Hearing Date: April 21, 2016 at 9:00 a.m. (prevailing Eastern Time)

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 607-7985
Marshall S. Huebner
Benjamin S. Kaminetzky
Michael J. Russano
Darren S. Klein
Attorneys for Delta Air Lines, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OMNIBUS RESPONSE OF DELTA AIR LINES, INC. TO THE OBJECTIONS OF THE AD HOC EQUITY COMMITTEE AND THE UNSECURED CREDITORS' COMMITTEE TO DEBTORS' MOTIONS (I) TO ASSUME CODESHARE AND RELATED AGREEMENTS, AS AMENDED, LEASE CERTAIN PROPERTY, AND SETTLE CLAIMS BETWEEN DELTA AIR LINES, INC. AND THE DEBTORS AND (II) TO AUTHORIZE DEBTORS TO OBTAIN POSTPETITION FINANCING

[1] The Debtors in these chapter 11 cases are the following entities: Republic Airways Holdings Inc.; Republic Airways Services, Inc.; Republic Airline Inc.; Shuttle America Corporation; 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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Delta Air Lines, Inc. ("**Delta**") files this response (the "**Response**") to (A) the Objection filed by the Ad Hoc Committee of Equity Holders (the "**Ad Hoc Committee**")[2] [ECF No. 360] (the "**Assumption, Lease, and Settlement Objection**") to Debtors' Motion Pursuant to Sections 363(b), 363(m), and 365(a) of the Bankruptcy Code and Bankruptcy Rules 6004, 6006 and 9019 for Authorization to (I) Assume Codeshare and Related Agreements, as Amended, with Delta Air Lines, Inc., (II) Lease Certain Property of the Estate and (III) Settle Claims Between Delta Air Lines, Inc. and the Debtors [ECF No. 244] (the "**Assumption, Lease, and Settlement Motion**"), filed by the Debtors and Debtors in Possession (collectively, "**Republic**") on March 24, 2016; (B) the Objection filed by the Ad Hoc Committee [ECF No. 359] (the "**DIP Objection**"; and collectively with the Assumption, Lease, and Settlement Objection, the "**Ad Hoc Objections**") to Debtors' Motion for Entry of an Order Pursuant to 11 U.S.C. §§ 105, 105, 361, 362(d)(1), 363(b), 364(c)(1), 364(c)(2), 364(c)(3), 364(d), 364(e), 503(b)(1) and 507(b) and Fed.R.Bankr.P. 4001 and 6004 (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay and (IV) Granting Related Relief [ECF No. 246] (the "**DIP Motion**"; and collectively with the Assumption, Lease, and Settlement Motion, the "**Motions**"), filed by Republic on March 24, 2016; and (C) the Limited Omnibus Objection of the Official Committee of Unsecured Creditors [ECF No. 364] ("the **Unsecured Creditors Committee**" or the "**UCC**") to the Assumption, Lease, and Settlement Motion and the DIP Motion (the "**UCC Limited Objection**"; and collectively with the Ad Hoc Objections, the "**Objections**").[3]

[2] The U.S. Trustee denied a petition to appoint an official equity committee on April 5, 2016.

[3] In addition, the U.S. Attorney's Office for the Southern District of New York ("**USAO**") has filed an objection [ECF No. 357] (the "**USAO Objection**") to the DIP Motion. Delta understands that the USAO Objection will be resolved by language that the Debtors and Delta have agreed to add to the DIP Order.

PRELIMINARY STATEMENT

1. After months of litigation and extensive negotiations with Republic, both before and after the commencement of these bankruptcy proceedings, Delta was the first of Republic's codeshare partners to reach agreement on new terms for a postpetition codeshare relationship. The Delta-Republic settlement (the "**Proposed Global Settlement**") encompasses a comprehensive and integrated restructuring of various agreements in a manner that provides substantial economic value to the Debtors, as well as a settlement of the prepetition litigation (the "**Litigation**") pending between Delta and Debtors Republic Airways Holdings, Inc. ("**RAH**") and Shuttle America Corporation ("**Shuttle**"; collectively, "**Defendants**") and related $1.7 billion damage claim asserted by Delta on account of Republic's nonperformance pursuant to the existing codeshare agreements.

2. The Ad Hoc Committee, while conceding — as it must — the need for Republic to restructure its relationship with Delta, asserts various piecemeal objections to individual components of the Proposed Global Settlement. The Ad Hoc Committee objects most strongly to the granting of an allowed unsecured claim of $170 million to Delta, contending that the Debtors did not reasonably exercise their business judgment in assigning any value to the potential litigation damages. This argument is misplaced, as there is no dispute that Republic failed to perform under the existing codeshare agreements, and that Delta has suffered and will continue to suffer substantial and quantifiable damages as a result. The reality is that settlement of the Litigation for pennies on the dollar,[4] in connection with other transactions that offer substantial economic value, is an excellent result for the Debtors, and is plainly within the range

[4] Delta would receive approximately ten cents on the dollar *if general unsecured creditors are paid in full*. Of course, given Debtors' financial condition, Delta is likely facing the prospect of a much lower recovery. As the Debtors have stated, "unsecured creditors are faced with the prospect of recovering potentially well less than 50 cents on every $1.00 of claims." Current Report (Form 8-K), Republic Airways Holdings Inc. (filed Apr. 4, 2016), Ex. 99.1, at 2.

of reasonableness. The Ad Hoc Committee's attempts to obfuscate this fact by arguing that Delta "artificially inflated" the value of the Litigation in bad faith lacks any evidentiary support whatsoever.

3. An additional key feature of the Proposed Global Settlement is the postpetition financing to be provided by Delta to Republic. This financing, which was negotiated at arm's-length creates substantial value for the estate in its own right.

4. Moreover, the Ad Hoc Committee's assertion that Delta is "a party whose interests are clearly adverse to the Debtors" is simply untrue. Republic is an important partner in the Delta Connection program, and Delta and Republic share a mutual interest in the Debtors' successful reorganization and emergence from these chapter 11 cases as stronger, healthier companies with efficient and reliable operations. In contrast, the Ad Hoc Committee is not, as it alleges, "completely aligned" with the Debtors. The Ad Hoc Committee's interest is solely to maximize recovery for themselves — a seemingly out of the money constituency — and is at odds with Republic's efforts to restructure its operations, including with some of its most important constituents such as the Codeshare Partners.[5]

5. For all of the foregoing reasons, and for those set forth below, Delta respectfully requests that the Motions be granted in their entirety.

FACTUAL AND PROCEDURAL BACKGROUND

6. Republic operates as a Delta Connection regional jet carrier through one of its operating companies, Shuttle America Corporation ("Shuttle") and its holding company Republic Airways Holdings, Inc. ("RAH"), pursuant to two Delta Connection Agreements, the

[5] Additionally, as explained in Paragraph 38 *infra*, the UCC's concern regarding the effect of the proposed financing on Republic's ability to finance new aircraft deliveries is misplaced.

Single-Class Agreement governing Shuttle's operation of ERJ-145 aircraft, and the Dual-Class Agreement governing Shuttle's operation of larger ERJ-170 and ERJ-175 aircraft.[6]

7. Beginning in February 2015, Republic began to reduce materially its flying in contravention of its contractual obligations under the Delta Connection Agreements. In addition, in August 2015, Republic informed Delta that it would not place additional ERJ-170 aircraft into service as required under an amendment to the Dual-Class Agreement. Republic contended that its nonperformance was caused by its inability to maintain sufficient pilot staffing as a result of a federal regulation that increased the minimum qualifications for airline pilots, known as the 1,500-Hour Rule. Due to Republic's failures to perform, Delta was left with no choice but to significantly reduce Republic's flying in order to protect the reliability of its flight schedules. Delta has estimated that, in the absence of the Proposed Global Settlement, Delta's damages resulting from Republic's contractual breaches would amount to approximately $1.7 billion. (*See* Deposition of John Luth ("**Luth Dep.**") at 69:17-70:9; Deposition of Joseph Allman ("**Allman Dep.**") at 54:25-55:3; Ex. 1 to Allman Dep. ("**Republic Worksheet**") at 1.[7])

8. Following unsuccessful attempts to resolve these disputes amicably, in October 2015 Delta commenced the Litigation against Shuttle and RAH. (Luth Dep. 17:11-20.) Among the damages asserted, Delta sought to recover the "los[t] profits it would have earned if the Defendants operated all flights as required by the Agreements." (Russano Decl. Ex. 4, Complaint at ¶ 51, *Delta Air Lines, Inc. v. Republic Airways Holdings, Inc. and Shuttle Am.*

[6] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motions.

[7] Excerpts of the Luth Deposition, excerpts of the Allman Deposition, and the Republic Worksheet are Exhibits 1, 2, and 3, respectively, to the accompanying Declaration of Michael J. Russano in Support of this Response ("**Russano Decl.**"). The Republic Worksheet, prepared by Seabury Group, Republic's financial advisor, for use during the negotiations that culminated in the Proposed Global Settlement, shows Delta's and Republic's negotiating positions on Delta's claims. (Allman Dep. 45:13-46:11, 79:11-19.)

Corp., No. 2015CV266675 (Ga. Super. Ct. Fulton Cnty.), *removed to* No. 15 Civ. 3839 (LMM) (N.D. Ga.).)

9. [redacted] Letter of Intent ("**LOI**") [redacted] (Luth Dep. 16:19-24, 31:1-32:6.) Unfortunately, the parties were unable to resolve their differences, and the settlement was never finalized.

10. Republic subsequently filed these cases. [redacted] (Allman Dep. 46:12-50:3, 69:8-71:10.) [redacted] All of this effort culminated in the Proposed Global Settlement as described in the Motions.

11. As described more fully in Republic's Motions, key terms of the Proposed Global Settlement include, *inter alia*: (a) Republic's entry into and assumption of amendments to the Single Class Agreement ([redacted]) and the Dual-Class Agreement ([redacted]); (b) Republic's entry into and assumption of an amended and restated lease of 13 LaGuardia Airport slots and assumption of the lease of 2 additional LaGuardia Airport slots; and (c) the resolution of the Litigation and

granting to Delta of an allowed, general unsecured claim of $170 million against two of the Debtors.

ARGUMENT

A. Applicable Legal Standards

12. As discussed in Republic's Motions, it is well settled that, under Section 365(a) of the Bankruptcy Code, "[a] court will normally approve the assumption of an executory contract 'upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment.'" *In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 462 (Bankr. S.D.N.Y. 2014); *see COR Route 5 Co. v. Penn Traffic Co. (In re Penn Traffic Co.)*, 524 F.3d 373, 383 (2d Cir. 2008) (noting "the business judgment standard employed by courts in determining whether to permit the debtor to assume or reject [an executory] contract"); *In re MF Global Holdings Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012) ("Courts generally will not second-guess a debtor's business judgment concerning whether the assumption or rejection of an executory contract or unexpired lease would benefit the debtor's estate."). Accordingly, as this Court has held, a motion to assume is a "summary proceeding," "intended to efficiently review the . . . debtor's decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate." *Genco*, 509 B.R. at 463 (quoting *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098-99 (2d Cir. 1993)).

13. Similarly, the Section 363(b) standard for approval of the use of estate property outside of the ordinary course of business is "also the business judgment of the debtor." *Genco*, 509 B.R. at 464; *see, e.g.*, *In re Borders Grp., Inc.*, 453 B.R. 459 (Bankr. S.D.N.Y. 2011) ("In approving a transaction conducted pursuant to section 363(b)(1), courts consider whether the debtor exercised sound business judgment."). As this Court has held, under both Section 365(a)

and 363(b), "there 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" *Genco*, 509 B.R. at 464 (quoting *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650, (S.D.N.Y. 1992)). A court "should not generally interfere with business decisions absent a showing of bad faith, self-interest, or gross-negligence." *U.S. Bank Trust Nat'l Ass'n v. Am. Airlines, Inc. (In re AMR Corp.)*, 485 B.R. 279, 288 (Bankr. S.D.N.Y. 2013), *aff'd*, 730 F.3d 88 (2d Cir. 2013) (quoting *Borders*, 453 B.R. at 482).

14. In approving a settlement pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure, the Court considers "whether the settlement is fair and equitable and in the best interests of the estate." *In re WorldCom, Inc.*, 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006). As this Court has observed, a "mini trial" on the underlying issues is not required to approve a settlement. *Fjord v. AMR Corp. (In re AMR Corp.)*, 502 B.R. 23, 42 (Bankr. S.D.N.Y. 2013). The "responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact raised by [objectants] but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). Moreover, although "approval of a settlement rests in the Court's sound discretion, the debtor's business judgment should not be ignored." *In re Charter Commc'ns*, 419 B.R. 221, 252 (Bankr. S.D.N.Y. 2009) (quoting *In re Stone Barn Manhattan LLC*, 405 B.R. 68, 75 (Bankr. S.D.N.Y. 2009)), *appeal dismissed*, 449 B.R. 14 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 476 (2d Cir. 2012).

B. The Good Faith Settlement of the Litigation Reflects Republic's Sound Business Judgment and in is the Best Interest of the Republic Estate

15. The Ad Hoc Committee requested and received ample discovery, including all communications between Delta and Republic concerning any claim to be allowed to Delta, and took lengthy depositions of Republic's chief financial officer, Joseph Allman, and financial advisor, John Luth, who were intimately involved in Republic's negotiations with Delta. Nonetheless, the Ad Hoc Committee failed to identify a scintilla of evidence of Delta's or Republic's alleged bad faith. Instead, the record demonstrates that intense negotiations between Republic and Delta were conducted in good faith, that Delta substantially compromised its meritorious claims, and that settlement of the Litigation as part of the Proposed Global Settlement is a sound exercise of business judgment that will provide substantial value to the Republic estate.

i. Negotiations Between Republic and Delta Were Conducted in Good Faith

16. The Ad Hoc Committee argues that good faith was lacking because Delta's calculation of the magnitude of the claim at approximately $1.7 billion was "artificially inflated" and was never disclosed to Republic until the eve of settlement. This unsupported argument is flatly contradicted by the record. As Republic's financial advisor, John Luth, testified, [redacted] (Luth Dep. 20:20-21:21, 24:3-14; *see also id.* at 22 ([redacted]) That is completely consistent with Delta's position throughout the

Litigation and the negotiation of the Proposed Global Settlement that its damages were substantial and would only increase over time.[8]

17. As Republic's witnesses testified, [redacted] (Allman Dep. 69:8-70:4.) [redacted] (Allman Dep. 46:12-50:3, 69:8-71:10; Luth Dep. 65:21-66:13, 70:14-25.) [redacted] (Allman Dep. 155:12-157:12, 158:15-21, 162:25-163:10; *see also* Luth Dep. 158:2-5 ([redacted]).)

18. Much of the Ad Hoc Committee's argument that the alleged damages are artificially high is premised upon the assumption that Delta has a [redacted] chance of success on recovery for lost profits relating to the extension period of the Single-Class Agreement. That assumption, in turn, is premised upon an internal Republic document, *prepared in connection with the negotiation*, that ascribes a [redacted] percent probability of success to that aspect of the claim, which alone accounted for approximately $1.3 billion.[9] (Republic Worksheet at 1.) It is utterly unsurprising, however, that a defendant to a billion-dollar-plus lawsuit would take a *negotiation position* of this nature. As Luth testified, Republic's "[redacted]" (Luth Dep. 80:4-7.) Thus, Republic's

[8] Under Delta's calculation, a substantial majority of the damages from Republic's nonperformance reflected postpetition damages attributable to nonperformance under the Single Class Agreement. Thus, the damages to Delta were likely to increase dramatically over 2016 in comparison to damages in 2015.

[9] [redacted]

negotiation strategy was to "[redacted]" (*Id.* at 80:10-14; *see also* Luth Dep. 155:3-7 ("[redacted]").)

19. Negotiation positions aside, Republic's witnesses testified to their belief that "[redacted]" in defending the Litigation. (Allman Dep. 83:14-15.) Tellingly, Luth testified that [redacted]. (Luth Dep. 80:2-3.)

20. In sum, after voluminous discovery, there is absolutely zero evidence to support the Ad Hoc Committee's accusations of bad faith and allegations that board approval of the Litigation settlement in conjunction with the Proposed Global Settlement was not a sound exercise of business judgment. Instead, the record contains substantial, uncontradicted evidence that Delta compromised in good faith its massive damages claims against Republic for a maximum of approximately ten cents on the dollar — certainly within the range of reasonableness — and in connection with a comprehensive settlement that will not only resolve Republic's dispute with Delta, but puts the Debtors in a position to effectuate a successful reorganization.

ii. <u>The Litigation Defenses Noted by the Ad Hoc Committee Lack Merit</u>

21. The Ad Hoc Committee additionally argues that the entire claim lacks merit by citing the primary defense asserted by Republic during the Litigation — that its failure to perform was excused by a *force majeure* defense in light of the 1,500 Hour Rule. Delta believes, and was prepared to vigorously litigate, that this defense has no merit whatsoever. Under New York law, which applies to each of the Delta Connection Agreements, *force majeure* clauses are

"construed narrowly." *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012); *see, e.g.*, *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902-03 (1987). Moreover, "financial considerations brought about by [governmental] regulations . . . . are not circumstances constituting a *force majeure* event, and financial hardship is not grounds for avoiding performance under a contract." *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227 (1st Dep't 2001). *See also Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1293 (Fed. Cir. 2002) ("[G]overnment policies that affect the profitability of a contract but do not preclude performance should not be considered 'acts of government' for force majeure clause purposes."). Thus, the law is clear that increased costs resulting from an industry regulation such as the 1,500 Hour Rule cannot be the basis for a *force majeure* defense.

22. Moreover, if the 1,500-Hour Rule affecting the entire industry had actually prevented Republic from maintaining adequate pilot staffing, one would logically have expected the impact to be felt across the entire industry. Instead, Republic's labor shortage was "already acute" even before the regulation became effective, due to an inferior pilot labor agreement and a lengthy labor dispute that was resolved in October 2015. (Declaration of Bryan K. Bedford Pursuant to Local Bankruptcy Rule 1007-2 [ECF No. 4], at ¶¶ 5, 8, 9.) Tellingly, unlike Republic, all of Delta's other regional carriers either suffered little to no drop in flying (and some even picked up additional flying) or resolved any flying shortages through pilot hiring or retention programs.

23. The Ad Hoc Committee also argues that Delta's claim should not be allowed against all Debtors because only Shuttle was obligated to perform under the Delta Connection Agreements. As a preliminary matter, this objection is moot with respect to [redacted].

As to RAH, the Ad Hoc Committee repeats a meritless argument that Republic advanced in the Litigation resting on a line of cases construing indemnity clauses narrowly. *See, e.g., Hooper Assocs., Ltd. v. AGS Computers*, 74 N.Y.2d 487, 491-92 (1989). As Delta argued to the District Court, these cases are inapposite because the Delta Connection Agreements expressly provide for RAH's joint and several liability *in addition to* indemnity. According to the plain language of Article 12(A) of those agreements, "[Operator] and [RAH], jointly and severally, shall be liable" for damages caused by, *inter alia* , "the performance, improper performance, or nonperformance of any and all obligations to be undertaken by Operator pursuant to this Agreement . . . or the operation, non-operation, or improper operation of Operator's aircraft . . . . " (*E.g.*, Russano Decl., Ex. 5, Article 12(A).) It is axiomatic that joint and several liability means that "each party is individually liable to plaintiff for the whole of the damage." *Hecht v. City of N.Y.* , 60 N.Y.2d 57, 62 (1983). Thus, an allowed claim against both Shuttle and RAH is consistent with the liability under the contracts and is an utterly reasonable exercise of Debtors' business judgment.[10]

24. Finally, the Ad Hoc Committee cites public statements by Republic denying the merit of Delta's claims asserted in the Litigation as purported evidence that such claims lack merit. As any litigant knows, however, such statements are part and parcel of a standard defense strategy and do not constitute, in any way, proof of nonliability. In contrast, the evaluations of Republic's chief negotiators, Joseph Allman and John Luth, that [redacted]. (*See, e.g.*, Luth Dep. 79:18-19 ("[redacted]

[10] Notably, although the revised Proposed Global Settlement [redacted]

[redacted]"); Allman Dep. 89:18-90:9 ([redacted].) To be clear, Delta believes that its claims are meritorious and that its damages are substantial and quantifiable, and Delta remains prepared to vigorously litigate those claims in the event the Proposed Settlement is not approved.

iii. The Litigation Settlement is an Integral Part of a Proposed Global Settlement That Will Provide Substantial Value to the Republic Estate

25. The Ad Hoc Committee argues that the proposed $170 million allowed claim is "unreasonable" because Republic has compared the value of that claim to the economic benefit to the estate from the Proposed Global Settlement. This argument attempts to muddy the issues before the Court. It is uncontested that the Proposed Global Settlement will return a substantial positive economic benefit to the estate, which has been estimated at "[redacted]" (Allman Dep. 137:22-138:5.) That Delta is prepared to settle its billion-dollar-plus claims at at least a 90% discount in connection with the Proposed Global Settlement as a whole (which will provide Republic with substantial value in 100-cent dollars, unlike the allowed general unsecured claim), is undeniably a reason why Republic found the Proposed Global Settlement to be amply justified. Rather than any basis for skepticism, this value creation is an *additional* reason why this Court should approve the settlement of the Litigation.

26. The Ad Hoc Committee also attacks the provision of the proposed Order obligating Debtors to provide an increased claim to the extent that a codeshare partner receives a priority or disproportionately large general unsecured claim. This provision is a crucial feature of the Proposed Global Settlement, because it protects Delta from suffering disadvantage as a result of its willingness to be the first codeshare partner to reach a comprehensive agreement with Republic. (*See* Luth Dep. 91:2-7 ([redacted]

[redacted]

[redacted]).)[11]

27. The settlement of the Litigation is further supported by a consideration of the alternatives available to Republic. If Republic and Delta had been unable to reach agreement on the Proposed Global Settlement, the only practical alternative would be for Republic to have rejected the Delta Connection Agreements. In that circumstance, Delta would be entitled to a substantial claim for rejection damages under those agreements exceeding $1.7 billion. Such a claim would have dwarfed the $170 million allowed under the Proposed Global Settlement while reducing the economic value of the estate and the prospects for a successful reorganization.

C. The Proposed Global Settlement Should Be Evaluated as an Integrated Set of Agreements That Provide Substantial Value to the Republic Estate

28. This Court should reject the view of the Ad Hoc Creditors that the minutia of each term of Proposed Global Settlement should be isolated and scrutinized instead of viewing the Proposed Global Settlement as a whole. Instead, the question in this "summary proceeding," *Genco*, 509 B.R. at 463, is whether the Ad Hoc Committee has rebutted the presumption of sound business judgment that the Proposed Global Settlement, in its entirety, will benefit the estate. *See id.* at 464 ("Parties opposing the proposed exercise of a debtor's business judgment have the burden of rebutting the presumption of validity." (quoting *Integrated Resources*, 147 B.R. at 656)). The Ad Hoc Committee has failed to do so.

[11] The UCC Limited Objection cites a decision in a *Madoff* adversary proceeding for the proposition that MFN clauses "are typically used to set a ceiling, rather than a floor." (UCC Limited Objection at ¶ 25 n.7.) This appears to be a distinction without a difference. In the *Madoff* case an avoidance action defendant settled with the estate for 85 cents on the dollar, and the settlement agreement contained an MFN clause that would be triggered if the estate settled with a similarly situated party on better terms *for the similarly situated* defendant. *See Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. No. 08-01789 (SMB), 2014 Bankr. LEXIS 4348 (Bankr. S.D.N.Y. Oct. 10, 2014). This is exactly the same purpose as the provision in the proposed Order.

i. Although the Court Should Reject the Comparison Between the Proposed Global Settlement and a Pre-Bankruptcy Letter of Intent, Any Such Comparison Favors the Proposed Global Settlement

29. The Ad Hoc Committee objects to the Proposed Global Settlement by comparing its terms to the pre-bankruptcy Letter of Intent, [redacted]. This argument, a complete red herring, should be disregarded by the Court. As Republic's witnesses testified, [redacted]. (Allman Dep. 37:16-20, 56:9-18.) [redacted] (*See* Luth Dep. 31:13-32:18, 35:11-37:2; Allman Dep. 56:9-11 ("[redacted]").)

30. Moreover, even if the LOI provided a valid comparison, which it does not, the evidence is clear and uncontradicted that the Proposed Global Settlement provides Republic with substantially more economic value than what was contemplated by the LOI. For example, as Luth and Allman testified, the Settlement provides substantial economic value not present in the LOI, including: [redacted]

[12] As Allman testified, [redacted]

[redacted] As Republic's CFO testified, [redacted] (Allman Dep. 137:22-138:5.)

ii. <u>The Ad Hoc Committee's Objections to the Slot Leases Lack Merit</u>

31. The Ad Hoc Committee's challenges to the terms of the LaGuardia slot leases merit little consideration. [redacted] As an initial matter, the slot leases are just one piece of the overall, integrated Proposed Global Settlement. Contrary to the Ad Hoc Committee's misguided, piecemeal approach, the benefit to the estate of these leases cannot be separated from the benefit of assuming the Delta Connection Agreements as amended and the other pieces of the Proposed Global Settlement. [redacted]

32. Further, as a good faith lessee, Delta is entitled to the protections of section 363(m) for the A&R Slot Lease. Section 363(m) provides that "[t]he reversal or modification on appeal of an authorization. . . of a . . . lease of property does not affect the validity of a . . . lease under such authorization to an entity that . . . leased such property in good faith." [redacted]

[redacted]

33. While the Ad Hoc Committee attempts to argue that Delta is not entitled to the protections of 363(m)—[redacted]—the facts and the law clearly demonstrate that Delta is indeed entitled to such protections. A court determines whether a lessee is a good-faith lessee by evaluating a lessee's integrity in connection with entering a lease. A finding of good faith would not be made if the lessee entered into the lease "as a result of 'fraud, collusion . . ., or an attempt to take grossly unfair advantage of other bidders." *Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.*), 430 B.R. 65, 78 (S.D.N.Y. 2010) (quoting *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 390 (2d Cir. 1997)). None are present here, where Delta and the Debtors negotiated a mutually beneficial lease as an integral part of a global settlement that will benefit the Debtors' estates. As described above, the evidence is clear and uncontradicted that Delta acted in good faith at all times in its negotiations with the Debtors, including with respect to the slot leases.

34. There is absolutely no evidence that Delta and the Debtors colluded or that Delta acted without the utmost integrity, despite the Ad Hoc Committee's unsupported assertions to the contrary. (*See, e.g.*, Assumption, Lease, and Settlement Objection ¶ 44.) Indeed, in the DIP Objection, the Ad Hoc Committee undermines its own argument that there was collusion among Delta and the Debtors by alleging that Delta "was preparing to move its business away from the Debtors." (DIP Objection ¶ 4.) The Ad Hoc Committee cannot have it both ways and the facts

do not support either of those allegations. The reality is that Delta and the Debtors negotiated in good faith a mutually beneficial settlement to restructure their relationship.

D. The Objections of the Ad Hoc Committee and the Unsecured Creditors Committee to the Terms of the Postpetition Financing Are Unfounded

35. By the DIP Motion, the Debtors seek final approval of an arm's-length, third-party, heavily negotiated financing under the DIP Credit Agreement (the "**DIP Financing**") entered into by the Debtors in the reasonable exercise of their business judgment. The economics and other terms of the DIP Financing, single, extremely loose milestone and covenants of the DIP Credit Agreement, were specifically negotiated and tailored. While the Ad Hoc Committee attempts to argue (with no proof or support) that it provided a proposal with economic terms more favorable to the Debtors, DIP financings are to be considered as a whole based on the availability of alternatives and the Debtors' business judgment. *See In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 888 (Bankr. S.D.N.Y. 1990) ("[The objectant] did not negotiate the Agreement and the Court is not to second guess the inclusion of some provisions as long as the Agreement as a whole is within reasonable business judgment, and the subject provisions do not distort the balance Congress struck in Chapter 11"). It is simply inappropriate for the Ad Hoc Committee to cherry-pick select provisions of the DIP Facility it would like to change, when the DIP Facility was a highly negotiated package that is clearly in the estates' best interests. Delta simply provided the best overall package, and Delta's proposal most closely matched the Debtors' requirements and desired terms. Given the Debtors' intention to move expeditiously through these proceedings, it was a sound exercise of their business judgment to proceed with Delta as their DIP lender.

36. The Ad Hoc Committee cites provisions of the DIP Credit Agreement and the DIP Order that it alleges would give Delta rights that are "troublesome." The reality, however, is

that the provisions of the DIP Credit Agreement and the DIP Order will not result in Delta exercising undue influence over these chapter 11 cases. For example, the DIP Credit Agreement contains but a single milestone that a plan that proposes to repay the DIP Facility or a motion to refinance the DIP Facility be filed at least 60 days prior to the maturity of the DIP Facility. The purpose of this milestone is to ensure repayment of the DIP Facility before the stated maturity date. Delta is not attempting to use milestones in the DIP Credit Agreement to lead the case in a particular direction solely for the benefit of Delta. Instead, the Debtors and Delta have negotiated the DIP Credit Agreement to provide the Debtors with flexibility to restructure in a manner that benefits all parties in interest.

37. Similarly, the fact that Delta has approval rights over the Budget (as defined in the DIP Credit Agreement) as set forth in Annex D of the Credit Agreement does not mean that Delta is attempting to improperly influence these cases, such as by improperly withholding approval of expenses at the determinant of other parties in interest. Delta is committed to, and has a legitimate self-interest in, the long-term stability of the Debtors, and if the Debtors are unable to pay their legitimate expenses then the Debtors will not survive — which would severely and negatively affect Delta. Moreover, it is commonplace for debtor-in-possession credit agreements to contain budget requirements.[13]

38. Because the DIP Facility is part of a comprehensive solution, the Proposed Global Settlement, the DIP Credit Agreement includes provisions, including Events of Default, that are related to the other components of the Proposed Global Settlement. However, none of these

[13] *See In re Great Atlantic & Pacific Tea Co.*, No. 15-23007 (RDD) (Bankr. S.D.N.Y. Aug. 12, 2015) (requiring DIP budget compliance for disbursements with a weekly variance test), Order ¶ 13(a)-(b) (Docket No. 531); *In re Chassix Holdings, Inc.*, No. 15-10578 (MEW) (Bankr. S.D.N.Y. Apr. 10, 2015) (requiring DIP budget compliance for cumulative net cash flow with a permitted variance, tested weekly), Order ¶ 11(f) (Docket No. 252); *In re LightSquared, Inc.*, No. 12-12080 (SCC) (Bankr. S.D.N.Y. Aug. 17, 2012) (requiring DIP budget compliance for operating expenditures with a permitted variance tested bi-monthly), Order ¶ 10(a) (Docket No. 224).

Events of Default demonstrate that Delta is seeking undue or improper protections. Rather, Delta is simply seeking to protect the entirety of the bargain it struck with the Debtors — a bargain that provided the Debtors with significantly enhanced economic terms that will lead to increased revenues and improved distributions to all creditors.

39. In the UCC Limited Objection, the Unsecured Creditors Committee expresses concern about the Debtors' hypothetical inability to finance new aircraft deliveries. As a preliminary matter, Delta has expressly agreed, as the result of continued negotiations with the Debtors, to permit the Debtors to grant liens senior to the DIP Liens on 1110 Assets (as defined in the DIP Credit Agreement) on account of Indebtedness (as defined in the DIP Credit Agreement) incurred to finance the acquisition of those 1110 Assets in accordance with the terms of the DIP Credit Agreement. Such permitted liens are precisely what purchase-money financiers rely upon every day to finance aircraft purchases. In addition, Delta has explicitly agreed to permit the Debtors to grant superpriority administrative claims junior to Delta's superpriority administrative claims in accordance with the terms of the DIP Credit Agreement on account of such indebtedness. The Debtors will be able to offer potential aircraft financers substantial incentives to induce them to deal with the Debtors. These provisions are as or more generous than in any case we know of in debtor-in-possession financing orders and credit agreements in similar airline bankruptcies, including those of Frontier Airlines, Mesaba Aviation, and Delta.[14]

[14] *See In re Frontier Airlines*, No. 08-11298 (RDD) (Bankr. S.D.N.Y. Sept. 3, 2008), Order, ¶¶ 6, 9 (Docket No. 490) and Russano Decl., Ex. 6, DIP Credit Agreement, §6.7(c) (permitting first-priority liens on newly acquired aircraft, but not senior superpriority administrative claims); *In re Mesaba Aviation, Inc.*, No. 05-39258 (GFK) (Bankr. D. Minn. Sept. 20, 2006), Order, ¶¶ 7(a), (d) (Docket No. 857), and Russano Decl., Ex. 7, DIP Credit Agreement, § 6.01(iii) (permitting first-priority purchase money security interests, but not senior superiority administrative claims); *In re Delta Air Lines, Inc.*, No. 05-17923 (PCB) (Bankr. S.D.N.Y. Oct. 6, 2005), Order, ¶¶ 9, 13 (Docket No. 652), and Russano Decl., Ex. 8, Credit Agreement § 6.7(c) (permitting first-priority liens on newly acquired aircraft, but not senior superpriority administrative claims).

CONCLUSION

40. The agreement reached between Delta and Republic reflects the culmination of a hard-fought and contentious dispute about their future relationship and a favorable resolution (to Republic) of the ongoing Litigation. The integrated transactions comprising the Proposed Global Settlement create value for Republic and their approval clearly represents the reasonable exercise of business judgment. Accordingly, for all the reasons above, Delta respectfully requests that the Court grant the Motions.

Dated: New York, New York
April 18, 2016

By: /s/ Marshall S. Huebner

Marshall S. Huebner
Benjamin S. Kaminetzky
Michael J. Russano
Darren S. Klein

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 607-7985

Attorneys for Delta Air Lines, Inc.