UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: August 15, 2013
Hearing Time: 10:00 a.m.

In re	:	Chapter 11
	:	Case No. 11-15463 (SHL)
AMR CORPORATION, et al.,	:	
	:	(Jointly Administered)
Debtors.	:	

OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN

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

Tracy Hope Davis, the United States Trustee for Region 2 (the "United States Trustee" or "UST"), respectfully submits this objection (the "Objection") to the Second Amended Joint Chapter 11 Plan of AMR Corporation and its affiliated debtors dated June 5, 2013 (the "Plan").[1] See ECF Doc. No. 8590. In support hereof, the United States Trustee respectfully states:[2]

I. INTRODUCTION

The United States Trustee objects to confirmation of the Plan because the Debtors have failed to meet their burden of proof to show that the Plan satisfies section 1129 of the Bankruptcy Code. The Plan impermissibly provides for:

- Approval of a $20 million severance payment to the Debtors' Chief Executive Officer ("CEO"), which payment is prohibited under a specific statutory provision of the Bankruptcy Code;

- The reimbursement of legal expenses of indenture trustees and members of the Creditors' Committee without requiring that those payments satisfy the requirements of section 503(b); and

- Non-debtor third-party releases and an exculpation provision that do not comport with Second Circuit law or the Bankruptcy Code because they are overly broad.

The United States Trustee respectfully requests that the Court (i) deny the provisions of the Plan that provide for a $20 million severance payment to the Debtors' CEO which do not meet the requirements of section 503(c); (ii) deny any provisions in the Plan that permit fees and expenses to be paid to indenture trustees and to members of the Creditors' Committee without full compliance with the requirements of section 503(b); and (iii) require that the Debtors narrow

[1] Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Second Amended Disclosure Statement, the Second Amended Joint Chapter 11 Plan, and the United States Trustee's Objection to the previous version of the Disclosure Statement. See ECF Doc. Nos. 8590, 8591, and 8309.
[2] The United States Trustee's time to file this Objection was extended to August 2, 2013 at 4:00 p.m. See ECF Doc. No. 9408.

the third party releases and injunction provision and/or require compliance with the law of this Circuit and the Bankruptcy Code.

II. FACTS

A. Background

1. On November 29, 2011, AMR Corporation ("AMR") and certain of its direct and indirect subsidiaries (each a "Debtor" and collectively, the "Debtors") each filed petitions for relief under chapter 11 of the Bankruptcy Code. ECF Doc. No. 1.

2. By Order dated November 29, 2011, the Debtors' cases are being jointly administered. ECF Doc. No. 46.

3. On December 5, 2011, the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Creditors' Committee"). ECF Doc. No. 128.

4. No trustee or examiner has been appointed in these cases.

5. The Debtors continue to operate their respective businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

B. The Merger

9. On February 22, 2013, the Debtors filed a motion (the "Merger Motion") seeking the Court's approval of the merger (the "Merger") of AMR, AMR Merger Sub, Inc. ("Merger Sub") and US Airways Group, Inc. ("US Airways"). ECF Doc. No. 6800. The Merger Motion provided that upon the confirmation and consummation of a chapter 11 plan of reorganization, Merger Sub, a wholly-owned subsidiary of AMR formed for the purpose of effecting the Merger, will be merged with US Airways, with US Airways continuing as the surviving entity as a direct, wholly-owned subsidiary of AMR. See Merger Motion at ¶ 1. Upon the Effective Date of the

Merger, AMR will be named “American Airlines Group Inc.” and the combined company will operate under the “American Airlines” name. Id. at ¶ 31. The closing of the Merger and the effectiveness of the Plan are to occur simultaneously. Id.

10. Among other things, the Merger Motion sought the Court’s approval of certain employee compensation and benefit arrangements including severance compensation of approximately $20 million in cash and stock to Thomas Horton, the Debtors’ CEO, pursuant to the Chairman Letter Agreement dated February 13, 2013, which was attached as Exhibit G to the Merger Agreement. Id. at ¶¶ 33, 76, 86, 89 and Exhibit G.

11. More specifically, the Chairman Letter Agreement provides, in relevant part, that upon the Merger Closing, Mr. Horton’s employment as CEO will terminate and he will be appointed as the Chairman of the Board of Directors for Newco (defined as “New AAG” in the Plan). Id. at Ex. G. It further provides that at the Merger Closing, Mr. Horton will be paid (i) “severance compensation” of $19,875,000 to be paid 50 percent in cash and 50 percent in New AAG common stock (the “$20 Million Severance”); (ii) full vesting of all accrued benefits under the Supplemental Executive Retirement Plan for Officers of American Airlines, Inc. (“SERP”); (iii) lifetime flight and other travel benefits for his spouse and other survivor benefits; and (iv) reimbursement of all legal fees associated with the above benefits. Id.

12. The United States Trustee objected to the Merger Motion on the grounds, inter alia, that the $20 Million Severance to Mr. Horton violated Bankruptcy Code section 503(c)(2). ECF Doc. No. 7138.

13. At the conclusion of the hearing on the Merger Motion held on March 27, 2013, the Court approved the Merger, with the exception of the proposed severance payment to Mr. Horton. Subsequently, on April 11, 2013, the Court rendered a Memorandum of Decision, in

which the Court found "that section 503(c) prohibits the authorization of the $20 million severance payment to Mr. Horton." In re AMR Corp., 490 B.R. 158, 169 (Bankr. S.D.N.Y. 2013).[3]

14. By Order dated May 10, 2013, the Court approved the Merger. ECF Doc. No. 8096.

C. The Disclosure Statement and Chapter 11 Plan

15. On April 15, 2013, the Debtors filed the proposed Joint Chapter 11 Plan of AMR and its affiliated Debtors and related Disclosure Statement. ECF Doc. Nos. 7631, 7632.

16. On May 24, 2013, the United States Trustee filed an Objection to the Debtors' Disclosure Statement. ECF Doc. No. 8309. In her Objection, the United States Trustee argued that (i) the Debtors failed to provide adequate information concerning certain provisions of the Plan, including, but not limited to, Mr. Horton's $20 Million Severance and third party releases; and (ii) the Plan was not confirmable because it sought to impermissibly reimburse legal expenses of certain key creditors and the payment Mr. Horton's $20 million severance in violation of section 503(b) and/or 503(c). Id.

17. On June 5, 2013, the Debtors filed the Second Amended Disclosure Statement and Second Amended Joint Chapter 11 Plan. ECF Doc. Nos. 8590, 8591.

18. By Order dated June 7, 2012, the Court approved the Second Amended Disclosure Statement. ECF Doc. No. 8614. The Court did not rule on the merits of the United States Trustee's confirmation objections when approving the Second Amended Disclosure Statement.

[3] In its Memorandum of Decision, the Court did not decide whether the Debtors could invoke section 1129(a)(4) as a basis to justify a post-emergence severance payment to Mr. Horton. AMR, 490 B.R. at 170, n.16.

19. The hearing to consider confirmation of the Plan is scheduled for August 15, 2013, at 10:00 a.m. Id.

III. OBJECTION

A. Confirmation Standards and Statutory Framework

There are two relevant statutes governing chapter 11 plan provisions and confirmation. Section 1123(b)(6) allows plan proponents to include terms that are "not inconsistent with the applicable provisions" of the Code. 11 U.S.C. § 1123(b)(6). Section 1129 of the Bankruptcy Code authorizes the bankruptcy court to confirm a plan only when it "complies with the applicable provisions of the Code." 11 U.S.C. § 1129. The plan proponent bears the burden of establishing compliance with section 1129. In re Charter Commc'ns, 419 B.R. 221 (Bankr. S.D.N.Y. 2009) (citing Heartland Fed. Savs. & Loan, Ass'n v. Briscoe Enters. (In re Briscoe Enters.), 994 F.2d 1160, 1165 (5th Cir. 1993) (stating that "[t]he combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown")); In re Worldcom, Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *46 (Bankr. S.D.N.Y. Oct. 31, 2003) (citing Briscoe).

Section 1129(a) of the Bankruptcy Code contains 16 standards that must be met for the Court to confirm a plan. 11 U.S.C. § 1129(a). Two of those sixteen requirements are relevant here. Section 1129(a)(1) requires that the Court find that the plan "complies with the applicable provisions of" the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Section 1129(a)(4) requires that the Court exercise substantive control over fees and costs related to the Chapter 11 case:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. §1129(a)(4). Section 1129(a)(4) is designed to "insure compliance with the policies of the Code that (1) the bankruptcy court should police the awarding of fees in title 11 cases and (2) holders of claims and interests should have the benefit of such information as might affect the claimants' decision to accept or reject the plan." See In re TCI 2 Holdings, LLC, 428 B.R. 117, 145-46 (Bankr. D.N.J. 2010) (internal quotation omitted) ("While a strong argument might be made that payments that are not made to fiduciaries and that do not deplete the bankruptcy estate need not be subject to court approval, this is simply not the decision that Congress has chosen to make.").

The Bankruptcy Code also provides that Chapters 1, 3, and 5 of the Bankruptcy Code apply in chapter 11 cases, subject to an exception not applicable here. 11 U.S.C. § 103(a). One "applicable" provision is section 503. As relevant to this Objection, section 503(c)(2) provides that "there shall neither be allowed, nor paid" a severance payment to an insider of a debtor, unless the payment complies with the standards set forth therein. Section 503(b)(3)(D) allows a party to recover administrative expenses for "making a substantial contribution" in a chapter 11 case. Section 503(b)(3)(F) allows a member of an official creditors' committee to recover expenses "incurred in the performance of the duties of such committee." Finally, section 503(b)(4) allows a party to recover attorneys' fees when an "expense is allowable under subparagraph (A), (B), (C), (D), or (E)" — but not subparagraph (F) — of section 503(b)(3).

For the reasons set forth below, the Debtors have not met their burden of proof showing that the Plan satisfies the confirmation standards of section 1129 of the Bankruptcy Code.

B. The Court Should Not Approve the Chairman Letter Agreement As Part of the Plan Because it Provides for a $20 Million Severance Payment That This Court Found is Not Authorized Under Section 503(c) of the Bankruptcy Code

(i) The $20 Million Severance Violates Section 503(c)

Pursuant to the Plan, the Debtors seek approval of the Chairman Letter Agreement, which includes a $20 million severance payment to the Debtors' CEO. Plan at Art. 6.24. This proposed payment is identical to the severance payment that was previously proposed by the Debtors in connection with the Merger Motion. Indeed, the only apparent difference between the Debtors' current request for approval of the Chairman Letter Agreement and their previous unsuccessful request in connection with the Merger is that the Debtors are now seeking this relief pursuant to the Plan.

Section 503(c) provides in pertinent part that "there shall neither be allowed, nor paid . . . a severance payment to an insider of the debtor" unless two criteria are met: (1) the payment must be part of a program that is generally applicable to all full-time employees and (2) the amount of the payment cannot exceed ten times the amount of the mean severance payment given to non-management employees during the same calendar year. 11 U.S.C. § 503(c)(2)(A), (B). Notably, because section 503(c) speaks to the allowance as well as the payment of obligations, it applies with equal force regardless of whether the payment is to be made by the debtor prior to plan confirmation, or whether the successor of the debtor is directed to make such a payment after emergence from bankruptcy. See In re Dana Corp., 351 B.R. 96, 102 (Bankr. S.D.N.Y. 2006) (applying 11 U.S.C. § 503(c) to bonus and severance payments that were to be made to debtor's insider upon emergence from bankruptcy); TCI 2, 428 B.R. at 171-72 (holding severance provision invalid under section 503(c)(2) notwithstanding fact that severance was to be paid after plan effective date by reorganized debtor).

This Court has already determined that because Mr. Horton qualifies as an insider and the proposed payment is severance, AMR, 490 B.R. at 166, n.10, the proposed severance payment to Mr Horton is prohibited by section 503(c). Id. at 160, 170. Indeed, aside from one argument fully addressed below, the Debtors' arguments as to why section 503(c) does not apply have been fully considered and ultimately rejected by this Court. First, the Court properly rejected the Debtors' contention that section 503(c) does not apply because the severance payment would be paid by the new enterprise created by the Merger and not by the Debtors. Id. at 169. Second, the Court appropriately rejected the Debtors' argument that section 363 provides a basis for immediate approval of the severance payment. Id. Finally, the Court found that the offer made by the Debtors during the hearing to amend the Merger Agreement to require the board of Newco to vote on the severance payments before any severance payment could be made would not obviate the need for the Debtors to comply with the requirements of section 503(c). Id.

The Court's findings in this regard are the law of the case, and the arguments thereto need not be repeated herein. Di Laura v. Power Auth. of N.Y., 982 F.2d 73, 76 (2d Cir. 1992) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"); United States v. Quintieri, 306 F.3d 1217, 1230 (2d Cir. 2002) (although adherence to law of the case doctrine is discretionary, departure from the doctrine is justified only when there are "cogent" and "compelling" reasons for doing so).

At the time of the Merger Hearing, however, a proposed plan of reorganization had not been filed and an appropriate record had not been made. The Court, therefore, reserved the Debtors' contention that section 1129(a)(4) was a basis to justify a post-emergence severance payment to Mr. Horton. AMR, 490 B.R. at 170, n.16. As discussed below, the Debtors' reliance upon the general terms of section 1129(a)(4), as opposed to the specific statutory provisions that govern severance payments is misplaced, contrary to controlling canons of statutory construction, and should be rejected by this Court.

(ii) Under the Supreme Court's Decision in RadLAX, the Debtors Cannot Circumvent 11 U.S.C. § 503(c)(2) by Relying on More Generalized Provisions of the Bankruptcy Code

The Debtors have argued that the proposed severance payment to Mr. Horton need not comply with section 503(c), but rather may be allowed pursuant to section 1129(a)(4). See, e.g., Debtors' Omnibus Reply to Objections to the Disclosure Statement for Debtors' Joint Chapter 11 Plan and Related Solicitation Procedures, ECF Doc. No. 8485 at ¶¶ 9-11. As discussed in further detail below, the Debtors cannot circumvent the specific statutory limitations under section 503(c) by relying upon more generalized provisions of the Bankruptcy Code, such as section 1129(a)(4).

The requirements of section 503(c) apply whether the severance payment is being proposed as part of a Merger Agreement or as a provision in a proposed plan of reorganization. The general prohibition of that section is clear and without qualification: "there shall neither be allowed, nor paid," certain transfers. 11 U.S.C. § 503(c). Moreover, section 1129(a)(1) provides that the Plan must comply with the applicable provisions of the Bankruptcy Code. This includes section 503(c). Thus, the fact that the Chairman Letter Agreement is now being presented in a different context does not cure its violation of section 503(c). Although the Court, in its Memorandum of Decision, declined to rule on whether the Debtors could invoke section 1129(a)(4) as a basis to justify the post-emergence severance payment to Mr. Horton, see AMR, 490 B.R. at 170, n.16, the United States Trustee's arguments as to why this payment is prohibited are similarly applicable in the Plan context.

Section 1129(a)(1) allows the Court to approve a plan only if it complies with all of the Code's "applicable" provisions. In enacting section 103(a), Congress statutorily prescribed what those "applicable" provisions are. By its own terms, section 103(a) makes all of chapter 5 (which includes section 503) "applicable" in chapter 11.

The Debtors posit that section 1129(a)(4)'s reasonableness requirement provides the governing standard for the Court's determination of the $20 million severance payment, in lieu of section 503(c)(2). Nothing in the text of 1129(a)(4), however, purports to override specific prohibitions that exist elsewhere in the Bankruptcy Code. See TCI 2, 428 B.R. at 145-47 (holding that proponents of plan could not bypass section 503 by relying on section 1129(a)(4) as authorization for payments of creditor attorney fees).

Although certain reported decisions have construed section 1129(a)(4) as providing authority to make payments under a plan that are not otherwise authorized under section 503, see, e.g., In re Lehman Bros. Holdings Inc., 487 B.R. 181 (Bankr. S.D.N.Y. 2013), appeal docketed, 13-cv-02211-RJS (S.D.N.Y. Apr. 3, 2013); In re Adelphia Commc'ns Corp., 441 B.R. 6 (Bankr. S.D.N.Y. 2010); In re Journal Register Co., 407 B.R. 520, 535-36 (Bankr. S.D.N.Y. 2009) (approving post-emergence incentive payments under section 1129(a)(4)), those holdings are questionable in light of the Supreme Court's decision in RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012). Adelphia and Journal Register were decided prior to RadLAX and in Lehman, which is currently on appeal, the Court did not discuss RadLAX.

In RadLAX, the Supreme Court held that a bankruptcy court could not confirm a plan that proposed to circumvent a Code provision giving specific protections to secured creditors by instead relying on a more general provision that did not provide those same protections. 132 S. Ct. at 2071-72. Noting the "commonplace of statutory construction that the specific governs the general," the Court held that where "a general authorization and a more limited, specific, authorization exist side by side . . . the terms of the specific authorization must be complied with." Id. at 2071. This rule "is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." Id. (internal citations omitted).

These rules of statutory construction do not change even if the parties consent to the allowance of the payment under section 1129(a)(4), because the bankruptcy court is not relieved of its duty to deny confirmation of plan provisions that do not comply with the Bankruptcy Code. United Student Aid Funds Inc. v. Espinosa, 130 S. Ct. 1367 (2010). In Espinosa, the Court ruled that a bankruptcy court should not have confirmed a chapter 13 plan that granted the debtor a discharge of student loan debt inconsistent with the statutory requirement that the debtor first obtain a judicial determination that repayment would constitute an undue hardship. Id. at 1380-81; see 11 U.S.C. § 523(a)(8) (excepting student loan debts from discharge unless the court finds undue hardship). In so doing, the Court overruled the Ninth Circuit's holding that a bankruptcy court may confirm a plan that contains improper provisions if no one objects.

The Supreme Court explained that 11 U.S.C. § 1325(a)(1), which authorizes the bankruptcy court to confirm a plan only if it complies with the "applicable provisions" of the Bankruptcy Code, "makes plain that bankruptcy courts have the authority — indeed the obligation — to direct a debtor to conform his plan to the requirements" of the Code. Id. at 1380-81. Section 1325(a)(1), like its chapter 11 counterpart[4] thus "*requires* bankruptcy courts to

[4] Although Espinosa concerned a plan under chapter 13 of the Bankruptcy Code, the provision at issue in *Espinosa* is virtually identical to its counterpart in chapter 11. Compare 11 U.S.C. § 1325(a)(1) (requiring that the plan comply with the "applicable provisions of this title") with 11 U.S.C. § 1129(a)(1) (requiring that the plan comply with the "applicable provisions of this title"). Accordingly, the Supreme Court's reasoning in Espinosa is fully applicable to chapter 11 cases.

address and correct a defect in a debtor's proposed plan even if no creditor raises the issue." Id. at 1381 n.14 (emphasis in original).

Similarly, in Cushman & Wakefield of Connecticut, Inc. v. Keren Limited Partnership, 189 F.3d 86 (2d Cir. 1999), a professional tried to use a broad provision of the Code to negate a specific limitation on a type of professional fee under section 503(b)(2). The professional could not meet the requirements for a section 503(b)(2) award, so it argued that it could obtain the fees under section 503(b)(1)(A), a provision that more broadly authorized administrative expense payments. The Second Circuit rejected that argument, and held that a broadly-worded provision of the Bankruptcy Code could not excuse the professional's noncompliance with the specific provision governing the administrative expense. Id. The Second Circuit reasoned that "[i]f a [professional] were able to be compensated under section 503(b)(1)(A), it would render [the statutory prerequisite in section 503(b)(2)] nugatory." Id. (internal modifications, quotation, and citation omitted).

Nothing in the text of section 1129(a)(4) can be reasonably read as overruling sections 103(a), 1129(a)(1), or any other provision of the Code, that (1) creates a general limitation on the applicability of section 503(c)(2) in chapter 11 cases, (2) allows parties to cherry-pick which of section 1129(a)'s sixteen plan-confirmation requirements apply (in violation of RadLAX) or (3) authorizes parties to consent to improper plan provisions (in violation of Espinosa).

Allowing **s**uch an expansive reading of section 1129(a)(4) would, in effect, nullify much of the Bankruptcy Code in chapter 11 cases with confirmed plans. Although section 503 and other specific Code provisions comprehensively control payments in bankruptcy, all of these provisions could be ignored, simply by invoking section 1129(a)(4) and funneling the payments through a plan. This is not what Congress intended when it enacted section 1129(a)(4).

As the Supreme Court explained in RadLAX, the "general language of a [Bankruptcy Code] statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." RadLAX, 132 S. Ct. at 2071. [T]his is "particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." Id. (internal quotation and citation omitted). After all, "the avoidance of unhappy consequences is not an adequate basis for interpreting a text." Nixon v. Mo. Mun. League, 541 U.S. 125, 141 (2004) (Scalia, J. Concurring). Cf Raleigh v. Ill. Dept. of Revenue, 530 U.S. 15, 24-25 (2000) ("Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides.").

C. The $20 Million Severance Payment is Not Reasonable Under the Facts and Circumstances of the Bankruptcy Cases

As this Court has previously observed, section 503(c) was added to the Bankruptcy Code in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, to "eradicate the notion that executives were entitled to bonuses simply for staying with the company through the bankruptcy process." See AMR, 490 B.R. at 165. The proponent of the amendment, the late Senator Edward Kennedy, expressed concern over the "glaring abuse of the bankruptcy system by the executives of giant companies . . . The effect of adding the section was to put in place 'a set of challenging standards' and 'high hurdles' for debtors to overcome before payments could be made." Id. (citing In re Global Home Prods., LLC, 369 B.R. 778, 784-85 (Bankr. D. Del. 2007)).

Clearly, the concerns expressed by Senator Kennedy are still relevant years after the BAPCPA amendments were promulgated. Here, not only are the Debtors seeking confirmation of a plan that provides for a $20 million severance payment without meeting the specific requirements of the Bankruptcy Code, but that proposed severance payment is above and beyond what Mr. Horton could have expected to be paid under his employment contract if these cases had not filed for bankruptcy protection. Indeed, prior to the filing of the bankruptcy petitions, the Debtors entered into executive termination benefit agreements, entitled "AMR Existing Severance Agreements," with certain of their executive officers including Mr. Horton. See Amendment No. 3, SEC Form S-4 Registration Statement dated June 10, 2013 at p. 36, 272 (the "Amended S-4"). Based on the Debtors' Amended S-4, the following table depicts Mr. Horton's severance, long-term incentives, and flight privileges that he would have received had his employment ended on December 31, 2012:

	Retirement ($)	**Voluntary Separation ($)**	**Death ($)**	**Disability ($)**	**Termination Other Than For Cause ($)**
Cash Severance Benefits	—	—	—	—	618,135
Long-Term Incentives	—	0	231,814	231,814	309,656
Pension Benefits (a)	0	5,503,296	5,503,296	5,503,296	5,503,296
Flight Privileges (b)	6,540	6,540	6,540	6,540	6,540
Total	6,540	5,509,836	5,741,650	5,741,650	6,437,627

Amended S-4 at 271. By the Debtors' own admission, if the Debtors had terminated Mr. Horton on December 31, 2012, the most Mr. Horton would have been entitled to receive under non-bankruptcy law would be $6.4 million. See id.

Pursuant to the AMR Existing Severance Agreement, in the event of a "change of control," Mr. Horton would be entitled to the following benefits:

Cash Severance ($)	Value of Stock Option/ SARs Vesting ($)	Value of Vesting of Non-Performance-Based Stock Awards ($)	Value of Vesting of Performance-Based Stock Awards ($)	Value of Additional Pension Benefits ($)	Outplacement, Relocation, and Continuing Perquisites and Benefits ($)	Flight Privileges ($)	Gross-up Payment for 280G Excise Taxes ($)	Total Change in Control Benefits ($)
2,967,048	0	241,280	235,480	7,364,305	438,107	0	4,085,917	15,332,137

Amended S-4 at 274. According to the Debtors' Amended S-4, a change of control is deemed to occur if:

> (i) over a 12-month period, a third party or group acquires beneficial ownership of 30% or more of its common stock, or the members of its board of directors (or their approved successors) no longer constitute a majority of the board; or (ii) its stockholders approve a complete liquidation or dissolution of AMR. Also, a reorganization, merger, or consolidation, or a sale or other disposition of all of AMR's assets, is considered a change in control of AMR unless: (a) AMR's stockholders prior to the transaction hold at least 50% of the voting securities of the successor company, (b) no one person owns more than 30% of the successor company, and (c) the members of its board of directors prior to the transaction constitute at least a majority of the board of the successor company. The event must also meet the change in control requirements of Section 409A of the Code. The Merger does not constitute a change in control for purposes of these plans or agreements.

Id. at 272 (emphasis added). Although the Debtors' Amended S-4 characterizes the Merger with US Airways as not constituting a change of control, the plain language of the provision does not appear to exclude the contemplated merger as constituting a change in control. The Debtors' conclusion to the contrary is necessary to pave the way for the inflated $20 million severance payment, thereby bypassing the limitation imposed by Mr. Horton's own pre-petition employment agreement, which contemplates a maximum pay-out of $15.3 million.

Notably, it is not likely that the sum of $15.3 million that Mr. Horton may have anticipated as a severance payment under his employment contract prior to the filing of these chapter 11 cases, would meet the requirements of section 503(c)(2). But, the fact that the Debtors have the temerity to propose a severance payment that well exceeds the severance payment that would have been made in the CEO's pre-petition employment contract demonstrates the need for continued vigilance over the "glaring abuse of the bankruptcy system by . . . executives, who lined their own pockets but left thousands of employees and retirees out in the cold." In re Dana Corp., 358 B.R. 567, 575 (Bankr. S.D.N.Y. 2006). The specific provisions of section 503(c) must be imposed whether the proposed severance payments are contained in a merger agreement or in a plan of reorganization.

D. The Plan's Award of an Automatic Administrative Expenses to Committee Members and Indenture Trustees Violates 11 U.S.C. § 503(b)

Pursuant to the Plan, the Debtors also intend to pay the professional fees and expenses (including attorneys' fees), without any review by the Bankruptcy Court, of (i) the indenture trustees (to the extent payable pursuant to the terms of the applicable Bond Documents) and (ii) the individual members of the Creditors' Committee (including professional fees in an amount to be agreed upon by the Debtors and Creditors' Committee). Plan at Art. 2.4 and 6.23. The Debtors propose to pay these fees as Allowed Administrative Expenses, which means that for the Plan to be confirmed, they must be paid in cash and in full on the Effective Date. 11 U.S.C. § 1129(a)(9)(A).

These provisions conflict with the statutory standards and procedures for payment of administrative expenses set forth in the Bankruptcy Code for at least two reasons. First, they authorize certain creditors to be paid administrative expenses without meeting their evidentiary burden for payment under section 503. Second, they authorize payment for the individual attorney fees of Committee members incurred in connection with their Committee service—which payments are prohibited by the Bankruptcy Code.

(i) 11 U.S.C. § 503(b)(3) and (5)

Section 503 of the Bankruptcy Code governs administrative expense payments from the bankruptcy estate. 11 U.S.C. §§ 103(a), 503(b). Section 503(b)(3) authorizes the Court to allow, as an administrative expense, "the actual, necessary expenses," incurred by a creditor or indenture trustee who has made a "substantial contribution" in a chapter 11 case. 11 U.S.C. § 503(b)(3)(D). In addition, section 503(b)(5) authorizes compensation "for services rendered by an indenture trustee in making a substantial contribution." 11 U.S.C. § 503(b)(5). Neither of these provisions authorizes creditors or indenture trustees to be compensated automatically, and in both cases requires them to meet an evidentiary burden of establishing a "substantial contribution." Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.), 479 F.3d 167, 172 (2d Cir. 2007) (Sotomayor, J.) ("the burden of proving entitlement to priority payment as an administrative expense . . . rests with the party requesting it"); see Trs. of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 101 (2d Cir. 1986) (internal quotation and citation omitted) ("If one claimant is to be preferred over others, the purpose should be clear from the statute"); Gen. Am. Transp. Corp. v. Martin (In re Mid Region Petroleum, Inc.), 1 F.3d 1130, 1132 (10th Cir. 1993) ("For a claim to rise to the level of an administrative expense, it must fit within one of the categories listed in 11 U.S.C. § 503(b)").

This burden is "particularly difficult." In re Hooker Invs., Inc., 188 B.R. 117, 120 (S.D.N.Y. 1995). Among other things, the creditor or indenture trustee must demonstrate that its actions were "extraordinary" and resulted in a "direct, significant, and demonstrably positive benefit upon the estate." In re Best Prods. Co., Inc., 173 B.R. 862, 865-66 (Bankr. S.D.N.Y. 1994).

The mere act of participating in a successful reorganization process does not constitute a substantial contribution, see In re Granite Partners, Inc., 213 B.R. 440, 449 (Bankr. S.D.N.Y. 1997), and a creditor is not entitled to compensation simply for performing its fiduciary duties. See In re Flight Transp. Corp. Secs. Litig., 874 F.2d 576, 581 (8th Cir. 1989) (denying application of indenture trustee and holding that section 503(b) "must require something more than satisfactory performance of fiduciary duties"). Finally, "efforts undertaken by creditors solely to further their self-interest are not compensable under section 503(b)," Best Prods., 173 B.R. at 866, and a creditor will not be entitled to a substantial contribution award unless it rebuts the presumption that its activities were primarily undertaken for its own private benefit. See Hooker Invs., 188 B.R. at 120 (noting that creditors are presumed to act primarily in their own interests); Lebron v. Mechem Financial, Inc., 27 F.3d 937, 946 (3rd Cir. 1994) (same).

Here, the Plan violates sections 503(b)(3) and (5) because it does not require the indenture trustees or the Creditors' Committee members to establish that they made a substantial contribution in order to be paid. Rather, payment to these creditors will be made as long as the fees and expenses are "reasonable." The Plan does not identify any statutory or legal principle that permits the Debtors to ignore section 503(b), nor is there any explanation as to what constitutes a "reasonable" fee or expense. Presumably, the Debtors seek this relief under section 1129(a)(4).

(ii) Payment of Committee Members' Professional Fees Violate 11 U.S.C. § 503(b)(3)(F) and (b)(4)

The Bankruptcy Code enumerates nine circumstances in which parties may recover administrative expenses from the bankruptcy estate. 11 U.S.C. § 503(b)(1)-(9). One provision specifically allows a member of an official committee to recover expenses "incurred in the performance of the duties of such committee." 11 U.S.C. § 503(b)(3)(F).

Prior to 2005, committee members could also recover personal attorneys' fees incurred in connection with their committee duties. Section 503(b)(4) previously permitted:

> reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection.

11 U.S.C. § 503(b)(4) (2000) (amended 2005). As committee members' expenses were allowed by section 503(b)(3)(F), their personal attorneys' fees could have been recovered under the pre-amendment text of section 503(b)(4).

But in 2005 Congress rewrote section 503(b)(4) to prevent committee members from recovering personal attorneys' fees for committee-related work. It accomplished that by revising section 503(b)(4) to allow only:

> reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection.

11 U.S.C. § 503(b)(4) (2006) (current version) (emphasis added). Given that paragraph (3) only contains subparagraphs (A)-(F), excluding subparagraph (F) from that list was a specific solution to a specific problem.

Section 503(b)(4)'s legislative history confirms that Congress deliberately omitted subparagraph (F) from section 503(b)(4) to prohibit committee members from recovering personal attorneys' fees. Congress enacted BAPCPA "to correct perceived abuses of the bankruptcy system." Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1329 (2010). As part of those reforms, Congress found it necessary "to limit the types of compensable professional services rendered by an attorney or accountant that can qualify as administrative expenses in a bankruptcy case." H.R. Rep. No. 109-31, at 142 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 201. Congress thus amended section 503(b)(4) so that "[e]xpenses for attorneys or accountants incurred by individual members of creditors' or equity security holders' committees are not recoverable but expenses incurred for such professional services incurred by such committees themselves would be." Id; accord 4 Collier on Bankruptcy ¶ 503.LH[3] (16th ed. 2010) (explaining that the 2005 amendment to section 503(b)(4) "correct[ed] a drafting error made during the 1994 Act, when section 503(b)(3)(F) was added," which had inadvertently allowed committee members to recover personal attorneys' fees for committee-related work).

Yet, the Debtors' Plan allows the Committee members to recover exactly what Congress specifically prohibited: their legal fees - without regard to whether those fees were incurred in connection with, or independently from, their committee service. Although bankruptcy courts in this District have held otherwise, see Lehman,[5] the United States Trustee disagrees with that holding and notes that it is not binding upon this Court. In re Madison Ave. Ltd. P'ship, 213 B.R. 888, 890, n.2 (Bankr. S.D.N.Y. 1997).

Nothing in the statutory context or legislative history suggests that Congress intended for parties to nullify section 503(b)(4)'s limitation by simply deeming a payment to be an allowable section 503(b) administrative expense in a plan under 1129(a)(4). To the contrary, as set forth above, section 1129(a)(1) requires that the plan "compl[y]" with the Bankruptcy Code. In turn, section 503(b) is the only statutory provision in the Bankruptcy Code that establishes a standard for allowing these expenses. 11. U.S.C. § 503(b); Bethlehem Steel, 479 F.3d at 172; Mid Region Petroleum, Inc., 1 F.3d at 1132. The plain language of sections 103(a) and 503(b) does not limit section 503(b)'s applicability. See 11 U.S.C. § 103(a); Patterson v. Shumate, 504 U.S. 753, 758 (1992). Nor is there anything in the statutory context that supports modifying the scope of the statute. See Water Transp. Ass'n v. ICC, 722 F.2d 1025, 1028-29 (2d Cir. 1983). Further,

[5] In Lehman, the court found that although members of a creditors' committee might have been unable to obtain reimbursement under section 503(b) for legal fees incurred in connection with their service on committee, these expenses were permissible under section 1129(a)(4) if contained in a provision in a confirmed plan.

because Congress specifically amended the statute to prohibit these fees to be allowed, this Court should "presume [Congress] intends its amendment to have real and substantial effect." Stone v. INS, 514 U.S. 386, 397 (1995); see H.R. Rep. No. 109-31, at 142.

The plain meaning of the Bankruptcy Code's text is congruent with Second Circuit law prohibiting administrative expense claimants from authority shopping when they would otherwise be ineligible for compensation under a specific part of section 503(b). In Keren, a professional tried to use a broad provision to negate a specific limitation on a type of professional fee under section 503(b)(2). The professional could not meet the requirements for a section 503(b)(2) award, so it argued that it could obtain the fees under section 503(b)(1)(A), a provision that more broadly authorized administrative expense payments. Keren, 189 F.3d at 87-88.

Similarly, the Committee Members here are specifically prohibited from recovering personal attorneys' fees under sections 503(b)(3)(F) and 503(b)(4) because those fees were merely incurred in connection with their duties as Committee members and not for making a substantial contribution to these cases.[6] The Second Circuit rejected that argument in Keren and held that a broadly-worded provision of the Bankruptcy Code could not excuse noncompliance with the specific provision governing the administrative expense. Id.; see also RadLAX and Espinosa, supra. The Second Circuit reasoned that "[i]f a [professional] were able to be compensated under section 503(b)(1)(A), it would render [the statutory prerequisite in section 503(b)(2)] nugatory." Id. (internal modifications, quotation, and citation omitted).

[6] There is no dispute that individual Committee members are entitled to administrative expense claims for expenses incurred in the performance of their committee duties (i.e., expenses for travel, lodging and meals). See 11 U.S.C. § 503(b)(4); 4 Collier on Bankruptcy ¶ 503.11[6].

RadLAX and Keren direct the outcome here. Congress has enacted a comprehensive scheme governing the allowance of administrative expenses. 11 U.S.C. § 503. A 2005 law intended "to correct perceived abuses of the bankruptcy system," Milavetz, 130 S. Ct. at 1329, specifically amended section 503(b)(4) so that "[e]xpenses for attorneys or accountants incurred by individual members of creditors' or equity security holders' committees are not recoverable." H.R. Rep. No. 109-31, at 142 (2005). If a committee member could recover administrative expenses for personal attorneys' fees under a plan notwithstanding section 503(b)(4)'s specific limitation, it would render Congress's 2005 amendment "nugatory" in any chapter 11 case with a plan and thus contravene Congress's specific intent to prohibit those fees. See RadLAX, 132 S. Ct. at 2071; Keren, 189 F.3d at 88.

Because sections 503(b)(3)(F) and 503(b)(4) are the specific provisions that govern these payments, consistent with Congress' 2005 amendment, the Committee members are prohibited from recovering their attorney and professional fees as administrative expense payments for their Committee-related work under the Plan.[7]

Finally, as set forth above at Section III(B)(ii) of this Objection, the Debtors should not be permitted to circumvent a specific provision of the Bankruptcy Code by relying on a more generalized provision under section 1129(a)(4).

[7] Keren is not an anomaly. The Third and Seventh Circuits agree that section 503(b)(1)'s general authorization does not provide independent authority to allow administrative expenses inconsistent with section 503(b)(2). In re Milwaukee Engraving Co., 219 F.3d 635, 637 (7th Cir. 2000); F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.), 844 F.2d 99, 108-09 (3d Cir. 1988). In addition, the Third Circuit has similarly ruled that a bankruptcy court's general grant of equitable authority under 11 U.S.C. § 105(a) does not provide independent authority to grant administrative expense status to wage claims that do not qualify as administrative expenses under section 503(b)(1). Former Emps. of Builders Sq. Retail Stores v. Hechinger Inv. Co. of Del. (In re Hechinger Inv. Co. of Del.), 298 F.3d 219, 228 (3d Cir. 2002).

E. The Exculpation and Third Party Releases Contained in the Plan Do Not Satisfy Section 1129(a)(1) and (a)(3)

The Plan contains an exculpation provision proposing to release non-debtor third-parties from various claims and liabilities and enjoin claims by and against non-debtor third-parties. Plan Art. 10.6–10.8. In order for the Court to approve the exculpation and third party releases under the Plan, the Debtors must demonstrate that such provisions are not inconsistent with the Second Circuit's decisions in In re Johns-Manville Corp., 517 F.3d 52 (2d Cir. 2008) ("Manville II"), vacated & remanded on other grounds, 557 U.S. 137 (2009), aff'g in part & rev'g in part, 600 F.3d 135 (2d Cir. 2010) ("Manville III") and Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F. 3d 136, 141 (2d Cir. 2005).

In Metromedia, the Second Circuit held that non-debtor third-party releases are proper only in "rare cases." Metromedia, 416 F. 3d at 141. The Second Circuit articulated at least two reasons for its reluctance to approve these releases:

> First, the only explicit authorization in the Code for non-debtor releases is 11 U.S.C. § 524(g), which authorizes releases in asbestos cases when specified conditions are satisfied, including the creation of a trust to satisfy future claims, [and] . . .
>
> Second, a non-debtor release is a device that lends itself to abuse. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect it may operate as a bankruptcy discharge without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.

Id. at 142.

The Second Circuit held that "[i]n bankruptcy cases, a Court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the Debtors' reorganization plan." Id. at 141 (quoting SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 960 F.2d 285, 292 (2d Cir. 1992)). The appellate court cautioned, however, that a non-debtor third-party release is not considered to be adequately supported by consideration simply because the non-debtor contributed something to the reorganization and the enjoined creditor took something out. Metromedia, 416 F.3d at 143. Rather, "[a] non-debtor third-party release should not be approved absent a finding by the court that 'truly unusual circumstances' exist that render the release terms important to the success of the plan." Id.

Subsequent cases further clarify the Metromedia requirements. For example, in In re DBSD North America, Inc., the Court stated:

> As the Second Circuit's decision in Metromedia and my earlier decision in Adelphia provide, exculpation provisions (and their first cousins, so-called "third party releases") are permissible under some circumstances, but not as a routine matter. They may be used in some cases, including those where the provisions are important to a debtor's plan; the claims are "channeled" to a settlement fund rather than extinguished; the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution; the released party provides substantial contribution; and where the plan otherwise provides for full payment of the enjoined claims.

In re DBSD N. Am., Inc., 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (emphasis in original) (footnotes omitted); In re Motors Liquidation Co., 477 B.R. 198, 220 (Bankr. S.D.N.Y. 2011) ("Although (since the Code is silent on the matter) third-party releases aren't 'inconsistent with the applicable provisions of this title,' the Second Circuit has ruled that they're permissible only in rare cases, with appropriate consent or under circumstances that can be regarded as unique, some of which the Circuit listed. But where those circumstances haven't been shown, third-party releases can't be found to be appropriate").[8]

[8] Other examples include: (i) Adelphia, 368 B.R. at 268–69 (holding that three categories of non-debtor third-party releases are acceptable under Metromedia: (1) persons indemnified by the estate under by-laws, employment contracts, or loan agreements, (2) persons involved in unique transactions, such as a party who makes a substantial financial contribution to the estate; and (3) persons who consent to the releases); (ii) In re Karta Corp., 342 B.R. 45 (S.D.N.Y. 2006) (framing inquiry as "whether a significant non-debtor financial contribution plus other unusual factors render a situation so "unique" that the non-debtor third-party releases are appropriate"). Id. at 55; (iii) In re Oneida Ltd., 351 B.R. 79 (Bankr. S.D.N.Y. 2006) (the equity committee had raised, but then abandoned, an objection to the validity of the non-debtor third-party releases, and the court found that the releases in that case were acceptable because all of the affected creditors had consented by affirmatively checking a box on the ballot

Before a court considers whether the proponent of a plan has demonstrated the "truly unusual circumstances" mandated by Metromedia, it must first determine whether it has subject matter jurisdiction to approve the releases or injunctions provided for, by, and against non-debtor third-parties. See Manville II; accord In re Dreier LLP, 429 B.R. 112, 132 (Bankr. S.D.N.Y. 2010); In re Metcalfe & Mansfield Alternative Invs., 421 B.R.685, 695 (Bankr. S.D.N.Y. 2010). In Manville II, the Second Circuit held that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the res of the bankruptcy estate." Manville II, 517 F.3d at 66; see also Dreier, 429 BR. at 133 (because the court lacks jurisdiction to enjoin claims that do not affect property of the estate or the administration of the estate, non-debtor third-party releases must be limited to claims that are derivative of the debtors).

Because this release seeks to include the release of claims by non-debtor third-parties against non-debtor third-parties, the Second Circuit's rulings in Manville II and Metromedia govern the Court's determination as to whether this release may be approved. It is now settled in the Second Circuit that the Court does not have subject matter jurisdiction to approve this provision because it seeks to release "direct" (non-derivative) claims that non-debtor third-parties may have against other non-debtor third parties. See Manville III, 600 F.3d at 153 (clarifying on remand that the bankruptcy court does not have jurisdiction to enjoin claims against non-debtor insurers that are not derivative of the debtor).

The Debtors have also failed to explain why the exculpation provision, which extends to third-parties who are not estate fiduciaries who served during the chapter 11 cases (such as the

indicating their willingness to grant the releases); (iii) In re Spiegel, Inc., No. 03-11540 (BRL), 2006 WL 2577825, *7 (Bankr. S.D.N.Y. Aug. 16, 2006) (plan's non-debtor third-party releases and injunctions were critical components of the settlement that played a "vital part in the plan" and "were necessary to the proposed reorganization of the Debtors and the successful administration of their estates"); and (iv) In re XO Commc'ns, Inc., 330 B.R. 394, 440 (Bankr. S.D.N.Y. 2005) (non-debtor third-party releases were permissible where the non-debtors provided significant consideration, the non-debtors were integral to the plan, and the non-debtors' interests aligned with those of the debtors with regard to the claims).

estate professionals and the Committee and its members) is appropriate. See In re Wash. Mutual, Inc., 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (limiting exculpation clause to estate fiduciaries). Further, the acts for which these parties are being exculpated are vague.

IV. CONCLUSION

WHEREFORE, the United States Trustee respectfully submits that the Court (i) deny the Debtors' attempt to pay the Debtors' CEO a $20 million severance without regard to the requirements of section 503(c); (ii) deny any provisions in the Plan that permit fees and expenses to be paid to indenture trustees and to Committee members without full compliance with the requirements of section 503(b); (iii) require that the Debtors narrow the third party releases and injunction provision and/or require compliance with the law of this Circuit and the Bankruptcy Code; and (iv) grant such other relief as is just.

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August 2, 2013

Respectfully submitted,

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