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Hearing Date & Time: June 15, 2016 at 11:00 a.m.
Objection Deadline: June 8, 2016 at 4:00 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	Case No. 16-10429 (SHL)
Republic Airways Holdings Inc., *et al.*,[1]	:	(Jointly Administered)
Debtors.	:	

OBJECTION OF THE AD HOC EQUITY COMMITTEE TO DEBTORS' MOTION PURSUANT TO SECTION 365(a) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 6006 AND 9019 FOR AUTHORIZATION TO (I) ASSUME CODESHARE AND RELATED AGREEMENTS, AS AMENDED, WITH UNITED AIRLINES, INC., AND (II) SETTLE CLAIMS BETWEEN UNITED AIRLINES, INC. AND THE DEBTORS

[1] The Debtors (the "Debtors" or "Republic") 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.

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

The Ad Hoc Committee of Equity Holders of Republic Airways Holdings Inc. (the "Ad Hoc Committee"),[2] hereby objects to the *Debtors' Motion Pursuant to Section 365(a) of the Bankruptcy Code and Bankruptcy Rules 6006 and 9019 For Authorization to (I) Assume Codeshare and Related Agreements, as Amended, with United Airlines, Inc., and (II) Settle Claims Between United Airlines Inc. and the Debtors* [Dkt. No. 614] (the "Motion"),[3] and respectfully represents as follows:

SUMMARY

1. The Debtors seek to assume various executory contracts with United under section 365(a) of the Bankruptcy Code and to settle certain alleged pre-petition disputes with United pursuant to Bankruptcy Rule 9019(a). If that were the extent of the relief sought, it would be a garden-variety request. The Motion goes much further, however, because the Debtors aim to compensate United with a newly created pre-petition general unsecured claim in exchange for various modifications to the assumed contracts. Simply put, the Bankruptcy Code does not contemplate or permit the allowance of pre-petition claims as currency for a chapter 11 debtor's post-petition business transactions. Compensating United with an allowed pre-petition claim for post-petition contract modifications is improper under the Bankruptcy Code because allowed pre-petition claims are only available for "creditors" actually holding "claims" as of the date of the bankruptcy filing. *See* 11 U.S.C. §§ 501, 502. United was not a creditor as of the petition date with respect to the contract modifications because it had no claim (*i.e.*, a "right to payment") with respect thereto. Because the Debtors are not paying with cash or granting post-petition administrative expenses, they are willing to be far more

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[2] The members of the Ad Hoc Committee and their respective holdings are set forth in the *Fourth Verified Supplemental Statement Pursuant to Bankruptcy Rule 2019*, filed on May 6, 2016 [Bankr. Dkt. No. 520].

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

generous in providing value (in the form of an unsecured claim) to their long-term business partners. The requested relief is legally improper and cannot be approved.

OBJECTION

2. The Debtors propose to grant United an allowed pre-petition unsecured claim in the amount of $193 million (the "United Claim") on account of "both" (i) a settlement of pre-petition claims "and" (ii) certain post-petition contract modifications. *See* Motion ¶ 13. The Debtors did not publicly disclose the allocation of the United Claim between these two components. [redacted][4] [redacted]

[4] [redacted] The form of the transaction should not be used to shield its component parts from judicial scrutiny.

[redacted][5]

3. The Bankruptcy Code does not authorize a chapter 11 debtor to create a new pre-petition claim as consideration for a post-petition contract modification. The Debtors rely on two sources of authority: Section 365(a) of the Bankruptcy Code and Bankruptcy Rule 9019. Section 365(a) merely addresses the assumption and rejection of executory contracts; it does not authorize the creation of pre-petition claims as consideration for post-petition contract modifications. Moreover, Bankruptcy Rule 9019 cannot serve as the source of authority to create a pre-petition claim for a post-petition contract modification because Bankruptcy Rule 9019 is procedural, not substantive. As the Rules Enabling Act makes clear, a rule cannot authorize any actions that the Code does not permit. 28 U.S.C. § 2072(b) ("[R]ules shall not abridge, enlarge, or modify any substantive right."); 28 U.S.C. § 2075 (same); *see also In re Barney's Inc.*, 197 B.R. 431, 438 (Bankr. S.D.N.Y. 1996) (noting that "[t]he bankruptcy rules do not and cannot create substantive rights that do not already exist elsewhere) (citing 28 U.S.C. § 2075).

4. The statutory framework for the allowance of pre-petition claims is set forth in sections 501(a)[6], 502(a)[7] and 502(b)[8] of the Bankruptcy Code. Read together, these provisions make clear that

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5 [redacted]

6 Section 501(a) provides, in relevant part, that a "creditor ... may file a proof of claim." 11 U.S.C. § 501(a).

only a creditor can file, assert and hold an allowed pre-petition claim. A "creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). A "claim" is defined, in pertinent part, as a "right to payment" or a "right to an equitable remedy for breach." *See* 11 U.S.C. § 101(10)(A). A "right to payment" is "an enforceable obligation" of the debtor. *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir. 1995) (citation omitted).

5. Clearly, United could be a creditor with a disputed claim for damages arising out any alleged breach of the parties' pre-petition contracts. However, United is not (and cannot be) a "creditor" with a "claim" as it relates to the proposed post-petition contract modifications because United has no "right to payment" or "enforceable obligation" against the estates to be compensated by the estates for the new business arrangement. In other words, United has no cognizable pre-petition right to compensation for its post-petition agreement to modify the contracts. Because United is not a "creditor" (with respect to the contract modifications) and has no "claim" or right to payment (with respect to the contract modifications), it is legally improper to create a pre-petition claim to compensate United for those modifications.

6. The Debtors likely will cite, as they did in connection with the Delta appeal, unreported bankruptcy court orders in *In re Northwest Airlines Corp.*, Case No. 05-17930 (ALG) (Bankr. S.D.N.Y. June 13, 2006) and *In re Pinnacle Airlines Corp.*, Case No. 12-11343 (REG) (Bankr. S.D.N.Y. May 17, 2012). However, these unreported orders have no probative value; not only was the

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[7] Section 502(a) provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects." 11 U.S.C. § 502(a).

[8] Section 502(b) provides, in relevant part, that "[e]xcept as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that [listing certain exceptions that are inapplicable here]." 11 U.S.C. § 502(b).

issue of claim creation never briefed, considered, or decided in these cases, but they are also readily distinguishable. In *Northwest*, the bankruptcy court approved a settlement between the debtors and its pilots' union pursuant to which the debtors granted the union an allowed claim upon the effective date of a to-be filed plan in exchange for the union's agreement to reduce its members' pre-petition benefit package. The allowance of a claim in that context was not challenged. Unlike United, the union was a creditor because it had a pre-petition "right to payment" of the benefits at the levels specified in its collective bargaining agreement.[9] In *Pinnacle*, the court allowed an unsecured claim when, unlike here, (i) the claim was on account of damages resulting from the early termination of a prepetition contract; (ii) the amount of the claim would be determined by the court; and (iii) the allowance of the claim was linked to the only available source of DIP financing, which was "essential" to the debtors' "survival." *See* Transcript of Hearing at 177, *In re Pinnacle Airlines Corp.*, Case No. 12-11343 (Bankr. S.D.N.Y. May 16, 2012), [Dkt. No. 375].

7. The impermissible feature of the proposed transaction (*e.g.*, allowing the creation of pre-petition claim in exchange for post-petition contract modifications) cannot be immunized by merely characterizing the arrangement as a set of "integrated transactions" or a "holistic restructur[ing]" of the business relationship between Republic and United. *See* Motion ¶¶ 19, 26. Courts, including the Second Circuit Court of Appeals, have rejected Rule 9019 settlements when, as here, they contain impermissible features (*e.g.*, class skipping gifts or non-consensual third party releases) even when the settlement, viewed holistically, may be beneficial to the estates. *See, e.g.*, *Motorola, Inc. v. Official Comm. of Unsecured Creditors and JP Morgan Chase Bank, N.A., (In re Iridium Operating LLC)*, 478 F.3d 452 (2d Cir. 2007) (vacating and remanding bankruptcy court's

[9] Moreover, the union's claim would spring into existence only upon the effective date of a plan of reorganization providing for assumption of the revised collective bargaining agreement. Thus, in *Northwest*, affected stakeholders had a right to evaluate and vote on the plan, including the assumption of the agreement, and the concomitant allowance of the claim, which is not the case here.

approval of settlement for further consideration on whether it violated the absolute priority rule); *see also In re Louise's, Inc.*, 211 B.R. 798 (D. Del. 1997) (rejecting 9019 settlement that amounted to *de facto* transfer of control of the debtor to creditor outside plan process). For these reasons, the Motion must be denied.

CONCLUSION

WHEREFORE, for the reasons set forth above, Ad Hoc Committee respectfully requests that the Court deny the relief sought in the Motion and grant the Ad Hoc Committee such other and further relief as may be just.[10]

Dated: June 8, 2016
New York, New York

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[10] In connection with Ad Hoc Committee's request for a stay pending its appeal of the Delta settlement, the Court made some observations about valuation based on the Office of the U.S. Trustee's decision to decline to appoint an official equity committee. By express agreement among the parties, valuation was not litigated in the context of the Delta settlement motion. Similarly, the Ad Hoc Committee does not believe that valuation is relevant to the issues raised in this objection. [redacted]

EXHIBIT A

[Confidential - Filed Under Seal]

EXHIBIT B

[Confidential - Filed Under Seal]

EXHIBIT C

[Confidential - Filed Under Seal]