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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	**:**	**Chapter 11 Case No.**
REPUBLIC AIRWAYS HOLDINGS INC., *et al*.,	**:**	**16-10429 (SHL)**
Debtors.[1]	**:**	**(Jointly Administered)**

DEBTORS' RESPONSE TO THE 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 TO (I) ASSUME CODESHARE AGREEMENT, AS AMENDED, WITH AMERICAN AIRLINES, INC., (II) ENTER INTO OR ASSUME RELATED AGREEMENTS, AND (III) SETTLE CLAIMS BETWEEN AMERICAN AIRLINES, INC. AND THE DEBTORS

1. The Debtors in these chapter 11 cases are the following entities: Republic Airways Services, Inc.; Shuttle America Corporation; Republic Airline Inc.; Republic Airways Holdings Inc.; Midwest Air Group, Inc.; Midwest Airlines, Inc.; and Skyway Airlines, Inc. The Debtors' employer tax identification numbers and addresses are set forth in their respective chapter 11 petitions.

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TO THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:

Republic Airways Holdings Inc. ("RAH"), and certain of its wholly-owned direct and indirect subsidiaries, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively with RAH, "Republic" or the "Debtors"), submit this response (the "Response") to the limited objection of the Official Committee of Unsecured Creditors (the "Committee") [ECF No. 994] (the "Limited Objection"). In support of this Response and in further support of the American Settlement Motion, the Debtors respectfully represent as follows:[1]

PRELIMINARY STATEMENT

1. The Committee does not—and cannot—dispute that the $250 million general unsecured claim agreed to by American in the Claim Settlement is an excellent result for the Debtors and in the best interest of their estates. The Committee only objects to a single provision of the Claim Settlement: the most favored nations provision ("MFN") provided to American, the Debtors' largest customer, in exchange for the substantial discount on claims of at least $[redacted] that American accepted in agreeing to a $250 million allowed general unsecured claim, and that also avoids potential litigation with Delta and United, the Debtors' other two customers, concerning potential claims under their Court-ordered MFNs.

2. As with the MFNs granted to Delta and United in settlements previously approved by this Court, the American MFN made settlement with American possible by ensuring that its

1. On September 2, 2016, the Debtors filed the Motion 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., (ii) Enter Into or Assume Related Agreements, and (iii) Settle Claims Between American Airlines, Inc. and the Debtors [ECF No. 957] (the "American Settlement Motion"). Capitalized terms used but not defined herein shall have the meaning set forth in the American Settlement Motion.

claim is not unduly diluted by subsequent events. Under the American MFN, in the event that the total allowed general unsecured creditor claims against the Debtors' estates exceed $1 billion, the American allowed general unsecured claim will correspondingly increase such that American will maintain the same claim percentage (25%) that it would have if the total claims were $1 billion. That percentage is far below the amount to which American firmly believes it is entitled if it were to litigate its claims.

3. The American MFN is entirely consistent with the MFNs provided to Delta and United, each of which was approved by this Court with the enthusiastic support of the Committee. Just as the Debtors could not have secured favorable settlements of Delta's and United's supported and quantifiable damages claims for pennies on the dollar without providing MFNs in exchange, American—the Debtors' largest creditor—would not have agreed to compromise its supported and quantifiable asserted damages claims of at least $[redacted] for a $250 million allowed general unsecured claim, without the protection of an MFN. Without the MFN, any claim settlement with American would have had to have been much higher.

4. Agreeing to a higher claim settlement with American would likely have triggered assertions by Delta and United that they were entitled to higher claims as a result of their MFN rights. In resolving litigation with American, it was essential to the Debtors that they avoid MFN litigation with Delta and United. American also recognized Delta's and United's MFN rights, and thus to comply with Delta's and United's Court-ordered MFNs, the American MFN also provides for a claim adjustment for Delta and United if aggregate general unsecured claims exceed $1 billion, thus ensuring that their respective claims do not fall below the percentage of aggregate general unsecured claims that their claims would represent if aggregate claims were $1 billion (17.35% for Delta and 19.6% for United). The Debtors are contemporaneously herewith

filing a proposed order implementing the Claim Settlement. Delta's and United's support of the Claim Settlement is premised upon the entry of the proposed order, including provisions of the American MFN that satisfy their MFN rights.

5. The Committee's suggestion that the American MFN could be "deleted" from the Claim Settlement fails to appreciate that the MFN is integral to the Claim Settlement. American would not have agreed to compromise its claims without the American MFN firmly in place.

6. The Claim Settlement—including the American MFN—is reasonable, fair and equitable, and a sound exercise of the Debtors' business judgment. On terms that are highly favorable to the Debtors, the Claim Settlement avoids the substantial cost and risk of complex litigation with the Debtors' largest Codeshare Partner and largest source of revenue. The Debtors and their advisors have analyzed the scheduled and filed general unsecured claims asserted against the Debtors as well as those anticipated based on potential executory contract renegotiations and rejections, and believe that it is unlikely that the Codeshare Partners' claims will increase significantly under the American MFN.

7. Conversely, if American's claims are litigated, the Debtors' estates will face substantial litigation risk and significant risk of delay in the Debtors' reorganization plan and emergence from chapter 11. Because of the potential size of American's claims—conceivably 50% or more of the total allowed claims against the Debtors' estates if American were to prevail in litigation—delay in resolution of American's claims will make it far more difficult for the Debtors to formulate a plan, raise any necessary capital, and emerge from chapter 11 promptly. In addition to the substantial direct costs of litigation, by prolonging the Debtors' reorganization process, litigation with American will also result in the Debtors incurring significant additional administrative fees for all professionals, currently approximately $3 million per month.

Litigation with the Debtors' largest Codeshare Partner [redacted].

8. The Debtors believe that the risks of dilution of creditors' claims under the American MFN by total allowed unsecured claims exceeding $1billion are substantially less than the dilution risks of litigating American's claims. In addition, litigation with American will be extremely costly, delay the Debtors' reorganization process, and could, as described below, be detrimental to the Debtors' business.

9. Furthermore, there is no merit to the Committee's argument that the American MFN converts the Claim Settlement into an improper *sub rosa* plan. As noted below, this is an objection frequently raised in opposition to proposed settlements, but rarely accepted by courts. Not only does the Claim Settlement not purport to be a plan or establish elements of a plan, it expressly provides that the Debtors will negotiate in good faith the elements of any proposed plan of reorganization with the Committee, United, Delta, American and other major general unsecured creditors. The American MFN does not short circuit the requirements of the chapter 11 plan process, nor does it dictate the terms of any future plan of reorganization or impair creditors' rights. Rather, it concerns the allowance of general unsecured claims—a routine matter for bankruptcy courts.

10. The Debtors respectfully request that the Court overrule the Limited Objection and approve the relief sought in the American Settlement Motion.

ARGUMENT

I. The Court Should Approve The Claim Settlement Because It Is Highly Beneficial To, And In The Best Interests Of, The Debtors' Estates And Constitutes A Sound Exercise Of The Debtors' Business Judgment.

11. Courts routinely approve settlements under Bankruptcy Rule 9019 that are fair, equitable, and in the best interests of the estate. *See In re Drexel Burnham Lambert Grp., Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991). In determining whether to approve a proposed settlement, the Court need not decide the numerous issues of law and fact raised by the settlement, but rather should "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (internal quotation marks omitted). Settlements are generally favored in bankruptcy because "compromises are 'a normal part of the process of reorganization.'" *In re N.Y., New Haven & Hartford R.R. Co.*, 632 F.2d 955, 959 (2d Cir. 1980) (quoting *Case v. Los Angeles Lumber Prods., Co.*, 308 U.S. 106, 130 (1939); *accord In re Purofied Down Prods. Corp.*, 150 B.R. 519, 522-23 (S.D.N.Y. 1993) ("The lenient standards concerning approval of settlements and a limited scope of review reflect the considered judgment that little would be saved by the settlement process if bankruptcy courts could approve settlements only after an exhaustive investigation and determination of the underlying claims. The applicable standards encourage courts to approve settlements in bankruptcy proceedings and related actions.").

12. In deciding to pursue a particular course of action or to proceed with a transaction, the debtor's legal duty is to exercise sound business judgment and determine whether the proposed course of action is in the best interests of the debtor's estate. *In re GSC, Inc.*, 453 B.R. 132, 169 (Bankr. S.D.N.Y. 2011) ("The Trustee's decision of what is best for the estate should be undertaken with the goal of maximizing the value of the estate."). In exercising its business judgment, the debtor should seek to maximize the going concern value of the

enterprise, taking into account the availability of alternative transactions, and the potential risks of proceeding or not proceeding with the proposed transaction. *See, e.g., In re Global Crossing Ltd*., 295 B.R. 726, 744-46 (Bankr. S.D.N.Y. 2003) (finding that there was "risk and uncertainty in the decision the Board made, but there [was] likewise risk and uncertainty in the alternatives," and that "[d]eclining to take the associated risks of that was well within the bounds of reasonable business judgment," and noting "the extensive process under which the Debtors made this decision. . . . [during which t]hey were mindful of their duties, employing the right standard; solicited the input of their professional advisors . . .; deliberated; and made their decision based on a lengthy consideration of the relevant facts and options."). As discussed below and described in the Luth Declaration, this is precisely what the Debtors have done here.

A. The *Iridium* Factors Weigh in Favor of Approval of the Claim Settlement.

13. To determine whether a settlement is fair, equitable and in the best interests of the debtor's estate, courts in the Second Circuit balance the seven *Iridium* factors:

> (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment; (3) the paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement; (4) whether other parties in interest support the settlement; (5) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement; (6) the nature and breadth of releases to be obtained by officers and directors; and (7) the extent to which the settlement is the product of arm's length bargaining.

Motorola, Inc. v. Official Comm. Of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007) (internal quotation marks omitted). Where, as here, a settlement constitutes "a global settlement of all the claims . . . . [t]he appropriate inquiry is whether the Settlement Agreement in its entirety is appropriate for the . . . estate." *Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. of Chi. (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 430

(S.D.N.Y. 1993); *see also In re NII Holdings, Inc.*, 536 B.R. 61, 99 (Bankr. S.D.N.Y. 2015) ("In complex settlements, it is appropriate for the court to not only consider each settled claim individually, . . . but also to consider the reasonableness of the settlement agreement as a whole.").

14. The Committee's objection to the Claim Settlement relates solely to the American MFN. (Limited Objection ¶ 1.) As this Court explained in approving the Debtors' comprehensive settlement with Delta, an MFN is a permissible component of a bankruptcy settlement where it is reasonable under the circumstances. *Modified Bench Ruling Under Seal on Debtors' Motions to (I) Assume Codeshare and Related Agreements, as Amended, with Delta Air Lines, Inc. Lease Certain Property of the Estate, and Settle Claims Between Delta Air Lines, Inc. and the Debtors, and (II) Authorize DIP Financing* [ECF No. 512] at 23 ("Given the lack of bright lines about the permissibility of MFN clauses, the question becomes here whether the MFN clause in this case is problematic given the facts of this settlement.").[2] Considered in the overall context of the Claim Settlement, and in light of the *Iridium* factors, the American MFN is fair and reasonable.

15. Although there are seven *Iridium* factors, the Committee asks the Court to ignore five of those factors, and rely on only two factors which the Committee asserts weigh in its favor. Indeed, the Committee admits that two of the Iridium factors—(i) that the Claim Settlement will avoid complex and protracted litigation, with its attendant expense, inconvenience, and delay, and (ii) the competency and experience of counsel supporting the

2. The District Court agreed in denying a motion for a stay pending appeal that has since been voluntarily dismissed. See *Ad Hoc Comm. of Equity Holders of Republic Airways Holdings Inc. v. Republic Airways Holdings Inc. (In re Republic Airways Holdings Inc.)*, No. 16-cv-03315 (KBF), 2016 WL 2621990, at *10 (S.D.N.Y. May 6, 2016) ("The Bankruptcy Court's detailed findings regarding the propriety of the MFN clause were not, furthermore, clearly erroneous.").

Claim Settlement— "weigh in favor of approving the Claim Settlement." (Limited Objection ¶ 25.) The Committee also admits that the Claim Settlement is the product of an arm's length negotiation between the Debtors and American, but the Committee suggests, without basis, that the Court should ignore that *Iridium* factor as irrelevant because the *Committee* was not a party to the negotiations. (Limited Objection ¶ 25.) In addition, the Committee asserts that the Court lacks sufficient information to determine whether the litigation's likelihood of success and the settlement's future benefits weigh in favor of approval. (Limited Objection ¶ 27.) As discussed below and set forth in the Luth Declaration, however, the evidence is uncontroverted that the benefits of the Claim Settlement and the risk of litigation weigh strongly in favor of approval. Finally, the Committee argues that two *Iridium* factors—the interests of creditors and whether other parties in interest support the settlement—weigh against approval of the American MFN. (Limited Objection ¶ 26.) To the contrary, for the reasons discussed below, these two factors in fact weigh heavily in favor of approval of the Claim Settlement, of which the MFN is an integral part. In fact, all six of the relevant *Iridium* factors weigh strongly in favor of approval.[3]

1. The benefits of the Claim Settlement and the substantial risks of litigation weigh heavily in favor of the settlement.

16. The Debtors face substantial risks if American's claims are litigated. American believes that the minimum amount of its supported, quantifiable damages is $[redacted], and that it could recover more if it were to litigate. (Luth Decl. ¶ 20.) While the Debtors believe that they have defenses to many of American's claims, if the Claim Settlement is not approved and the validity and amount of American's claims and defenses to such claims are litigated, the outcome of such litigation is highly uncertain. (Luth Decl. ¶ 24.) It would depend on the Court's evaluation of testimony and other evidence, its interpretation of complex contractual

3. The seventh factor—the breadth of officer and director releases—is not relevant here.

provisions, and its determination of critical facts and legal issues in areas of inconsistent or conflicting legal precedent. (Luth Decl. ¶ 24.)

17. In addition to the risks inherent in litigation, the Debtors face significant risks to their business and ability to successfully reorganize and emerge from chapter 11 if American's claims are litigated. Litigation with American would distract the Debtors' senior management from the needs of Republic's business and the reorganization, and would be expensive and time consuming. (Luth Decl. ¶ 25.) The size of American's claims alone—which could be [redacted] or more of the total allowed claims if American prevails in litigation—will significantly delay the Debtors' ability to formulate a plan, raise any necessary capital, and emerge from chapter 11 if the Debtors are forced to litigate with American. (Luth Decl. ¶ 25.) By prolonging the Debtors' reorganization, litigation with American will result in the Debtors' incurring significant additional administrative fees for all professionals, currently at a rate of approximately $3 million per month. (Luth Decl. ¶ 25.) Potential appeals from any decision would cause even further delays. (Luth Decl. ¶ 25.) [redacted]. (Luth Decl. ¶ 25.) The risk of harm to Republic's business relationships with American and its other Codeshare Partners as a result of the adverse impact of litigation with American is significant. (Luth Decl. ¶ 25.)

18. The Committee's argument that the Court lacks sufficient information to evaluate the Claim Settlement, and its underlying contention that it is impossible to assess the impact of the American MFN on the total allowed claims of the Codeshare Partners when there are $3.5

billion in scheduled or filed claims against the Debtors, is baseless. (Limited Objection ¶ 28.) In fact, Seabury, the Debtors and counsel have analyzed the general unsecured claims that have been scheduled or filed against the Debtors as well as those anticipated based on potential executory contract renegotiations and rejections. (Luth Decl. ¶ 23.) Based on this analysis, Seabury and the Debtors concluded that the total allowed general unsecured claims against the Debtors will be very close to $1 billion. (Luth Decl. ¶ 23.) Further, based on this analysis, Seabury and the Debtors concluded that if the total allowed general unsecured claims against the Debtors were to exceed $1 billion, it is unlikely to be by more than $100 million. (Luth Decl. ¶ 23.)

19. On a numerical basis alone, the Claim Settlement is a better alternative than litigating American's claims. It is highly unlikely that the aggregate increase, if any, of the three Codeshare Partners' claims under the American MFN would exceed the increase in American's claims over $250 million should they be litigated. If the total amount of allowed general unsecured claims against the Debtors is $1 billion or less, there will be no increase in any of the Codeshare Partners' claims under the American MFN. If the total amount of allowed general unsecured claims against the Debtors increases to $1.05 billion, then, under the American MFN, the general unsecured claims of Delta, American, and United would increase by $80 million in the aggregate. (Luth Decl. ¶ 26.) Non-Codeshare Partner general unsecured creditors would fare worse in litigation with American unless the amount of any allowed unsecured claim granted to American were less than $330 million. (Luth Decl. ¶ 26.) If the total amount of allowed general unsecured claims against the Debtors increases to $1.1 billion, the general unsecured claims of Delta, American, and United would increase by $160 million in the aggregate. (Luth Decl. ¶ 27.) Non-Codeshare Partner general unsecured creditors would fare worse in litigation with American

unless the amount of any allowed unsecured claim granted to American were less than $410 million. (Luth Decl. ¶ 27.) If the total amount of allowed general unsecured claims against the Debtors increases to $1.15 billion, then, under the American MFN, the general unsecured claims of Delta, American, and United would increase by $241 million in the aggregate. (Luth Decl. ¶ 28.) Non-Codeshare Partner general unsecured creditors would fare worse in litigation with American unless the amount of any allowed unsecured claim granted to American were less than $491 million. (Luth Decl. ¶ 28.) All of these amounts ($80-$491 million) are well within the range of potential outcomes if American's supported and quantifiable asserted damages claims of at least $[redacted] are litigated—in fact the outcome of American's claim in litigation could be far higher. If American were to prevail in litigation and the full amount of its claim were allowed, the total amount of allowed general unsecured claims against the Debtors would have to reach [redacted] for the non-Codeshare Partner general unsecured creditors to fare worse under the American MFN. (Luth Decl. ¶ 29.) As set forth in the Luth Declaration, based on the analysis performed by Seabury and the Debtors, if the total allowed general unsecured claims against the Debtors were to exceed $1 billion, it is unlikely to be by more than $100 million. (Luth Decl. ¶ 23.) The settlement is therefore justified based on the numbers alone, and becomes even more so when factoring in all of the substantial potential delays, cost, and potential harm that would result from litigation with American (*see supra* ¶¶ 16-17).

20. Although the Committee and its professionals failed to perform any analysis of the estimated allowed claims, incorrectly asserting such analysis is "impossible" (Limited Objection ¶ 28), the Committee nonetheless (i) presents a table purportedly showing the effect of the MFN if allowed general unsecured claims were to increase in arbitrary $200 million dollar increments from $1.1 billion to $1.5 billion, and (ii) argues that the claims of the Codeshare

Partners will escalate dramatically if the total claims pool were to aggregate an arbitrary $1.3 billion. (Limited Objection ¶ 14.) As set forth in the Luth Declaration, based on analysis performed by Seabury and the Debtors, the aggregate allowed general unsecured claims is likely to be "very close to $1 billion," unlikely to exceed $1.1 billion, and would not, "in any conceivable scenario, approach $1.3 billion." (Luth Decl. ¶ 23.) Accordingly, the Court should disregard the Committee's arbitrary and baseless hypotheticals.

21. This Court has sufficient information to conclude that, in view of the inherent and substantial risks of litigation on the one hand and, on the other hand, the substantial likelihood that the total allowed general unsecured claims against the Debtors will be at, or very close to, $1 billion, the settlement of American's supported, quantifiable claims asserting damages of at least $[redacted] for a $250 million general unsecured claim in exchange for the MFN is a fair, reasonable, and tremendously favorable outcome for the Debtors and all creditors. *In re Purofied Down Prods. Corp.*, 150 B.R. at 522 ("The reviewing court need not conduct its own investigation concerning the reasonableness of the settlement and may credit and consider the opinion of the Trustee and counsel that the settlement is fair and equitable.").

2. The benefits of the Court-approved Delta and United MFNs and the American MFN accrue to all creditors.

22. Ignoring the significant benefits that creditors have received as a result of the Delta and United settlements (of which the MFNs were integral parts) supported by the Committee,[4] and the benefits that creditors will receive from the American settlement, the

4. *See* Apr. 21, 2016 [Open Session] H'rg Tr. at 37:5-10 [Mr. Miller] ("The committee feels that with the current status of the documents before Your Honor with Delta, the debtors have satisfied their business judgment, and the committee is comfortable that moving forward is the right thing to do in these cases. And for those reasons, we've withdrawn our limited objection and now support the relief requested."); June 15 H'rg Tr. at 50:23-51:4 [Mr. Miller] ("The committee . . . focused on the claims being created . . . . And we inserted ourselves in the discussions with the debtors as well as United, and Delta once the MFN became implicated, in order to come to a resolution that we support . . . .")

Committee illogically argues that the Claim Settlement is not in the interests of all creditors because it fixes the Codeshare Partners' unsecured claims at 62% of the pool of allowed general unsecured claims, thus limiting other creditors to 38% of the pool. The Committee's argument takes for granted substantial concessions the Codeshare Partners have made in compromising their claims in exchange for the MFNs. Without the MFNs, the Codeshare Partners' claims would far exceed 62% of the general unsecured creditor pool.

23. The negotiation of the Delta settlement was lengthy and difficult. (Luth Decl. ¶ [10].) Delta asserted claims totaling close to $[redacted]. (Luth Decl. ¶ 10.) Over the course of negotiation, Delta ultimately lowered its demand to approximately $[redacted] but refused to go lower. (Luth Decl. ¶ 11.) The Debtors ultimately offered Delta an allowed general unsecured claim of $170 million and to provide Delta with an MFN to ensure that its claim would receive the same treatment that United and American ultimately received, and Delta agreed. (Luth Decl. ¶ 11.) Delta would not have agreed to the substantial discount on its damages claim without the protection of the MFN. (Luth Decl. ¶ 11.)

24. The negotiation of the United settlement was also lengthy and difficult. (Luth Decl. ¶ 13.) United asserted a damages claim in the amount of approximately $[redacted] based on Republic's past underperformance under the parties' existing codeshare agreements, and projected failure to perform, and that the economic concessions under its amended codeshare agreement with the Debtors totaled approximately $[redacted]. (Luth Decl. ¶ 13.) After extensive diligence and negotiations, the parties ultimately agreed to a $193 million general unsecured claim with an MFN. (Luth Decl. ¶ 14.) As with Delta, United would not agree to this substantial discount on its damages claim without the protection of the MFN in exchange. (Luth Decl. ¶ 14.)

25. American is Republic's single largest source of revenue, and its largest creditor. (Luth Decl. ¶ 20.) The Debtors' business relationship with American currently accounts for almost 50% of the Debtors' revenues. (Luth Decl. ¶ 20.) American believes that the minimum amount of its damages is $[redacted], and that it could recover far more than the $250 million settlement if it were to litigate. (Luth Decl. ¶ 20.) American's agreement to compromise its claims for a $250 million general unsecured claim was premised on an understanding that the total allowed general unsecured claims pool would be approximately $1 billion. (Luth Decl. ¶ 20.) Therefore, American also insisted that, to the extent that the claims pool exceeded $1 billion, it would receive a commensurate increase in the amount of its allowed claim. (Luth Decl. ¶ 20.) This is a far smaller percentage than American believes it would receive in the event that its claims were litigated. (Luth Decl. ¶ 20.) Indeed, the American MFN was vigorously negotiated between the parties. (Luth Decl. ¶ 20.) American initially sought a threshold total allowed general unsecured claims pool against the Debtors of [redacted] to trigger the American MFN; the Debtors rejected this threshold as too low, and countered at a [redacted] threshold. (Luth Decl. ¶ 20.) The parties eventually agreed to the American MFN at a $1 billion threshold as a compromise. (Luth Decl. ¶ 20.) Having forfeited a tremendous amount of its asserted claim value, American insisted on the assurance that its claim would remain at 25% total allowed general unsecured claims against the Debtors in the event that the total pool exceeds $1 billion. (Luth Decl. ¶ 20.)

26. In reaching settlements with the Debtors, each of the Codeshare Partners—first Delta, then United, and now American—have agreed to provide valuable economic concessions to the Debtors in the amended codeshare agreements, which are essential to the Debtors' successful reorganization, and also have agreed to significant discounts on their claims for

damages arising under their existing codeshare agreements in exchange for the protection of an MFN. (Luth Decl. ¶ 22.) Without any one of these settlements, each of which is essential to the Debtors' continued relationship with each of the Codeshare Partners, the Debtors' ongoing business would be drastically reduced, and might not be viable. (Luth Decl. ¶ 22.)

27. Absent settlement, the Codeshare Partners' claims could well exceed 62% of the total claims pool. Rather than harm other unsecured creditors, the MFNs—by virtue of having made possible settlements for pennies on the dollar—have provided significant benefits to unsecured creditors, and the non-Codeshare Partner creditors will now comprise a significantly greater percentage of the total general unsecured claims pool as a result.

28. The only alternative to the Claim Settlement is litigation. As discussed in detail above and in the Luth Declaration, it is highly unlikely that the increase, if any, of the Codeshare Partners' claims under the American MFN would exceed the increase in American's claims over $250 million if American's claims were litigated.

29. Accordingly, taking into account the probable increase in American's allowed claim in litigation and the substantial likelihood that the aggregate general unsecured claims will be close to $1 billion—and significantly less than $1.1 billion—it is almost a certainty that general unsecured creditors will receive greater distributions under the Claim Settlement than if American's claims are litigated. In addition, as discussed in detail above, the high costs of litigation—both direct and indirect—will be detrimental to the Debtors' business, its emergence, and will inure to the detriment of all general unsecured creditors and other parties in interest.

30. The Committee also contends that the Claim Settlement should not be approved because it does not have the support of other parties in interest. There is no factual basis for that assertion, however. The Committee has filed the only objection to the Claim Settlement. Two of

the Committee's members, both of whom assert claims that the Debtors vigorously dispute, voted to object to the Claim Settlement, whereas American and United, two Committee members who support the Claim Settlement, were recused and did not vote. Delta and United, the Debtors' two largest unsecured creditors (after American), support approval of the Claim Settlement. The Committee has failed to provide any basis (other than its own objection) to support its contention that the Claim Settlement does not have the support of other parties in interest.

B. The Claim Settlement is Not a *Sub Rosa* Plan.

31. *Sub Rosa* plan objections are frequently made but rarely accepted by courts. *See In re Tower Auto., Inc.*, 342 B.R. 158, 163 (Bankr. S.D.N.Y. 2006), *aff'd*, 241 F.R.D. 162 (S.D.N.Y. 2006). "*In extreme circumstances*, courts have refused to approve settlements . . . without the benefit of a confirmed plan or court-approved disclosure statement and without an adequate business justification." *Id*. (emphasis added). This is not such an extreme circumstance, and thus there is no merit to the Committee's argument that the American MFN converts the Claim Settlement into an impermissible *sub rosa* plan. The American MFN does nothing to "short circuit the requirements of [C]hapter 11 for confirmation of a reorganization plan" and thus is not a *sub rosa* plan. *In re Iridium*, 478 F.3d at 466 (alternation in original) (internal quotation marks omitted). Indeed, not only does the settlement not purport to be a plan or establish elements of any future plan, it expressly provides for the Debtors "to negotiate in good faith the elements of any proposed Plan of reorganization . . . with the Committee, United, Delta, American and other major general unsecured creditors." (Letter Agreement at 6.)

32. The MFN is an integral component of a Claim Settlement with the Debtors' largest creditor. Bankruptcy Courts routinely approve large and important settlements before the confirmation of a plan, notwithstanding a "*sub rosa* plan" objection, where, as here, the

settlements did not "dispose of all of the debtor's assets, restrict creditors' rights to vote as they deem fit on a plan of reorganization, or dictate the terms of a plan of reorganization." *Official Comm. of Unsecured Creditors of Tower Auto. v. Tower Auto., Inc. (In re Tower Auto., Inc.)*, 241 F.R.D. 162, 169 (S.D.N.Y. 2006); *see, e.g.*, *Debenedictis v. Truesdell (In re Global Vision Prods., Inc.)*, Nos. 07-Cv. 12628(RDD), 09 Cv. 374(BSJ), 2009 WL 2170253, at *7 (S.D.N.Y. July 14, 2009) (holding that settlement was not a *sub rosa* plan because the settlement did not dictate the terms of a future plan, prevent creditors from proposing their own plans, or restrict any rights afforded to creditors under the Bankruptcy Code); *accord Official Comm. of Unsecured Creditors v. Cajun Electric Power Coop., Inc. (In re Cajun Electric Power Coop., Inc.)*, 119 F.3d 349, 354-55 (5th Cir. 1997) (holding that settlement of significant litigation was not a *sub rosa* plan because the settlement did not dispose of all claims against the debtor, restrict creditors' rights to vote as they deem fit on any proposed plan of reorganization, or dispose of virtually all of the debtor's assets).

33. Moreover, in the Second Circuit, "[e]ven if there is an allegation that the proposed action deprives a party in interest of Chapter 11 protections, the estate may take action if there is an articulated business justification for it." *In re Global Vision Prods., Inc.*, 2009 WL 2170253, at *6; *see also Comm. of Equity Security Holders v. Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application."); *In re General Motors Corp.*, 407 B.R. 463, 491 (Bankr. S.D.N.Y. 2009) ("If, however, the transaction has a 'proper business justification' which has the potential to lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized.").

34. It cannot be disputed that there is a proper business justification for the Claim Settlement (of which the MFN is an integral part). American is the Debtors' largest Codeshare Partner and single largest source of revenue. The single most important aspect of the Debtors' chapter 11 cases—and the most crucial item to the Debtors' ability to successfully emerge from bankruptcy as a going concern—is the implementation of new agreements with the Codeshare Partners and the resolution of their massive damages claims against the Debtors' estates. The Comprehensive Settlement, including the Claim Settlement, clears the pathway for a successful emergence from chapter 11. The Debtors face substantial litigation risk and other harms, including the potential substantial delay in the Debtors' reorganization plan and emergence from chapter 11, and the harmful publicity of litigation with the Debtors' largest Codeshare Partner, if the American claims must be litigated. American would not agree to a $250 million allowed general unsecured claim without the MFN. Any amount that American might have agreed to without an MFN would have carried substantial risk of an upward adjustment of Delta's and United's claims under their Court-approved MFNs, and potential related litigation. Thus, the proper business justification for the Claim Settlement, of which the American MFN is an integral part, is clear.

35. Tellingly, the Committee cites only two out-of-circuit cases—from 33 and 21 years ago, respectively—in which a debtor's proposed transaction was rejected as a *sub rosa* plan. In *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways)*, 700 F.2d 935 (5th Cir. 1983), the court found a transaction to constitute a *sub rosa* plan because it (i) required significant restructuring of the creditors' rights, (ii) dictated some of the terms of any future plan of reorganization, (iii) required secured creditors to vote a portion of their deficiency claim in favor of any future plan of reorganization approved by a majority of the unsecured

creditors' committee, and (iv) mandated that all parties release claims against the debtor, its officers and secured creditors. *See id.*at 939-40. And in *In re Quality Beverage Co.*, 181 B.R. 887 (Bankr. S.D. Tex. 1995), the debtor had not articulated a sufficient business justification for the proposed transaction. *Id.* at 895. Not one of the features present in *Braniff*—and nothing even approaching one of those features—is even remotely present here, and the Debtors have articulated a compelling business justification for the Claim Settlement.[5]

36. Moreover, since the Claim Settlement does not constitute a *sub rosa* plan, nor is there any merit to the Committee's argument that the American MFN violates Bankruptcy Code section 1123(a)(4), which applies only to plans and not to settlements. *See In re Dana Corp.*, 412 B.R. 53, 62 (S.D.N.Y. 2008) ("The language of 11 U.S.C. § 1123 is addressed to a bankruptcy plan . . . . It is not addressed to the steps in a reorganization that occur before a plan is confirmed, such as the Settlement Order in this case."). Further, the American MFN will not cause claims of the same class to receive unequal treatment within the meaning of section 1123(a)(4). *See In re Quigley Co., Inc.*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) ("Equality of treatment has two aspects. Absent consent to accept less favorable treatment, all members of the class must receive equal value. In addition, each member of the class must pay the same

5. The remaining cases cited by the Committee are inapposite. *See In re Cajun Electric*, 119 F.3d at 355 (holding that settlement is not a *sub rosa* plan where settlement does not "alter creditors' rights, dispose of assets, and release claims to the extent proposed in the wide-ranging transaction disapproved in *Braniff*") (internal quotation mark omitted); *In re General Motors Corp.*, 407 B.R. at 495 (holding that section 363(b) sale is not a *sub rosa* plan where the sale "does not dictate the terms of a plan of reorganization, as it does not attempt to dictate or restructure the rights of the creditors of th[e] estate"); *In re Energy Future Holdings Corp.*, 648 F. App'x 277, 285 (3d Cir. 2016) (holding that settlement is not a *sub rosa* plan because "the settlement neither subverts the bankruptcy process nor impermissibly dictates the outcome to other creditors"); *In re Global Vision*, 2009 WL 2170253, at *7 (holding that settlement agreement is not a *sub rosa* plan because it "does not dictate the terms of a future plan" or "restrict any rights afforded to creditors under the Bankruptcy Code").

consideration for its distribution."). The American MFN will not in any way cause members of the same class to receive different value for their claims under any plan of reorganization.[6]

CONCLUSION

37. For all of the foregoing reasons, the Limited Objection should be overruled, and the Claim Settlement approved in all respects.

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6. Moreover, even assuming that the standards applicable to plan confirmation applied (which they do not), neither section 1123(a)(4) nor section 1129(b) requires that all general unsecured creditors always be treated exactly the same. Instead, "courts have held that [section 1123(a)(4)] does not require identical treatment for all class members in all respects under a plan, and that the requirements of section 1123(a)(4) apply only to a plan's treatment *on account of particular claims* or interests in a specific class—not the treatment that members of the class may separately receive under a plan on account of the class members' other rights or contributions." *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 249-50 (Bankr. S.D.N.Y. 2007). Similarly, although a plan cannot unfairly discriminate under section 1129(b)(1), where "a reasonable basis for the disparate treatment of two classes of similarly situated creditors exists, there is no unfair discrimination." *In re Young Broad. Inc.*, 430 B.R. 99, 139 (Bankr. S.D.N.Y. 2010.).

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