Hearing Date: September 21, 2016 at 11:00 a.m. (Eastern)
Objection Deadline: September 16, 2016 at 5:00 p.m. (Eastern) (by extension)

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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

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

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 "Debtors") hereby submits this limited objection (the "Objection") 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 [Dkt. No. 957] (the "Motion").[1] In support of the Objection, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Committee fully supports a global resolution between the Debtors and American as being in the best interest of the Debtors' estates and their unsecured creditors, and has no objection to the Commercial Settlement. However, the Committee does object to the Claim Settlement—and more specifically, to a single, unprecedented aspect of the Claim Settlement—on the basis that it is unfairly prejudicial to the Debtors' non-airline unsecured creditors. Significantly, unlike the Debtors' previous settlements with Delta and United, the American settlement expressly contemplates that the Commercial Settlement is severable from the Claim Settlement. *See* Motion ¶ 34.vi.

2. Under the Claim Settlement, the Debtors propose to grant American a general unsecured claim in the amount of $250 million against RAH (the "American Guarantee Claim") and a single general unsecured claim in the amount of $250 million to be split into two claims and allocated against Shuttle America and Republic Airline (the "American Allocable Claim"). *See* Motion at ¶ 34.ii. If this was the totality of the Claim Settlement, the Committee would fully support it. Unfortunately, the Claim Settlement contains an additional wrinkle, which is referred to in this Objection as the "Inflation Provision": In the event that the total allowed general unsecured claims against Republic Airline and Shuttle America exceed $1 billion, then the American Allocable Claim will be increased to an amount that results in American having 25.0% of the total allowed general unsecured claims against Republic Airline and Shuttle America. Similarly, if the total allowed general unsecured claims against RAH exceed $1 billion, then the

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

American Guarantee Claim will be increased to provide American with an American Guarantee Claim that results in American having 25.0% of the total allowed general unsecured claims against RAH. *See* Motion at ¶ 34.iv. The Motion further contemplates that each of Delta and United may be allowed a similar right of claim adjustment to maintain their pro rata distributions of approximately 17% and 19%, respectively, on account of their settled claims. *Id.*

3. The Inflation Provision impermissibly abridges the rights of all other non-airline creditors. This aspect of the Claim Settlement fixes the proportional distributions to be received by each of American, Delta and United (the "Code Share Partners") at an aggregate of 62% relative to other unsecured creditors before the Debtors' actual total claims exposure can be known with any degree of certainty. As a result, the Code Share Partners could receive preferential treatment under a plan before a plan has ever been filed or voted on, much less confirmed by this Court. As such, the Inflation Provision converts the proposed Claim Settlement into an impermissible *sub rosa* plan. Even worse, that plan would be unconfirmable even if appropriately proposed by the Debtors. Accordingly, the Inflation Provision must be stricken if the Court is to approve the Claim Settlement in its present form.

4. The Inflation Provision also fails to satisfy the standards for approval of a settlement under Bankruptcy Rule 9019. The Inflation Provision will be triggered if the total allowed unsecured claims pool against Republic Airline and Shuttle America exceeds $1 billion dollars, and approximately $3.5 billion in unsecured claims have already been scheduled by or filed against those Debtors. The Inflation Provision will also be triggered if the total allowed unsecured claims pool against RAH exceeds $1 billion dollars, and approximately $3 billion in unsecured claims have been scheduled by or filed against that Debtor to date. Given the significant number of potentially large unresolved claims, it is impossible for the Court to assess

the impact of the Inflation Provision on the total allowed claims of the Code Share Partners. But one thing is clear—that impact could be enormous. For every $100 million in non-airline claims above $1 billion, the Code Share Partners' aggregate allowed claims would increase by approximately $160 million by operation of the Inflation Provision. In short, the Code Share Partners' claims could grow astronomically after approval of the Claim Settlement, making it impossible for the Court to evaluate the Claim Settlement's future benefits versus the outcome of litigation with American. Nor can the Court currently determine whether the Claim Settlement "falls 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)). Thus, at best, approval of the Claim Settlement at this point is premature.

5. The Committee is engaged in negotiations with the Debtors and American regarding the Inflation Provision and is hopeful that the parties will be able to reach a consensual resolution in advance of the hearing on the Motion. To the extent a resolution is not reached, however, the Committee respectfully requests that the Court condition approval of the Claim Settlement on the deletion of the Inflation Provision. In the alternative, the Committee requests that the Court defer consideration of the Claim Settlement to allow additional progress to be made regarding the reconciliation of the other unsecured claims asserted against the Debtors, so that the impact of the Inflation Provision on other unsecured creditors' recoveries can be more fully understood.[2] To the extent the Debtors are able to make significant progress in resolving other large unsecured claims against the estates to provide reasonable certainty regarding the

[2] Such a delay would not jeopardize either the Commercial Settlement or the Claim Settlement. As noted above, bifurcation of the Commercial Settlement and the Claim Settlement is expressly contemplated. *See* Motion at ¶ 34.iv. [redacted] . *See* Letter Agreement at § 1.d.

total amount of unsecured claims that are likely to be allowed, the Committee's objection to the Inflation Provision could be largely resolved.

RELEVANT BACKGROUND

6. On February 25, 2016 (the "Commencement Date"), each of the Debtors filed with the Court a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, commencing the above captioned Chapter 11 cases.

7. On March 4, 2016, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed the Committee[3] pursuant to section 1102(a)(1) of the Bankruptcy Code [Dkt. No. 89].

8. On May 3, 2016, the Court approved the terms of a settlement between the Debtors and Delta Air Lines, Inc. (the "Delta Settlement") [Dkt. No. 506] (the "Delta Settlement Order"), pursuant to which the Debtors were authorized to (a) assume the restructured Delta code share agreement and certain related lease agreements, and (b) settle prepetition claims between Delta and the Debtors and certain of Delta's post-petition claims against the Debtors, pursuant to which Delta was granted an allowed general unsecured claim in the amount of $170 million (the "Delta Unsecured Claim"). Among other things, the Delta Settlement includes the "MFN clause," which provides that Delta will be entitled to an increase in the amount or priority of its settled claim in the event another Code Share Partner receives a claim that is "in a greater proportion to such codeshare partners' maximum reasonable damages or in a greater proportion of the economic concessions to the Debtors, than the Delta Claim is to Delta's maximum reasonable damages or economic concessions. . . ." *See* Delta Settlement Order at ¶ 9.

[3] The initial members of the Committee were: (i) GE Engine Services, LLC, (ii) Pratt & Whitney Component Services, (iii) Embraer S.A., (iv) United Airlines, Inc., (v) American Airlines, Inc., (vi) International Brotherhood of Teamsters Airline Division, and (vii) NAC Aviation 23 Limited. NAC Aviation 23 Limited resigned from the Committee effective as of May 24, 2016.

9. On June 3, 2016, the U.S. Trustee amended the Committee appointment [Dkt. No. 630].[4]

10. On June 16, 2016, the Court approved the terms of a settlement between the Debtors and United Airlines, Inc. (the "United Settlement") [Dkt. No. 678] (the "United Settlement Order"), pursuant to which the Debtors were authorized to (a) assume the restructured United code share agreement and certain related lease agreements, and (b) settle prepetition claims between United and the Debtors and certain of United's post-petition claims against the Debtors, pursuant to which United was granted an allowed general unsecured claim in the amount of $193 million (the "United Unsecured Claim"). The United Settlement also includes an MFN clause, although rather than providing United with an automatic increase in the amount of the United Unsecured Claim, it is structured as a covenant that the Debtors will not agree to the allowance of the claim of any other Code Share Partner that is "in a greater proportion to such codeshare partners' maximum reasonable damages or in a greater proportion of the economic concessions to the Debtors" than the United Unsecured Claim is to United's maximum reasonable damages or economic concessions. *See* United Settlement Order at ¶ 7.[5]

11. The United Settlement triggered the MFN clause under the Delta Settlement, resulting in a minor adjustment of the Delta Unsecured Claim up to $173.5 million. *See* United Settlement Order at ¶ 5.

12. On September 2, 2016, the Debtors filed the Motion, pursuant to which the Debtors seek authority to (a) assume the restructured American Airlines code share agreement

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[4] The current members of the Committee are: (i) GE Engine Services, LLC, (ii) Pratt & Whitney Component Services, (iii) Embraer S.A., (iv) United Airlines, Inc., (v) American Airlines, Inc., (vi) International Brotherhood of Teamsters Airline Division, and (vii) Residco (ALF IV, Inc.).

[5] Both the Delta and the United MFN clauses exclude litigated claims. Thus, in the event the Claim Settlement is not approved and American litigates its claims against the Debtors to conclusion, Delta and United would not be entitled to any adjustment of their own claims pursuant to their MFN provisions.

and certain related agreements, and (b) settle prepetition claims between American and the Debtors and certain of American's post-petition claims against the Debtors, in connection with which the Debtors propose to grant American an allowed general unsecured claim in the amount of $250 million (the "American Unsecured Claim"), subject to potential increase under the Inflation Provision.

ARGUMENT

A. The Inflation Provision Provides the Code Share Partners with Preferential Treatment at the Expense of Other Unsecured Creditors

13. If approved, the Inflation Provision will lock in minimum percentage recoveries (likely to be in the form of equity of the Reorganized Debtors) for the Debtors' Code Share Partners, irrespective of the amount of claims that are ultimately allowed in favor of all other unsecured creditors. This is accomplished by increasing the aggregate amount of the Code Share Partners' claims to dilute all other unsecured claims in the event the total unsecured claims pool exceeds $1 billion. That dilution will ensure that the Code Share Partners' claims always comprise at least 62% of the total unsecured claims pool, and that the Code Share Partners receive 62% of any distributions on account of unsecured claims under a plan.

14. So, for example, if aggregate unsecured claims total exactly $1 billion, the Code Share Partners would hold allowed claims under their respective settlements totaling $615.1 million, and other unsecured creditors would hold claims totaling $384.9 million. If the aggregate amount of other unsecured claims is $100 million higher, pushing the aggregate claims pool to $1.1 billion, the amount of the Code Share Partners' claims will automatically be adjusted upwards by 44%, to a total of $775 million. If the aggregate amount of other unsecured claims is $300 million higher, then the Code Share Partners' claims will be increased to almost

$1 billion in the aggregate. This escalation in the Code Share Partners' claims, and the resulting dilution of other unsecured claims, is depicted in the chart below:

Dilution Summary ($ millions)	$1.0 Billion in Claims	$1.1 Billion in Claims	$1.3 Billion in Claims	$1.5 Billion in Claims	% of Total
American	$250.0	$315.0	$444.9	$574.8	25%
Delta	$173.5	$218.6	$308.7	$398.9	17%
United	$191.6	$241.4	$340.9	$440.5	19%
Other Unsecured Claims	$384.9	$484.9	$684.9	$884.9	38%
Total After Inflation Provision Is Applied	N/A	$1,259.8	$1,779.4	$2,299.0	
Other Claims % Before Inflation Provision	N/A	44%	53%	59%	
Increase in Amount of Airline Claims After Inflation Provision Is Applied	N/A	$159.8	$479.4	$799.0	
Percentage of Airline Claims Increase After Inflation Provision Is Applied	N/A	26%	78%	130%	

B. The Inflation Provision Renders the Claim Settlement an Impermissible *Sub Rosa* Plan

15. Where aspects of a transaction dictate the terms of the ensuing plan or constrain parties in exercising their rights in the context of confirmation of a plan, the transaction may be considered a *sub rosa* plan. *See PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets."); *Official Comm. of Unsecured Creditors v. Cajun Elect. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 354 (5th Cir. 1997) (stating that "section 363(b) does not authorize . . . a settlement if the result amounts to a *sub rosa* plan of reorganization"); *In re General Motors Corp.*, 407 B.R. 463, 491 (Bankr. S.D.N.Y. 2009), *aff'd sub nom., Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43 (S.D.N.Y. 2010) ("[A] debtor cannot enter into a transaction that "would amount to a *sub rosa* plan of reorganization" or

"attempt[s] to circumvent the chapter 11 requirements for confirmation of a plan of reorganization.").

16. The *sub rosa* plan concept is a judicially created doctrine based on the recognition that certain significant transactions ought to be voted on by creditors and not merely approved under the bankruptcy court's discretionary powers. The Inflation Provision renders the Claim Settlement just such a transaction.

17. The Inflation Provision guarantees that the Code Share Partners will receive at least 62% of the distributions to unsecured creditors under any plan, even though the amount of other unsecured claims against the Reorganized Debtors has not yet been determined. This allocation of distributions under the plan would be established outside of the protections afforded under a plan approval process, which include the requirement that the Debtors cannot discriminate unfairly between similarly-situated creditors, and that the plan must otherwise be "fair and equitable." *See* 11 U.S.C. §§ 1123(a)(4), 1129(b). Because the Inflation Provision will irretrievably and significantly alter the rights of creditors that are not a party to the Claims Settlement, it should not be approved outside of a plan process. *See, e.g., In re Quality Beverage Co.*, 181 B.R. 887, 895 (Bankr. S.D. Tex. 1995) (declining to approve a settlement agreement because significant creditors were not adequately represented during the drafting of the agreement, and stating that "[n]either the Committee nor the Chapter 11 Trustee should be permitted to bind [other] creditors without the disclosure, claims allowance, and voting safeguards of plan confirmation in Chapter 11").

18. Indeed, in evaluating whether settlements are *sub rosa* plans, one of the key factors that other courts have considered is the impact of those settlements on the rights and recoveries of non-party creditors. *Energy Future Holdings Corp. v. Del. Trust Co.*, No. 15-1591,

2016 U.S. App. LEXIS 8179, at *19 (3d Cir. May 4, 2016) (in addressing a *sub rosa* plan argument, the court considered whether "any other creditor's recovery is impacted by the settlement," and whether "any requirement of Chapter 11 is subverted by the plan"); *DeBenedictis v. Truesdell (In re Global Vision Prods., Inc.)*, No. 09-cv-374 (BSJ), 2009 U.S. Dist. LEXIS 64213, at *18, 20 (S.D.N.Y. July 13, 2009) (in considering whether a settlement constituted a *sub rosa* plan, the court evaluated whether the settlement "dictate[ed] the terms of a future plan," "restrict[ed] any rights afforded to creditors under the Bankruptcy Code," and bound only the parties to the settlement agreement).

19. Critically, not only is the Claim Settlement a *sub rosa* plan, it is a patently unconfirmable *sub rosa* plan. The Inflation Provision gives preferential treatment to the Code Share Partners, at the expense of other similarly situated unsecured creditors. Unlike the MFN clause, the Inflation Provision violates section 1123(a)(4) of the Bankruptcy Code, which requires that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). The MFN clause under the Delta Settlement and United Settlement ensures that the Debtors cannot give preferential treatment to any Code Share Partner in reaching a settlement compared to the other Code Share Partners. This is consistent with section 1123(a)(4), because creditors are free to limit their agreement to accept less beneficial treatment on the condition that other similarly situated creditors must also agree to such treatment.

20. What creditors cannot do under section 1123(a)(4) is agree to give themselves more beneficial treatment at the expense of all other creditors. *See, e.g., Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings)*, 407 B.R. 576, 592 (D. Del. 2009)

("[I]f claims within the same class are not receiving the same treatment, and the holders of those claims being treated less favorably have not consented to the discrimination, the plan is not confirmable."); *In re Quigley Co.*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) (equality of treatment requires that all class members' claims must be of "equal value" through the application of the same pro rata distribution or payment percentage procedures to all claims). This is true even if the creditors to which preferential treatment is proposed to be given have provided benefits to the debtor's estate via a settlement. *New Century*, 407 B.R. at 592 (holding that section 1123(a)(4) was violated where the plan provided a 100% distribution to some claims in a given class and 130% to other claims in that same class even where the holders of the claims proposed to receive 130% had relinquished claims in an entirely different class).

21. The Inflation Provision runs afoul of section 1123(a)(4) because it does exactly what 1123(a)(4) prohibits—it requires the Debtors to give preferential treatment to the Code Share Partners at the expense of all other unsecured creditors without their consent if the aggregate unsecured claims pool turns out to be larger than the Debtors currently hope it will be. Accordingly, the Claims Settlement cannot be approved as proposed.

C. The Claim Settlement Does Not Satisfy the Standards for Approval of a Settlement under Bankruptcy Rule 9019

22. Bankruptcy Rule 9019(a) empowers bankruptcy courts to approve settlements "if they are in the best interests of the estate." *Vaughn v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). A decision to approve a particular compromise or settlement is within the sound discretion of the bankruptcy court. *In re Drexel Burnham*, 134 B.R. at 505.

23. The Second Circuit articulated the standards for determining whether settlements are "fair and equitable" and in the best interests of creditors in *Motorola, Inc. v.*

Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007). The interrelated factors to be considered by a court are:

(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.

24. *Id*. at 462 (citing *TTMT Trailer Ferry Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)). In determining whether to approve a proposed settlement, a bankruptcy court need not decide the numerous issues of law and fact raised by the settlement, but rather should "canvas 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)).

25. The Committee agrees that two of the relevant *Iridium* factors—(2) the chances that the litigation will be complex and protracted, and (5) the competency and experience of counsel supporting the settlement—weigh in favor of approving the Claim Settlement. And the seventh factor, whether the settlement is the product of arm's length bargaining, is of limited relevance. While it is certainly true that the settlement was negotiated at arms' length as

between the Debtors and American, all other unsecured creditors who stand to be adversely affected by the Inflation Provision had no role in negotiating the Claim Settlement.

26. However, as set forth in this Objection, the third and fourth factors—whether the settlement is in the interests of the creditors and the extent to which other parties in interest support the settlement—both weigh heavily against approval of the Claim Settlement. The Inflation Provision means that the total amount of unsecured claims in this case could skyrocket, and that the recoveries by unsecured creditors other than the Code Share Partners will be significantly marginalized.

27. With respect to the remaining *Iridium* factor, the balance between the litigation's likelihood of success and the settlement's future benefits, the Committee submits that neither the Debtors, the Committee, nor the Court have sufficient information at this point to make a determination regarding the benefits of the settlement. In discussing the factors to be taken into account by a court in considering whether to approve a settlement, the *Iridium* court went on to quote the Supreme Court's holding that "the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, <u>and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, including comparing the compromise with the likely rewards of litigation</u>." *Iridium* at 462 (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968) (emphasis added).

28. Because the impact of the Inflation Provision will depend on the total amount of unsecured claims that are ultimately allowed, in determining whether the Claim Settlement is fair and reasonable, the Court's analysis must be based on an understanding of the total amount of

unsecured claims that will ultimately be allowed. At this time, the total amount of liquidated unsecured claims scheduled by or filed against Republic Airline and Shuttle America exceeds $3.5 billion, and the total amount of such claims currently asserted against RAH exceeds $3 billion, even after excluding intra-Debtor claims and claims related to aircraft for which amended financing agreements have been approved by the Court. Those amounts do not include potentially significant claims related to the return or surrender of aircraft and modification or rejection of other contracts that have not even been filed yet. Until the other large unsecured claims have been resolved, it is impossible to know what the allowed unsecured claims pool will be. The Debtors have not moved to estimate the remaining unsecured claims and cannot short circuit the claims reconciliation process through a third party settlement. Without having undertaken the claims reconciliation process, the Court cannot evaluate how large the Code Share Partners' ultimate allowed claims will be following application of the Inflation Provision, or whether the Claim Settlement is in the best interests of other unsecured creditors. Nor can the Court assess whether the proposed Claim Settlement as a whole falls below the "lowest point in the range of reasonableness."

29. The assessment of whether the Claim Settlement is reasonable is further complicated by the exclusion of litigated claims from the MFN clauses under the United and Delta Settlements. In the event American were to litigate its claims against the Debtors to conclusion, resulting in an allowed claim that is higher than $250 million, Delta and United would not be entitled to increased claims under their respective MFN clauses. As a result, the Court must evaluate the risk of an increase in all Code Share Partner claims versus the potential for a higher litigated claim held solely by American (which claim was filed in the amount of up

to $433 million, plus additional potential damages of approximately $195 million in connection with proposed amendments to American's code share agreements with the Debtors).

30. In addition to the seven *Iridium* factors discussed above, the *Iridium* court further held that, "in the Chapter 11 context, whether a pre-plan settlement's distribution plan complies with the Bankruptcy Code's priority scheme will be the most important factor for a bankruptcy court to consider in approving a settlement under Bankruptcy Rule 9019. In most cases, it will be dispositive." *Iridium* at 455. In support of this holding, the court described the priority scheme under the Bankruptcy Code as "a long-standing creditor protection." An equally important protection under chapter 11 is the requirement under section 1123(a)(4) that that equally situated creditors must be treated equally. *See* 11 U.S.C. § 1123(a)(4); *Begier v. IRS*, 496 U.S. 53, 58 (1990)) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."). And, as with the priority scheme, Bankruptcy Rule 9019 does not permit a pre-plan settlement to circumvent that fundamental principle. As discussed above, the Inflation Provision will result in the preferential treatment of the Code Share Partners over other unsecured creditors without their consent and without the protections of the confirmation process. Under the rationale applied by the Second Circuit in *Iridium*, this factor alone should be dispositive in the Court's evaluation of the proposed Claim Settlement.

CONCLUSION

31. For the foregoing reasons, the Committee respectfully requests that this Court (a) approve the Commercial Settlement, (b) deny the Claim Settlement or, in the alternative, defer consideration of the Claim Settlement until the omnibus hearing scheduled for October 20, 2016, and (c) grant such other relief as it deems appropriate.

Dated: September 16, 2016
New York, New York

Respectfully submitted,

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