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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION

The Official Committee of Unsecured Creditors (the "Committee") of Republic Airways Holdings Inc. and certain of its wholly-owned direct and indirect subsidiaries in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the "Republic" or the "Debtors") hereby submits this reply (the "Reply") in support of the *Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Dkt. No. 1311] (as may be amended, modified or supplemented from time to time, the "Plan").[1] In support of the Plan, the Committee respectfully represents as follows:

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

PRELIMINARY STATEMENT

1. The Plan represents the successful culmination of a complex case in which numerous challenges faced by the Debtors have been resolved through hard-fought negotiations and consensus-building among creditors. Among other achievements during the case, the Debtors have: (a) streamlined their corporate structure and improved their bottom line through the merger and consolidation of their operating entities and the planned liquidation of other subsidiaries; (b) reconfigured their fleet by returning out of favor aircraft on consensual terms; (c) entered into restructured codeshare agreements with each of American, Delta, and United (collectively, the "Codeshare Partners"), the Debtors' sole customers and largest creditors, which will provide the Debtors with guaranteed business for the foreseeable future; and (d) resolved the substantial majority of claims asserted against them.

2. Given the extraordinary progress made during this case, it should come as no surprise that the Plan is almost wholly uncontested. Indeed, only one substantive objection has been interposed. That objection (the "Residco Objection"),[2] which was filed by Wells Fargo Bank Northwest, N.A., as owner trustee (the "Owner Trustee"), and ALF VI, Inc., as owner participant (the "Owner Participant", and along with the Owner Trustee, "Residco"), asserts that the partial substantive consolidation effected under the Plan (the "Plan Consolidation") *may* unfairly prejudice Residco's rights by eliminating its guarantee claims. Notably, Residco acknowledges that prejudice would *only* arise in the legally impossible scenario that Residco's guarantee claims against Republic Airways Holdings Inc. ("RAH") are allowed in an amount

[2] *See Objection to Confirmation of Debtors' Second Amended Joint Plan of Reorganization by Wells Fargo Bank Northwest, N.A., as Owner Trustee, and ALF VI, Inc., as Owner Participant, as Holders of Claims Arising from Rejections of Lease Transactions for N286SK, N561RP, N562RP, N287SK, N288SK, N563RP and N259JQ* [Dkt. No. 1534].

that is greater than the related direct claims asserted by Residco against Shuttle America Corporation ("Shuttle").

3. The Residco Objection lacks merit because, as a matter of law, Residco's guarantee claims *cannot* be allowed in a higher amount than its direct claims. On this basis alone, the Court can overrule the Residco Objection and approve the Plan Consolidation under applicable Second Circuit standards. Moreover, Residco's arguments ignore three fundamental facts upon which the Plan Consolidation is premised: (a) the assets and liabilities listed in the schedules for RAH do not accurately reflect (and likely significantly overstate) the real value at that entity; (b) nearly all of the Debtors' creditors that hold material claims against Shuttle or the Debtors' other primary operating entity, Republic Airline Inc. ("Republic Airline"), *also* hold guarantee claims against RAH (and voted overwhelmingly to approve the Plan); and (c) the cost of attempting to determine the allocable value of assets and liabilities among each of the Debtors' estates would far exceed any speculative benefit to be gained by claimants with guarantee claims against RAH as a result of such an exercise. In light of these factors, it is clear that the Plan Consolidation benefits all of the Debtors' creditors, including Residco. Accordingly, the Plan satisfies the requirements for substantive consolidation as articulated by the Second Circuit under *Union Savs. Bank. v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir. 1988) ("*Augie/Restivo*") and its progeny.

4. Should the Court determine that Residco will (or plausibly might) suffer a net harm as a result of the Plan Consolidation, the Committee submits that, rather than deny confirmation of the Plan, the Court may instead authorize alternative Plan treatment for Residco. Specifically, as set forth in the Debtors' reply to the Residco Objection, Residco can be carved out of the Plan Consolidation if its guarantee claims are allowed in greater amounts than its

direct claims. In such an instance, Residco could be provided with the same treatment it would have received under hypothetical separate plans for each Debtor against which it has asserted claims. Such an approach would provide Residco with its precise legal entitlement on account of its claims absent the Plan Consolidation to which it objects. As such, it is more appropriate than the treatment suggested in the Residco Objection (*i.e.*, that the Court simply provide Residco with distributions equal to the average amount of its direct claims and guarantee claims), which arbitrarily assigns significant value to the guarantee claims and could result in a windfall for Residco to the extent it is permitted to retain its guarantee claims *and* benefit from enhanced recoveries provided as a result of the Plan Consolidation. The Debtors' suggested approach also will allow the Debtors to avoid the time and expense of performing a standalone valuation of the Debtors' estates until—and only if—Residco's guarantee claims are in fact allowed in a higher amount than its direct claims, which would benefit all creditors (including Residco). Although such a solution would potentially provide Residco with unique rights and presents some risk that the Debtors will ultimately need to conduct a standalone valuation of the Debtors' estates, it is nonetheless preferable to denying confirmation of the Plan altogether.

5. Residco should not be permitted to hide behind the alleged harm caused by the Plan Consolidation to leverage a satisfactory settlement of its claims, which it values at over *10 times* its actual damages (over $70 million in contrast to the Debtors' estimate of approximately $6.4 million). Nor should the Residco Objection be allowed to derail a Plan that has overwhelming creditor support and, for the reasons set forth herein and as will be adduced through evidence presented at the confirmation hearing, is feasible, fair, and value maximizing for all creditors. Accordingly, the Committee respectfully requests that the Court overrule the Residco Objection and confirm the Plan.

RELEVANT BACKGROUND

A. Case Background

6. On February 25, 2016 (the "Petition Date"), each of the Debtors filed chapter 11 petitions with this Court commencing these chapter 11 cases.

7. On May 26, 2016, RAH and each of the other Debtors filed their schedules of assets and liabilities (the "Schedules").[3]

8. On December 19, 2016, the Debtors filed the Plan, and on December 23, 2016, the Court approved the *Modified Disclosure Statement for Debtors' Second Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code* (the "Disclosure Statement"). *See* Dkt. Nos. 1358, 1360.

9. Effective as of January 31, 2017, Shuttle merged (the "Merger") into Republic Airline. *See* Dkt. No. 1236 (order approving merger of Shuttle into Republic (the "Merger Order"). Pursuant to the terms of the Merger Order, "any claim against Shuttle or Republic Airline will be treated substantially similarly and shall be a claim only against Republic Airline, the surviving entity; such claim will be entitled to a single distribution from Republic Airline under a chapter 11 plan . . . . " *See* Shuttle/Republic Airline Merger Order, at ¶8.

B. The Residco Claims

10. As set forth in detail in the Residco Objection, Residco and Shuttle are successor parties to seven aircraft lease agreements (the "Original Leases"), each for a single ERJ145 aircraft (the "Aircraft"). The Original Leases were entered into between June 2001 through November 2003, and were scheduled to terminate in 2020. The Original Leases specified a monthly basic rent schedule for each Aircraft, and also contained a stipulated loss value ("SLV")

[3] *See* Dkt. Nos. 595 (Schedules for RAH), 598 (Schedules for Republic Airways Services, Inc.), 600 (Schedules for Republic Airline), 602 (Schedules for Shuttle), 604 (Schedules for Midwest Air Group, Inc.), 606 (Schedules for Midwest Airlines, Inc.) and 608 (Schedules for Skyway Airlines, Inc.).

damage provision that provided a formula for calculating damages in the event that Shuttle breached its obligations under the Leases.

11. Residco asserts that the SLV provisions were intended to ensure that the owner trustee received the benefit of its bargain under the Original Leases by shifting the risk of a decrease in the residual value of the Aircraft to Shuttle, the lessee. However, the Original Leases were subject to residual value guarantees ("RVGs") from Embraer, the manufacturer of the Aircraft, which allowed Mitsui & Co. ("Mitsui") as the original owner trustee to recapture lost rent on the Aircraft as well as any declines in the estimated residual value of the Aircraft. The Original Leases also contained an early termination provision, which allowed Shuttle to terminate the Original Leases beginning in approximately June 2017. Upon such an early termination, Shuttle would have been liable only for basic rent amounts through 2017 (assuming the early termination date occurred before December 31, 2017).

12. In 2012, the Original Leases were restructured and RAH issued guarantees in Mitsui's favor to secure Shuttle's obligations under the Original Leases (the "Guarantees"). The Guarantees are, by their terms, unconditional and include a waiver by RAH of any defense to, or right to seek a discharge of, its obligations under the Guarantees with respect to the validity, legality, regularity or enforceability of the Original Leases (the "Defenses Waiver").

13. In 2013, the Original Leases were amended and restated (the "A&R Leases") to reduce the scheduled amounts of basic rent payments. Upon information and belief, the residual value of the Aircraft had significantly decreased at the time the A&R Leases were executed, and Mitsui had started receiving payments from Embraer under the RVGs. According to the Residco Objection, at the time the Original Leases were executed, the residual value for each of the Aircraft was expected to be between $7.1 and $7.6 million in 2017. That expectation proved to

be sorely misplaced. Today, Residco believes that the actual fair market value for each Aircraft is currently no more than $800,000. Notwithstanding this significant decrease in residual value of the Aircraft, as well as the reduction in the rent amounts due under the A&R Leases, the A&R Leases did not include any modifications of the SLV provisions under the Original Leases.

14. In December 2014, Mitsui sold and assigned its beneficial interest in the Aircraft to the Owner Participant, together with the A&R Leases, Guarantees, and other related documents.

15. On May 10, 2016, the Court approved a stipulation pursuant to Bankruptcy Code section 1110, which provided for the rejection of both the A&R Leases and Guarantees, as well as the return of the Aircraft to Residco [Dkt. No. 540].

16. Residco has asserted rejection damage claims against RAH based on the Guarantees (the "Guarantee Claims") and against Shuttle based on the A&R Leases (the "Lease Claims" and, together with the Guarantee Claims, the "Residco Claims"). The Guarantee Claims and Lease Claims seek aggregate damages totaling approximately $75.8 million and $73.2 million, respectively, based on the SLV provisions of the A&R Leases.

17. The Debtors have asserted that the SLV provisions constitute unenforceable penalties under New York law (which governs both the A&R Leases and the Guarantees), as held by the Third Circuit in *Interface Grp.-Nevada, Inc. v. TWA (In re TWA)*, 145 F.3d 124, 135 (3d Cir. Del. 1998) and numerous cases (including decisions in this Circuit) following it. *See also In re Nw. Airlines Corp*., 393 B.R. 352, 355 (Bankr. S.D.N.Y. 2008); *E. Air Lines, Inc. v. Brown & Williamson Tobacco Corp. (In re Ionosphere Clubs, Inc.)*, 262 B.R. 604, 617 (Bankr. S.D.N.Y. 2001). The Debtors contend that the proper measure of damages arising under the A&R Leases is simply the amount of lost rent under the A&R Leases as a result of their rejection

plus return condition damages, which damages total approximately $6.4 million (before potential mitigation).

18. Residco disputes the Debtors' damage calculations. It further argues that, even if the Lease Claims are subject to reduction on the basis that the SLV provisions are unenforceable penalty clauses, RAH waived its right to contest the SLV provisions pursuant to the Defense Waiver. As a result, Residco asserts that its Guarantee Claims entitle it to full damages under the SLV provisions, notwithstanding the existence of any valid defenses that Shuttle may have to the underlying Lease Claims.

ARGUMENT

A. The Plan Eliminates the Guarantee Claims Through Substantive Consolidation

19. As an initial matter, Residco contends that the Plan is ambiguous with respect to the treatment of the Guarantee Claims. The relevant language is found in Section 2.2 of the Plan, and provides as follows:

> (a) 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 Debtor of the obligations of any other Consolidated Debtor shall be eliminated so that any Claim against any Consolidated Debtor, any guarantee thereof executed by any other Consolidated Debtor and any joint or several liability of any of the Consolidated Debtors shall be one obligation of the Consolidated Debtors*. . . .

Plan, § 2.2(a) (emphasis added).

20. The Committee submits that the Plan is clear that the Guarantee Claims are eliminated. Residco has suggested that the reference to Section 2.2(b) may somehow be read to preserve its Guarantee Claims for purposes of receiving a distribution under the Plan by protecting "defenses to any Cause of Action." *See* Plan, § 2.2(b). Such an interpretation would

render the express Plan language eliminating guarantee claims a nullity, and should be rejected. It would also likely result in a windfall for Residco, since it likely significantly overvalues the Guarantee Claims, for the reasons set forth below.[4] In any event, to the extent the Court determines that Residco is not harmed by the Plan Consolidation, the Court need not decide the effect of the Plan Consolidation on the Guarantee Claims (which have yet to be litigated or allowed) at this juncture.

B. The Court Can Approve the Plan Consolidation on a Consensual Basis Because as a Matter of Law the Guarantee Claims Cannot Have More Value than the Lease Claims

21. Residco's arguments regarding the prejudicial effect of the Plan Consolidation *only* apply if the Court determines that the Guarantee Claims should be allowed in a higher amount than the Lease Claims. Residco asserts that it may be entitled to larger claims under its Guarantee Claims because the Defense Waiver renders those claims unassailable, even if the SLV damage claims under the Lease Claims are disallowed as unenforceable penalties. That position is incorrect as a matter of law—New York law is clear that a party cannot waive defenses based on public policy. *See, e.g.*, *Bell v. Ebadat*, No. 08-CIV-8965 (RJS), 2009 U.S. Dist. LEXIS 129708, at *8 (S.D.N.Y. June 16, 2009) (holding that liquidated damages clause was unenforceable as a matter of law and stating, "as a matter of public policy, a defendant could not waive an objection to a liquidated damages clause") (internal citations omitted); *Wells Fargo Bank Nw., N.A. v. Energy Ammonia Transp. Corp.*, No. 01-CIV-5861 (JSR), 2002 U.S. Dist. LEXIS 19983, at *5 (S.D.N.Y. Oct. 21, 2002) (denying summary judgment where party attempted to claim that even if liquidated damage was a penalty, that the parties had waived that issue and stating, "the 'invalidity of a contract offensive to public policy cannot be waived by the

[4] Likewise, Residco's proposal that its Guarantee Claims and Lease Claims be averaged would also result in a windfall for Residco in the unlikely event the claims are allowed in different amounts.

parties . . . [as] it is a barrier which the court itself [is] bound to raise in the interests of the due administration of justice.'") (citation omitted). Accordingly, the Defense Waiver in the rejected Guarantees is unenforceable on the basis that it is contrary to public policy generally.

22. Even if such a waiver could be countenanced under New York law generally, it is unenforceable in bankruptcy. Because the Defense Waiver would be harmful to the estate and detrimental to other creditors, it is exactly the kind of contractual provision that courts have held are unenforceable in bankruptcy due to their conflict with fundamental bankruptcy policies. *See, e.g.*, *In re GSC, Inc.*, 453 B.R. 132, 164 (Bankr. S.D.N.Y. 2011) (collecting cases in support of proposition that prepetition agreements may be rendered unenforceable in bankruptcy on a public policy basis); *In re South East Fin. Assoc.*, 212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997) (waiver of right to oppose motion to dismiss unenforceable, as other creditors would be materially harmed by dismissal of chapter 11 case); *In re Pease*, 195 B.R. 431, 433-34 (Bankr. D. Neb. 1996) (waiver of right to contest automatic stay relief unenforceable because the Bankruptcy Code "extinguishes" contractual freedoms that conflict with bankruptcy policy); *In re Sky Grp. Int'l, Inc.*, 108 B.R. 86, 89 (Bankr. W.D. Pa. 1989) (automatic stay waiver unenforceable because the debtor cannot waive rights in a manner detrimental to creditors).

23. As a result, there is no scenario under which the Guarantee Claims could be allowed in an amount in excess of the Lease Claims, and Residco's objection to the Plan Consolidation falls away entirely. The Court can therefore approve the Plan Consolidation on the basis that it is consensual without reference to the *Augie/Restivo* standards (discussed below). *See, e.g.*, *In re Owens Corning*, 419 F.3d 195, 210 (3d Cir. 2005) (citing to, and applying a test similar to, *Augie/Restivo* in evaluating a request for substantive consolidation, and noting that it only applies "absent consent").

C. Substantive Consolidation Is Warranted Under the Circumstances

24. Residco asserts that the Debtors cannot meet the standards for non-consensual substantive consolidation set forth in *Augie/Restivo*, and therefore, the Plan cannot be confirmed over its objection. Contrary to Residco's arguments, the Debtors' affairs are indeed "so entangled that consolidation will benefit all creditors." *Augie/Restivo*, 860 F.2d at 518.

1. *Augie/Restivo* Is Satisfied

25. In *Augie/Restivo*, the leading Second Circuit case addressing the standards for substantive consolidation, the Second Circuit collapsed the various considerations relevant to nonconsensual substantive consolidation into two "critical factors":

> (i) "whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit"; or
>
> (ii) "whether the affairs of the debtors are so entangled that consolidation will benefit all creditors."

Id. at 518 (internal citations omitted). Regarding the second prong of the test, the Second Circuit explained that "substantive consolidation should be used only after it has been determined that all creditors will benefit because untangling is either impossible or so costly as to consume the assets." *Id*.

26. Courts in this District have taken a practical approach to applying the second *Augie/Restivo* prong. For example, in *In re WorldCom, Inc.*, No. 02-13533 (AJG), 2003 Bankr. LEXIS 1401, 106-109 (Bankr. S.D.N.Y. Oct. 31, 2003), the bankruptcy court observed that "[c]ourts have 'a good deal of discretion' in determining whether substantive consolidation is appropriate," and cited with support cases employing a balancing test to determine whether the relief achieves the best results for all creditors. *Id.* at 106-07 (citing *In re Affiliated Foods, Inc.*, 249 B.R. 770, 780 (Bankr. W.D. Mo. 2000) (ordering substantive consolidation because "in the

final analysis the benefits of consolidation substantially outweigh the harm to creditors"); *White v. Creditors Serv. Corp. (In re Creditors Serv. Corp.)*, 195 B.R. 680, 690 (Bankr. S.D. Ohio 1996) ("the ultimate inquiry [for a court deciding substantive consolidation] involves a balancing of the equities based on the bankruptcy court's inherent powers pursuant to § 105")); *In re Leslie Fay Cos.*, 207 B.R. 764, 780 (Bankr. S.D.N.Y. 1997) (finding that the record "amply supports a finding that equity warrants approval of the substantive consolidation of these estates" based on testimony that "the only classes that would be detrimentally affected by this consolidation have consented to their treatment and further that the only objectants to substantive consolidation (the Claimants) would be the direct beneficiaries of such consolidation")). *See also In re Jennifer Convertibles, Inc.*, 447 B.R. 713, 723-724 (Bankr. S.D.N.Y. 2011) (noting that "substantive consolidation is a flexible concept and that a principal question is whether creditors are adversely affected by consolidation and, if so, whether the adverse effects can be eliminated").

27. Thus, the Court can approve the Plan Consolidation based upon a finding that any potential prejudice to creditors that may result from the Plan Consolidation is outweighed by the prejudice, harm, and waste that would occur if the Plan Consolidation is not ordered. *See In re Gucci*, 174 B.R. 401, 414 (Bankr. S.D.N.Y. 1994) ("[E]ven if it were found that some creditors may be prejudiced, that, in of itself, would not necessarily defeat the motion [for consolidation] because 'any potential prejudice to creditors . . . and affiliates that may result from substantive consolidation . . . is greatly outweighed by the much greater [potential] for prejudice, harm and waste if substantive consolidation is not ordered.") (internal citation omitted).

28. Under this balancing test, the second prong of *Augie/Restivo* is satisfied, because the benefits to creditors, including Residco, clearly outweigh any speculative harms stemming from the Plan Consolidation. As noted above, Residco's' entire basis for establishing that it may

be harmed through the Plan Consolidation is incorrect as a matter of law. Even if the Court were to conclude that there is some remote hypothetical possibility that the Residco Claims will be allowed in different amounts, Residco directly benefits from the Plan Consolidation by avoiding the substantial delay and expense that would be entailed in determining the standalone value of assets and liabilities of the various Debtor estates. Despite Residco's assertions to the contrary, such an exercise is unlikely to result in higher recoveries for creditors of RAH under a standalone plan scenario because the Schedules do not accurately reflect the value at RAH. In fact, after undergoing the substantial time, expense, and delay of unwinding the estates, in all likelihood there would be little, if any, value available to satisfy the Guarantee Claims. Because Residco cannot demonstrate that the remote hypothetical risk its Guarantee Claims will be allowed in a higher amount than its Lease Claims will result in prejudice through the Plan Consolidation that outweighs the benefits Residco stands to receive as a result of the Plan Consolidation, its objection should be overruled. *Gucci*, 174 B.R. at 414 (overruling creditor objection to substantive consolidation where creditor failed to make a clear showing that it would suffer prejudice as a result).

2. Avoiding the Cost of Untangling RAH's Assets and Liabilities Benefits All Creditors

29. Determining the actual value of the assets and liabilities residing at RAH would require evaluation of a host of factors that were not taken into account when preparing the Debtors' Schedules. The cost of attempting to unravel those details would delay distributions and drain estate resources that could otherwise be used to satisfy claims. Even though such an exercise is, as a practical matter, likely possible, the costs associated with performing it far outweigh any benefit that would be received by a claimant with a guarantee claim against RAH and a direct claim against Shuttle or Republic Airline.

30. Moreover, the majority of unsecured creditors with material claims against Shuttle and Republic Airline also hold guarantee claims at RAH. That is why Residco has acknowledged that it would not be harmed if its Guarantee Claims are allowed in the same amounts as its Lease Claims. Because substantially all of the Debtors' unsecured creditors are similarly situated and none of them other than Residco have objected to the Plan Consolidation, their acceptance of the Plan sends a clear signal that the Plan Consolidation is fair and in the best interest of all creditors.

3. The Schedules Do Not Accurately Reflect the Value of RAH

31. The Residco Objection notes that under RAH's Schedules, the Debtors reported that RAH held $403.2 million in assets (including $105 million in cash and cash equivalents and $267 million on account of net operating loss tax attributes ("NOLs")) and $483.6 million in liabilities, leaving it with a deficiency of approximately $80 million. Residco contends that, in light of these values, unsecured creditor recoveries at RAH on a standalone basis may be meaningfully greater than the estimated 45-48% recoveries to be received by unsecured creditors under the consolidated Plan. That contention is flawed in numerous respects.

32. Among other things: (a) the Schedules use net book values, rather than actual fair market values, as it would be "prohibitively expensive, unduly burdensome, and an inefficient use of estate assets for the Debtors to obtain current market valuations of all of their assets." (*see* RAH Schedules at 3); (b) the Debtors' Schedules exclude the value of avoidance actions or similar claims, including avoidance actions that may be asserted by one Debtor estate against another under a non-consolidation scenario (*id.*); (c) the Schedules do not account for the value of unliquidated claim amounts, including certain guarantee claims held by other creditors such as American and United, whose guarantee claims against RAH under their respective settlements were liquidated after the Schedules were filed and, together with Delta's guarantee claims, total

more than $600 million; (d) under a non-consolidated plan, some or all of the $105 million in cash at RAH would be subject to arguments that it should be allocated among the operating entities that generated it; and (e) in the absence of a tax sharing agreement (which does not exist here), the NOLs are the property of the operating entities that generated the NOLs (i.e., Shuttle and Republic Airline), rather than of RAH,[5] and, in any event, would have no independent value for RAH because RAH generates no income. In short, Residco's blind reliance on the asset values under the RAH Schedules is misplaced, as that value is undoubtedly vastly overstated and subject to significant claims not reflected in the Schedules, including those of other Debtor estates that might be asserted absent consolidation.

D. Any Prejudice to Residco Can Be Cured By Excluding Residco from the Plan Consolidation

33. Should the Court find that the Debtors have failed to carry their burden of proof to establish that the Plan Consolidation is appropriate with respect to the Residco Claims, the Committee respectfully suggests that this problem can be easily remedied without requiring material amendments to the Plan or denial of confirmation altogether. Instead, as set forth in more detail in the Debtors' reply, Residco can be carved out of the Plan Consolidation, such that it would be entitled to prosecute both its Lease Claims and Guarantee Claims against the Debtors and, solely in the event that its Guarantee Claims are ultimately allowed in amounts that are greater than its Lease Claims, Residco would be entitled to receive an amount equal to the

[5] The inclusion of the NOLs in RAH's Schedules is consistent with Treasury regulations, which provide that one entity in a consolidated group is generally designated as the "sole agent (agent for the group) that is authorized to act in its own name with respect to all matters relating to the tax liability for that consolidated return year." 26 C.F.R. § 1.1502-77(a) (2017). However, such agency relationship is procedural in nature and does not provide the agent entity any substantive ownership with respect to NOLs, nor does it impose a fiduciary relationship between the agent entity and any of the other members with respect to tax liability matters. *See, e.g., Official Comm. of Unsecured Creditors v. PSS S.S. Co. (In re Prudential Lines, Inc.)*, 928 F.2d 565, 571 (2d Cir. 1991) (holding that NOLs not governed by a tax sharing agreement belong to the subsidiary who generated such NOLs, noting that"[t]he fact that a subsidiary's NOL ultimately may be used to offset another corporation's income does not mean that the subsidiary loses any interest in its NOL").

recoveries it would have received on account of such claims under a hypothetical standalone plan of reorganization for each of RAH and Republic Airline.

34. Similar individualized treatment designed to provide a workaround for problematic claims in the context of an otherwise consensual substantive consolidation plan has been authorized, or at least suggested, by other courts. *See, e.g.*, *In re Jennifer Convertibles, Inc.*, 447 B.R. at 724-26 (authorizing debtors to provide for payment in full of certain small trade creditors who dealt with a single debtor to ensure they were not being harmed as a result of substantive consolidation in lieu of submitting a separate liquidation analysis for that debtor, since, "[i]n a case where the propriety of substantive consolidation has been established, a separate liquidation analysis would not be required or even appropriate, as the cost of the effort to create it would defeat one of the purposes of consolidation"); *Owens Corning*, 419 F.3d at 210 n. 16 (noting the possibility that in order to overcome an opposing creditor's objection to substantive consolidation, a debtor could seek to guarantee the objecting creditor the same recovery it would have received absent consolidation (*i.e.*, a deemed non-consolidation as to that creditor)); *In re Standard Brands Paint Co.*, 154 B.R. 563, 570 (Bankr. C.D. Cal. 1993) (stating "the bankruptcy court has the power to modify substantive consolidation to meet the specific needs of the case") (citation omitted).

CONCLUSION

35. For the reasons set forth herein, the Committee respectfully requests that the Court overrule the Residco Objection and enter an order confirming the Plan.

Dated: March 1, 2017
New York, New York

Respectfully submitted,

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