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### The Republic Airways Bankruptcy: A Brief Chapter 11 Flyby

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**The Republic Airways Bankruptcy:  
A Brief Chapter 11 Flyby**

By

John Cornell

Brittany Headrick

Evan Sharber

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**Cast of Characters**

<b>ENTITY</b>	<b>DESCRIPTION</b>
<b>Ad Hoc Committee of Equity Holders</b>	The Ad Hoc Committee, represented by Schulte Roth & Zabel, LLP is composed of equity shareholders in Republic Airways Holdings, Inc.: Axar Master Fund, Ltd.; SOLA, LTD; Man GLG Select Opportunities Master LP, Trishield Capital Management LLC; Quantum Partners LP; Drawbridge Special Opportunities Fund LP; Ultra, Ltd; Drawbridge Special Opportunities Fund, Ltd.; and Worden Master Fund I LP.
<b>American Airlines, Inc.</b>	American Airlines is a legacy carrier and RAH's largest codeshare partner.
<b>Bombardier, Inc.</b>	Bombardier, Inc. is the manufacturer of the Q400 fleet and the counterparty to Debtors' prepetition purchase agreement for 40 CS300 aircraft.
<b>Bryan K. Bedford</b>	President & CEO of RAH.
<b>Chautauqua Airlines, Inc.</b>	Chautauqua is RAH's spiritual predecessor and a pioneer of the codeshare agreement. As of this bankruptcy, Chautauqua is a subsidiary of RAH.
<b>The Official Committee of Unsecured Creditors</b>	The Official Committee is composed of the seven unsecured creditors with the largest claims: 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.
<b>Debtors</b>	RAH and its subsidiaries, Midwest Air Group, Inc., Midwest Airlines, Inc., Skyway Airlines, Inc, Republic Airlines, Inc., Shuttle America Corp., and Republic Airways Services, Inc.
<b>Delta Air Lines, Inc.</b>	Delta is a legacy carrier and RAH's third largest codeshare partner.
<b>Embraer S.A. &amp; Affiliates</b>	Embraer S.A. is the manufacturer and one of the maintenance providers of RAH's restructured aircraft fleet, producers of the E170 and E175 aircraft.
<b>General Electric &amp; Affiliates</b>	General Electric is the manufacturer and maintenance provider of all the engines that the Debtors own and lease.

<b>International Brotherhood of Teamsters, Airline Divisions</b>	The Teamsters union entered an eight-year-long negotiation over pilots' salaries with RAH, concluding just before the bankruptcy commenced.
<b>Midwest Air Group, Inc,</b>	Midwest Air Group is a subsidiary of RAH and the holding company for Midwest Airlines and Skyway Airlines.
<b>Midwest Airlines, Inc.</b>	Midwest Airlines is a subsidiary of RAH and Midwest Air Group.
<b>NAC Aviation</b>	NAC Aviation is an unsecured creditor of RAH that settled its claims against RAH early in the bankruptcy. Residco replaced NAC on the Creditors' Committee.
<b>Prime Clerk, LLC</b>	Prime Clerk is the claims and noticing agent for RAH during the bankruptcy.
<b>Republic Airline, Inc.</b>	Republic Airline is a subsidiary of RAH that operates flight routes for its codeshare partners.
<b>Republic Airways Services, Inc.</b>	Republic Airways Services is a subsidiary of RAH that owns the offices, vehicles, leases, and equipment for RAH.
<b>Residco</b>	Residco is a creditor to RAH holding leases and guaranteeing claims on multiple aircraft leases, which replaced NAC Aviation on the Creditors' Committee. Residco's objection to the final plan of reorganization became one of the most contentious aspects of the bankruptcy.
<b>Shuttle America Corporation</b>	Shuttle America is a subsidiary of RAH.
<b>Skyway Airlines, Inc.</b>	Skyway is a subsidiary of RAH and Midwest Air Group.
<b>United Airlines, Inc.</b>	United is a legacy carrier and RAH's second largest codeshare partner.

## Introduction

On February 25, 2016, Republic Airways Holdings, Inc. (“RAH”) – along with six subsidiaries (together hereinafter, “Republic”)<sup>1</sup> – filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the Southern District of New York in Manhattan. Republic used its affiliate Republic Airways Services, Inc., a New York State Corporation, to file in that district, pursuant to 28 U.S.C. §§ 1408–09.<sup>2</sup> U.S. Bankruptcy Judge Sean H. Lane presided over the case.

A Section 341 meeting was held on June 13, 2016, and the deadline for filing claims was on August 22, 2016. Ultimately, the Chapter 11 plan, originally due on June 24, 2016, was confirmed on April 20, 2017.

Republic’s bankruptcy was fairly straightforward. It allowed Republic to continue business operations while restructuring contractual relationships and finances. Specifically, Republic renegotiated its codeshare agreements with legacy carriers, replaced existing equity holders with pre-bankruptcy creditors, streamlined its operating fleet of aircraft into a single line, and fixed the redundancy of having two subsidiaries with carrier certificates.<sup>3</sup>

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<sup>1</sup> The six subsidiaries are companies owned by RAH, consisting of: Republic Airways Services, Inc., Republic Airline, Inc., Shuttle America Corp., Midwest Air Group, Inc., Midwest Airlines, Inc., and Skyway Airlines, Inc.

<sup>2</sup> Chapter 11 Voluntary Petition for Non-Individual, [ECF No. 1](#); Declaration of Bryan K. Bedford Pursuant to Local Bankruptcy Rule 1007-2 n. 2, [ECF No. 4](#).

<sup>3</sup> Hughes Hubbard & Reed LLP, *Mondaq Business: 2017 Corporate Reorganization & Bankruptcy Mid-Year Review*, BLOOMBERG LAW (Jul. 14, 2017, 3:14 PM), <https://www.bloomberglaw.com/product/blaw/document/OTZW4PBE5TS0> [<https://perma.cc/VA4N-E2ZS>].

## The Debtor's Business

### Early Company History

Republic first flew under the name Chautauqua Airlines (“Chautauqua”). Joel and and Gloria Hall formed the company in Jamestown, New York in 1973.<sup>4</sup> Chautauqua pioneered the codeshare agreement, and aviation business arrangement in which major airlines contract with smaller, regional carriers, such as Chautauqua, to operate flights at a flat rate under the major airline’s name. Using this arrangement, Chautauqua formed a relationship with the company that would later become US Airways to take over regional flights in the northeastern United States.<sup>5</sup>

Chautauqua expanded down the east coast throughout the 1970s and 1980s, carrying passengers as far as Florida, and added more aircraft to accommodate the new routes.<sup>6</sup> In 1988, Guarantee Security Life Insurance Company of Jacksonville, Florida purchased Chautauqua from the Halls, but quickly became insolvent due to Guarantee Security’s orientation toward junk bonds.<sup>7</sup> As a result, the Florida Department of Insurance commandeered Chautauqua. Despite many bids from private buyers, the state insurance commission established Guaranty Reassurance Corporation (“GRC”) to assume the business, increase its value over the next five years, and try to find a buyer at a higher price.<sup>8</sup>

During the early 90s, Chautauqua experienced some turbulence with falling revenues caused by unprofitable routes,<sup>9</sup> in part because its sole client, then known as US Air, was struggling – losing \$2.6 billion between 1991 and 1994.<sup>10</sup> Additionally, Chautauqua received erroneous negative media

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<sup>4</sup> *The Turbo-Prop Era 1973-1998: Republic Airways History*, REPUBLIC AIRLINE, <http://rjet.com//about-republic-airline/our-history/turbo-prop-era/> [<https://perma.cc/8LZR-E6WY>] (last visited April 13, 2018).

<sup>5</sup> *Chautauqua Airlines, Inc.*, in 38 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, 130-32 (Jay P. Pederson, ed., 2001).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*



coverage following the 1994 crash of a commuter plane between Chicago and Indianapolis. The company was not actually involved in the accident.<sup>11</sup> Despite these hardships, Chautauqua recovered, picked up more routes, purchased additional aircraft, and moved main operations to Indianapolis,<sup>12</sup> where Republic's headquarters remain today.<sup>13</sup>

In 1998, Wexford Management, LLC ("Wexford"), a diversified Greenwich, Connecticut-based investment company, purchased Chautauqua, formed RAH, and made Chautauqua its subsidiary.<sup>14</sup> The new holding company brought on Bryan Bedford as CEO in July of 1999, and he remains in that position to date.<sup>15</sup> At the time, Bedford was the 37-year-old CEO of Mesaba Holdings, Inc. who helped restructure Mesaba's contract with Northwest Airlines. Outsiders viewed Bedford "as the perfect choice for an airline planning to go public."<sup>16</sup>

### **The Republic Brand**

On May 26, 2004, Republic launched its initial public offering under the RJET ticker symbol on the NASDAQ capital market.<sup>17</sup> Wexford remained Republic's largest shareholder.<sup>18</sup>

One year later, on May 9, 2005, Republic completed its purchase of Shuttle Acquisition LLC ("Shuttle"), an affiliate of Wexford, for one million dollars plus the assumption of less than one million dollars in debt.<sup>19</sup> Shuttle began operating the Embraer 170 aircraft under the United Express brand, as a part of Republic's codeshare agreement with United Airlines.<sup>20</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *The Turbo-Prop Era 1973-1998: Republic Airways History*, REPUBLIC AIRLINE, <http://rjet.com//about-republic-airline/our-history/turbo-prop-era/> [<https://perma.cc/5EFX-KNQV>] (last visited April 13, 2018).

<sup>14</sup> *Chautauqua Airlines, Inc.*, in 38 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, 130-32 (Jay P. Pederson, ed., 2001).

<sup>15</sup> *The Small Jet Era 1999-2003: Republic Airways History*, REPUBLIC AIRLINE, <http://rjet.com//about-republic-airline/our-history/small-jet-era/> [<https://perma.cc/GTR9-2TUS>] (last visited April 19, 2018).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

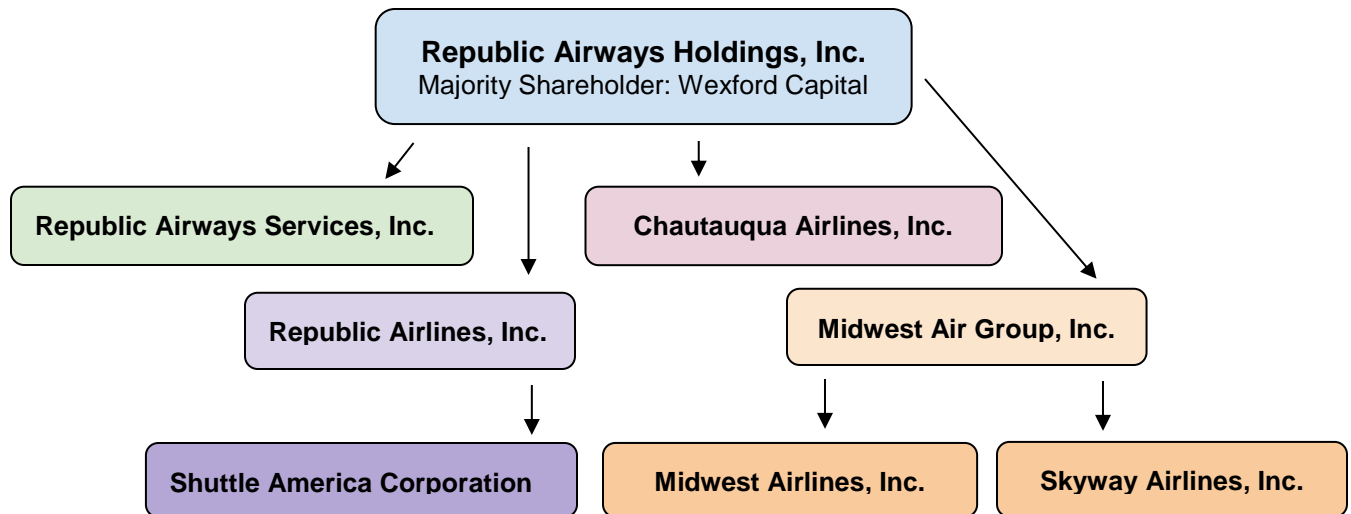
<sup>18</sup> *The EJet Era 2004-2009: Republic Airways History*, REPUBLIC AIRLINE, <http://rjet.com//about-republic-airline/our-history/ejet-era/> [<https://perma.cc/M7VL-5Y6M>] (last visited April 25, 2018).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

From 2005 to 2009, Republic expanded its business further, acquiring Milwaukee-based Midwest Airlines and Denver-based, discount carrier Frontier Airlines Holdings. Republic also started a joint venture with Mesa Air Group and expanded its corporate headquarters with 300 additional employees.<sup>21</sup> In 2013, Republic sold Frontier Airlines to an investment fund affiliated with Indigo Partners LLC.<sup>22</sup> At the time, Bedford spun the sale as “a direct result of Frontier’s successful restructuring, continued cost reduction efforts and laser focus on revenue generation.”<sup>23</sup> He further noted that Frontier would “enjoy future growth as Indigo [continued] the process” to make it the leading low-cost carrier.<sup>24</sup>

After these acquisitions and the sale of Frontier, the Republic’s organizational chart was generally structured as follows:



<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Matt Egan, *Frontier Airlines Sold for \$109M to Firm Led by Former Spirit Airlines Exec*, Fox Business, <https://www.foxbusiness.com/features/frontier-airlines-sold-for-109m-to-firm-led-by-former-spirit-airlines-exec> [https://perma.cc/E386-RFQV] (last visited April 30, 2018).

<sup>24</sup> *The Small Jet Era 1999-2003: Republic Airways History*, REPUBLIC AIRLINE, <http://rjet.com/about-republic-airline/our-history/small-jet-era/> [https://perma.cc/GTR9-2TUS] (last visited April 19, 2018).

## Codesharing Agreements

The bulk of Republic's business occurs through what the airline industry terms "codeshare agreements."<sup>25</sup> Codeshare agreements set forth the contractual terms of inter-airline partnerships. Large airlines, like United Airlines, market flights to passengers under their own names. However, the arrangement allows smaller, regional airlines like Chautauqua, to operate the flights for a fixed fee. For example, United Airlines advertises the flight on a Chautauqua-operated route as if it were using its own fleet, and sells the tickets to the passengers. Likely, however, United Airlines does not actually operate a flight on the route that the passenger will take. Instead, the passengers fly on Chautauqua planes, with Chautauqua pilots and crew. In this way United Airlines can offer a diverse number of routes for passengers without having to own and operate planes on all those routes itself. In exchange, Chautauqua receives a flat fee from United Airlines for each passenger, and United Airlines pockets the difference between the flat fees paid to regional partners and the gross ticket sale, assuming United Airlines made sufficient sales to cover expenses.<sup>26</sup>

Republic's major codeshare partners are United Airlines, through its regional brand United Express; Delta Air Lines, through its regional brand Delta Connection; and American Airlines, through its regional brand American Eagle.<sup>27</sup> Thus, passengers flying on United Express, Delta Connection, and American Eagle are actually often flying on Republic-operated flights.

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<sup>25</sup> Disclosure Statement for Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code 7, [ECF No. 1312](#).

<sup>26</sup> American Airlines, <https://www.aa.com/i18n/travel-info/partner-airlines/codeshare.jsp> [<https://perma.cc/568G-B27E>] (last visited April 19, 2018); ABC NEWS, *What the Heck Is a Codeshare, Anyway?*, <http://abcnews.go.com/Business/FlyingHigh/story?id=865304&page=1> [<https://perma.cc/HH9T-5KUZ>] (last visited Apr. 25, 2018).

<sup>27</sup> *The Present Era: 2010-Now, Republic Airways History*, REPUBLIC AIRLINE, <http://rjet.com//about-republic-airline/our-history/present-era/> [<https://perma.cc/4JQ8-C5W5>] (last visited April 25, 2018).

## **Regional Flights**

Outside of codesharing, Republic also acquired and contracted with a slew of smaller airlines and businesses to provide regional flights to a variety of destinations.<sup>28</sup> Republic's acquisition of Midwest and Frontier in 2009 were attempts to diversify business beyond codeshare agreements.<sup>29</sup> Interestingly, Republic contracted in 2012 with Caesars Entertainment Corporation, which owns and operates casinos, hotels, and golf courses in Nevada. During a three-year span, Republic operated five aircraft that provided flights to Caesar's U.S.-based customers.<sup>30</sup>

## **Turbulence**

The first signs of trouble for Republic arose in 2011 when the company announced that it would restructure Frontier Airlines to reduce costs and, hopefully, make it a profitable business.<sup>31</sup> In 2012, Republic announced that it would also restructure Chautauqua Airlines to "mitigate future negative cash flows . . . on average by approximately \$45 million annually over the next five years."<sup>32</sup> Thus, the overture for a Chapter 11 case began.

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<sup>28</sup> REPUBLIC AIRLINE, *supra* note 16.

<sup>29</sup> *Id.*

<sup>30</sup> REPUBLIC AIRLINE, *supra* note 23.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

### **Events Leading to Filing for Chapter 11**

The largest impetus behind Republic's bankruptcy filing was the growing national pilot shortage in the United States. This prolonged shortage primarily resulted from Congressional legislation that became effective in 2013 and 2014, which imposed "(a) more restrictive 'time and duty rest' requirements' and (b) a six-fold increase in the minimum flight hour requirements for new pilots (from 250 hours to 1500 hours) before new pilots could be considered as 'qualified' for employment as regional airline first officers."<sup>33</sup> According to Republic, the time and duty rest requirements increased the number of pilots needed to operate its current schedule by five to seven percent, and, at the same time, the new minimum hour requirements severely decreased the pool of qualified new pilots available for hire. Thus, the legislation simultaneously increased labor demand while also decreasing labor supply.<sup>34</sup>

Furthermore, pilots at regional airlines such as Republic were subject to high levels of attrition because of the aging population of pilots at legacy carriers such as Delta, American, and United who must retire at the age of 65.<sup>35</sup> Pilots at regionals are attracted to these job vacancies because they provide higher pay, larger aircraft to fly, more desirable destinations, and higher prestige.<sup>36</sup>

In addition to these general trends in the regional airline industry, Republic specifically faced the challenge of a very difficult eight-year-long negotiation with its pilots' union, the International Brotherhood of Teamsters, Airline Division.<sup>37</sup> Because of this dispute and the fact that the existing labor agreement, from a pilot's perspective, was highly inferior to those offered by other regionals, Republic experienced attrition of its pilots that was significantly higher than its competitors and had

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<sup>33</sup> Declaration of Bryan K. Bedford Pursuant to Local Bankruptcy Rule 1007-2 ¶ 5, [ECF No. 4](#).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at ¶ 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ¶ 7.

extreme difficulty in replacing the pilots that departed.<sup>38</sup> Once the new collective bargaining agreement was finally ratified, it created the additional problem of significantly increasing Republic's labor costs.<sup>39</sup>

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Because of this massive shortage of qualified regional airline pilots, it became difficult for Republic, as well as other regional airlines, to maintain requisite pilot staffing levels.<sup>41</sup> This left Republic unable to sustain the performance requirements of its agreements with codeshare partners and caused the grounding of operating aircraft.<sup>42</sup> This in turn had a large negative effect on Republic's finances and cash flows.<sup>43</sup> While the situation was helped somewhat by the new collective bargaining agreement between Republic and their pilots' union, Republic sought bankruptcy protection mainly in order to buy itself time to recruit and train new pilots, return its stagnant aircraft to profitable service, and restore the expected levels of scheduled service for its codeshare partners.<sup>44</sup>

Another factor leading to Republic's gravitation towards Chapter 11 protection was the realization that they were in possession of several aircraft types that had fallen out of favor in the regional airline industry. Smaller turboprops, such as the Bombardier Dash 8 Series, and smaller regional jets, such as the Embraer E-145 had become too small to efficiently service Republic's routes because they would have to fly more flights and consume more fuel.<sup>45</sup> Furthermore, since per FAA regulations a pilot can only fly one type of aircraft during any given statutory time period, not all of

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<sup>38</sup> *Id.* at ¶ 8.

<sup>39</sup> Unlike the previous American Airlines bankruptcy, the details of Republic's labor negotiations were decided prior to Republic's filing. Transcript Regarding Hearing Held on February 26, 2016 21, [ECF No. 222](#) (During first day motions hearing, counsel for the debtor indicated: "As I said, fortunately, a new agreement was reached in late 2015; there has been a significant turnaround. We have labor peace. Unlike many other airline Chapter 11 cases, you will not see a 1113 motion in this case. The hiring of new pilots has increased dramatically; the attrition rate for senior pilots has declined").

<sup>40</sup> Dec. Bedford ¶ 9–10, [ECF No. 4](#).

<sup>41</sup> *Id.* at ¶ 4.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at ¶ 28.

<sup>45</sup> Disclosure Statement for Debtors' Second Amended Disclosure Statement 13, [ECF No. 1312](#).

Republic's pilots could serve all of its routes.<sup>46</sup> For example, if a pilot was assigned to and trained on the E-145, s/he could not fly routes served by other aircraft types. This also increased training costs and provided an obstacle when extra pilots were needed to cover sick time, vacation time, and the like, leading to the possible cancellation of flights and subsequent loss of revenue.<sup>47</sup> Thus, Chapter 11 protection also allowed Republic time to restructure its fleet of aircraft into just one aircraft type, thereby significantly decreasing costs—not just in pilot training but also in costs for maintenance professionals, and flight attendants, as well as maintenance costs in general.<sup>48</sup>

In the months leading up to its voluntary petition, Republic was engaged in discussions with its codeshare partners and other key stakeholders to “secure compensation for the higher labor costs, [to] address its costs for idle aircraft, and to improve its liquidity position.”<sup>49</sup> However, it became clear that a significant portion of these negotiations would not be completed within a reasonable amount of time.<sup>50</sup> Therefore, due to the loss of revenues during the past several quarters and the decline in liquidity, Republic believed that its interests and those of its employees, creditors, shareholders, other stakeholders (especially those areas of the country which Republic serves exclusively on behalf of its codeshare partners), codeshare partners, and passengers would be best served by restructuring under Chapter 11.<sup>51</sup>

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<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.*

<sup>48</sup> Dec. Bedford ¶ 28, [ECF No. 4](#).

<sup>49</sup> Dec. Bedford ¶ 10, [ECF No. 4](#).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

### Republic's Prepetition Capital Structure

Republic's Second Amended Plan includes a summary of its prepetition capital structure. At the commencement of the cases, RAH was the direct parent company of debtors Republic Airways Services, Inc. ("Republic Services"); Republic Airline Inc.; Shuttle America Corporation ("Shuttle" or "Shuttle America"); Midwest Air Group, Inc.; as well as non-debtor Lynx Aviation, Inc.; and the indirect parent of debtors Midwest Airlines, Inc.; Skyway Airlines Inc.; and non-debtors Carmel Finance 2015, LLC and Republic Airline Inc. (Panama).<sup>52</sup>

Republic's total indebtedness "included (i) approximately \$91.8 million under two secured credit facilities, (ii) approximately \$3.461 billion under various aircraft and equipment financing arrangements and commitments, and (iii) approximately \$15.3 million in loaned proceeds of industrial revenue bonds."<sup>53</sup>

Republic was a party to two secured credit facilities.<sup>54</sup> The first facility (the "DB Facility"), dated April 7, 2015, as amended, was among Republic Airline, Inc., as borrower; DB AG New York Branch, as administrative agent, revolving lender, and revolving facility issuing lender; as well as Key Bank National Association and Morgan Stanley Bank, as revolving lenders; and RAH, Shuttle, and Republic Services, as guarantors.<sup>55</sup> The agreement provided for a revolving credit amount of \$60 million and up to \$10 million in letters of credit.<sup>56</sup> The second facility (the "Citi Facility") dated April 24, 2015 as amended, was among Republic Airline, Inc., as borrower; Citibank, N.A., as administrative agent, the lenders party thereto; RAH, as parent and guarantor; and Republic Services and Shuttle, as guarantors.<sup>57</sup> The facility provided an aggregate revolving credit amount of \$25 million. As of

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



commencement of the case, “Republic had \$60 million in borrowings outstanding and \$8.8 million in issued and outstanding letters of credit under the DB Facility and \$23 million in borrowings outstanding under the Citi Facility.”<sup>58</sup>

Republic also was a party to several secured aircraft and equipment financing obligations. These arrangements included \$2.318 billion in notes amortized through 2027 and secured by aircraft,<sup>59</sup> \$56.7 million in notes amortized through 2022 and secured by spare parts and equipment,<sup>60</sup> and \$1.7 million in notes amortized through 2017 and secured by spare parts and equipment.<sup>61</sup>

Further, Republic had “committed to purchase 40 CS300 aircraft from Bombardier and at least a total of 15 spare engines from Pratt & Whitney and GE Engines Services.”<sup>62</sup> Further, Republic had “debt financing arrangements for 24 new E175 aircraft under firm purchase commitments.”<sup>63</sup>

Additionally, “in 1998 and 2001, the City of Milwaukee, Wisconsin issued variable rate industrial development bonds in an aggregate principal amount of \$15.3 million” (the “Milwaukee Bonds”). Midwest Airlines and Skyway Airlines received the proceeds of the bond issuance “to fund construction of two hangars and maintenance facilities at General Mitchell International Airport in Milwaukee.”<sup>64</sup> The subsidiaries were still obligated for the full principal and interest amount, as of the commencement date. Letters of credit issued by U.S. Bank National Association secured these obligations.<sup>65</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (bearing interest at fixed rates ranging from 2.04% to 8.49%).

<sup>60</sup> *Id.* (bearing interest at fixed rates ranging from 5.13% to 8.38%).

<sup>61</sup> *Id.* (bearing interest at variable rates based on LIBOR plus a 3.18% to 3.66%).

<sup>62</sup> *Id.*

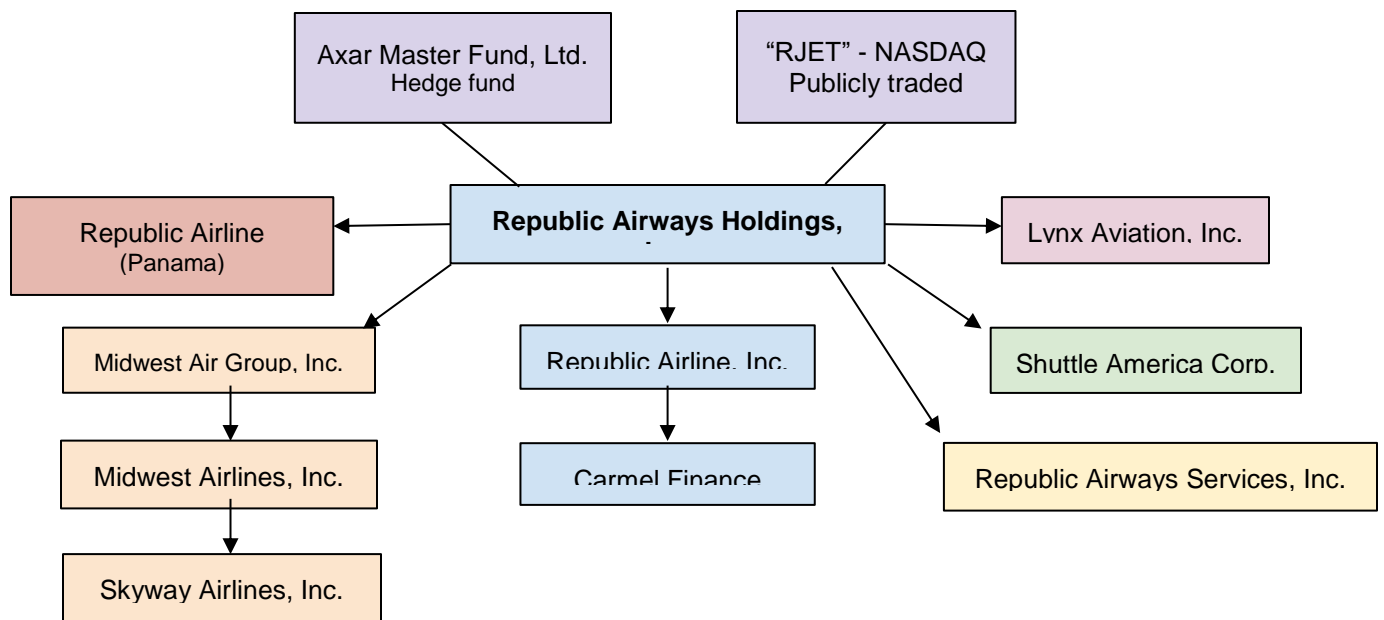
<sup>63</sup> *Id.* at 9.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (According to the terms of a credit assistance agreement, “Milwaukee County was required to reimburse U.S. Bank National Association for any draws on the letters of credit. As a result, Milwaukee County was subrogated to the rights of U.S. Bank National Association with respect to the loans.”)

Prior to the bankruptcy filing, RAH was a public reporting company under section 12(g) of the Securities and Exchange Act of 1934.<sup>66</sup> However, on March 8, 2016, the NASDAQ suspended trading of Republic’s common stock, which had been traded under the symbol “RJET”, and subsequently delisted those shares.<sup>67</sup> “As of May 9, 2016, [Republic] had 150,000,000 authorized shares of common stock, of which 50,955,051 shares were outstanding.”<sup>68</sup> Further, Republic had 5 million authorized shares of preferred stock, but none of those shares were outstanding.<sup>69</sup> As of May 6, 2016, Axar Master Fund, Ltd. owned 19.85% of the common stock of Republic.<sup>70</sup>

At the commencement of bankruptcy proceedings, Republic’s organizational structure was as follows:



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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Amended Corporate Ownership Statement 2, [ECF No. 562](#).

<sup>71</sup> *Id.* at 2–3.



## First Day Motions

When Republic filed for bankruptcy protection, it also filed first day motions to enable the corporation and its subsidiaries to continue doing business during bankruptcy. This paper organizes the first day motions using the following three categories, as outlined in *Bankruptcy in Practice*: (i) orders facilitating the administration of the estate; (ii) orders that smooth day-to-day operations; and (iii) orders authorizing the debtor to honor its prepetition obligations.<sup>72</sup>

### **A. Orders Facilitating the Administration of the Estate**

#### *Order Directing Joint Administration of Related Cases*

RAH and its debtor subsidiaries each filed voluntary bankruptcy petitions. It is customary in large chapter 11 cases for multiple debtors in the same corporate group to seek joint administration “so that they have a single caption and case number.”<sup>73</sup> The Republic bankruptcy was no different. Republic Services submitted a motion for joint administration under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure.<sup>74</sup> Under the motion, Republic Services sought the entry of an order pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure directing the joint administration of all of the chapter 11 cases for procedural purposes only.<sup>75</sup> Under Rule 1015(b), a bankruptcy court “may order joint administration of the estates” of a debtor and its affiliates.<sup>76</sup> Judge Lane granted the motion, based on a finding that joint administration of these cases would avoid duplicative costs from being passed on to creditors and, therefore, be in the best interest of the “[d]ebtors, their estates, creditors and all parties in interest.”<sup>77</sup>

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<sup>72</sup> BERNSTEIN & KUNNEY, *BANKRUPTCY IN PRACTICE* (5TH ED.) 273–75.

<sup>73</sup> *Id.* at 271.

<sup>74</sup> Corporate Ownership Statement Pursuant to Fed. R. Bankr. P. 1007(a)(1) and Local Bankruptcy Rule 1007-3, [ECF No. 2](#); Motion for Joint Administration, [ECF No. 3](#).

<sup>75</sup> Order Pursuant to Fed. R. Bankr. P. 1015(b) Directing Joint Administration of Chapter 11 Cases 2, [ECF No. 39](#).

<sup>76</sup> 1015 FED. R. BANKR. P. § 1015(b).

<sup>77</sup> Order Granting Motion for Joint Administration 3, [ECF No. 39](#); Motion for Joint Administration, *supra* note 71, at 2.

*Order Extending Time to File Schedules, Statements, and Lists*

Republic filed for relief to extend the time to file schedules of assets and liabilities, executory contracts, and unexpired leases, as well as to extend the time to file its statement of financial affairs.<sup>78</sup> Under Fed. R. Bank. P. 1007(c), “[a]ny extension of time to file schedule[s] and] statement[s] . . . may be granted only on motion for cause shown and on notice [to] the United States Trustee, any committee . . . , trustee, examiner, or other party as the court may direct.”<sup>79</sup> The judge granted relief based on the extensive time necessary to prepare and finalize voluminous schedules for a large company like Republic.<sup>80</sup>

Pursuant to Section 105(a), which gives the bankruptcy court extraordinary power to “issue any order . . . necessary or appropriate to carry out the provisions”<sup>81</sup> of the Bankruptcy Code, the court also waived the requirement to file an equity list and modified the requirement to provide notice to equity security holders.<sup>82</sup> This requirement normally would be used to put equity security holders that are not otherwise associated with the debtor on notice of the Plan.<sup>83</sup> However, because Republic directly or indirectly owned the remaining six debtors, preparing a list of equity security holders and sending notices to those parties was unnecessary and only created additional expense without any benefit.<sup>84</sup>

Republic and its subsidiaries filed all the required schedules and statements by May 2016.

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<sup>78</sup> Debtors’ Motion Pursuant to 11 U.S.C. §§ 342(a), 521 & 105(a), FED. R. BANKR. P. 1007(a), 1007(c), 2002, 2015.3 & 9006(b), and Local Bankruptcy Rule 1007-1 for Entry of Order 6, [ECF No. 5](#).

<sup>79</sup> *Id.* at 5. FED R. BANK. P. § 1007(c).

<sup>80</sup> Order Signed on 2/29/2016, Pursuant to 11 U.S.C. §§ 342(a), 521 & 105(a), Fed. R. Bankr. P. 1007(a), 1007(c), 2002, 2015.3 & 9006(b), and Local Bankruptcy Rule 1007-1, [ECF No. 49](#).

<sup>81</sup> 11 U.S.C. § 105(a).

<sup>82</sup> Order Signed on 2/29/2016 3, [ECF No. 49](#).

<sup>83</sup> *Id.*

<sup>84</sup> Debtor’s Motion 19, [ECF No. 5](#).

*Order Authorizing the Retention of “Ordinary Course” Professionals*

Republic sought an order allowing it to pay “the pre-petition wages of employees whose services [we]re needed to keep the case going (those wages [that] accrued pre-petition, [for which] payday [was] set to be post-petition).”<sup>85</sup> Section 327 of the Bankruptcy Code permits the debtor in possession to “retain or replace such professional persons if necessary in the operation of . . . business.”<sup>86</sup>

After finding that such professionals were necessary in the operation of business, the Court authorized Republic “to employ [ordinary course professionals] . . . in the ordinary course of business.”<sup>87</sup> The order required such professionals to declare that they did “not represent or hold any interest adverse to Republic or its estates.”<sup>88</sup> It also gave the U.S. Trustee and members of the committees the opportunity to object to the employment of any professionals.<sup>89</sup> The court also set forth monthly and aggregate caps on their compensation.<sup>90</sup>

*Order Establishing Interim Professional Fee Procedures*

Many different professionals, including accountants and lawyers, provided services during the Republic bankruptcy. Section 331 of the Bankruptcy Code authorizes compensation of such professionals, stating that “[a] trustee, an examiner, a debtor’s attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court . . . for such compensation for services rendered . . . or reimbursement for expenses.”<sup>91</sup> Further, Rule 2016(a) of the Federal Rules of Bankruptcy Procedure allows certain entities seeking compensation or reimbursement for expenses from the debtor’s estate to file an application with the Court that states: (1) the services that

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<sup>85</sup> BERNSTEIN & KUNEY, BANKRUPTCY IN PRACTICE (5TH ED.) 271.

<sup>86</sup> 11 U.S.C. § 327(b).

<sup>87</sup> Order Signed on March 23, 2016 3, [ECF No. 213](#).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 11 U.S.C. § 331.

the entity rendered, the time it expended, and the expenses incurred; and (2) the amounts requested.<sup>92</sup> On March 23, 2016, the Court entered a confirming order establishing procedures for interim compensation and reimbursement of expenses of professionals.<sup>93</sup>

*Order Authorizing Procedure for Notice*

Republic applied for entry of an order authorizing Republic to retain Prime Clerk, LLC (“Prime Clerk”) as the claims and noticing agent pursuant to 28 U.S.C. §156(c), section 105(a) of the Bankruptcy Code, and Local Bankruptcy Rule 5075-1.<sup>94</sup> Section 156(c) authorizes a court to “utilize facilities or services, either on or off the court’s premises, which pertain to the provision of notices, dockets, calendars, and other administrative information to parties in cases filed under the provisions of title 11 of the United States Code, where the costs of such facilities or services are paid for out of the assets of the estate and are not charged to the United States.”<sup>95</sup> Because the record showed over 10,000 creditors in the Republic bankruptcy, and because it appeared that the “receiving, docketing, and maintaining of proofs of claim would be unduly time consuming and burdensome” for the Clerk of Court, the court authorized Prime Clerk to perform noticing services and “to receive, maintain, record, and otherwise administer” the proofs of claim filed in the Chapter 11.<sup>96</sup> All of Prime Clerk’s

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<sup>92</sup> FED. R. BANKR. P. 2016(a).

<sup>93</sup> Order, Case 16-10429, [ECF No. 214](#).

<sup>94</sup> Motion to Appoint Prime Clerk LLC as Claims and Noticing Agent / Debtors’ Application Pursuant to 28 U.S.C. § 156(c), 11 U.S.C. § 105(a), and Local Bankruptcy Rule 5075-1 for an Order Appointing Prime Clerk LLC as Claims and Noticing Agent Nunc Pro Tunc to the Commencement Date, [ECF No. 19](#).

<sup>95</sup> 28 U.S.C. § 156(c). Additionally, Section 105(a) of the Bankruptcy Code authorizes the court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Further, Local Rule 5075-1 of the U.S. Bankruptcy Court for the Southern District of New York provides that the “Court may direct, subject to the supervision of the Clerk, the use of agents either on or off the Court’s premises to file Court records, either by paper or electronic means, to issue notices, to maintain case dockets, to maintain Judges’ calendars, and to maintain and disseminate other administrative information where the costs of such facilities or services are paid for by the estate.”

<sup>96</sup> Order Signed on 2/29/2016, Granting Motion Appointing Prime Clerk LLC as Claims and Noticing Agent for the Debtors Nunc Pro Tunc to the Commencement Date, [ECF No. 40](#).

fees and expenses under the order were treated as an administrative expense of the Republic estate under section 503(b)(1)(A) of the Bankruptcy Code.<sup>97</sup>

*Order Applying Cash-Management Procedures and Authorizing the Use of Prepetition Bank Accounts*

Republic filed a motion seeking authorization from the court to “(a) continue operat[ing] its existing [c]ash [m]anagement [s]ystem with respect to intercompany cash management and obligations, including the maintenance of existing [b]ank [a]ccounts at [its] existing [financial institutions] and the continuation of the investment [of] its cash in accordance with its prepetition practices, (b) honor certain prepetition obligations related to its [c]ash [m]anagement [s]ystem, (c) provide administrative expense priority status to post-petition intercompany claims incurred in connection with the transfers

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<sup>97</sup> *Id.* at 4. Section 503(b)(1)(A) provides allowed administrative expense status to “the actual, necessary costs and expenses of preserving the estate including—(i) wages, salaries, and commissions for services rendered after the commencement of the case.” Republic was authorized to compensate Prime Clerk “upon the receipt of reasonably detailed invoices setting forth the services provided by Prime Clerk and the rates charged for each.” The rate structure was attached to the order and provided the hourly rates as follows:

**Claims and Noticing Rates**

<b>Title</b>	<b>Hourly Rate</b>
<b>Analyst</b> The Analyst processes incoming proofs of claim, ballots and return mail, and physically executes outgoing mailings with adherence to strict quality control standards.	\$25-\$45
<b>Technology Consultant</b> The Technology Consultant provides database support for complex reporting requests and administers complicated variable data mailings.	\$80-\$95
<b>Consultant</b> The Consultant is the day-to-day contact for mailings, updates the case website, prepares and executes affidavits of service, responds to creditor inquiries and maintains the official claim register, including processing of claims objections and transfers.	\$90-\$130
<b>Senior Consultant</b> The Senior Consultant directs the data collection process for the master mailing list and Schedules & SOFA, oversees all mailings, performs quality control checks on all claims and ballots and generates claim and ballot reports.	\$135-\$160
<b>Director</b> The Director is the lead contact for the company, counsel and advisors on the case engagement and oversees all aspects of the bankruptcy administration, including managing the internal case team. In many instances, the executives of Primare Clerk will serve in this role at this rate.	\$165-\$185

*Id.* at 14. The rate document also provided the rates for a Solicitation Consultant and Director of Solicitation, as well as rates for printing and noticing services, newspaper and legal notice publishing, case website, client access, data administration and management, on-line claim filing services, call center services, and disbursement services. *Id.* at 14–16.



of funds under the [c]ash [m]anagement [s]ystem, and (d) maintain existing business forms.”<sup>98</sup> The motion also sought to waive “the requirements under section 345(b) of the Bankruptcy Code to the extent that they appl[ied] to any of Republic’s Bank Accounts or to Republic’s cash investments through [a] JP Morgan Clearing Account.”<sup>99</sup> As a part of its motion, Republic included an overview of the system and movement of funds in an attached exhibit.<sup>100</sup>

Under Section 105(a) of the Bankruptcy Code, the court’s “equitable powers” permit the court to “issue any order, process or judgment necessary or appropriate to carry out the provisions of [the Bankruptcy Code].”<sup>101</sup> Section 363(c)(1) of the Bankruptcy Code permits the debtor in possession to “enter into transactions, including the sale or lease of property of the estate, *in the ordinary course of business*, without notice or a hearing . . .” and permits the debtor in possession to “use property of the estate in the ordinary course of business without notice or a hearing.”<sup>102</sup> Although the purpose of section 363(c)(1) “is to provide a debtor with the flexibility to engage in the ordinary course transactions required to operate its business without unneeded oversight by its creditors or the court,” the motion sought authority to continue the “collection, concentration, and disbursement of cash pursuant to the [c]ash [m]anagement [s]ystem.”<sup>103</sup> Although the motion cited Section 363(b) of the Bankruptcy Code, Republic did not make an argument that the system would be used for outside of the ordinary course transactions.<sup>104</sup>

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<sup>98</sup> Interim Order Pursuant to 11 U.S.C. §§ 105(a), 345(b), 363(b), 363(c), 364(a), 503(b) & 507(a) and Fed. R. Bankr. P. 6003 & 6004 Authorizing Debtors to (A) continue Using Existing Cash Management System, (B) Honor Certain Prepetition Obligations Related to the Use Thereof, and (c) Maintain Existing Bank Accounts and Business Forms, [ECF No. 42](#).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 11 U.S.C. § 105(a).

<sup>102</sup> 11 U.S.C. § 363(c)(1).

<sup>103</sup> Debtors’ Motion Pursuant to 11 U.S.C. §§ 105(a), 345(b), 363(b), 363(c), 364(a), 503(b) & 507(a) and Fed. R. Bankr. P. 6003 & 6004 for Entry of Interim and Final Orders 11, [ECF No. 6](#).

<sup>104</sup> *Id.*

On February 29, 2016, the court entered an order granting Republic’s motion on an interim basis and finding that the use of the cash management system was consistent with Republic’s authority under Section 363(c) of the Bankruptcy Code.<sup>105</sup> As such, Republic’s banks were directed to honor intercompany fund transfers consistent with the prepetition policies.<sup>106</sup> Further, the court ordered that each of the banks would not be liable “to any party on account of (a) following Republic’s representations, instructions, or presentations as to any order of the [c]ourt (without any duty of further inquiry), (b) the honoring of prepetition checks, drafts, wires, or other electronic fund transfers with a good-faith belief or upon a representation by Republic that the [c]ourt has authorized such prepetition check, draft, wire, or other electronic fund transfers, or (c) an innocent mistake made despite implementation of reasonable handling procedures.”<sup>107</sup>

Under Section 345(b) of the Bankruptcy Code, “money of the estate [must be] insured or guaranteed by the United States or by a department, agency or instrumentality of the United States or backed by the full faith and credit of the United States.”<sup>108</sup> As of the petition date, Republic had approximately 33 bank accounts in the United States and Canada.<sup>109</sup> Two of the bank accounts, one at Bank of America and the other at Key Bank, were Canadian accounts.<sup>110</sup> The Canadian account at Key Bank was inactive.<sup>111</sup> Additionally, Republic, on a regular basis swept “funds in excess of \$25 million (in aggregate) . . . from the Main Operating Accounts” into an investment account at JP Morgan Chase, where “the cash [was] invested in highly-liquid short-term investments, typically

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<sup>105</sup> Interim Order Pursuant to 11 U.S.C. §§ 105(a), 345(b), 363(b), 363(c), 364(a), 503(b) & 507(a) And Fed. R. Bankr. P. 6003 & 6004 Authorizing Debtors 3, [ECF No. 42](#).

<sup>106</sup> *Id.* at 5.

<sup>107</sup> *Id.*

<sup>108</sup> Objection Of United States Trustee To Debtors’ Motion Pursuant To 11 U.S.C. §§ 105(a), 345(b), 363(b), 363(c), 364(a), 503(b) & 507(a) and Fed. R. Bankr. P. 6003 & 6004 for Entry of Interim and Final Orders 6, [ECF No. 149](#) (hereinafter “Trustee’s Objection to Cash Management Motion”).

<sup>109</sup> *Id.* at 4.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

money-market funds.”<sup>112</sup> This investment account was not FDIC-insured.<sup>113</sup> However, all of the funds were invested in “AAA-rated short-term liquid investments.”<sup>114</sup>

The U.S. Trustee objected to Republic’s motion to the extent that a final order would waive the requirements of Section 345 of the Bankruptcy Code, requiring money of the estate to be in safe accounts.<sup>115</sup> Republic responded that, on the contrary, Section 345 allows a debtor in possession to make a deposit or investment of money of the estate that will yield the maximum reasonable net return on that money.<sup>116</sup> Republic argued that its burden in satisfying the 345(b) requirements and ability to obtain a higher yield in the JP Morgan investment account justified Republic in seeking an order to skirt these requirements.<sup>117</sup> The U.S. Trustee objected on the grounds that those arguments could be made by any debtor and that “if sufficient to establish cause in every case, would render the protections contemplated by Section 345 totally ineffective.”<sup>118</sup> The U.S. Trustee also cited Lehman Brothers as an institution having a solid reputation prior to its bankruptcy in seeking to show that if any of the funds did encounter difficulty, “the fact that the underlying investments [were] in Triple-A rated investments, [would] not necessarily help the debtor.”<sup>119</sup> Indeed, during the height of the financial crisis, money-market funds “broke the buck.”<sup>120</sup>

In response, Republic argued that the “[U.S.] Trustee’s [objection] [was] premised on a strained reading of section 345(b) that completely disregard[ed] section 345(a), and . . . in fact read the provision

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<sup>112</sup> *Id.* at 4–5.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> Transcript regarding Hearing Held on February 26, 2016 at 4:09 PM RE: (Cash Management) Motion to Authorize/Debtors’ Motion Pursuant to 11 U.S.C. Sections 105(a), 345(b), 363(b), 363(c), 364(a), 503(b) & 507(a) and Fed. R. Bankr. P. 6003 & 6004 for Entry of Interim and Final Orders 30, [ECF No. 222](#) (hereinafter “First Day Motions Hearing Transcript”).

<sup>115</sup> *Id.* at 35:10–25-36:1–2.

<sup>116</sup> 11 U.S.C. § 345(a).

<sup>117</sup> First Day Motions Hearing Transcript 30:5–12, [ECF No. 222](#).

<sup>118</sup> Trustee’s Objection to Cash Management Motion 5, [ECF No. 149](#).

<sup>119</sup> First Day Motions Hearing Transcript 32–33, [ECF No. 222](#).

<sup>120</sup> Douglas Rice, *Why Money Market Funds Break the Buck*, Investopedia [\[https://perma.cc/733Z-XBW3\]](https://perma.cc/733Z-XBW3).

out of the statute.”<sup>121</sup> Section 345(a) provides that “[a] trustee in a case under this title may make such deposit of investment of the money of the estate for which such trustee serves as will yield the maximum reasonable return of such money, taking into account the safety of such deposit or investment.”<sup>122</sup>

Nonetheless, during the hearing on first-day motions, Judge Lane indicated that he “normally [doesn’t] and [wouldn’t] here . . . waive the 345(b) requirement.”<sup>123</sup> However, in the final order, the judge waived the requirements in section 345(b), perhaps relying on persuasive authority found in Delaware Local Bankruptcy Rule 4001-3, which was cited in Republic’s brief and “provides that cause for relief from the requirements of 345(b) . . . exists where money from the estate is invested in certain registered investment companies regulated as “money market funds” that invest exclusively in United States Treasury securities. . . .”<sup>124</sup> Therefore, based on the apparent safety of money market funds, Judge Lane waived the 345(b) requirement for Republic’s investment account.<sup>125</sup>

## **B. Orders that Smooth Day-to-Day Operations**

### *Order Establishing Reclamation Procedures*

At the time of filing, Republic had purchased a variety of parts and other goods on credit to use in its operations.<sup>126</sup> Republic was in possession of many of these goods but had not yet received invoices or made final payment to the suppliers.<sup>127</sup>

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<sup>121</sup> Debtors’ Reply in Further Support of Their Motion Pursuant to 11 U.S.C. §§ 105(a), 345(b), 363(b), 363(c), 364(a), 503(b) & 507(a) and Fed. R. Bankr. P. 6003 & 6004 for Entry of Interim and Final Orders 3, [ECF No. 159](#).

<sup>122</sup> *Id.*, 11 U.S.C. § 345(a).

<sup>123</sup> First Day Motions Hearing Transcript 35, [ECF No. 222](#).

<sup>124</sup> Final Order Pursuant to 11 U.S.C. §§ 105(a), 345(b), 363(c), 364(a), 503(b) & 507(a) and Fed. R. Bankr. P. 6003 & 6004 Authorizing Debtors to (A) Continue Using Existing Cash Management System, (B) Honor Certain Prepetition Obligations Related to the Use Thereof, and (C) Maintain Existing Bank Accounts and Business Forms 6–7, [ECF No. 228](#) (hereinafter “Final Cash Management Order”). *See also* Local Rule 4001-3 for the U.S. Bankruptcy Court, District of Delaware.

<sup>125</sup> *Id.*

<sup>126</sup> Debtor’s Motion for Entry of Order Pursuant to 11 U.S.C. §§ 105 & 46(c) Establishing and Implementing Exclusive and Global Procedures for Treatment of Reclamation Claims ¶ 7, [ECF No. 15](#) (hereinafter “Motion Establishing Procedures for Treatment of Reclamation Claims”).

<sup>127</sup> *Id.*

The Uniform Commercial Code and Section 546(c) of the Bankruptcy Code “permit[] a supplier, subject to certain specified limitations (including the prior right of a holder of a security interest in the goods or the proceeds), to reclaim goods delivered to an insolvent buyer.”<sup>128</sup> Under the Bankruptcy Code:

The supplier has 45 days after the goods have been received by the debtor to demand reclamation. If the 45-day period expires after the commencement of the case, the supplier has 20 days after the commencement of the case to demand reclamation.<sup>129</sup>

In order to “avoid piecemeal litigation that would interfere with [Republic’s] efforts to preserve enterprise value and successfully reorganize, [Republic] [sought] to establish procedures for the assertion and resolution of such reclamation claims.”<sup>130</sup> The court granted this motion.<sup>131</sup> That procedure required any vendor asserting a reclamation claim “to deliver to the Debtors its Reclamation Demand such that the Reclamation Demand was received by the Debtors and their counsel on or before the 20 calendar days after commencement.”<sup>132</sup> By that deadline, Republic had received 16 Reclamation Demands.<sup>133</sup>

In its notice of treatment of reclamation demands, Republic categorized some of those demands as valid and some as invalid.<sup>134</sup> As will be discussed in the next section, some of those demands were given 503(b)(9) administrative expense status instead.<sup>135</sup> In addition, Republic’s reclamation notice alleged the following errors with some of the reclamation claims: that some claims were not filed before the reclamation deadline; that the claim was for services rather than goods; that

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<sup>128</sup> 5 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 88.11 (2018).

<sup>129</sup> *Id.*, see also BERNSTEIN & KUNEY, BANKRUPTCY IN PRACTICE (5TH ED.) 399–400. The right of reclamation is limited to the sale of goods.

<sup>130</sup> Motion Establishing Procedures for Treatment of Reclamation Claims ¶ 8, [ECF No. 15](#).

<sup>131</sup> Order Pursuant to 11 U.S.C. §§ 105 & 546(c) Establishing and Implementing Exclusive and Global Procedures for Treatment of Reclamation Claims, [ECF No. 50](#).

<sup>132</sup> Notice of Filing Of Debtors’ Reclamation Notice Under Order Pursuant to 11 U.S.C. §§ 105 & 546(c) Establishing and Implementing Exclusive and Global Procedures for Treatment of Reclamation Claims ¶ 6, [ECF No. 721](#).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at ¶ 7.

<sup>135</sup> *Id.*

the claim was received outside of the reclamation period; that the goods were not specifically identifiable or not in Republic's possession; or that the amount of the claim did not match Republic's books and records.<sup>136</sup>

*Order Establishing Procedures to Assert 20-day §503(b)(9) Claims*

At the time of filing, Republic had approximately \$5 million in goods sold to Republic in the ordinary course of business and received by Republic within twenty days before commencement of the bankruptcy.<sup>137</sup> Under section 503(b)(9), the payment for such goods not yet being made gives rise to an administrative expense claim on the part of the vendor.<sup>138</sup> Republic sought to avoid “piecemeal litigation” that would divert Republic “from the more pressing task of administering the chapter 11 cases” by establishing one uniform set of procedures for asserting these claims.<sup>139</sup>

The court granted Republic's motion, and, pursuant to its 503(b)(9) order, any vendor asserting a 503(b)(9) claim was required to deliver such claims to Republic “no later than May 10, 2016.”<sup>140</sup> Then, Republic had until July 25, 2016 to evaluate those claims.<sup>141</sup> In analyzing the 224 503(b)(9) claims to determine their validity, Republic found that some of them were invalid for the following reasons:

- (i) the 503(b)(9) Claim [was] duplicative; (ii) the Vendor provided insufficient documentation to evaluate the claim; (iii) the claim include[d] non-goods such as services and delivery charges; (iv) the claim include[d] goods that were not received by the Debtors within twenty (20) days before the Commencement Date (the “503(b)(9) Period”); and/or (v) the Debtors [had] paid the Vendor all or a portion of the amount due on account of the claim for goods received in the 503(b)(9) Period.<sup>142</sup>

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<sup>136</sup> *Id.* at ¶ 7.

<sup>137</sup> Debtors' Motion Pursuant to 11 U.S.C. §§ 503(b)(9) & 105(a) for Entry of Order ¶ 9, [ECF No. 16](#).

<sup>138</sup> *Id.* at ¶ 8.

<sup>139</sup> *Id.* at ¶ 10.

<sup>140</sup> Notice of Filing of Debtors' Report and Objections to Claims Asserted Pursuant to 11 U.S.C. § 503(b)(9) ¶ 6, [ECF No. 829](#).

<sup>141</sup> *Id.* at ¶ 6.

<sup>142</sup> *Id.* at ¶ 6–7.

*Order Establishing Procedure for Paying Utilities and Utility Deposits and Prohibiting Utilities from Terminating Service*

Republic sought to provide adequate assurance of payment to utilities providers, to establish procedures for resolving objections by utility companies, and to prohibit utilities from altering or discontinuing service.<sup>143</sup>

Section 366 of the Bankruptcy Code “governs relations between the bankruptcy debtor and utilities.”<sup>144</sup> The critical portion of that section prohibits a utility provider from “alter[ing], refus[ing], or discontinu[ing] service” to a debtor “solely because the debtor did not pay prepetition service or because the debtor filed for bankruptcy relief.”<sup>145</sup> However, under 366(b), a utility may terminate service if the debtor fails to provide “adequate assurance of payment.”<sup>146</sup>

One of the parties identified on Republic’s Utility Service List, Waste Connections of North Carolina (“WCNC”), asserted that it was not a “utility” because “[n]o local or state ordinance regulate[d] the prices that WCNC [could] charge to its customers, nor [was] there any local or state ordinance that require[d] WCNC to provide service to everyone.”<sup>147</sup> Furthermore, “there [were] several other options [in the Charlotte, North Carolina area] for precisely the same services WCNC [provided] to [Republic].”<sup>148</sup> As a result, WCNC was removed from the list prior to the final order.<sup>149</sup>

The final order gave the court’s stamp of approval that Republic’s deposit of \$122,000 into a segregated interest-bearing account for the benefit of the utility companies satisfied the requirements of section 366 with respect to adequate assurance of payment.<sup>150</sup>

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<sup>143</sup> Debtors’ Motion Pursuant to 11 U.S.C. §§ 366 & 105(a) for Entry of Interim and Final Orders, [ECF No. 12](#).

<sup>144</sup> 5 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 78.06 (2018).

<sup>145</sup> *Id.*, see also 11 U.S.C. § 366.

<sup>146</sup> 5 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 78.06 (2018).

<sup>147</sup> Waste Connections of North Carolina’s Opposition to Debtor’s Motion ¶ 2, [ECF No. 81](#).

<sup>148</sup> *Id.*

<sup>149</sup> Final Order Signed On 3/23/2016, Pursuant to 11 U.S.C. §§ 366 & 105(a) ¶ 2–3, [ECF No. 203](#).

<sup>150</sup> *Id.* at ¶ 3.

### C. Substantive Orders

#### *Prepetition Employee Obligations*

Republic filed a motion for entry of an order authorizing Republic to pay, in its sole discretion, all amounts owed with respect to “[p]repetition [e]mployee [o]bligations, including, without limitation, [w]ages, [i]ndependent [c]ontractor [o]bligations, [i]ncentive [p]rogram [o]bligations, [r]eimbursement [o]bligations, [w]ithholding [o]bligations, [p]ayroll [m]aintenance [f]ees, [s]everance [o]bligations, [r]elocation [o]bligations, [l]eave [o]bligations, [e]mployee [b]enefit [o]bligations, [o]ther [e]mployee [p]rogram [o]bligations, and in each case any fees, costs, or expenses related to the foregoing.”<sup>151</sup> The motion also sought authorization for Republic and its subsidiaries “to continue its practices, programs, and policies for its [e]mployees, as those practices, programs, and policies were in effect as of the [c]ommencement [d]ate and as such practices, programs, and policies” might be amended in the ordinary course of business.<sup>152</sup> The order also sought to authorize Republic’s banks “to receive, process, and pay any and all checks drawn on Republic’s payroll and disbursement accounts, and automatic or other electronic fund transfers to the extent that such checks or transfers relate to any of the foregoing.”<sup>153</sup>

Under Section 363(b) of the Bankruptcy Code, “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.”<sup>154</sup> Further, Section 105(a) of the Bankruptcy Code authorizes the court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”<sup>155</sup>

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<sup>151</sup> Interim Order Pursuant to 11 U.S.C. §§ 363(b) & 105(a) 1–2, [ECF No. 41](#).

<sup>152</sup> *Id.* at 2.

<sup>153</sup> *Id.*

<sup>154</sup> 11 U.S.C. §363(b); Debtor’s Motion Pursuant to 11 U.S.C. §§363(b) & 105(a) for Entry of Interim and Final Orders 17, [ECF No. 7](#) (noting that “it is well-established that a court may authorize a debtor to pay certain prepetition obligations pursuant to section 363(b) when there is a sound business justification for doing so”).

<sup>155</sup> 11 U.S.C. § 105(a).



Relying on the business judgment of Republic, as well as the Bedford Declaration, the record from the first-day motions hearing, and all of the proceedings before the Court, the Court granted Republic's motion for an interim order as necessary to avoid immediate and irreparable harm to Republic and its estates.<sup>156</sup> During the interim period, Republic was not permitted to "pay any individual [e]mployee or [i]ndependent [c]ontractor an amount greater than the \$12,475 statutory priority imposed by section 507(a)(4) of the Bankruptcy Code."<sup>157</sup>

On March 23, 2016, the court entered a final order granting Republic's motion to honor its employee obligations.<sup>158</sup>

#### *Prepetition Insurance Obligations*

Like most businesses, Republic needed to carry insurance to cover "workers' compensation, commercial property, crime, . . . and various other property-related and general liabilities" coverage.<sup>159</sup> One of Republic's first day motions was for an order "authorizing [Republic] . . . to continue its [i]nsurance [p]rograms and [to satisfy all its pre-petition] . . . obligations in connection therewith."<sup>160</sup> The court relied on Section 503(b)(1) of the Bankruptcy Code, which "provides for the allowance of 'the actual, necessary costs and expenses of preserving the estate,' as administrative expenses" in letting Republic satisfy post-petition insurance obligations.<sup>161</sup> In addition, Republic cited and the court relied on Section 363(b), 105(a), and several cases in authorizing Republic to satisfy insurance obligations arising before the commencement date, including modifying the automatic stay to allow Republic employees to proceed with workers' compensation claims.<sup>162</sup> The court relied on the "necessity of

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<sup>156</sup> FED. R. BANKR. P. 6003.

<sup>157</sup> Interim Order Pursuant to 11 U.S.C. §§363(b) & 105(a) 4, [ECF No. 41](#).

<sup>158</sup> *Id.* at 1–4; Final Order, [ECF No. 198](#).

<sup>159</sup> Dec. Bedford 36, [ECF No. 4](#).

<sup>160</sup> Final Order 1, [ECF No. 204](#).

<sup>161</sup> Motion to Authorize 8, [ECF No. 13](#).

<sup>162</sup> Final Order 3–4, [ECF No. 204](#). *See also* Motion to Authorize 9, [ECF No. 13](#), *citing In re Fin. News Network, Inc.*, 134 B.R. 732, 735-36 (Bankr. S.D.N.Y. 1991) ("[A] bankruptcy court may allow pre-plan payments of prepetition obligations where such payments are critical to the debtor's reorganization").

payment” doctrine as well, which “[permits] immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-organization claims shall have been paid.”<sup>163</sup> Because Republic was “required legally and contractually to maintain” insurance and because payment of the prepetition insurance obligations was “necessary to avoid immediate and irreparable harm to Republic and its estates,” Judge Lane granted Republic’s motion.<sup>164</sup>

#### *Orders Affecting Foreign Creditors*

Pursuant to sections 363(b) and 105(a), Republic also sought the authority to satisfy the prepetition obligations owed to its foreign creditors -- those without the minimum contacts with the United States necessary to satisfy the jurisdiction requirements of the court and Bankruptcy Code.<sup>165</sup> Republic indicated that the aggregate amount of these foreign creditor claims was approximately \$500,000.<sup>166</sup> The rationale for allowing payment of these prepetition obligations was to avoid unnecessary interruptions in Republic’s operations and the adverse effects that a temporary break could have on its business.<sup>167</sup> Citing sections 363(b) and 105(a), as described above, Judge Lane granted an interim order allowing such prepetition payments up to \$250,000, and, after a final hearing on the matter, permitted Republic to pay foreign claims up to \$500,000 based on its reasonable exercise of business judgment.<sup>168</sup> Additionally, the court issued an order “enforcing and restating the automatic stay and *ipso facto* provisions of the Bankruptcy Code” to help protect Republic from

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<sup>163</sup> Motion to Authorize 10, [ECF No. 13](#) (citing *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972)).

<sup>164</sup> Final Order 3, [ECF No. 204](#).

<sup>165</sup> Motion to Authorize / Debtors’ Motion Pursuant to 11. U.S.C. §§ 363 (b), 105(a) & 503(b)(9), [ECF No. 8](#). Those foreign creditors included: “foreign vendors, service providers, independent contractors, and other parties, as well as . . . various governmental and quasi-governmental authorities, [and] foreign, provincial, municipal, or airport authorities.”

<sup>166</sup> *Id.* at 5.

<sup>167</sup> *Id.* at 7.

<sup>168</sup> Interim Order, [ECF No. 43](#); Final Order 3, [ECF No. 199](#).

improper actions, “particularly by parties in foreign jurisdictions who [we]re not familiar” with United States bankruptcy law.<sup>169</sup>

#### *Shipping and Warehouse Liens*

During the course of Republic’s business, it “[used] and [made] payments to domestic and foreign commercial common carriers, movers, shippers, freight forwarders and consolidators, delivery services, postal services, shipping auditing services, distributors, and other third-party service providers . . . to ship, transport, store, and otherwise facilitate the movement of [g]oods through established national and international distribution networks, as well as third-party warehouses to store [g]oods in transit.”<sup>170</sup> Those services were critical to Republic’s day-to-day operations.<sup>171</sup> Citing the fear that some of those shippers and warehousemen holding Republic’s goods could refuse to release those goods “pending receipt of payment for their prepetition services,” Republic proposed “to pay the prepetition amounts owed” to such entities that would agree “to continue to provide [g]oods or services to Republic on terms no less favorable to Republic than those in effect prior to the” bankruptcy.<sup>172</sup> Again, citing sections 363(b), 105(a), and 503(b), as discussed above, Judge Lane authorized Republic to pay the prepetition obligations of such holders of shipping and warehouse liens.<sup>173</sup>

#### *Critical Vendor Claims*

Republic had many “vendors whose goods and/or services [were] required by [Republic] and who w[ould] not supply them absent payment of their pre-petition claims.”<sup>174</sup> These so-called “critical

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<sup>169</sup> See Motion to Approve 4, [ECF No. 17](#); Transcript 84, [ECF No. 222](#) (indicating the court’s understanding that there are “numerous entities” overseas “who may not have appreciation for what the Bankruptcy Code does for a debtor”).

<sup>170</sup> Debtors’ Motion Pursuant to 11 U.S.C. §§ 105(a), 363(b), 503(b) & 507(a) for Entry of Interim and Final Orders 5, [ECF No. 9](#).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 7.

<sup>173</sup> Final Order 3, [ECF No. 200](#).

<sup>174</sup> BERNSTEIN & KUNEY, BANKRUPTCY IN PRACTICE (5TH ED.), 271.

vendors” included: “(i) safety and security providers, (ii) maintenance 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.”<sup>175</sup>

Republic indicated that the “uniqueness and competitiveness of the airline industry, coupled with [the] remote and highly-regulated venue in which airlines must operate, [would leave it] with few options with respect to certain vendors and service providers.”<sup>176</sup> In addition, “[e]ven where more than one vendor [would] be located to provide a service, Federal Aviation Administration . . . regulations inhibit[ed Republic]’s ability to switch expeditiously from one supplier of goods or services to another.”<sup>177</sup> In sum, “these suppliers [were], by definition, irreplaceable absent extraordinary expense or extensive delay, and as a result, these limited-source suppliers [were] in the unique position of having a virtual monopoly over the goods and services they [provided].”<sup>178</sup>

As such, Republic sought authority to pay “some or all of the prepetition obligations of [these] [c]ritical [v]endors that [were] essential to its ongoing operations and reorganization efforts.”<sup>179</sup> The court relied on sections 105(a), 363(b), and 503(b)(9), as discussed above, in authorizing Republic, in the reasonable exercise of its business judgment, to pay “some or all of the” critical vendor claims.<sup>180</sup>

#### *PK AirFinance Prepayment*

Prior to bankruptcy, Shuttle America was party to a credit agreement, dated as of November 2014, “among Shuttle; PK AirFinance US, Inc. (“PK Airfinance”); and Wells Fargo Bank Northwest, N.A. (the “Security Trustee”).”<sup>181</sup> The “loan was made to finance Shuttle’s purchase of a certain

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<sup>175</sup> Motion to Authorize 5, [ECF No. 10](#).

<sup>176</sup> *Id.* at 4.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 10.

<sup>180</sup> *Id.* at 8.

<sup>181</sup> Debtors’ Motion for an Order 3, [ECF No. 22](#).

Embraer ERJ 107-100 SE Aircraft and the engines associated therewith.”<sup>182</sup> RAH was a guarantor of the loan.<sup>183</sup> The outstanding principal at the time of the motion was approximately \$4,600,000.<sup>184</sup> To secure the loan, Shuttle had “granted a first-priority lien . . . on certain aircraft and aircraft engines to the Security Trustee pursuant” to a separate security agreement. The collateral under that agreement was, at the time of the motion, valued at over \$10 million.<sup>185</sup> Since the collateral was “more than twice the current loan balance, Republic determined to pay down the [l]oan so” the collateral under that security agreement, valued at \$10 million, could be used “to secure debtor-in-possession financing.”<sup>186</sup> Under the credit agreement, Shuttle had prepayment rights, which it began to exercise prior to bankruptcy.<sup>187</sup> In the days leading up to bankruptcy, Shuttle “delivered an irrevocable notice advising PK AirFinance” of its intent to pay the loan in full on March 1, 2016.<sup>188</sup> Therefore, the RAH subsidiary had set in motion pre-petition an obligation that would become payable shortly after the bankruptcy was filed. Therefore, Republic requested, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, as well as rule 6004 of the Federal Rules of Bankruptcy Procedure, that the court enter an order authorizing Shuttle to pay the prepayment to PK Airfinance and directing the Security Trustee to release the collateral that Republic wished to use to secure DIP financing.<sup>189</sup>

On March 22, 2016, the Court authorized Republic to make a prepayment because the loan was highly over-secured and “no creditors or parties in interest [would] be prejudiced by the payment of the” amount if PK Airfinance released the lien.<sup>190</sup>

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<sup>182</sup> *Id.* at 3-4.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 4.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 5.

<sup>190</sup> *Id.*

### *Clearinghouse Agreements*

The “airline business is an interdependent industry that relies upon a network of complex agreements governing virtually all aspects of air travel and airline operations.”<sup>191</sup> In order to “facilitate cooperation among airlines with respect to transactions for providing and obtaining essentials such as maintenance services and critical parts,” Republic, other airlines, and nonairline third-party participants commonly entered into so-called Clearinghouse Agreements, which “provide[d] for the settlement of . . . obligations that [we]re owed among airline participants . . . as well as [third-party participants].”<sup>192</sup>

As such, Republic sought to satisfy its commitments under these industry-standard agreements pursuant to sections 105(a), 362(d), 363(b), and 365(a) of the Bankruptcy Code. First, it would do so by getting authorization “to assume the Clearinghouse Agreements *nunc pro tunc* to the Commencement Date.”<sup>193</sup> Under Section 365(a) of the Bankruptcy Code, a debtor in possession “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”<sup>194</sup> Citing the business judgment of Republic, the court granted relief pursuant to the doctrine of necessity, Section 105(a) and 363(b)(1), as discussed above.<sup>195</sup> In addition, final order allowed payment of prepetition airline clearing transaction obligations under the agreements.<sup>196</sup> Further, pursuant to section 362(d), the court modified the automatic stay “solely to the extent necessary to enable [Republic] and the airline counterparties to [the agreements] to participate, in the ordinary course of business, in routine billings, settlements, and adjustments.”<sup>197</sup>

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<sup>191</sup> Motion to Authorize 3, [ECF No. 11](#).

<sup>192</sup> *Id.* at 3–4.

<sup>193</sup> *Id.* at 5.

<sup>194</sup> *Id.* at 6.

<sup>195</sup> Final Order 3, [ECF No. 202](#).

<sup>196</sup> *Id.*

<sup>197</sup> Final Order 3–4, [ECF No. 202](#).

### *Taxes and Fees*

At the time of filing, Republic had approximately \$4.3 million in prepetition taxes and assessments that had been incurred and withheld but had not yet become due.<sup>198</sup> These included sales and use taxes, state fuel taxes, property taxes, state and local income taxes, franchise taxes and fees, and other taxes.<sup>199</sup> Republic proposed to pay \$399,000 with respect to those taxes and assessments within the first thirty days of the bankruptcy.<sup>200</sup>

Pursuant to sections 105(a), 363(b), 507(a)(8), and 541 of the Bankruptcy Code, Republic sought authority to pay all prepetition taxes and assessments.<sup>201</sup> Under the law around section 363(b)(1), “it is well-established that a court may authorize a debtor to pay certain prepetition obligations . . . when there is a sound business justification for doing so.”<sup>202</sup> The court also relied on sections 105(a) and the doctrine of necessity, as cited above, to authorize Republic to pay these prepetition taxes and fees.<sup>203</sup>

### *Trading Order to Preserve Tax Benefits*

As of December 31, 2015, Republic had approximately \$1.4 billion “in estimated, consolidated net operating loss carryforwards” (“NOLs”).<sup>204</sup> NOLs generally “[permit] corporations to carry forward their [losses] to reduce future taxable income.”<sup>205</sup> Understandably, Republic wished to preserve the NOLs in order to offset any income realized during the pendency of the bankruptcy “and potentially thereafter.”<sup>206</sup>

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<sup>198</sup> Motion to Authorize 4, [ECF No. 14](#).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 6.

<sup>202</sup> *Id.* at 7.

<sup>203</sup> Final Order 3, [ECF No. 205](#).

<sup>204</sup> Debtor’s Motion 4, [ECF No. 18](#).

<sup>205</sup> *Id.*, see also I.R.C. § 172 (2012).

<sup>206</sup> *Id.*

In order to preserve the NOLs, Republic needed “the ability to enforce the stay to preclude certain transfers and to monitor and possibly object to other changes in the ownership of” its common stock.<sup>207</sup> Section 382 of the Internal Revenue Code “limits a corporation’s ability to use its NOLs . . . after the corporation undergoes a specified change of ownership.”<sup>208</sup> Therefore, Republic requested a restriction against “the accumulation of equity interests above 4.75 percent of [Republic’s] outstanding shares.”<sup>209</sup>

Additionally, Republic sought to preserve its ability to use the NOLs after bankruptcy under Section 382(l)(5) of the Internal Revenue Code.<sup>210</sup> Section 382(l)(5) provides more flexible rules permitting the retention of NOLs for business reorganizations in the bankruptcy process. Under that provision, Republic believed that it could retain the NOLs post-confirmation, “if the plan involve[d] the retention or receipt of at least half of the stock of the reorganized debtor by its stockholders or qualified creditors.”<sup>211</sup>

On March 23, 2016, the Bankruptcy Court approved these requests.<sup>212</sup> Specifically, it required any person who was or would become an owner of approximately 4.75 percent of Republic’s stock to provide notice to the parties in the bankruptcy case.<sup>213</sup> Further, it caused any change of control transactions to need written approval by Republic in order to be consummated, and it implemented restrictions on trading covered claims.<sup>214</sup>

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<sup>207</sup> *Id.* at 5.

<sup>208</sup> Second Amended Disclosure Statement 5, [ECF No. 1312](#).

<sup>209</sup> *Id.*, *see also* Interim Trading Order 3, [ECF No. 88](#) (quantifying 4.25 percent as at least 2,420,048 shares of Republic stock).

<sup>210</sup> Debtor’s Motion 4–6, [ECF No. 18](#); *see also* I.R.C. § 382(l)(5).

<sup>211</sup> Second Amended Disclosure Statement 5, [ECF No. 1312](#).

<sup>212</sup> Final Trading Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Claims Against and Interests in the Debtors’ Estates, [ECF No. 206](#).

<sup>213</sup> *Id.* at 3–5.

<sup>214</sup> *Id.* at 5.



*Order Authorizing Rule 1110 Agreements*

Under Section 1110 of the Bankruptcy Code, 11 U.S.C. § 1110, creditors with a security interest in “aircraft, aircraft engine[s], propeller[s], appliance[s], or spare part[s]” have the right to take possession of the collateral, “*unless* the trustee timely agrees to perform the debtor’s obligations under the terms of the relevant agreement and also timely cures certain defaults.”<sup>215</sup> Therefore, Republic faced a “stark choice: either perform and cure the relevant contractual obligations or surrender the equipment,” and it had only 60 days from the date of the entry of the order of relief to decide.<sup>216</sup>

In its first-day motions, Republic sought authorization to “enter into . . . ‘1110 Agreement[s]’ . . . to perform its respective obligations” under the aircraft and parts financing arrangements, as well as to take actions necessary to cure defaults and enter into stipulations with parties to extend the 60-day period.<sup>217</sup> The only requirement for this relief is found under Section 1110(b), which states that the Trustee and the secured party who has the right to take possession of the aircraft equipment must agree, with approval of the court, to extend the deadline.

Republic’s 1110 motion notably went without objection,<sup>218</sup> except for one from Citibank. Citibank was a secured creditor with a security interest in certain aircraft that Republic’s deadline-extending motion affected. Citibank demanded that Republic deliver the aircraft with the original engines, despite the fact that Republic had removed some engines from their original airframes in the ordinary course of business. However, Citibank raised its objection after the objection deadline,<sup>219</sup> and Judge Lane noted that, despite the thin case law in this area, Section 1110 did not “impose onerous conditions on the returner of aircraft” to reunite engines with their original airframes just to surrender

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<sup>215</sup> 7-1110 Collier on Bankruptcy ¶ 1110.01 (16th ed. 2017).

<sup>216</sup> *Id.*

<sup>217</sup> Debtor’s Motion 4, [ECF No. 23](#).

<sup>218</sup> Hearing Transcript of March 22, 2016 38:20-25–39:1-12, [ECF No. 225](#).

<sup>219</sup> *Id.* at 54:3-6.

collateral,<sup>220</sup> and instead urged Citibank to “bring their people to dismantle the engines from the airframe that’s not theirs and vice versa” to facilitate a speedy collateral surrender and avoid incurring more costs in a reasonable way,<sup>221</sup> because “the hallmark of Section 1110 is speed”<sup>222</sup> and “the rest of it is reasonableness.”<sup>223</sup>

Judge Lane granted Republic’s motion on March 23, 2016, authorizing Republic to: (1) enter into 1110 Agreements to perform its obligations under each Aircraft Agreement, respectively; (2) make payments and take actions to cure any defaults under the Aircraft Agreements subject to Section 1110; (3) enter into 1110(b) stipulations with Aircraft Parties as necessary to extend the 60-day default cure period under Section 1110(a)(2); and (4) file redacted 1110 Election Notices and 1110(b) Stipulations. The automatic stay protected Republic thereafter with respect to the aircraft equipment subject to Section 1110.

Pursuant to the resulting 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.”<sup>224</sup>

*Order Rejecting Leases or Executory Contracts (or Establishing Procedures for Extending Time for Same)*

At the time of filing, Republic owned approximately 300 aircraft, many of which were subject to secured debt or lease financing arrangements.<sup>225</sup> Because Republic sought “to streamline its operations by operating a single aircraft type (E170/175) and [return] out of favor aircraft types (Q400, ERJ-145, and ERJ-140),” it filed a motion, pursuant to section 363(b) of the Bankruptcy Code and

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<sup>220</sup> *Id.* at 84:2-24

<sup>221</sup> *Id.* at 85:3-8; 83:15-18.

<sup>222</sup> *Id.* at 83:15-16.

<sup>223</sup> *Id.* at 84:9.

<sup>224</sup> Second Amended Disclosure Statement 20, [ECF No. 1312](#).

<sup>225</sup> Motion to Authorize 3, [ECF No. 100](#).

rule 2002 of the Federal Rules of Bankruptcy Procedure, seeking “to retire [these] underutilized and idle aircraft and engines from its fleet through rejection and abandonment.”<sup>226</sup>

Some of the aircraft and engines that Republic proposed to surrender were subject to Citibank liens.<sup>227</sup> At the time of filing, the principal amount outstanding under the Citibank credit agreement was approximately \$23 million.<sup>228</sup> According to the Republic’s motion, this collateral was not necessary to the going-forward business plan.<sup>229</sup> Further, Republic had agreed to sell an engine manufactured by General Electric (“GE”), but a condition precedent to the sale included that the engine be free and clear of all liens.<sup>230</sup> Therefore, Republic sought an order authorizing Republic to perform its obligations under the sale agreement and directing Citibank to release its liens and security interests on the engine.<sup>231</sup>

Citibank raised a limited objection to Republic’s motion. First, it challenged provisions in the proposed order that “unduly prejudice Citibank in violation of section 1110 of the Bankruptcy Code.”<sup>232</sup> Second, Citibank objected to the sale of the GE engine free and clear of Citibank’s liens without satisfying any of the requirements of 363(f) of the Bankruptcy Code. Section 363(f) of the Bankruptcy Code provides that the trustee may sell property free and clear of any interest in that property of an entity other than the estate, so long as applicable nonbankruptcy law permits the sale, the entity with the interest consents, the interest is a lien and the sale price is greater than the aggregate value of all liens on the property, the interest is in bona fide dispute, or the entity could be compelled to accept money in satisfaction of the interest.<sup>233</sup> The bank indicated that Republic should either

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 4.

<sup>228</sup> *Id.* at 5.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Objection to Motion, Limited Objection of Citibank 2, [ECF No. 147](#).

<sup>233</sup> 11. U.S.C. § 363(f).

“conduct a proper marketing process for the GE [e]ngine to obtain the ‘highest and best’ purchase price available, or surrender and return [the engine] to Citibank along with the rest of its collateral.”<sup>234</sup>

Additionally, the Ad Hoc Committee of equity holders objected to Republic’s motion on the grounds that Republic had failed to provide meaningful information to the committee to adequately assess the ramifications of the relief sought.<sup>235</sup> The Ad Hoc Committee continued to argue that there was “significant equity value for existing shareholders and [that] every dollar of unsecured claims created by or against the Debtors serv[ed] to dilute that value.”<sup>236</sup> The Ad Hoc Committee’s objection raised these concerns and asked the court to adjourn the hearing on the Republic motion for a short period to fully vet the issues.<sup>237</sup>

Republic reviewed Citibank’s limited objection and determined to withdraw its request to sell the GE engine and instead modified its initial request to now request the surrender of the GE engine to Citibank.

As noted in Republic’s Second Amended Disclosure Statement, Republic, utilizing Section 1110 and the rejection of leases, as of December 12, 2016, had:

- “• with respect to the Debtors’ Q400 fleet, rejected leases relating to 27 aircraft and 6 related spare engines;
- “• with respect to the Debtors’ E140/145 fleet, rejected leases relating to 29 aircraft and 11 engines, surrendered and returned 11 aircraft and 2 spare engines by Court order, agreed to the consensual return and title transfer of 31 owned and 7 leased aircraft by stipulation; and
- “• with respect to the Debtors’ E170/175 fleet, rejected leases relating to 18 aircraft, surrendered and returned 1 aircraft, assumed leases on 5 aircraft, made elections under section 1110(a) of the Bankruptcy Code with respect to 78 aircraft, amended aircraft agreements with respect to 86 aircraft, received Court approval to sell 3 aircraft, and pledged 1 aircraft as collateral under the DIP Agreement.”<sup>238</sup>

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<sup>234</sup> *Id.*

<sup>235</sup> Limited Objection of Ad Hoc Committee 2, [ECF No. 148](#).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 3.

<sup>238</sup> *Id.*

Thus, Republic worked around the generous powers provided to airline creditors in Section 1110 of the Bankruptcy Code, using the process to “streamline its operations by operating a single aircraft type[, the E170/175),] and return out-of-favor aircraft -- the Q400 and ERJ-140/145 fleet.”<sup>239</sup>

The image below is of a Q400 formerly registered to Republic subsidiaries Lynx Aviation, Inc. and Republic Airline, Inc.<sup>240</sup>



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The image below is of a ERJ 140/45-type jet.



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The image below is of an Embraer ERJ-170 that is currently a part of Republic’s fleet.<sup>243</sup>

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<sup>239</sup> *Id.*

<sup>240</sup> N502LX Aircraft Registration, FLIGHTAWARE, <https://perma.cc/7YBV-96Q8>.

<sup>241</sup> Blaine Nickeson, *Flight Review: Flying First Class . . . On a United Q400*, AIRLINE REPORTER, (Jun. 12, 2014), <https://perma.cc/NSU8-MS95>.

<sup>242</sup> *Republic Airlines to Park 27 Regional Jets*, AIRWAYS, <https://airwaysmag.com/industry/republic-airlines-park-27-regional-jets/> [<https://perma.cc/FB4Y-RTC8>].

<sup>243</sup> *Republic Airlines Fleet Details and History*, PLANESPOTTERS.NET, <https://www.planespotters.net/airline/Republic-Airlines> [<https://pe.rma.cc/FLW4-JMUY>].



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<sup>244</sup> FELIPE GARCIA II, *N631RW Shuttle America Embraer ERJ-170SE (ERJ-170-100 SE)*, PLANESPOTTERS.NET, [<https://perma.cc/4U2T-Q6K3>].

### Appointment of Committees

Section 1102(a)(1) of the Bankruptcy Code allows the U.S. Trustee to appoint a committee of creditors holding unsecured claims and to appoint additional committees of creditors or equity security holders as it deems appropriate.<sup>245</sup> In Republic's bankruptcy, the U.S. Trustee chose to appoint the Official Committee of Unsecured Creditors, sometimes referred to as the Creditors' Committee. Additionally, the holders of common stock formed the Ad Hoc Committee of Equity Holders, sometimes referred to as the Equity Committee. Both committees were active during Republic's bankruptcy.

Section 1102 provides that the U.S. Trustee "shall appoint a committee of creditors holding unsecured claims" as soon as possible after the order for relief is entered.<sup>246</sup> Creditors' Committees are intended "to be a linchpin of the chapter 11 process, policing the debtor and formulating a plan."<sup>247</sup> Committees like these play an important role in large bankruptcies -- they may even be represented by counsel and employ other professionals, as was the case here.<sup>248</sup> In fact, "[a] well-organized committee of sophisticated creditors, speaking through competent counsel, can play a major part in shaping a case and sometimes even dominate a case."<sup>249</sup> A properly organized committee may be able to preserve the values of their claims, or "do what is necessary to maximize the value of their claims."<sup>250</sup>

To those ends, the committees may request documents and schedule depositions.<sup>251</sup> They may also object to the sale of assets, if they wish, or object to some portion of the Plan or a motion by another party that is not agreeable to their interests.<sup>252</sup> On the downside, committee members can be

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<sup>245</sup> 11 U.S.C. § 1102(a)(1).

<sup>246</sup> BERNSTEIN & KUNEY, BANKRUPTCY IN PRACTICE (5TH ED.) 20.

<sup>247</sup> *Id.* at 21.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 21–22.

<sup>250</sup> *Id.* at 22.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

restricted or barred from trading claims or securities of the debtor, and may open themselves to liability for willful wrongdoing.<sup>253</sup>

The court may also appoint additional committees if it is “necessary to assure adequate representation of creditors or of equity security holders,” though this is rare.<sup>254</sup> Otherwise, equity security holders, like those in Republic’s case, may choose to form an ad hoc committee on their own. Whether officially appointed or not, committees typically consist of those willing to serve on a committee “that hold the seven largest claims against the debtor of the kinds represented on such committee.”<sup>255</sup>

#### *Official Committee of Unsecured Creditors*

The U.S. Trustee appointed the Official Committee of Unsecured Creditors on March 4, 2016 to represent the interests of all unsecured creditors in Republic’s bankruptcy.<sup>256</sup> This Committee was comprised of seven members: GE Engine Services; Pratt & Whitney Component Services; Embraer S.A.; United Airlines, Inc.; American Airlines, Inc.; NAC Aviation 23, Ltd.; and the International Brotherhood of Teamsters Airline Division. On June 3, 2016, the Court replaced NAC Aviation, an aircraft lessor, with Residco (ALF IV, Inc.),<sup>257</sup> after Republic reached an agreement with NAC to return 27 Bombardier Q400s to NAC,<sup>258</sup> thus settling NAC’s lease claims and moving Residco into the top seven unsecured creditors. Further, in October of 2016, the Committee granted Delta Airlines *ex officio* status.<sup>259</sup>

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<sup>253</sup> *Id.* at 23.

<sup>254</sup> *Id.* at 24.

<sup>255</sup> *Id.* at 25.

<sup>256</sup> Notice of Appointment of Official Committee of Unsecured Creditors, [ECF No. 89](#).

<sup>257</sup> Amended Notice of Appointment of Official Committee of Unsecured Creditors, [ECF No. 630](#).

<sup>258</sup> Edward Russell, *Republic seeks to return 27 Q400s to NAC*, FLIGHT GLOBAL, <https://www.flightglobal.com/news/articles/republic-seeks-to-return-27-q400s-to-nac-423567> [https://perma.cc/WN5E-FFTP] (last visited April 26, 2018).

<sup>259</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan of Reorganization 15, [ECF No. 1312](#).



*Ad Hoc Committee of Equity Holders*

On April 4, 2016, Republic submitted a letter to the U.S. Trustee opposing the creation of an official committee of equity security holders.<sup>260</sup> The U.S. Trustee agreed and declined to form any official equity committee.<sup>261</sup> However, certain holders of common stock in RAH formed this committee to represent their common interests in the reorganization. The Ad Hoc Committee includes nine equity shareholders in RAH: Axar Master Fund, Ltd., SOLA, Ltd., Man GLG Select Opportunities Master LP, Trishield Capital Management LLC, Quantum Partners LP, Drawbridge Special Opportunities Fund LP, Ultra, Ltd., Drawbridge Special Opportunities Fund, Ltd., and Worden Master Fund I LP.<sup>262</sup>

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<sup>260</sup> *Id.* at 16.

<sup>261</sup> *Id.*

<sup>262</sup> Verified Statement Pursuant to Bankruptcy Rule 2019 Ex. A, [ECF No. 107](#).

## The Codeshare Agreements

In general, Republic sought to settle its claims with its codeshare partners under Bankruptcy Rule 9019, which provides that “on motion by the trustee and after notice and hearing, the court may approve a compromise or settlement”,<sup>263</sup> and Section 365 of the Bankruptcy Code, which provides that “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”<sup>264</sup> Typically, the Bankruptcy Court grants such requests by the debtor if doing so is in the best interests of the estate and all stakeholders in a chapter 11 case.

The most important part of the plan and Republic’s restructuring was the modification of their codeshare agreements to obtain compensation for the increased costs of operations, to assist with the restoration of normal service, and to facilitate the restructuring of Republic’s fleet, which was another vital goal of this restructuring. As previously discussed, before the petition date Republic was involved in negotiations with Delta Airlines regarding the ongoing litigation between the two parties. These talks resumed post-petition, primarily regarding negotiation of amended flying and ground handling agreements, as well as amended agreements regarding the leases of departure slots at New York’s LaGuardia Airport. As compensation for their agreement to amend the terms of these agreements, Delta received a pre-petition general unsecured claim of \$170 million against Republic and subsidiary, Shuttle America.<sup>265</sup> The parties agreed on this amount subject to a “most favored nations” clause, which provided that Delta’s claim would increase proportionally to the extent that any other codeshare partner was granted a priority or disproportionately large general unsecured claim pursuant to a settlement with Republic. The use of this clause permitted Delta to increase its claim amount by \$3.5 million to \$173.5 million due to the negotiations with other code share partners during the case. After the amendments were agreed upon between the parties, Republic filed a motion seeking the approval

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<sup>263</sup> FED. R. BANKR. P. 9019(a).

<sup>264</sup> 11 U.S.C. §365(a).

<sup>265</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan of Reorganization 16, [ECF No. 1312](#).

of the bankruptcy court to, primarily, assume the various amended agreements and to settle all claims with Delta.<sup>266</sup> The Bankruptcy Court issued an order approving these issues after it was modified somewhat in response to a limited objection made by the Creditors' Committee.<sup>267</sup> These modifications included limiting Delta's unsecured claim to Republic Holdings and Shuttle America rather than against all debtors and clarifying that an equity transaction in the context of a plan of reorganization that did not result in a single person or entity obtaining a majority interest in the debtors would not trigger a default under the change of control provisions of Delta's codeshare agreement.<sup>268</sup> In approving the motion, the Court overruled an asserted objection by the Ad Hoc Equity Committee that Republic did not reasonably exercise its business judgment in assessing the value of potential litigation damages.<sup>269</sup> The Ad Hoc Committee then appealed to the District Court and requested a stay pending the appeal. The Court denied both requests, and the parties agreed to dismissal of the appeal with prejudice.<sup>270</sup>

After the filing of the chapter 11 cases, Republic also resumed its negotiations with United in furtherance of a restructuring of the parties' relationship, to provide increased revenues to Republic and to accelerate the removal of the Q400 under the United codeshare agreement.<sup>271</sup> After the bankruptcy court approved Republic's settlement with Delta, Republic and United agreed that, in exchange for agreeing to the amendments to the codeshare agreements, United would be granted a general unsecured claim of \$193 million against RAH, Shuttle, and Republic Airline.<sup>272</sup> After these

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<sup>266</sup> 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, [ECF No. 244](#).

<sup>267</sup> Limited Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtors' Motions, [ECF No. 364](#).

<sup>268</sup> Order Pursuant to 11 U.S.C. §§ 363(b), 363(m), and 365(a) of the Bankruptcy Code and Bankruptcy Rules 6004, 6006, and 9019 For Authorization, [ECF No. 506](#).

<sup>269</sup> Omnibus Response of Delta Air Lines, Inc. to the Objections of the Ad Hoc Equity Committee and the Unsecured Creditors' Committee to Debtors' Motion ¶ 20, [ECF No. 384](#).

<sup>270</sup> *Supra*, note 263 at ¶ 6.

<sup>271</sup> Disclosure Statement 17–18, [ECF No. 1312](#).

<sup>272</sup> *Id.*

negotiations concluded, Republic filed a motion seeking authorization to assume its agreements with United, assume lease agreements for slots at Newark Airport, and settle claims.<sup>273</sup> After this motion was filed, Republic responded to substantial diligence requests on the United claim from the Creditors' Committee and from Delta regarding the computation methodologies used to calculate United's claim and the implications with respect to the most favored nation clause in the Delta's settlement order.<sup>274</sup> As a result of negotiations and diligence, the United claim was reduced to \$191.6 million and was allocated as follows: a general unsecured claim of \$191.6 million against RAH and a single general unsecured claim of \$191.6 million split between Republic Airline and Shuttle, the aforementioned increase in Delta's claim under the most favored nation clause, and the splitting and allocating of Delta's claim against the operating subsidiaries consistent with the allocation of United's claim.<sup>275</sup> United's settlement included a most favored nation clause similar to that contained in the Delta settlement but applied only to the extent that the remaining codeshare partner, American, received a priority or disproportionately large general unsecured claim pursuant to a settlement with Republic. As with Delta's settlement agreement, the Ad Hoc Committee made an objection to the United settlement. This objection was made on the same grounds as the Delta objection.<sup>276</sup> Following a hearing, the bankruptcy court approved the United settlement agreement and overruled the Ad Hoc Committee's objection.<sup>277</sup> The Ad Hoc Committee appealed this ruling to the district court, where it was consolidated with its appeal of the denial of its objection to the Delta settlement. It was likewise dismissed with prejudice.<sup>278</sup> Finally, on November 15, 2016, Republic filed a motion seeking

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<sup>273</sup> Debtors' Motion Pursuant to Section 365(a) of the Bankruptcy Code And Bankruptcy Rules 6006 and 9019 For Authorization to (I) Assume Codeshare Agreements, As Amended, With United Airlines, Inc. And (II) Settle Claims Between United Airlines, Inc. and the Debtors, [ECF No. 614](#).

<sup>274</sup> Disclosure Statement for Debtors' Second Amended Joint Plan 18, [ECF No. 1312](#).

<sup>275</sup> *Id.*

<sup>276</sup> Objection of the Ad Hoc Equity Committee To Debtors' Motion Pursuant To Section 365(a) Of The Bankruptcy Code and Bankruptcy Rules 6006 and 9019 for Authorization, [ECF No. 641](#).

<sup>277</sup> *Supra*, note 268, at 3.

<sup>278</sup> *Supra*, note 269.

authorization to further amend its codeshare agreement with United to provide for Republic's lease of additional aircraft owned by United for deployment under the codeshare agreement.<sup>279</sup> The bankruptcy court entered an order approving this amendment roughly one month later, after determining that "[t]he relief sought in the Motion . . . is in the best interests of the Debtors, their estates, creditors, and all parties in interest, and that the legal and factual basis set forth in the Motion . . . establish just cause for the relief granted."<sup>280</sup>

In July 2016, Republic reached an agreement with American Airlines on the amended flying agreements as well as a full settlement of American's pre- and post-petition claims.<sup>281</sup> In September, Republic filed a motion seeking authorization to assume its codeshare agreement and related agreements and to settle the claims between the parties.<sup>282</sup> This settlement provided for the consolidation of all of Republic's flying for American under one codeshare agreement, as well as serving the other major goals of this reorganization by increasing the rates that American must pay Republic in compensation for services rendered and extending the terms of the agreement with respect to certain aircraft, as well as providing for a transition regarding the seat configurations of certain aircraft.<sup>283</sup> In consideration for the various concessions that it made, American was granted a general unsecured claim of \$250 million against RAH and a single general unsecured claim of \$250 million to be split into two claims allocated against Shuttle and Republic airline, similar to what was given to Delta and United.<sup>284</sup> In consideration for the substantial discount on its claims that this settlement represented, Republic agreed to provide American with a most favored nations provision, providing

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<sup>279</sup> Debtors' Motion for Entry Of An Order Pursuant to 11 U.S.C. §363(b) and Fed. R. Bankr. P. 6004 Authorizing and Approving Amendment to Codeshare Agreement with United Airlines, Inc., [ECF No. 1183](#).

<sup>280</sup> Order Pursuant to 11 U.S.C. § 107(b) and Fed. R. Bankr. P. 9018 Authorizing the Filing of Certain Information Under Seal 2, [ECF No. 1293](#).

<sup>281</sup> Disclosure Statement for Debtors' Second Amended Joint Plan 19, [ECF No. 1312](#).

<sup>282</sup> Debtors' Motion Pursuant to Sections 363(b) and 365(a) of the Bankruptcy Code and Bankruptcy Rules 6004, 6006, and 9019 For Authorization, [ECF No. 957](#).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at ¶ 12.

that in the event the total allowed general unsecured claims against the debtors exceeded \$1 billion, the American general unsecured claim would correspondingly increase such that American would maintain the same claim percentage of 25 percent that it would have if the claims were equal to an even \$1 billion.<sup>285</sup> In order to reconcile this most favored nations (“MFN”) provision with those of United and Delta, the American MFN also provided for a claim adjustment for the other two codeshare partners if aggregate general unsecured claims exceeded \$1 billion, thus protecting their allowed general unsecured claims from falling below the percentage of aggregate general unsecured claims that their claims would represent if the claims were equivalent to \$1 billion in a similar manner to which American’s claims were protected.<sup>286</sup> These numbers came out to be 17.35 percent for Delta and 19.16 percent for United.<sup>287</sup> The Creditors’ Committee filed a limited objection to this MFN provision in the claim settlement, claiming that it was prejudicial to other non-airline unsecured creditors.<sup>288</sup> Citing that approval was in the best interests of Republic, creditors, and all other parties in interest, the bankruptcy court entered an order approving the commercial settlement (the settlement assuming the amended agreements) between Republic and American.<sup>289</sup> After this approval, the Creditors’ Committee withdrew its limited objection to the claim settlement because it was highly unlikely that the provision was to be triggered and, even if it were to be triggered, it was unlikely to

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<sup>285</sup> *Id.* at ¶ 11.

<sup>286</sup> *Id.*

<sup>287</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan 19, [ECF No. 1312](#).

<sup>288</sup> Limited Objection Of The Official Committee Of Unsecured Creditors To The Debtors’ Motion Pursuant to Sections 363(b) and 365(a) Of The Bankruptcy Code And Bankruptcy Rules 6004, 6006, and 9019 For Authorization 2, [ECF No. 994](#).

<sup>289</sup> Order Pursuant To Sections 363(b) and 365(a) Of The Bankruptcy Code and Bankruptcy Rules 6004, 6006, and 9019 For Authorization To (I) Assume Codeshare Agreement, As Amended, With American Airlines, Inc., and (II) Enter Into Or Assume Related Agreements, [ECF No. 1028](#).

result in significant dilution of other unsecured creditor's claims.<sup>290</sup> Subsequently, the bankruptcy court entered an order approving the claim settlement including the MFN provision.<sup>291</sup>

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<sup>290</sup> Disclosure Statement for Debtors' Second Amended Joint Plan 19, [ECF No. 1312](#).

<sup>291</sup> Order Pursuant to Sections 363(b) And 365(a) of the Bankruptcy Code And Bankruptcy Rules 6004, 6006, and 9019 for Authorization to Settle Claims Between American Airlines, Inc. and the Debtors, [ECF No. 1196](#).

## Settlements with Original Equipment Manufacturers

### **A. Bombardier**

Bombardier, Inc. manufactured Republic's Q400 fleet and was the counterparty to Republic's prepetition purchase agreement for 40 CS300 aircraft. In October 2016, the Republic filed a motion seeking the authorization of the Bankruptcy Court to amend and assume its existing purchase agreement with Bombardier for the CS300 aircraft and to settle claims asserted by Bombardier and its affiliates.<sup>292</sup> The amendments made to the purchase agreement provided for the deferral of scheduled aircraft payments to Bombardier as well as for the delay in the scheduled aircraft deliveries.<sup>293</sup> Under a subsequent separate claims settlement, Bombardier received an administrative expense claim of \$700,000 and a general unsecured claim of \$1.5 million. In compensation for these allowed claims, Bombardier agreed to withdraw its original claims that exceeded \$72 million.<sup>294</sup> The Bankruptcy Court entered an order approving this motion on December 14, 2016, stating that granting the motion was appropriate as it was in the best interests of all debtors and other parties in interest.<sup>295</sup>

### **B. Embraer**

Embraer S.A. manufactured and provided service on RAH's entire restructured aircraft fleet of the E170 and E175 aircraft. In November 2016, Republic sought and, in December, received approval of a comprehensive settlement with Embraer, as well as two agreements related to maintenance and spare parts.<sup>296 297</sup> The settlement resolved more than \$600 million in claims by Embraer against the Debtors

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<sup>292</sup> Debtors' Motion Pursuant to 11 U.S.C. §§ 363(b) and 365(a) and Fed. R. Bankr. P. 6004, 6006, and 9019 For Authorization to (I) Enter Into Settlement Agreement With Bombardier, Inc., Learjet, Inc. And C Series Aircraft Limited Partnership And (II) Assume Purchase Agreement, As Amended, With Bombardier, Inc., [ECF No. 1126](#).

<sup>293</sup> *Id.* at ¶ 10.

<sup>294</sup> Disclosure Statement for Debtors' Second Amended Joint Plan 20, [ECF No. 1312](#).

<sup>295</sup> Order Pursuant to 11 U.S.C. §§ 363(b) and 365(a) and Fed. R. Bankr. P. 6004, 6006, and 9019 Authorizing Debtors TO (I) Enter Into Settlement Agreement With Bombardier, Inc., Learjet, Inc., and C Series Aircraft Limited Partnership, and (II) Assume Purchase Agreement, As Amended, With Bombardier, Inc., [ECF No. 1288](#).

<sup>296</sup> Debtors' Motion For An Order Pursuant to 11 U.S.C. §§ 362, 363, and 365(a) and Fed. R. Bankr. P. 6004, 6006, And 9019, [ECF No. 1181](#).

<sup>297</sup> Order Pursuant to 11 U.S.C. §§ 362, 363, & 365(a) and Fed. R. Bankr. P. 6004, 6006, and 9019 (I) Approving The Letter of Intent Between Certain Debtors And Embraer S.A., (II) Authorizing The Debtors to Assume Amended



by granting it a general unsecured claim of \$99 million as well as a modification to the automatic stay, which allowed Embraer to “apply a portion of pre-delivery payments to its damages under the agreements.”<sup>298</sup>

### **C. GE Engine Services**

General Electric (“GE”) manufactured and provided maintenance for Republic’s engines. In November of 2016, Republic filed a motion seeking Bankruptcy Court approval of its global restructuring with GE pursuant to the terms of the Restructuring Letter Agreement.<sup>299</sup> Under this agreement, Republic agreed to amend and assume its existing maintenance and purchase agreements with GE.<sup>300</sup> In return, GE agreed to resolve more than \$180 million of claims by taking a single general unsecured claim of \$10 million against RAH and a cure payment of \$37 million.<sup>301</sup> Having found the requirements of the relied upon sections – §§ 362, 363, and 365(a) – and rules – 6004, 6006, and 9019 – to be met, the court approved the settlement as in the best interest of all parties on December 14, 2016.<sup>302</sup>

### **The Plan**

Prior to Republic’s exclusive filing period ending on December 31, 2016, Republic filed its first plan of reorganization on November 16, 2016. There were objections to confirmation, causing the parties to modify the plan, and Judge Lane confirmed Republic’s Second Amended Joint Plan of

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Purchase Agreement, EAMS Maintenance Agreement, And Amended EPOOL Agreement, (III) Approving Allowed Claims, and (IV) Granting Related Relief, [ECF No. 1293](#).

<sup>298</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan 23, [ECF No. 1312](#).

<sup>299</sup> Debtors’ Motion for an Order Pursuant To 11 U.S.C. §§ 362, 363(b), and 365(a) and Fed. R. Bankr. P. 6004, 6006, and 9019 (I) Approving the Restructuring Agreements with General Electric and Its Affiliates (II) Authorizing the Debtors to Assume Amended Maintenance Agreement, Amended Letter Agreements, and the Related General Terms Agreement, (III) Approving Allowed Claim, And (IV) Granting Related Relief, [ECF No. 1185](#).

<sup>300</sup> *Id.* at ¶ 1.

<sup>301</sup> *Id.* at ¶ 3.

<sup>302</sup> Order Pursuant To 11 U.S.C. §§ 362, 363(b), And 365(a) And Fed. R. Bankr. P. 6004, 6006, And 9019 (I) Approving The Restructuring Agreements With General Electric And Its Affiliates (II) Authorizing The Debtors To Assume Amended Maintenance Agreement, Amended Letter Agreements, And Related General Terms Agreement, (III) Approving Allowed Claim, And (IV) Granting Related Relief, [ECF No. 1290](#).

Reorganization (“Plan”) on April 20, 2017, despite some objections which this paper discusses below.<sup>303</sup>

## **Legal Requirements**

The whole point of Republic’s bankruptcy was to hammer out “a collective contract among the debtor, its creditors, equity interest-holders, and administrative claimants” -- a plan to allow the company to continue its existence.<sup>304</sup>

The basic confirmation requirements of Section 1129(a) of the Bankruptcy Code provide that the “court shall confirm a plan only if the following requirements are met. . . .”<sup>305</sup> At that point, the statute lists 16 requirements, many of which are “inapplicable in most cases.”<sup>306</sup>

Judge Lane confirmed Republic’s Plan because it complied with Section 1129 of the Bankruptcy Code.<sup>307</sup> Most importantly, the Plan’s voting class, which was “impaired pursuant to the Plan and entitled to vote, voted to accept the Plan by the requisite majority, . . . thereby satisfying the requirements of section 1129(a)(10) of the Bankruptcy Code.”<sup>308</sup>

## **What the Plan Provided**

The classes of claims were as follows:

### *Administrative Claims*

“In accordance with §1123(a)(1), DIP Facility Claims, Other Administrative Claims, Priority Tax Claims, and Professional Fee claims against the Debtors [were] not classified for the purposes of voting on, or receiving distributions under, the Plan. Holders of such claims [were] not entitled to

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<sup>303</sup> Order Confirming Second Amended Joint Plan of Reorganization 1, [ECF No. 1722](#).

<sup>304</sup> BERNSTEIN & KUNEY, BANKRUPTCY IN PRACTICE (5TH ED.) 515.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Supra*, note 298, at 9.

<sup>308</sup> *Id.* at 19.

vote on the Plan.”<sup>309</sup> All such claims [were] instead treated separately in accordance with Article 3 of the Plan and the requirements of §1129(a)(9).<sup>310</sup>

Claim Category	Definition	Payment Details	Estimated Total
DIP Facility Claims	“[A]ll [c]laims arising against [Republic] pursuant to the DIP Facility or DIP Orders.” The DIP Facility Claims “[were] Allowed as provided in the DIP Orders.” <sup>311</sup>	Each DIP Facility Claim was to be paid in full in cash on or prior to the Effective Date and in complete satisfaction of the claims.	The DIP facility was available but unused. \$0. <sup>312</sup>
Other Administrative Claims	Included “cure amounts and other liabilities incurred by the Debtors in the ordinary course of their businesses, reclamation claims under §546(c) of the Bankruptcy Code and Uniform Commercial Code §2-702, claims under §503(b)(9) of the Bankruptcy Code, amounts owing under an agreement made by the Debtors in accordance with the Section 1110 Procedures Order that satisfies the requirements of §503(b) of the Bankruptcy Code, and all requests for compensation or expense reimbursement for making a substantial contribution in the Chapter 11 cases pursuant to §§ 503(b)(3), (4), or (5) of the Bankruptcy Code.” <sup>313</sup>	Unless the parties agreed to less favorable treatment, each holder of such a claim was to be paid the full unpaid amount of their claim in cash “(i) on or as soon as reasonably practicable after the Effective Date (for Claims Allowed as of the Effective Date), (ii) on or as soon as practicable after the date such claim becomes Allowed (or upon such other terms as may be agreed upon by such holder and the [Debtor], or (iii) as otherwise ordered by the Bankruptcy Court.” <sup>314</sup>	\$3 million
Professional Fee Claims	The amount granted by the Bankruptcy Court pursuant to each professional’s final application for allowance of compensation for services rendered was to be paid in full in cash by the Debtors. <sup>315</sup>	Claims were to be paid in full in cash by the Debtors, “in such amounts as are allowed by the Bankruptcy Court pursuant to the provisions of the order of the Bankruptcy Court granting final allowance of compensation and reimbursement of expenses pursuant to §330.” <sup>316</sup>	\$16 million
Priority Tax Claims	“Claims (whether secured or unsecured” of a governmental unit entitled to priority pursuant to §507(a)(8) or specified under §502(i) of the Bankruptcy Code.”	Except to the extent that the holder of such a claim was paid prior to the effective date, or the post-effective date debtor and the holder agreed to less favorable treatment, holders received, “at the sole option of the Post-Effective Date Debtors, (a) payment in full in cash made on or as soon as reasonably practicable after the later of the Effective Date or 20 calendar days after the date such Claim is Allowed, or (b) regular installment payments in accordance with §1129(a)(9)(C).” <sup>317</sup>	\$5 million

<sup>309</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan 29, [ECF No. 1312](#).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 29–30.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 23.

<sup>315</sup> *Id.* at 31.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 32.

Intercompany Claims	"Claims held against a Debtor by a Debtor or Non-Debtor Affiliate."	Pursuant to §1124(1), these claims were unimpaired by the Plan but were subject to the rights of the Debtors to eliminate or adjust them as of the Effective Date by offset, cancellation, contribution, etc. <sup>318</sup>	N/A
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*All Other Claims and Interests*

All other claims and interests in the case were classified and treated as follows:

Title	Classification	Treatment	Voting Rights	Estimated Total to Be Paid on Effective Date
Class 1: Other Priority Claims	All claims that were not Administrative Claims and Priority Tax Claims, entitled to a priority in payment under §507(a)	Except to the extent that the holder agreed to less favorable treatment, such holder would receive "in full satisfaction, settlement, release, and discharge of, and in exchange for, such Allowed Other Priority Claim, a cash payment in an amount equal to the difference between (a) such [Claim] and (b) the amount of any Permitted Payments made to the holder of such claim, on the latest of: (i) the Effective Date; (ii) such date would be fixed by the Bankruptcy Court; (iii) the 14th day after the claim was allowed; and (iv) another date agreed upon between the holder and the Debtor.	Unimpaired. Presumed to accept under §1126(f). Not entitled to vote on the Plan.	\$0
Class 2(a): Reinstated Aircraft Secured Claims	All claims against any of the Debtors secured by valid, perfected, and enforceable liens on any of the Debtors' aircraft equipment, which claims the Debtors have determined to reinstate. <sup>319 320</sup>	(1) On the Effective Date, each claim set forth in Schedule 4.3 was rendered unimpaired pursuant to §§ 1123(b)(1) and 1124(2), "notwithstanding any contractual provision or applicable non-bankruptcy law that entitle[d] the holder ... to demand or receive payment of such [Claim] from and after the occurrence of a default to the extent provided in §1124(2)." (2) Holders retained their security interests on the aircraft equipment and these security interests remained "(i) . . . valid, perfected, legal, binding, and enforceable security interests in the collateral granted in accordance with the terms of the applicable underlying agreements, (ii) [continued to be] deemed perfected on the Effective Date, or if perfected earlier, such earlier date of perfection, and (iii) [were] deemed granted for fair consideration, reasonably equivalent value, and in good faith." (3) The Debtors [were to take all] steps necessary to make filings and recordings,	Unimpaired. Presumed to accept under §1126(f). Not entitled to vote on the Plan.	\$0

<sup>318</sup> *Id.*

<sup>319</sup> Disclosure Statement for Debtors' Second Amended Joint Plan 33, [ECF No. 1312](#).

<sup>320</sup> *Id.* at Schedule 4.3.

		and “obtain all governmental approvals and consents necessary to establish, maintain, and perfect” these security interests. (4) Any payments that were necessary to bring the reinstated obligations current were made on the Effective Date.		
Class 2(b): Other Secured Claims	All other secured claims that are not Reinstated Aircraft Secured Claims or DIP Facility Claims.	Each holder of such a claim, at the sole option of the Debtor, received one of the following treatments: (i) payment in cash in the amount of the Secured Claim; (ii) reinstatement of the legal, equitable, and contractual rights of the holder with respect to such Secured Claim; (iii) a distribution of the proceeds of the sale or disposition of the collateral securing the Secured Claim (net of costs of the disposition) to the extent of the value of the holder’s secured interest; (iv) a distribution of the collateral securing the Secured Claim without representation or warranty by or recourse against the Debtors; or (v) such other distribution as necessary to satisfy the requirements of §1124.  All distributions were to be made on or as soon as practicable after the latest of: (i) the Effective Date; (ii) 20 calendar days after the date the claim becomes allowed; and (iii) the date for payment provided by any agreement between the Debtor and the holder of the claim.	Unimpaired. Presumed to accept under §1126(f). Not entitled to vote on the Plan.	\$0
Class 3(a): General Unsecured Claims (Consolidated Debtors)	Included prepetition Claims that were not Administrative Claims, Priority Tax Claims, Other Priority Claims, Secured Claims, §510(b) Claims, or Intercompany Claims. Also included any unsecured Claims under §506(a)(1), unsecured damage claims arising from the rejection of executory contracts and unexpired leases, and other unsecured claims arising before the Commencement Date.	On or as soon as practicable after the later of (i) the Effective Date and (ii) the date the Class 3(a) General Unsecured Claim becomes an Allowed Class 3(a) General Unsecured Claim: (A) each holder in an aggregate amount equal to or less than \$500,000 received distributions of cash equal to 45% of the allowed amount of its claim up to a maximum of \$225,000, unless the creditor elected to receive its pro-rata share of New Common Stock; and (B) each holder in an aggregate amount greater than \$500,000 received its pro rata share of New Common Stock, unless it elected to reduce the amount of its claim to \$500,000 and to receive cash instead of the pro rata share of New Common Stock, in which case the creditor received \$225,000 in cash. For the purpose of determining eligibility to receive cash distributions, the aggregate amount of Class 3(a) claims held by a single holder was calculated as the sum of all Class 3(a) claims held by the holder and all affiliates of such holder.	Impaired. Holders of Class 3(a) claims were entitled to vote to accept or reject the plan.  Holders were also entitled to choose their form of recovery on their ballot (either cash distribution or issuance of New Common Stock).	\$1 billion.  The distribution of New Common Stock to holders of Allowed Class 3(a) Claims represented a recovery of roughly 41-48% of the allowed amounts of the Class 3(a) Claims for which the New Common Stock election was made.
Class 3(b)-(d): General Unsecured	Included prepetition Claims that were not Administrative Claims, Priority Tax Claims,	All holders of these claims did not receive any distributions or retain any property.	Impaired. Presumed to reject the Plan	N/A

Claims (Liquidating Debtors)	Other Priority Claims, Secured Claims, §510(b) Claims, or Intercompany Claims. Also included any unsecured Claims under §506(a)(1), unsecured damage claims arising from the rejection of executory contracts and unexpired leases, and other unsecured claims arising before the Commencement Date.		under §1126(g). Not entitled to vote on the Plan.	
§510(b) Claims	All claims arising from the rescission of a purchase or sale of shares, notes, or any other securities of any of the Debtors or their Affiliates (i) “for damages arising from the purchase or sale of any such security, (ii) for violations of the securities laws, misrepresentations or any similar Claims related to the foregoing or otherwise subject to subordination under §510(b) ... (iii) for reimbursement, contribution, or indemnification allowed under §502 ... on account of any such Claim, including claims based upon allegations that the Debtors made false and misleading statements or engaged in other deceptive acts in connection with the offer or sale of securities, or (iv) for attorneys’ fees, other charges or costs incurred on account of any of the foregoing Claims or Causes of Action.” <sup>321 322</sup>	All holders of these claims did not receive any distributions or retain any property.	Impaired. Presumed to reject the Plan under §1126(g). Not entitled to vote on the Plan.	N/A
Interests in RAH	Included “any equity security of RAH and any warrants, options, convertible securities, liquidating preferred securities, or contractual rights to purchase or acquire any such equity interests.” <sup>323</sup>	All interests in RAH were “deemed cancelled and extinguished” and holders of these interests [did] not receive or retain any property.	Impaired. Presumed to reject the Plan under §1126(g). Not entitled to vote on the Plan.	N/A
Subsidiary Interests	All interests held in a Debtor by another Debtor.	At the Debtors’ option, each such interest was either to be “(i) cancelled (or otherwise eliminated) and receive no distribution under the Plan or (ii) unaffected by the Plan, and the Post-Effective Date Debtor holding such [Interest] would continue to hold such [Interest] subject to the merger and any restructuring transactions.” <sup>324</sup>	Holders consented to the treatment and were presumed to approve the plan. Not entitled to	N/A

<sup>321</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan 36, [ECF No. 1312](#).

<sup>322</sup> 11 U.S.C. §510(b).

<sup>323</sup> *Supra*, note 316.

<sup>324</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan 37, [ECF No. 1312](#).

			vote on the Plan.	
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## Implementation of the Plan

### *(i) Substantive Consolidation*

Nothing in the Plan was intended to substantively consolidate the Estates of RAH and its subsidiaries, except for the consolidating entities, each entity maintained its separate and distinct assets both during and after discharge. The Court treated the six debtor entities as substantively consolidated for the purposes of the Plan only.<sup>325</sup> This is especially significant regarding Residco's objection, to be discussed later.

### *(ii) Securities Issued Pursuant to the Plan*

On the effective date of the plan, all interests in RAH were cancelled and the authorized capital stock of reorganized RAH consisted of 50,000,000 shares of new common stock with 20,000,000 of these issued pursuant to Republic's plan of reorganization.<sup>326</sup> Pursuant to section 1145(a)(1) of the Bankruptcy Code, "the offer, issuance, and distribution of the New Common Stock . . . was in exchange for Claims against the Debtors" -- meaning they were exempt from registration requirements under federal securities laws.<sup>327</sup> This section exempting securities issued pursuant to a bankruptcy proceeding from securities laws is a flat exemption if the securities are exchanges, in whole or in part, "for a claim against, an interest in, or a claim for an administrative expense" against the debtor in the case.<sup>328</sup>

These 20,000,000 shares had an estimated fair market value of between \$20.65 and \$23.90 per share. The Plan required all holders of these new common shares to enter into a shareholders

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<sup>325</sup> *Id.* at 38.

<sup>326</sup> *Id.*

<sup>327</sup> Order Confirming Second Amended Joint Plan of Reorganization 23, [ECF No. 1722](#).

<sup>328</sup> *Id.*

agreement, regardless of the date of acquisition.<sup>329</sup> These shares were also restricted by the amended certificate of incorporation to ensure compliance with federal regulations relating to air carriers. For example, federal law prohibits foreign persons or entities from ownership of an airline registered in the United States. The plan also contained an assurance that, subsequent to the effective date, the debtors would “take all necessary action immediately after the Effective Date to suspend any requirement to (i) be a reporting company under the Securities Exchange Act and (ii) file reports with the Securities and Exchange Commission or any other entity or party.”<sup>330</sup> In addition, the debtors were not required to file any reports with the Bankruptcy Court after the effective date had passed, with the exception of providing to the U.S. Trustee a calculation of their disbursements on a quarterly basis until the entry of a final decree pursuant to Rule 3022.<sup>331 332</sup> Furthermore, there were restrictions on transfer of the shares of new common stock in the reorganized RAH that are contained in the amended certificate of incorporation and the stockholders agreement.

*(iii) Changes to Capital Structure*

As noted, Republic used the bankruptcy process to rid itself of smaller planes that became disfavored and cancelled several aircraft purchase orders -- focusing on a single aircraft type, in an attempt to “[reduce] spending on parts and maintenance.”<sup>333</sup> Once confirmed, Republic exited “bankruptcy with \$2.37 billion in long-term debt related to aircraft leases, about what it had before the case was filed.”<sup>334</sup> However, the company was able to “swap about \$1 billion in [previously incurred] debt for equity” as part of the plan.<sup>335</sup>

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 39.

<sup>332</sup> FED. R. BANKR. P. 3022.

<sup>333</sup> Steven Church & Mary Schlangenstone, *Republic Airways Nears Bankruptcy Exit With New Owners Waiting*, BLOOMBERG (Mar. 16, 2017), <https://www.bloomberglaw.com/ms/document/OMX4FI6JTSEB> [<https://perma.cc/Y2L9-X64Y>].

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*



Additionally, Republic used the bankruptcy process to merge its air carrier subsidiaries, Republic Airline, Inc. and Shuttle America Corporation, so that afterwards they would operate under a single air carrier certificate.<sup>336</sup> Under Section 363(b) of the Bankruptcy Code, the trustee, “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” Thus, the standard by which the court judged Republic’s decision to effectuate the merger was the business judgment standard, which was particularly favorable to Republic.<sup>337</sup> Republic cited “significant economic benefits and operational efficiencies that would begin to accrue immediately upon implementation” of the merger as rationales for consolidating its operations, including by “eliminat[ing] the significant, redundant costs currently associated with two air carrier certificates.”<sup>338</sup> Republic resolved objections by Deutsche Bank AG New York<sup>339</sup> and Agência Especial de Financiamento Industrial<sup>340</sup> by agreeing to provide clarifying language in the order approving the merger that, by agreeing to the merger, those two entities’ claims and rights against Republic in bankruptcy (pursuant to section 1110 and under their contracts) were not in any way waived.<sup>341</sup>

The Plan also allowed Republic to liquidate its subsidiaries Skyway, MAGI, and Midwest.

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<sup>336</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan 24, [ECF No. 1312](#).

<sup>337</sup> Notice of Hearing on Debtors’ Motion Pursuant to Sections 105(A) and 363(B) of the Bankruptcy Code and Bankruptcy Rule 6007 for Approval of (I) Merger of Shuttle America Corporation Into Republic Airline Inc., and (II) Surrender of the Shuttle America Corporation Air Carrier Certificate 15, [ECF No. 1165](#).

<sup>338</sup> *Id.* at 25.

<sup>339</sup> Objection to Motion / Limited Objection of Deutsche Bank AG New York Branch to Debtors’ Motion Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 6007 for Approval of (I) Merger of Shuttle America Corporation into Republic Airline Inc., and (II) Surrender of the Shuttle America Corporation Air Carrier Certificate (related document(s)1165) filed by Scott G. Greissman on behalf of Deutsche Bank AG New York Branch, [ECF 1209](#).

<sup>340</sup> Objection to Motion / Limited Objection of Agencia Especial de Financiamento Industrial FINAME to the Debtors’ Motion Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 6007 for Approval of (I) Merger of Shuttle America Corporation into Republic Airline Inc., and (II) Surrender of the Shuttle America Corporation Air Carrier Certificate (related document(s)1165) filed by Richard A. Graham on behalf of Agencia Especial de Financiamento Industrial - FINAME, [ECF No. 1206](#).

<sup>341</sup> Order Signed On 11/28/2016, Granting Approval Of (I) Merger Of Shuttle America Corporation Into Republic Airline Inc., And (II) Surrender Of The Shuttle America Corporation Air Carrier Certificate 4, [ECF No. 1236](#) (The final order stated as follows: “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 Deutsche Bank AG New York Branch and Agência Especial de Financiamento Industrial (or the relevant security trustees) under their contracts with the Debtors or under section 1110 of the Bankruptcy Code.”).

After confirmation, American became the “biggest owner, with a 25 percent stake, followed by United with 19 percent and Delta with 17 percent.”<sup>342</sup> The remaining stock was held by “creditors[,] including Embraer SA and GE Capital Aviation Services.”<sup>343</sup> As noted, since the company could not repay “all creditors in full, [previous] shares [were] canceled and stockholders [did not] recover anything.”<sup>344</sup>

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<sup>342</sup> Steven Church & Mary Schlangenstein, *Republic Airways Nears Bankruptcy Exit With New Owners Waiting*, BLOOMBERG (Mar. 16, 2017), <https://www.bloomberglaw.com/ms/document/OMX4FI6JTSEB> [<https://perma.cc/Y2L9-X64Y>].

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

## Objection to Confirmation

Section 2.2(a) of the Plan of Reorganization provided for the substantive consolidation of assets and liabilities of all the Consolidated Debtors (RAH, Republic Airline, Shuttle America, and Republic Airways Services, Inc.).<sup>345</sup> This section of the Plan also provided for the related elimination of guarantee claims:

Solely for the purposes specified in the Plan (including voting, Confirmation, and distributions) and subject to Section 2.2(b), (i) all assets and liabilities of the Consolidated Debtors shall be consolidated and treated as though they were merged, (ii) all guarantees of any Consolidated Debtors shall be eliminated so that any claim against any Consolidated Debtor and any joint or several liability of any of the Consolidated Debtors shall be one obligation of the Consolidated Debtors and (iii) each and every claim filed or to be filed in the Chapter 11 Cases against any of the Consolidated Debtors shall be deemed filed against the Consolidated Debtors collectively and shall be one Claim against and, if and to the extent allowed, shall become one obligation of the Consolidated Debtors.<sup>346</sup>

The Plan defined “plan consolidation” as “the deemed consolidation of the Estates of the Consolidated Debtors, solely for the purposes associated with the confirmation of the Plan and the occurrence of the Effective Date, including voting, Confirmation, and distribution.”<sup>347</sup>

Wells Fargo Bank Northwest, N.A., as owner trustee, and ALF VI, Inc., as owner participant (together, “Residco”) filed an objection to the Second Amended Joint Plan of Reorganization. Residco objected to the substantive consolidation provisions of the Plan.<sup>348</sup> As the owner trustee and owner participant for seven aircraft leases with Republic, Residco held both lease claims against Shuttle America Corporation and guarantee claims for those lease obligations against RAH.<sup>349</sup> Residco argued

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<sup>345</sup> The other three Debtor entities (Skyway Airlines, Inc., Midwest Airlines, Inc., and Midwest Air Group, Inc., are referred to as the “Liquidating Debtors.”

<sup>346</sup> Disclosure Statement for Debtors’ Second Amended Joint Plan 28, [ECF No. 1312](#).

<sup>347</sup> *Id.* at 12.

<sup>348</sup> Objection to Confirmation of Debtors’ Second Amended Joint Plan of Reorganization by Wells Fargo Bank Northwest, N.A., as Owner Trustee, and ALF IV, Inc., as Owner Participant, as Holders of Claims from Rejections of Lease Transactions For N286SK, N561RP, N562RP, N287SK, N288 SK, N563RP, and N259JQ, [ECF No. 1534](#) (hereinafter the “Residco Objection”).

<sup>349</sup> *Id.*

that the substantive consolidation provisions being proposed by Republic were improper because they eliminated the guarantee claims that Residco claimed were more valuable, while preserving the lease claims that Residco believed were riskier and thus less valuable.<sup>350</sup>

### **A. Background**

Over the course of two and a half years, from early 2001 until late 2003, Wells Fargo and Mitsui & Co. (USA) entered into the seven leases at issue with the Debtors, pursuant to which Mitsui leased seven ERJ-145 aircraft to Republic (hereinafter the “Residco Leases”).<sup>351</sup> These leases were originally between Wells Fargo and Mitsui on one hand and Chautauqua on the other. In January of 2015, Chautauqua was consolidated into Shuttle America (one of the Consolidated Debtors).<sup>352</sup> ALF VI acquired the owner participation interests held by Mitsui for each of the Residco Leases in December 2014.<sup>353</sup> The Residco Leases contained stipulated loss value (“SLV”) liquidated damages provisions.<sup>354</sup> These provisions provided a formula to calculate damages if the lessee breached its obligations under the leases.<sup>355</sup> In the event of such a breach, the SLV liquidated damages provisions provided that:

Lessor ... may demand that Lessee pay ... any unpaid Basic Rent for the Aircraft ... plus, as liquidated damages for loss of bargain and not as a penalty (in lieu of Basic Rent payable for the period commencing after the date specified for payment ...), whichever of the following amounts Lessor, in its sole discretion, shall specify ...: (i) the amount, if any, by which (x) the Stipulated Loss Value computed as of the payment date ... exceeds (y) the aggregate Fair Market Rental Value ... of the Aircraft for the remainder of the Basic Term ... after discounting such Fair Market Rental Value to present worth ..., (ii) the amount, if any, by which (x) the Stipulated Loss Value computed as of the payment date ... exceeds (y) the Fair Market Sales Value ... of the Aircraft ..., or (iii) the amount, if any, by which (x) the aggregate Basic Rent for the remainder of the Basic Term ..., discounted ... to present worth ..., exceeds (y) the

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<sup>350</sup> *Id.* at 1.

<sup>351</sup> *Id.* at 4.

<sup>352</sup> Dec. Bedford ¶ 29, [ECF No. 4](#).

<sup>353</sup> Residco Objection 6, [ECF No. 1534](#).

<sup>354</sup> *Id.* at 5.

<sup>355</sup> *Id.*

Fair Market rental Value ... of the Aircraft for the remainder of the Basic Term ... after discounting such Fair Market Rental Value to present worth ....<sup>356</sup>

Residco asserted that Shuttle America bore the risk that the residual value of the aircraft might decline.<sup>357</sup> According to Residco, the expected residual value for each of the aircraft was between \$7 million and \$8 million as of the time that the parties first entered into the Residco Leases.<sup>358</sup> Residco further asserted that, as of the filing of the objection, the fair market value of each aircraft was no more than \$800,000.<sup>359</sup>

RAH guaranteed each of the obligations owed by Shuttle America under the Residco Leases.<sup>360</sup> These guarantees stated that the “Guarantor understands and agrees that its obligations hereunder shall be continuing, absolute and unconditional without regard to, and Guarantor hereby waives any defense to, or right to seek a discharge of, its obligations hereunder with respect to the validity, legality, regularity, or enforceability of any Operative Agreement, any of the Obligations or any collateral security therefore ....”<sup>361</sup>

#### *Ongoing Conflict During Bankruptcy*

In 2016, the Debtors and Residco entered into a Section 1110 stipulation, which was subsequently approved by the Bankruptcy Court.<sup>362</sup> Pursuant to this stipulation, Republic returned the aircraft to Residco and rejected the leases.<sup>363</sup> Residco then filed proofs of claim asserting rejection

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<sup>356</sup> Debtors’ Response to Objection to Confirmation of Debtors’ Second Amended Joint Plan of Reorganization by Wells Fargo Bank Northwest, N.A., as Owner Trustee, and ALF IV, Inc., as Owner Participant, as Holders of Claims From Rejections Of Lease Transactions For N286SK, N561RP, N562RP, N287SK, N288 SK, N563RP, and N259JQ, [ECF No. 1559](#) (“Debtors’ Response To Residco Objection”) (citing Leases §17.02(c)).

<sup>357</sup> Residco Objection 5, [ECF No. 1534](#).

<sup>358</sup> *Id.* at 5–6.

<sup>359</sup> *Id.* at 6.

<sup>360</sup> *Id.* at Ex. A.

<sup>361</sup> *Id.* at 5, 16–17.

<sup>362</sup> Stipulation and Order Approving the Section 1110(b) Extension for N288SK, N259JQ, N286SK, N287SK, N563RP, and N562RP, [ECF No. 540](#).

<sup>363</sup> Debtors’ Response to Residco Objection 18, [ECF No. 1559](#).

damages against Shuttle America for \$72,323,546 and claims against RAH under the guarantees for \$75,847,798.<sup>364</sup>

In its objection, Residco argued that the Court should not grant substantive consolidation as the requisite test had not been met, specifically that Residco relied upon the Debtors' corporate separateness and that the financial affairs of the individual Republic subsidiaries could, and therefore should, be separated.<sup>365</sup> Furthermore, Residco argued that it would be heavily prejudiced by substantive consolidation because its claims against Shuttle America and RAH could potentially be allowed in different amounts.<sup>366</sup> Residco asserted that its lease claims against Shuttle America based on the SLV liquidated damages provisions could be subject to various defenses, thus making them less valuable than their guarantee claims against RAH, which would not be subject to such defenses.<sup>367</sup> Based on this, Residco objected to the elimination of its potentially more valuable guarantee claims as part of substantive consolidation. Residco argued that, if the Court allowed its lease and guarantee claims in different amounts, then the Court should calculate Residco's recovery using the average of its allowed lease claim and allowed guarantee claim for each transaction. Alternatively, Residco proposed that the Court should allow its claims in the higher amount for each lease transaction.<sup>368</sup>

In opposition to this proposition, Shuttle America, RAH, and the Official Committee of Unsecured Creditors contended that substantive consolidation was appropriate given how Republic operated and the benefits to the creditors in this particular Chapter 11 case.<sup>369</sup> Furthermore, both the Committee and Republic disputed that Residco relied upon the separateness of RAH and Shuttle America as corporate entities and that Residco's claims could have been allowed in different amounts

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<sup>364</sup> *Id.* at ¶ 19.

<sup>365</sup> Residco Objection 24–30, [ECF No. 1534](#).

<sup>366</sup> *Id.* at 26–27.

<sup>367</sup> *Id.* at 15–17.

<sup>368</sup> *Id.* at 18.

<sup>369</sup> Debtors' Response to Residco Objection ¶ 6, [ECF No. 1559](#).

against them Nevertheless, both parties proposed to carve out Residco's claims from substantive consolidation to resolve the objection.<sup>370</sup> Under this carve out, Residco:

would [have been] entitled to receive distributions for (i) the allowed amount of its Guarantee Claims, based on an estimated percentage that non-priority general unsecured creditors of RAH would have received in a standalone plan of reorganization for RAH *plus* (ii) the allowed amount of the Lease Claims based on an estimated percentage distributions that nonpriority general unsecured creditors of Shuttle would have received in a standalone plan of reorganization for Republic Airline, in each case following the merger of Shuttle into Republic Airline pursuant to the *Order Pursuant To Sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 6004 for Approval of (I) Merger of Shuttle America Corporation into Republic Airline Inc., and (II) Surrender of the Shuttle America Corporation Air Carrier Certificate.*<sup>371</sup>

This "Non-Consolidation Treatment" would have Residco with the amounts they would have recovered if the plan consolidation had not taken place. Despite this proposition by the Unsecured Creditors Committee and Republic, Residco continued to insist that the carve it did not sufficiently protect its rights.<sup>372</sup>

While there is no explicit statutory authority for a court to grant substantive consolidation, it is generally understood to be within the equitable powers of the Bankruptcy Court to do so under §105(a), which allows the court to "issue any order, process or judgment that is necessary and appropriate to carry out the provisions" of the Bankruptcy Code.<sup>373374</sup> In the Second Circuit, the determination of whether to approve substantive consolidation in bankruptcy is made with reference to two inquiries: whether (i) creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (ii) the affairs of the debtors are so entangled that

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<sup>370</sup> Reply of the Debtors to Response of Wells Fargo Bank Northwest, N.A., as Owner Trustee, And ALF VI, Inc., as Owner Participant, to Revised Alternate Treatment for Residco Parties Submitted by Debtors and Committee Ex. A, [ECF No. 1655](#).

<sup>371</sup> *Id.*

<sup>372</sup> Response of Wells Fargo Bank Northwest, N.A., As Owner Trustee, and ALF VI, Inc., as Owner Participant, to Revised Alternative Treatment for Residco Parties Submitted by Debtors and Committee ¶ 1–3, [ECF No. 1574](#).

<sup>373</sup> 11 U.S.C. §105(a).

<sup>374</sup> *In re Angie/Restivo Baking Co. Ltd.*, 860 F.2d 515 (2d Cir. 1988).

consolidation will benefit all creditors.<sup>375</sup> This is known as the “Augie/Restivo Test.” Further case law holds that the test is disjunctive and the satisfaction of either prong can justify substantive consolidation.<sup>376</sup> The first prong is applied from the creditors prospective and takes into account whether the creditors treated the debtors as a single entity, “not whether the managers of the debtors themselves, or consumers viewed the debtors as one enterprise.”<sup>377</sup> In evaluating the second factor, courts consider whether the debtors have demonstrated either an operational or a financial entanglement of business affairs.<sup>378</sup> Another important factor that courts often consider is whether substantive consolidation “will yield an equitable treatment of creditors without any undue prejudice to any particular group.”<sup>379</sup> Courts will “use a balancing test to determine whether the relief achieves the best results for all creditors.”<sup>380</sup>

In this particular case, the Bankruptcy Court found that the Republic entities satisfied both prongs for substantive consolidation under the *Augie/Restivo* Test. Firstly, the court found that the Consolidated Debtors operated as a “single economic unit”.<sup>381</sup> The reasons behind this finding of the Bankruptcy Court included: (i) the fact that the Consolidated Debtors operated under a single business under a single business plan; the fact that none of the Consolidated Debtors had ever received a credit rating independently from another Consolidated Debtor, and analyst reports discussed the Debtors as a unified enterprise.<sup>382</sup> Furthermore, the Court found that the Consolidated Debtors shared “the same overhead, management, accounting, and other back office functions; there [were] significant intercompany obligations; and there [were] significant overlaps in the creditor pools due to

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<sup>375</sup> *Id.* at 518.

<sup>376</sup> *In re Verestar, Inc.*, 343 B.R. 444 (Bankr. S.D.N.Y. 2006).

<sup>377</sup> *In re Consumer Elecs, Inc.*, 195 B.R. 244 (S.D.N.Y. 1996).

<sup>378</sup> *In re Leslie Fay Cos., Inc.*, 207 B.R. 764 (Bankr. S.D.N.Y. 1997).

<sup>379</sup> *In re Food Fair, Inc.*, 10 B.R. 123 (Bankr. S.D.N.Y. 1981).

<sup>380</sup> *Augie/Restivo* 860 F.2d at 518–19.

<sup>381</sup> Memorandum of Decision Signed on 4/10/2017 Regarding Objection to Confirmation 12, [ECF No. 1694](#).

<sup>382</sup> *Id.* (citing Dec. Bedford ¶ 17).



guarantees.”<sup>383</sup> The Consolidated Debtors also “issue[d] consolidated financial statements, [were] jointly controlled from a shared business headquarters at a common business address, [had] no separate budgets, use[d] the same cash management system, and file[d] a consolidated tax system.”<sup>384</sup>

Second, the Court also concluded that the record supported a finding that the benefits of substantive consolidation outweighed any harm suffered by the creditors. According to the Court, if it did not grant substantive consolidation in this case, a much more protracted bankruptcy would have resulted, especially if it required untangling the Consolidated Debtor’s assets. This would result in an additional \$3 million to \$4 million in administrative expenses per month that the bankruptcy continues.<sup>385</sup> Additionally, the Court found that a longer stay in bankruptcy could adversely impact the Debtors’ dire pilot shortage, as it is not an attractive situation for pilots to join.<sup>386</sup> It could also negatively affect Republic’s liquidity position as there were a number of transactions (such as a number of sale-leaseback transactions) that cannot close until Republic exits bankruptcy.<sup>387</sup> Finally, the Court found it highly impactful that the Committee of Unsecured Creditors (of which Residco was a member) supported substantive consolidation and that over 90% of the Committee in both number and amount voted to support the Plan.<sup>388</sup> Based on the Consolidated Debtors’ satisfaction of the *Angie/Restivo* Test, the Bankruptcy Court overruled Residco’s objection and ordered that the language of the previously discussed carve out provision be added to the plan.<sup>389</sup>

### **Conclusion**

Republic Airways Holdings, Inc.’s bankruptcy was a fairly straightforward matter. It allowed Republic to continue business operations while restructuring contractual relationships and finances.

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<sup>383</sup> *Id.* (citing Dec. Bedford ¶ 16).

<sup>384</sup> *Id.*

<sup>385</sup> Memorandum of Decision Signed on 4/10/2017 Regarding Objection to Confirmation 13, [ECF No. 1694](#).

<sup>386</sup> *Id.* at 14.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 17.

<sup>389</sup> *Id.* at 34.

Specifically, Republic renegotiated its codeshare agreements with legacy carriers, replaced existing equity holders with pre-bankruptcy creditors, streamlined its operating fleet of aircraft into a single line, and fixed the redundancy of having two subsidiaries with carrier certificates. Republic emerged from Chapter 11 with an official announcement of its success on May 1, 2017.<sup>390</sup> CEO Bryan Bedford expressed his pleasure that Republic “accomplished all of [its] goals timely,” and said that Republic’s “future success will be determined by how well Republic continues to deliver . . . consistent and outstanding operational reliability . . . financial and operational efficiencies . . . and remain[s] an employer of choice for its current and future aviation professionals.”<sup>391</sup> As it’s Chapter 11 closed, so “starts a new chapter for Republic,” Bedford concluded.<sup>392</sup>

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<sup>390</sup> Gregory Polek, *Republic Airways Emerges from Bankruptcy*, AINonline, <https://www.ainonline.com/aviation-news/air-transport/2017-05-01/republic-airways-emerges-bankruptcy> [] (last visited April 30, 2018).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*