11 cases and in case law. Debtors' Response to Residco's Objection to Confirmation, ECF No. 1559.

under the RAH lease guarantees because RAH had waived the unenforceability defense under the guarantees. Republic pointed out, however, that New York law provides that a party cannot waive its defense to the unenforceability of a penalty provision. To allow such a waiver would violate public policy. To summarize Republic's view,

> The Objection is a transparent attempt by Residco, using the threat of delaying confirmation, to force the Debtors, the Committee, and the Debtors' other creditors to agree to an unjustifiably preferential settlement with Residco at the expense of all the other Debtors' creditors, including similarly situated aircraft lease rejection counterparties.

In its original objection, Residco also asserted that if the Court found the liquidated damages claims to be enforceable, Residco would accept the averaged claim and drop its objection.[406] If, however, the Court found the liquidated damages claims to be unenforceable, Residco would maintain its objection to the substantive consolidation provisions of the Plan because "Residco could have a greater recovery if RAH's estate were not consolidated with the Consolidated Debtors." Residco asserted that Republic was attempting to use the substantive consolidation provisions of the Plan to buttress its rights against particular creditors. Therefore, Redisco claimed, Republic did not afford equality of treatment to each of the creditors within the same class and the Plan violated section 1124(a)(4) and could not be confirmed.

In its reply, Republic stated that if somehow the unenforceable guarantee claim was allowed in an amount greater than the direct claim, then Republic would carve out Residco from the substantive consolidation of RAH.[407] This would solve the impairment problem. Further, Republic argued that Residco should be equitably estopped from objecting because Residco was a member of the Creditors Committee which unanimously voted in favor of the Plan. As a committee member, Residco had every opportunity to raise the clarification issue before holding up the confirmation process. Residco's delay of the confirmation caused direct and substantial costs to the bankruptcy estate. Noting the substantial costs of continuing the chapter 11 proceedings, Republic asserted that "sustaining Residco's eleventh hour objection would inflict substantial injustice on the Debtors and their stakeholders."[408] Furthermore, 94% of all the unsecured creditors had already voted to confirm the Plan.

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406 ECF No. 1534.

407 ECF No. 1559.

408 Republic noted that it paid approximately $3 million per month for professional services provided to continue the bankruptcy proceedings.

The Creditors Committee also responded to Residco's objection in support of confirmation of the Plan.[409] In its response, the Committee made the same arguments posed by Republic, noting the legal impossibility of Residco's guarantee claims against RAH being more than its direct claims against Shuttle. As such, Residco should be precluded from objecting to the Plan consolidation. Again, if the Court somehow found that Residco would receive a lesser amount as a result of the consolidation, the Court could allow a carve out under which "Residco could be provided with the same treatment it would have received under hypothetical separate plans for each Debtor against which it has asserted claims. This approach would provide Residco with its precise legal entitlement on account of its claims absent the Plan Consolidation to which it objects."

On March 8, Residco filed its reply to Republic's and the Committee's responses to discuss new matters raised in those responses. The confirmation hearing began on the same day. The hearing, however was derailed by arguments over the Residco objection.[410] The confirmation hearing was scheduled to continue on March 16. After that March 16 hearing was again consumed by the Residco objection arguments, Republic revised its proposed carve out for Residco, to which Residco again objected.

Confirmation was delayed until the Residco objection had played out. Republic was directed by the Court to respond to Residco's objection to the new issues raised. Republic responded, and the Court finally issued a memorandum of decision on April 10 overruling Residco's objection, finding that Republic satisfied the standard for substantive consolidation. The Court also directed that the Plan be amended to include the carve-out for Residco's claims. With the Residco objection resolved, the confirmation hearing was scheduled to continue on April 13. After the April 13 hearing and continued hearing on April 20, the Plan was finally confirmed.

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[409] Reply of the Official Committee of Unsecured Creditors, ECF No. 1558.

[410] Portfolio Media, https://www.law360.com/articles/899979/republic-airways-fights-plane-lessor-in-bid-to-clear-ch-11 (last visited April, 26, 2017).