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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' RESPONSE TO OBJECTION TO CONFIRMATION OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION BY WELLS FARGO BANK NORTHWEST, N.A., AS OWNER TRUSTEE, AND ALF VI, INC., AS OWNER PARTICIPANT, AS HOLDERS OF CLAIMS ARISING FROM REJECTIONS OF LEASE TRANSACTIONS FOR N286SK, N561RP, N562RP, N287SK, N288SK, N563RP, AND N259JQ

1. The Debtors in these chapter 11 cases are the following entities: Republic Airways Services, Inc.; Shuttle America Corporation; Republic Airline Inc.; Republic Airways Holdings Inc.; Midwest Air Group, Inc.; Midwest Airlines, Inc.; and Skyway Airlines, Inc. On January 31, 2017, Shuttle America Corporation was merged with and into Republic Airline Inc. The Debtors' employer tax identification numbers and addresses are set forth in their respective chapter 11 petitions.

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

Republic Airways Holdings Inc. ("RAH") and those of its subsidiaries that are debtors and debtors in possession in these proceedings (together with RAH, "Republic" or the "Debtors"), submit this response (the "Response") to the objection [ECF No. 1534] (the "Objection") filed by Wells Fargo Bank Northwest, N.A., as Owner Trustee (the "Lessor"), and ALF VI, Inc., as Owner Participant (collectively, "Residco") to Confirmation of Debtors' Second Amended Joint Plan of Reorganization. In support of this Response and in further support of confirmation of the Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated December 19, 2016 [ECF No. 1360] (as the same has been or may be amended, modified, supplemented, or restated, the "Plan"),[1] the Debtors respectfully represent as follows:

Preliminary Statement

1. Throughout these cases, the Debtors and their professionals, together with the Official Committee of Unsecured Creditors (the "Committee"), have worked diligently and have spared no effort to achieve fair and equitable settlements with their creditors, and in particular with those creditors that leased or financed aircraft and aircraft equipment. As the Court is aware, these efforts have been very successful, resulting in agreements with each of the Debtors' codeshare partners and virtually all of their aircraft financiers and lessors, regardless of whether the Debtors are reinstating debt, surrendering equipment, assuming leases, or rejecting leases.

2. Unfortunately, despite the Debtors' best efforts over many months to negotiate a fair and equitable settlement with Residco that would be consistent with similarly situated creditors, Residco remained intransigent, insisting that, as part of its rejection damage claims, it

1. Capitalized terms used but not defined herein shall have the meaning set forth in the Plan.

is entitled to liquidated damages under the stipulated loss value ("SLV") provision of its leases. Although Residco contends that the SLV provision in its leases is enforceable, the Residco SLV provision is indistinguishable from countless unenforceable SLV provisions in other rejected leases in these chapter 11 cases and in the case law. *See, e.g.*, *In re Trans World Airlines, Inc.*, 145 F.3d 124, 135-36 (3d Cir. 1998) (finding a similar SLV provision unenforceable and noting that the formula in the liquidated damages provisions "simply have no bearing on [lessor's] probable loss in the event of a breach" which is merely the total remaining rental payments less fair market value, which are not difficult for the parties to ascertain upon breach). As Residco acknowledges in its Objection, based on application of the unenforceable SLV provisions, Residco's asserted claims exceed its actual damages by more than $50 million.

3. As there is no legal basis to apply the Residco SLV provisions in calculating Residco's rejection damages and the Debtors have settled all other aircraft rejection damage claims based on calculated actual damages (not SLV provisions), Residco's intransigence made it impossible for Debtors to achieve a consensual resolution of Residco's claims.

4. In early February, for the first time, after more than eight months of negotiations, Residco informed the Debtors that it believed that, notwithstanding whether the SLV provision was unenforceable under the Residco leases, it would nonetheless be enforceable under the RAH lease guarantees because, according to Residco, RAH had waived the unenforceability defense under the guarantees. Residco then demanded that the Debtors agree to amend the Debtors' proposed Plan to "clarify" that substantive consolidation under the Plan would not eliminate the RAH guarantees of the Residco leases. Residco further informed the Debtors that, if the Debtors refused to make the "clarification," Residco would object to the substantive consolidation provisions of the Plan.

5. The Objection is a transparent attempt by Residco, using the threat of delaying confirmation, to force the Debtors, the Committee, and the Debtors' other creditors to agree to an unjustifiably preferential settlement with Residco at the expense of all the other Debtors' creditors, including similarly situated aircraft lease rejection counterparties. The Committee and its professionals participated actively with the Debtors and their professionals in negotiating the terms of the Plan. As a member of the Committee, Residco had a myriad of opportunities to comment on the proposed plan. Yet, until early February (over two months after the Plan was filed), Residco never questioned or requested modification or "clarification" of the substantive consolidation provision that it seeks to alter now. To the contrary, it was a unanimous decision of the Committee, including Residco, to support the Plan.[2]

6. The Plan, including the substantive consolidation provisions, represents the result of long, difficult, and complex negotiations among the Debtors, the Committee, the three codeshare partners, secured lenders, and other parties in interest. The Debtors submit that confirmation of the Plan is in the best interests of the Debtors, their estates, and all parties in interest. The Debtors further submit that substantive consolidation is in the best interests of all creditors and that no creditors, including Residco, will be harmed by substantive consolidation. Notably, other than Residco's strategic objection, not a single creditor has objected to

2. Based on public statements by the Committee and discussions with Residco, it is the Debtors' understanding that Residco, like all Committee members, supported the Plan. *See* Disclosure Statement at 4 ("THE CREDITORS COMMITTEE ALSO SUPPORTS THE PLAN AND URGES CREDITORS TO ACCEPT IT, AS SET FORTH IN THE LETTER IN SUPPORT OF THE PLAN, WHICH IS ENCLOSED WITH THE DISCLOSURE STATEMENT FOR THE HOLDERS OF CLAIMS THAT ENTITLED TO VOTE ON THE PLAN."); *see also* Letter from the Official Committee of Unsecured Creditors, dated December 29, 2016, which is annexed as Exhibit B to the *Affidavit of Service of Solicitation Materials*, filed January 6, 2017 [ECF No. 1398] ("SUBJECT TO FINAL AGREEMENT ON THE PLAN SUPPLEMENT DOCUMENTS AND THE EXERCISE OF ITS FIDUCIARY DUTIES, THE COMMITTEE ENDORSES THE PLAN AND RECOMMENDS THAT ALL HOLDERS OF UNSECURED CLAIMS VOTE TO ACCEPT THE PLAN."). In early February, for the first time, Residco's counsel indicated to Debtors' counsel that Residco was considering objecting to the Plan.

substantive consolidation, the Committee supports the Plan including substantive consolidation, and creditors voted overwhelmingly in favor of the Plan.[3]

7. Residco contends that there is a hypothetical "risk" that (i) it could be allowed a guarantee claim against RAH in a larger amount than its primary claim against Republic Airline Inc. ("Republic Airline") if: (x) the SLV provision is found to be an unenforceable penalty provision under New York law with respect to the primary claim and (y) the SLV provision is nonetheless deemed enforceable under the guarantee; and (ii) as a result of such hypothetical discrepancy (the "Hypothetical Discrepancy"), Residco could have a greater recovery if RAH's estate were not consolidated with the Consolidated Debtors. However, no such "risk" exists. As demonstrated in detail below, under New York law (which governs the leases and the guarantees), (x) liquidated damages that constitute a penalty violate public policy and are unenforceable and (y) as a matter of public policy, a defendant cannot waive an objection to such an unenforceable liquidated damages clause. Thus, if the SLV provision is unenforceable under the leases as a matter of public policy, it is similarly unenforceable under the guarantees, and therefore a Hypothetical Discrepancy is an impossibility. Accordingly, because the Objection is based solely on the "risk" of the Hypothetical Discrepancy, the Debtors respectfully submit that the Court should find as a matter of law that the Hypothetical Discrepancy cannot occur, and overrule the Objection.

8. Alternatively, if the Court is not inclined to overrule the Objection in its entirety for the reasons outlined above and described in detail below, the Debtors propose that, in the

3. As set forth in the *Certification of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code,* filed contemporaneously, 94.12% in number and 93.8% in amount voted to accept the Plan. Residco submitted two ballots rejecting the Plan, making up 6.15% of the voting pool (or 99.16% of the amount rejecting the Plan).

event the Residco guarantee claim were allowed in an amount greater than the allowed amount of the direct claim, then Residco (and only Residco) shall be carved out of substantive consolidation of RAH (the "Residco Carve-Out"). Under the Residco Carve-Out, Residco would receive two classes of claims for Plan purposes — the guarantee claims against RAH, and the direct claims against Republic Airline, with each such class of claims calculated on the basis that the assets and liabilities of RAH and Republic Airline were not consolidated and each of RAH and Republic Airline are valued as separate from each other as reorganized entities.

9. If necessary, the Residco Carve-Out would be a fair and equitable solution and would protect Residco from the only potential impairment that it alleges in its Objection that it could suffer — the "risk" of the Hypothetical Discrepancy. Equally important, the Residco Carve-out will permit confirmation of the Plan to proceed without unnecessary and costly delay as it will not require the Court to determine at this time (or possibly ever) the enforceability of the SLV provisions, the amount of allowance of the guarantee claim, the potential distributions to RAH creditors and Republic Airline creditors if their estates were not consolidated, or any other disputed factual issues.

10. Accordingly, the Debtors request that the Court overrule the Objection and confirm the Debtors' proposed plan of reorganization.

Background

11. On February 25, 2016 (the "Commencement Date") each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of title 11, United States Code (the "Bankruptcy Code"). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

12. On March 4, 2016, the US Trustee appointed seven members of the Committee [ECF No. 89]. On June 3, 2016, the US Trustee filed a notice replacing NAC Aviation 23 Limited with Residco (ALF IV, INC) as a member of the Committee [ECF No. 630].

13. Pursuant to Fed. R. Bankr. P. 1015(b), the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered.

Republic's Business

14. RAH is a holding company that, as of the Commencement Date, provided scheduled regional passenger services through its wholly-owned operating air carrier subsidiaries, Republic Airline and Shuttle America Corporation ("Shuttle"). On January 31, 2017, Shuttle was merged with and into Republic Airline in accordance with the *Order Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 6004 for Approval of (I) Merger of Shuttle America Corporation Into Republic Airline Inc., and (II) Surrender of the Shuttle America Corporation Air Carrier Certificate*, entered on November 28, 2016 [ECF No. 1236].

15. Republic offers approximately 900 flights daily to 97 cities in 36 states, Canada, the Caribbean, and Central and South America through Republic's fixed-fee code-share agreements with United Airlines, Inc., Delta Air Lines, Inc., and American Airlines, Inc. (collectively, the "Codeshare Partners"), operating under the designations of United Express, Delta Connection, and American Eagle, including service out of the Codeshare Partners' respective hubs and focus cities. Republic's operational fleet consists of approximately 180 aircraft.

16. Detailed information regarding Republic's business, capital structure, and the circumstances leading to the commencement of these chapter 11 cases is set forth in the

Declaration of Bryan K. Bedford Pursuant to Local Bankruptcy Rule 1007-2 [ECF No. 4] (the "Bedford Declaration"), filed with the Court on the Commencement Date.

The Residco Claims

17. On December 10, 2013, the Lessor and Shuttle entered into an *Amended and Restated Aircraft Lease Agreement* for each of seven EMB-145LR aircraft bearing U.S. registration marks N288SK, N561RP, N259JQ, N286SK, N287SK, N563RP, and N562RP (the "Residco Aircraft," and the leases, each as amended and supplemented, a "Residco Lease" and collectively, the "Residco Leases"). In connection with Residco's acquisition of beneficial ownership of the Aircraft, on December 12, 2014, RAH guaranteed Shuttle's obligations under the Residco Leases pursuant to seven separate Guarantees (collectively, the "Guarantees").[4] Each of the Leases contain a liquidated damages provision providing that, upon the occurrence of any Event of Default (as defined in the Leases):

> Lessor . . . may demand that Lessee pay . . . any unpaid Basic Rent for the Aircraft . . . plus, as liquidated damages for loss of bargain and not as a penalty (in lieu of Basic Rent payable for the period commencing after the date specified for payment . . .), whichever of the following amounts Lessor, in its sole discretion, shall specify . . .: (i) the amount, if any, by which (x) the Stipulated Loss Value computed as of the payment date . . . exceeds (y) the aggregate Fair Market Rental Value . . . of the Aircraft for the remainder of the Basic Term . . . after discounting such Fair Market Rental Value to present worth . . ., (ii) the amount, if any, by which (x) the Stipulated Loss Value computed as of the payment date . . . exceeds (y) the Fair Market Sales Value . . . of the Aircraft . . ., or (iii) the amount, if any, by which (x) the aggregate Basic Rent for the remainder of the Basic Term . . ., discounted . . . to present worth . . ., exceeds (y) the Fair Market Rental Value . . . of the Aircraft for the remainder of the Basic Term . . . after discounting such Fair Market Rental Value to present worth . . . .

4. The Guarantee annexed to the Objection was superseded on December 12, 2014 by seven separate guarantees, each substantially the same as the previous guarantee, for each Residco Lease.

Leases § 17.02(c). The Stipulated Loss Value ("SLV") for each Residco Aircraft is set forth on a schedule attached to the relevant Lease.

18. On April 22, 2016, the Debtors and Residco entered the *Stipulation and Order Approving Section 1110(b) Extension for N288SK, N561RP, N259JQ, N286SK, N287SK, N563RP and N562RP* [ECF No. 415], which was approved by the Court on May 10, 2016 [ECF No. 540] (the "1110 Stipulation"). Pursuant to the 1110 Stipulation, between April 25, 2016 and October 1, 2016, the Debtors returned the Aircraft to Residco and rejected the Leases.

19. On or around July 22, 2016, Residco asserted (i) rejection damages claims against Shuttle in the aggregate amount of $72,323,546.00 (*See* Proofs of Claim 1140, 1221,1243, 1251, 1260, 1282, 1166, 1254, 1257, 1281, 1305, and 1321) (the "Lease Claims"); and (ii) claims against RAH in connection with the Guarantees in the aggregate amount of $75,847,798.00 (*See* Proofs of Claim 1175, 1222, 1244, 1250, 1272, 1275, 1279, and 1309) (the "Guarantee Claims").

20. The Debtors have calculated, consistent with methods accepted by other aircraft equipment lessors in these Chapter 11 Cases, that Residco's actual damages for Shuttle's failure to make the monthly rental payments under the Residco Leases through the end of each term and failure to meet certain return conditions set forth in the Residco Leases aggregate approximately $6.4 million (before any deduction for present value).

The Plan and Disclosure Statement

21. On November 16, 2016, the Debtors filed the Plan and their related proposed Disclosure Statement for Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code [ECF No. 1190] (as thereafter amended, modified, or supplemented, the "Disclosure Statement"). The Plan is supported by the Committee. On December 12, 2016, the Debtors filed amended versions of the Plan and Disclosure Statement [ECF Nos. 1277 and 1278, respectively], and on December 19, 2016, second amended versions of the Plan and Disclosure

Statement [ECF Nos. 1311 and 1312, respectively]. On December 21, 2016, this Court approved the Disclosure Statement and Republic's proposed procedures for the solicitation and tabulation of votes on the Plan [ECF No. 1358] (the "Approval Order"). Republic commenced the solicitation on December 29, 2016. In accordance with the Approval Order, the Debtors extended the voting deadline for Residco to February 23, 2017.

22. On February 23, 2017, Residco submitted ballots rejecting the Plan and opting out of the voluntary releases provided for in Section 11.9 of the Plan (the "Third-Party Releases"). Thus, in accordance with that paragraph, Residco shall not receive the benefit of the Third Party Releases even if for any reason otherwise entitled.

23. As detailed in Section 2.2(a) of the Plan:

> Solely for the purposes specified in the Plan (including voting, Confirmation, and distributions) and subject to Section 2.2(b), (i) all assets and liabilities of the Consolidated Debtors shall be consolidated and treated as though they were merged, (ii) all guarantees of any Consolidated Debtor of the obligations of any other Consolidated Debtor shall be eliminated so that any Claim against any Consolidated Debtor, any guarantee thereof executed by any other Consolidated Debtor and any joint or several liability of any of the Consolidated Debtors shall be one obligation of the Consolidated Debtors and (iii) each and every Claim filed or to be filed in the Chapter 11 Cases against any of the Consolidated Debtors shall be deemed filed against the Consolidated Debtors collectively and shall be one Claim against and, if and to the extent allowed, shall become one obligation of the Consolidated Debtors.

Plan at § 2.2(a).

Argument

A. The Court Has the Equitable Power to Order Substantive Consolidation

24. The equitable doctrine of substantive consolidation permits a bankruptcy court "to disregard the separate identity of corporate entities, and to consolidate and pool their assets and liabilities and treat them as though held and incurred by one entity." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 764 (Bankr. S.D.N.Y. 1992); *see also, Union Sav. Bank v.*

Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.), 860 F.2d 515, 518 (2d Cir. 1988); *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 58 (2d Cir. 1992) ("substantive consolidation . . . effects the combination of the assets and the liabilities of distinct, bankrupt entities and their treatment as if they belonged to a single entity").

25. The power to substantively consolidate debtors' estates flows from the court's general equitable powers under section 105 of the Bankruptcy Code. *See, e.g.*, *In re Worldcom, Inc.*, Case No. 02-13533 (AJG), 2003 WL 23861928, at *34 (Bankr. S.D.N.Y. Oct. 31, 2003); *Colonial Realty Co.*, 966 F.2d at 59; *Augie/Restivo*, 860 F.2d at 518 n.1. Because substantive consolidation derives from equity, bankruptcy courts have broad discretion in deciding whether to order substantive consolidation and the decision to consolidate is decided on a case by case basis. *See Worldcom*, 2003 WL 23861928, at *36 (citing *Moran v. Hong Kong & Shanghai Banking Corp. (In re Deltacorp, Inc.)*, 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995)) (finding that the court is afforded discretion in granting substantive consolidation and the appropriateness of granting such relief is determined by balancing the equities on a case by case basis); *see also In re Drexel*, 138 B.R. at 764 (holding that courts invoke their broad equitable power to order substantive consolidation after reviewing the facts on a case by case basis).

26. In *Augie/Restivo*, the Second Circuit set forth a two part inquiry focusing on: (i) whether creditors dealt with the entities as a "single economic unit" and did "not rely on their separate identity in extending credit"; or (ii) whether the affairs of the debtors are "so entangled that consolidation will benefit all creditors." *Augie/Restivo*, 860 F.2d at 518 (internal citations omitted); *see also In re 599 Consumer Elecs., Inc.*, 195 B.R. 244, 248-51 (S.D.N.Y. 1996); *Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Corp. (In re Verestar, Inc.)*, 343 B.R. 444, 462-63 (Bankr. S.D.N.Y. 2006). This test is disjunctive, and courts in this

district have found that the presence of either factor can justify substantive consolidation. *See Verestar*, 343 B.R. at 462-63; *see also Worldcom*, 2003 WL 23861928, at *36 (citing *In re 599 Consumer Electrs.*, 195 B.R. at 250) (finding that substantive consolidation could be warranted on either ground of the *Augie/Restivo* test and that the Second Circuit's use of the conjunction "or" suggests that the two factors cited therein are alternatively sufficient criteria).

27. In applying the *Augie/Restivo* factors, courts weigh whether the benefit obtained by substantive consolidation outweighs any harm substantive consolidation causes. *Worldcom*, 2003 WL 23861928, at *35 ("As an equitable remedy, substantive consolidation is to be used to afford creditors equitable treatment and thus may be ordered when the benefits to creditors therefrom exceed the harm suffered.") (citations omitted).

28. Where harm to creditors is material, the *Augie/Restivo* factors are rigorously applied. Where, as here, the harm to creditors is minimal or non-existent, the *Augie/Restivo* factors can be applied with less rigor. Courts may also tailor the consolidation order to minimize harm. *See In re Standard Brands Paint Co.*, 154 B.R. 563, 570 (Bankr. C.D. Cal. 1993) ("the bankruptcy court has the power to modify substantive consolidation to meet the specific needs of the case") (citation omitted). Thus, the consolidation factors discussed above "must be evaluated within the larger context of balancing the prejudice resulting from the proposed consolidation against the effect of preserving the debtor entities." *Drexel*, 138 B.R. at 764-65 (citing *In re Donut Queen, Ltd.*, 41 B.R. 706, 709, 710 (Bankr. E.D.N.Y. 1984)); *see also In re Affiliated Foods, Inc.*, 249 B.R. 770, 780 (Bankr. W.D. Mo. 2000) (granting substantive consolidation where the benefits of consolidation substantially outweigh the harm to creditors); *White v. Creditors Serv. Corp. (In re Creditors Serv. Corp.)*, 195 B.R. 680, 690 (Bankr. S.D. Ohio 1996) (noting that the overarching inquiry for courts in deciding a substantive consolidation request

involves a balancing of the equities based on the bankruptcy court's inherent powers under section 105 of the Bankruptcy Code); *In re Murray Indus., Inc.*, 119 B.R. 820, 829 (Bankr. M.D. Fla. 1990) (finding that substantive consolidation should be permitted where "consolidation yields benefits offsetting the harm it inflicts on objecting parties") (citations omitted).

29. In evaluating the impact of substantive consolidation, courts have focused on: (i) potential savings in costs and time by eliminating the need to disentangle the records and accounts of the debtors; (ii) the elimination of duplicate claims and the need to adjudicate the question of which debtor is liable; (iii) the financial benefit from consolidation; and (iv) whether consolidation would enhance debtor rehabilitation and produce a reorganized enterprise with greater profit potential. *Drexel*, 138 B.R. at 765 (collecting authorities).

B. The Debtors Satisfy the *Augie/Restivo* Factors

30. *The Debtors' Business Affairs are Entangled*: In determining whether debtors are entangled for substantive consolidation purposes, courts typically analyze whether the debtors have demonstrated either an operational or financial entanglement of their business affairs. *See In re Standard Brands Paint Co.*, 154 B.R. at 572 (finding substantive consolidation appropriate based on the functional entanglement of the debtors' business affairs); *see also Worldcom*, 2003 WL 23861928, at *37 (finding that the debtors demonstrated operational and financial entanglement of their business affairs warranting substantive consolidation). Courts in this district have considered a number of factors evidencing an interrelationship between the entities warranting consolidation, including, *inter alia:* (i) the sharing of overhead, management, accounting, and other related expenses among the different entities; (ii) the existence of intercompany guarantees on loans; (iii) the presence of consolidated financial statements; (iv) the ownership by an entity of all or a majority of the capital stock of an affiliate; (v) the existence of common directors or officers among the entities; (vi) the financing of entities by an affiliated

entity; (vii) entities having substantially no business except with its parent or its affiliates or no assets except those conveyed to it by the parent or an affiliate; and (viii) the entities acting from a shared business location. *See Drexel*, 138 B.R. at 764.

31. The facts in these chapter 11 cases clearly demonstrate that RAH and Republic Airline's affairs are substantially entangled. Republic Airline and RAH have no separate identity. RAH has almost no assets other than intercompany receivables and cash swept from Republic Airline in connection with cash management, virtually no outside trade creditors or vendors, a multitude of guarantees, and no separate business plan — illustrating its entanglement and shared identity with Republic Airline.

32. Additionally, many of the factors discussed above as historically warranting substantive consolidation are present in this case. Most notably:

- RAH and Republic Airline share the same overhead, management, accounting, and other back-office functions;
- there are significant intercompany obligations;
- there are significant overlaps in the creditor pools due to guarantees;
- the Consolidated Debtors issue consolidated financial statements;
- the Consolidated Debtors are jointly controlled from a shared business headquarters at a common business address;
- the Consolidated Debtors have no separate business plans, and only one of the Consolidated Debtors — Republic Airline — has any business operations;
- the Consolidated Debtors have no separate budgets and use the same cash management system; and
- the Consolidated Debtors file a consolidated tax return.

33. *The Debtors' Operate as a Single Economic Unit*: In addition, the Consolidated Debtors operate as a single economic unit, and are perceived as such. The Consolidated Debtors operate a single business, Republic Airline, under a single business plan. Further, creditors seek

guarantees because they perceive the Consolidated Debtors to be a single economic unit. Indeed, as part of the Republic group, none of the Consolidated Debtors has ever received a credit rating independently from one received by another Consolidated Debtor. And analyst reports routinely discuss Republic as a unified enterprise.

34. *Benefits of Substantive Consolidation Exceeds any Harm*: All the Debtors' creditors will benefit from substantive consolidation due to the savings in costs and time of eliminating the need to disentangle the records and accounts of RAH and the other Consolidated Debtors and the elimination of duplicate claims. Moreover, Courts have recognized that whether certain creditors may be adversely affected by substantive consolidation "alone is not controlling and the bankruptcy court must weigh the conflicting interests which should be balanced in such way as to reach a rough approximation to some rather than to deny justice to all." *Murray*, 119 B.R at 832 (citing *In re Commercial Envelope Mfg. Co.*, Cases No. 76B-2354-2357, 1977 WL 182366 (Bankr. S.D.N.Y. Aug. 22, 1977)).

35. In addition, substantive consolidation enhances efficiency and reduces administrative costs, because confirming a single consolidated plan is less costly than confirming separate plans. It will shorten the length and cost of these Chapter 11 cases and eliminate the need to disentangle the myriad claims improperly filed against RAH that are properly classified as claims against other entities (generally against Republic Airline). The Debtors are relieved from filing multiple Chapter 11 plans that would impose baroque voting requirements on creditors that think of their claims as a single unit against a single enterprise and that would also necessitate a longer and more complex disclosure statement. Myriad confirmation and voting issues are avoided by consolidation as well, as are potential intercreditor disputes about allocation of intercompany payables and receivables. In short, substantive consolidation is an

integral part of moving the Debtors toward a faster and less expensive reorganization. A speedier and less expensive reorganization benefits all creditors.

36. The evidence of entanglement, coupled with the benefits discussed above and the lack of injury, provide ample grounds for overruling the Objection. The existence of the Consolidated Debtors as a single economic unit, coupled with the benefits discussed above and the lack of injury, constitutes an independent ground for overruling the Objection.

C. Residco Has Not Shown Any Prejudice From Substantive Consolidation of RAH and Republic Airline

37. Courts in this Circuit recognize that substantive consolidation is a flexible concept and a "principal question is whether creditors are adversely affected by consolidation and, if so, whether the adverse effects can be eliminated." *In re Jennifer Convertibles, Inc.*, 447 B.R. 713, 723-24 (Bankr. S.D.N.Y. 2011). Courts approve substantive consolidation upon finding that any potential prejudice to creditors that may result from substantive consolidation is outweighed by the prejudice, harm, and waste if substantive consolidation is not ordered. *See In re Gucci*, 174 B.R. 401, 414 (Bankr. S.D.N.Y. 1994).

38. Residco has failed to establish that it will be harmed from the proposed substantive consolidation. *See Drexel*, 138 B.R. at 765 n.9 (Bankr. S.D.N.Y. 1992) (an objecting creditor must show that "it will be prejudiced by substantive consolidation") (internal quotation omitted). Rather than demonstrate any harm from substantive consolidation, Residco speculates that there exists a unique set of circumstances that could trigger a hypothetical "risk" that the Guarantee Claims are allowed in a greater amount than the Lease Claims, allegedly resulting in a lesser recovery for Residco due to the elimination of guarantees under substantive consolidation. According to Residco, this Hypothetical Discrepancy is the sole basis for its objection to substantive consolidation. (*See* Objection at 12.) Residco contends that the Hypothetical

Discrepancy could occur if Residco were allowed Guarantee Claims in a larger amount than its Lease Claims if: (x) the SLV provision is found to be an unenforceable penalty provision under New York law with respect to the Lease Claims and (y) the SLV provision is nonetheless deemed enforceable under the Guarantees with respect to the Guarantee Claims. However, no such "risk" exists.

39. Residco contends that if the SLV provision were determined to be an unenforceable penalty with respect to the Leases, nonetheless, the Guarantee Claims would be allowed on the basis of the SLV penalty provision because RAH purportedly waived its right to challenge the SLV provision. (*See* Objection at 16.) In support of this hypothetical, Residco cites only one case, a Second Circuit summary order with no precedential effect. *See 136 Field Point Circle Holding Co. v. Invar Int'l Holding, Inc.*, 644 F. App'x 10 (2d Cir. 2016).

40. Residco omits citation of New York court cases which unequivocally demonstrate that under New York law, a party cannot waive its defense to the unenforceability of a penalty provision because such unenforceability is a matter of public policy.[5] *See, e.g.*, *Bell v. Ebadat*, No. 08 CIV 8965 RJS, 2009 WL 1803835, at *3 (S.D.N.Y. June 16, 2009) (holding that liquidated damages clause was unenforceable as a matter of law and stating, "***as a matter of public policy, a defendant could not waive an objection to a liquidated damages clause***") (internal citations omitted) (emphasis added); *Thomas James Assocs., Inc. v. Jameson*, 102 F.3d 60, 67 (2d Cir. 1996) (holding that waiver of arbitration in employment agreement was unenforceable and stating, ***"[I]f a waiver is contrary to public policy (as we find it is), then the parties may not contract for a waiver."***) (emphasis added); *Wells Fargo Bank Nw., N.A. v.*

5. In an internal citation from *136 Field Point*, Residco includes a quotation from *Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. v. Navarro*, 25 N.Y.3d 485 (2015). In that case, the court enforced waiver in a guarantee of collusion defense. This case has no relevance here as it does not involve liquidated damages or public policy.

Energy Ammonia Transp. Corp., No. 01 CIV. 5861 (JSR), 2002 WL 31368264, at *2 (S.D.N.Y. Oct. 21, 2002) (denying summary judgment where party attempted to claim that even if liquidated damage was a penalty, that the parties had waived that issue and stating, "However, ***the '[i]nvalidity of a contract offensive to public policy cannot be waived by the parties ... [as] it is a barrier which the court itself [is] bound to raise in the interests of the due administration of justice.'***") (quoting *Ins. Co. of N. Am. v. S/S Cape Charles*, No. 92 Civ. 6184, 1994 WL 263592, at *2 (S.D.N.Y. June 3, 1994)) (emphasis added); *In re Cont'l Broker-Dealer Corp.*, 368 B.R. 109, 112 (Bankr. E.D.N.Y. 2007) (holding that contracting parties could not waive right to arbitration through contract as it was against public policy and stating, "***Even if the parties intended to waive th[is] requirement, they did not have the right to waive it as such a waiver violates public policy.***") (emphasis added).

41. In addition to the prohibition of waiver of public policy defenses under New York law, bankruptcy courts will not enforce liquidated damage provisions that are punitive. *See OPM Leasing Servs., Inc.*, 23 B.R. 104, 110-11 (Bankr. S.D.N.Y. 1982) (***"It is well established that a bankruptcy court, being a court of equity, will not enforce a liquidated damages clause that is in reality a penalty."***) (emphasis added). Similarly, a bankruptcy court may prohibit punitive amounts from being included in claims against debtors. *See, e.g., In re Gen. Growth Props, Inc*., 451 B.R. 323, 328 (Bankr. S.D.N.Y. 2011) (courts may "modify private contractual arrangements imposing default interest rates. . . [where] the contractual interest rate constitutes a penalty"); *Urban Communicators PCS Ltd. P'ship v. Gabriel Capital, L.P*., 394 B.R. 325, 338 (S.D.N.Y. 2008) (enforcement of punitive interest rate "would do violence to the principles which constitute the foundation of bankruptcy law") (internal citation omitted); *In re Target Two Associates, L.P.*, No. 04 CIV 8657 (SAS), 2005 WL 1140538, at *4 (S.D.N.Y. May 16, 2005)

(remanding for reconsideration of return of deposit amount on grounds that "[e]quity abhors a forfeiture and will . . . avoid an unjust windfall"); *In re Outdoor Sports Headquarters, Inc.*, 161 B.R. 414, 424 (S.D. Ohio 1993) ("A prepayment charge formula must effectively estimate actual damages, otherwise, the charges may operate as either a penalty on the debtor or a windfall to a lender, at the expense of the creditors of the bankruptcy estate."); *see also In re Bratt*, 527 B.R. 303, 313 (Bankr. M.D. Tenn. 2015) (describing the "application, spirit, and purpose of the Bankruptcy Code's carefully structured system of claim allowance—which includes a prohibition against punitive rather than compensatory amounts being added to the claims of oversecured creditors"), *aff'd on other grounds*, 549 B.R. 462 (B.A.P. 6th Cir. 2016), *aff'd sub nom.*, *In re Corrin*, No. 16-57515, 2017 WL 710473 (6th Cir. Feb. 23, 2017).[6]

42. Thus, if the SLV provision is unenforceable under the Leases as a matter of public policy or under principles of equity, it is similarly unenforceable under the Guarantees, and therefore a Hypothetical Discrepancy is an impossibility. If, as Residco argues, the SLV provisions are enforceable, there will be no discrepancy between the Lease Claims and the Guarantee Claims.[7] Accordingly, because the Objection is based solely on the purported "risk" of the Hypothetical Discrepancy, the Debtors respectfully submit that the Court should find as a matter of law that the Hypothetical Discrepancy cannot occur, Residco will not be harmed by substantive consolidation under the Plan, and overrule the Objection.

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6. Alternatively, the Court may equitably subordinate a creditor's claims where the creditor seeks a penalty from the Debtor at the expense of the Debtors' other creditors, or there has been misconduct by the creditor, in particular where, as a member of the Committee, the creditor is a fiduciary of the debtors' unsecured creditors.

7. Residco devotes more than two complete pages to arguing that the SLV provision is not a penalty clause. (Objection at 14-15.) This argument has no relevance to the Objection and is merely an attempt by Residco to gain a leg up in any future litigation. However, it is notable that if Residco were correct (and it is not), then the Objection should be overruled as in such event, the Lease Claims and the Guarantee Claims would be equal, a circumstance in which Residco admits it would not be harmed by substantive consolidation under the Plan.

43. Alternatively, if the Court is not inclined to overrule the Objection in its entirety for all the reasons described herein, the Debtors propose that, in the event the Residco Guarantee Claims were allowed in an amount greater than the allowed amount of the Lease Claims, then Residco (and only Residco) shall be carved out of substantive consolidation of RAH — the Residco Carve-Out. Residco would receive two classes of claims for Plan purposes — the Guarantee Claims against RAH, and the Lease Claims against Republic Airline, with each such class of claims calculated on the basis that the assets and liabilities of RAH and Republic Airline were not consolidated and each of RAH and Republic Airline are valued as separate from each other as reorganized entities. Attached hereto as Exhibit 1 is language that the Debtors propose to implement the Residco Carve-Out if the Court concludes the Plan cannot otherwise be confirmed.

44. Courts in this and other districts have fashioned similar relief to address objections to substantive consolidation. *See, e.g., James Talcott, Inc. v. Wharton (In re Cont'l Vending Mach. Corp.),* 517 F.2d 997, 1001 (2d Cir. 1975) (approving an amended plan of reorganization that consolidated assets and liabilities of the debtors for purposes of dealing with unsecured claims but not with respect to secured claims); *In re F.W.D.C., Inc.*, 158 B.R. 523 (Bankr. S.D. Fl. 1993) (allowing debtor co-obligors to substantively consolidate, subject to the condition that the objecting creditor's claim against the newly consolidated debtors be preserved and otherwise remain unaffected); *see also First National Bank v. Giller (In re Giller),* 962 F.2d 796, 799 (8th Cir. 1992) ("the Bankruptcy Court retains the power to order less than complete consolidation").

45. If necessary, the Residco Carve-Out would be a fair and equitable solution and would protect Residco from the only potential harm that it alleges in its Objection it could suffer

— the "risk" of the Hypothetical Discrepancy. Equally important, the Residco Carve-out would permit confirmation of the Plan to proceed without unnecessary and costly delay as it will not require the Court to determine at this time (or possibly ever) the enforceability of the SLV provisions, the amount of allowance of the Guarantee Claims, the potential distributions to RAH creditors and Republic Airline creditors if their estates were not consolidated, or any other disputed factual issues.

D. Residco's Objection Should be Overruled Because Class 3(a) Voted Overwhelmingly in Favor of the Plan

46. In *Bruce Energy Ctre Ltd. v. Orfa Corp. Of America (In re Orfa Corp. Of Phila.)*, the court rejected the substantive consolidation objection of a member of a class that had voted to accept a plan stating that the creditor had placed itself in the "awkward posture of arguing a cause for unsecured creditors of [the debtor] in which the [class of unsecured creditors] of [the debtor] themselves apparently lack interest." 129 B.R. 404, 412-16 (Bankr. E.D.Pa. 1991). The court reasoned that it was inclined to view the creditor's advocacy "as motivated principally by a desire to destroy the Plan ... rather than motivated by a good faith concern that the effective consolidation effected by the joint Plan will unfairly prejudice its economic interests." *Id.* at 412. The court further reasoned that no creditors beyond the objector were troubled by consolidation and that the creditor would suffer no harm from consolidation. *Id.* at 415.

47. *Orfa Corp* is directly applicable here. Class 3(a), of which Residco is a member, voted overwhelmingly in favor of the Plan (approximately 94% in amount and in number). The substantive consolidation under the Plan is thus demonstrably in line with creditor expectations, and will benefit all creditors. Residco is the only creditor objecting to substantive consolidation. It is evident that Residco is not motivated by a good faith concern that consolidation will unfairly prejudice its economic interests. Residco had numerous opportunities to resolve its Objection in

a manner that would preserve its rights. Residco has steadfastly rejected such solution because its Objection is not motivated by concern with substantive consolidation; rather Residco is using its Objection to substantive consolidation as a weapon to threaten a costly delay of confirmation of the Plan in an effort to gain leverage over the Debtors and extract a preferential settlement of its claims five to ten times greater than what similarly situated creditors are receiving in these cases. Accordingly, the Court should overrule the Objection and confirm the Plan.

E. The Substantive Consolidation Plan Provisions Do Not Require "Clarification" or Amendment

48. Section 2.2(a) of the Plan provides:

> Solely for the purposes specified in the Plan (including voting, Confirmation, and distributions) and subject to Section 2.2(b), (i) all assets and liabilities of the Consolidated Debtors shall be consolidated and treated as though they were merged, (ii) ***all guarantees of any Consolidated Debtor of the obligations of any other Consolidated Debtor shall be eliminated so that any Claim against any Consolidated Debtor, any guarantee thereof executed by any other Consolidated Debtor and any joint or several liability of any of the Consolidated Debtors shall be one obligation of the Consolidated Debtors*** and (iii) each and every Claim filed or to be filed in the Chapter 11 Cases against any of the Consolidated Debtors shall be deemed filed against the Consolidated Debtors collectively and shall be one Claim against and, if and to the extent allowed, shall become one obligation of the Consolidated Debtors.

Plan at § 2.2(a) (emphasis added).

49. Although Section 2.2(a) of the Plan clearly and ambiguously provides that all guarantees are eliminated, Residco complains in its objection that the Debtors refused to "clarify" section 2.2(a). (Objection at 11-12.) No clarification is required.[8] Residco is not

8. Residco argues incredibly that language in Section 2.2(b) providing that consolidation "shall not affect … any defenses to any Cause of Action" somehow suggests that Residco's Guarantee Claims would not be eliminated despite the express and unambiguous language in Section 2.2(a) of the Plan. (Objection at 11). This makes no sense. To the extent Residco seeks clarification from the Debtors, the Debtors hereby confirm that under Article 2 of the Plan, Residco's Guarantee Claims against RAH are eliminated.

seeking "clarification;" rather it is demanding that Section 2.2(a) be amended to provide Residco with preferential treatment and additional leverage against the Debtors in any claims negotiation. Section 2.2(a), like all the provisions of the Plan, was drafted and included in the Plan in consultation with Committee, which approved the Plan by unanimous agreement of all its members, including Residco.

50. Bankruptcy courts in the Second Circuit generally confirm substantive consolidation plans providing for elimination of guarantees as a matter of course. *See Stillwater Liquidating LLC v. Net Five at Palm Pointe, LLC (In re Stillwater Asset Backed Offshore Fund Ltd.)*, 559 B.R. 563, 585 (Bankr. S.D.N.Y. 2016) (noting that, where substantive consolidation is ordered, "intercompany claims are eliminated and guarantees from co-debtors are disregarded"); *In re Richton Int'l Corp.*, 12 B.R. 555, 556 (Bankr. S.D.N.Y. 1981) ("[T]his Court concludes that the requirements for substantive consolidation developed by the courts of this circuit have been satisfied, and that the application of the Debtors for an order . . . eliminating all intercompany obligations and guarantees is hereby granted."); *In re Food Fair, Inc.*, 10 B.R. 123, 124-25 (Bankr. S.D.N.Y. 1981) (same). The guarantee elimination language in such plans is almost identical to that of the Debtors' Plan. *See*, *e.g.*, *In re AMR Corp.*, Case No. 11-15463 (SHL) (Bankr. S.D.N.Y. Jun. 7, 2013) ("all guarantees of any AMR Debtors of the payment, performance, or collection of obligations of any AMR Debtor shall be eliminated and cancelled"); *In re GSC Group, Inc.*, Case No. 10-14653 (AJG) (Bankr. S.D.N.Y. Jan. 12, 2012) ("all guarantees of any Debtor of the payment, performance or collection of another Debtor with respect to Claims against such Debtor shall be eliminated and cancelled and Claims on account thereof shall be released and of no further effect"); *In re Motors Liquidation Company*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y. March 29, 2011) ("all guarantees of any Debtor of the

payment, performance, or collection of obligations of another Debtor shall be eliminated and cancelled"); *In re Extended Stay Inc.*, No. 09-13764 (JMP), 2010 WL 6561113, at *19 (Bankr. S.D.N.Y. July 20, 2010) ("all guarantees of the Debtors of payment, performance or collection of obligations of any other of the Debtors shall be eliminated and cancelled."); *In re Oldco M. Corp*, No. 09-13412 (MG), 2010 WL 2910136, at *13 (Bankr. S.D.N.Y. Feb. 23, 2010) ("all guarantees by one Debtor of the obligations of any other Debtor shall be deemed eliminated so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint or several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors.")

51. Section 2.2(a) of the Plan is typical of substantive consolidation provisions approved in this District and elsewhere. There is no basis to amend Section 2.2(a) other than to advance the parochial interests of Residco at the expense of all other creditors and parties in interest.

F. There is No Legal or Factual Basis for Residco's Request that its Lease and Guarantee Claims be Averaged

52. Based solely on the schedules of assets and liabilities (the "Schedules") filed with this Court by the Debtors as required by statute, Residco suggests that it is an easy matter for RAH to separate its assets and liabilities from the other Consolidated Debtors, and further suggests, based solely on the Schedules, that on a non-consolidated basis, RAH creditors would receive significant recoveries, thereby harming Residco in the event of a Hypothetical Discrepancy. Residco's arguments and conclusions are flawed and lack merit.

53. With respect to the Schedules upon which Residco bases its analysis, Residco ignores and fails to acknowledge the Summary of Reporting Policies included therein:

> Summary of Significant Reporting Policies. The Debtors use a consolidated cash management system through which the Debtors

> collect substantially all receipts and pay liabilities and expenses. As a result, ***certain payments in the Schedules and Statements may have been made prepetition by one entity on behalf of another entity*** through the operation of the consolidated cash management system. A description of the Debtors' prepetition cash management system is in the Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 346(b), 363(b), 363(c), 364(a), 503(b) & 507(a) and Fed. R. Bankr. P. 6003 & 6004 for Entry of an Interim and Final Orders (i) Authorizing Debtors to (A) Continue Using Existing Cash Management System, (B) Honor Certain Prepetition Obligations Related to the Use Thereof, (C) Provide Postpetition Intercompany Claims Administrative Expense Priority, and (D) Maintain Existing Bank Accounts and Business Forms and (ii) Waiving the Requirements of 11 U.S.C. § 345(b) dated February 25, 2016 [ECF No. 6].

Schedules of Assets and Liabilities for Republic Airways Holdings Inc. (Case No. 16-10429 (SHL)) at 2, filed on May 26, 2016 [ECF No. 595] (emphasis added).

54. In other words, the cash shown for RAH on the Schedules is nothing other than a cash concentration which includes, for example, substantial drawdowns by other Debtors on their secured facilities. Accordingly, the Schedules provide at most a starting point in what would be a complex and time-consuming analysis to determine distribution of assets and liabilities between RAH, on the one hand, and the other Consolidated Debtors. Fortunately, there is no reason to perform that expensive exercise. As discussed in detail above, Residco is not harmed by the Plan's substantive consolidation and neither is any other creditor, none of whom have objected to substantive consolidation.

55. To address this non-existent problem, Residco proposes that the Court impose a Plan amendment on the Debtors, the Committee, and all the other creditors who overwhelmingly voted to accept the Plan. Residco's request would provide that it be granted an allowed claim in an amount that is the average of its Lease Claims and its Guarantee Claims. In the event that the Guarantee Claims were allowed in an amount greater than the Lease Claims, implementation of

Residco's request would have the effect of carving out Residco from substantive consolidation and arbitrarily treating its claims on the basis that percentage recoveries on an unconsolidated basis would be equal to creditors of RAH, on the one hand, and creditors of the Other Consolidated Debtors on the other hand. There is no factual basis on which to base that conclusion. Although the Debtors believe, as set forth above, that as a matter of law, Residco's Guarantee Claims cannot be greater than its Lease Claims, the Residco request is arbitrary and without basis in fact or in law, and is solely designed to provide Residco with negotiating leverage and preferential treatment to the disadvantage of all the Debtors' other creditors.

56. If the Court is not inclined to overrule the Objection in its entirety and approve substantive consolidation under the Plan in its current form without addressing Residco's Hypothetical Discrepancy, the Debtors submit that the Residco Carve-Out proposed by the Debtors provides a fair and equitable resolution. If the Residco Carve-Out is adopted by the Court, the Plan can be confirmed without further delay and without the necessity of making a determination of separate recoveries for creditors of RAH and the Other Consolidated Debtors on a non-consolidated basis. This would only be required in the unlikely event that the Court were to determine that (i) the SLV provision is an unenforceable penalty provision and (ii) such unenforceable penalty provision is enforceable against RAH notwithstanding New York law and the equities of bankruptcy to the contrary. If that were to occur, then the Debtors would perform the required calculations and Residco would receive the distributions it would be entitled to on a non-consolidated basis.[9]

9. The Debtors believe that, on a non-consolidated basis, percentage recoveries for RAH creditors would be substantially less than for the other Consolidated Debtors. However, it is not necessary for the Court to make such a determination in connection with this Response or with respect to approval of the Residco Carve-Out as proposed by the Debtors.

G. The Plan Satisfies Section 1123(a)(4) of the Bankruptcy Code

57. Without providing any case law or statutory support, Residco contends wrongly that the Plan does not satisfy section 1123(a)(4) "same treatment" requirement because of the elimination of guarantee claims under substantive consolidation. In fact, the Plan satisfies section 1123(a)(4) because it provides for the same treatment by the Debtors for each Claim or Interest in each respective Class.

58. The "same treatment" standard of section 1123(a)(4) "does not require identical treatment for all class members in all respects under a plan." *In re Adelphia Commc'ns Corp*., 368 B.R. 140, 249 (Bankr. S.D.N.Y. 2007) (footnotes omitted). Nor does it "require that all claimants within a class receive the same amount of money," and disparity in amounts, whether in distributions received or consideration granted, do not necessarily suggest that a creditor was the victim of unequal treatment. *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 982 F.2d 721, 749 (2d Cir.1992); *see also In re Resorts Int'l, Inc*., 145 B.R. 412, 447 (Bankr.D.N.J.1990) ("This is not to be interpreted as requiring precise equality of treatment, but rather, some approximate measure since there is no statutory obligation . . . to quantify exactly what each class member is relinquishing[.]") (internal citation omitted).

59. Here, the Plan provides the same treatment for each Claim in its respective Class, including Residco's Class 3(a) Claims, thereby satisfying section 1123(a)(4). Under the substantive consolidation provision of the Plan, all guarantee claims are eliminated and all creditors enjoy the benefits of substantive consolidation, including the elimination of guarantee claims held by other creditors, the elimination of intercompany claims, and the reduction of costs and administrative burdens. Residco's Guarantee Claims are not singled out or treated differently.

H. Residco Should be Equitably Estopped From Objecting to Substantive Consolidation

60. Equitable estoppel is appropriate "where the enforcement rights of one party would create injustice to the other party who has justifiably relied on the words or conduct of the party against whom estoppel is sought." *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 462 F.3d 87, 93 n.3 (2d Cir. 2006) (internal citations omitted). To prevail on a claim for equitable estoppel, a party must show that they (1) lacked knowledge of the true facts, (2) reasonably relied on the misleading conduct of the party to be estopped, and (3) suffered prejudice as a result of their reliance. *In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994). The Second Circuit has stated that "Section 105(a) should be construed liberally to enjoin [actions] that might impede the reorganization process." *Id*. (internal quotations omitted).

61. Residco should be equitably estopped from asserting the Objection. The first prong — the Debtors' lack of knowledge of the true facts — is satisfied. Residco, as a member of the Committee, was consulted regarding the proposed Plan and voted in favor of the Committee's support of the Plan. Until early February, the Debtors had no reason to believe that Residco would attempt to derail the plan confirmation process at the eleventh hour to the detriment of the Debtors and all their other creditors. Residco's contention that its delay was due to a purported lack of clarity of Section 2.2 of the Plan lacks credibility. As described in detail above, Section 2.2(a) expressly states that "all guarantees of any Consolidated Debtor of the obligations of any other Consolidated Debtor shall be eliminated." In addition, as set forth above, similar language has been approved in numerous plans in this district.

62. The second prong is also satisfied as the Debtors, in filing and proposing the Plan and expending significant resources soliciting approval of the Plan, reasonably relied on Residco's representation, as a member of the Committee, that they supported the Plan. Through

their participation in discussions as a Committee member, Residco was given every opportunity to raise this issue before significant estate resources were expended in finalizing, filing, and soliciting votes on the proposed Plan, and having not only failed to do so, but affirmatively represented their position to be inapposite with the current Objection, Residco should now be estopped from pursuing positions inconsistent with their prior representations. *Cf. In re La Difference Restaurant, Inc.*, *29 B.R. 178* (Bankr. S.D.N.Y. 1983) (holding that where feasibility of a debtor's plan was made in reliance on a creditor's representations, future arguments of the creditor that are inconsistent with those representations are appropriately estopped).

63. Finally, as to the third prong, it is indisputable that Residco's attempt to inject delay and uncertainty into the confirmation process creates injustice to the Debtors, their nearly 5,200 employees, and thousands of vendors and other creditors, along with the flying public. The costs of delay are direct and substantial. Republic incurs approximately $3 million each month in fees and expenses paid to advisors retained by Republic, the Committee, and certain of its aircraft lessors and lenders. Moreover, any delay in approval of the Plan may impede Republic's ability to attract qualified pilots and lead to higher attrition, which could impair Republic's ability to meet its flying commitments and cause irreparable harm. Certain important transactions cannot close while Republic is in bankruptcy, which may impair Republic's ability to fund obligations under the Plan.[10] For all these reasons, sustaining Residco's eleventh hour objection would inflict substantial injustice on the Debtors and their stakeholders.

10. As one example, Republic's Court-approved sale-leaseback transaction of 5 aircraft with DBD Mesa LLC will give Republic almost $21 million in additional liquidity. That transaction, however, can be terminated by DBD Mesa LLC if the sale has not occurred by April 30, 2017 because Republic is still in bankruptcy. Termination of the transaction would require Republic to seek alternative liquidity sources to fund obligations under the Plan, which may prove difficult while Republic is in bankruptcy.

64. As Residco's conduct easily satisfies all three prongs necessary to prevail on a claim for equitable estoppel, this Court is empowered to estop Residco from pursuing their Objection and indeed, the principles of equity mandate such a result. "It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process" and the Second Circuit has "repeatedly emphasized the importance of the bankruptcy court's equitable power." *In re Momentum Mfg. Corp.*, 25 F.3d at 1136.

I. Residco Has Forfeited its Right to Releases Under the Plan

65. Non-debtor releases and exculpations are permissible "when the provisions are important to a debtor's plan; where the claims are 'channeled' to a settlement fund, rather than extinguished; where the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution; where the released party provides substantial consideration; where the plan otherwise provides for the full payment of the enjoined claims; or where the creditors consent." *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233 (Bankr. S.D.N.Y. 2014). Here, the Plan currently provides for the release and exculpation of all the members of the Committee premised on each of their substantial contribution to the Plan process, including confirmation of the Plan. However, by its Objection, Residco is not contributing to the process; to the contrary, Residco is attempting to hinder and delay the Plan process solely to further its own economic interests and extract preferential treatment at the expense of all other creditors. Accordingly, Residco does not qualify for release or exculpation under the Plan.

66. Due to the foregoing, prior to confirmation of the Plan, the Debtors intend to seek pursuant to section 1127(a) of the Bankruptcy Code, approval of modifications to the Plan to remove Residco from the definition of "Released Parties" and "Exculpated Parties".

Conclusion

WHEREFORE, the Debtors respectfully submit that the Plan complies with and satisfies all the requirements of section 1129 of the Bankruptcy Code. The Objection should be overruled, and the Plan should be confirmed.

Dated: New York, New York
March 1, 2017

/s/ Bruce R. Zirinsky

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Exhibit 1

Residco Carve-Out

Notwithstanding anything in the Plan to the contrary, in the event that the claims of Wells Fargo Bank Northwest, N.A., as Owner Trustee, and ALF VI, Inc., as Owner Participant (together, "Residco") against RAH (the "Guarantee Claims") in connection with the rejection of the *Amended and Restated Aircraft Lease Agreement* for each of seven EMB-145LR aircraft bearing U.S. registration marks N288SK, N561RP, N259JQ, N286SK, N287SK, N563RP and N562RP are allowed in a higher amount than the corresponding claims of Residco against Shuttle (the "Lease Claims," and together with the Guarantee Claims, the "Residco Claims"), such claims would not be consolidated for purposes of determining the amount of any distributions on account of the Residco Claims under the Plan. Instead, in that event, Residco would be entitled to receive distributions for (i) the allowed amount of the Guarantee Claims, based on an estimated percentage that non-priority general unsecured creditors of RAH would have received in a standalone plan of reorganization for RAH ***plus*** (ii) the allowed amount of the Lease Claims based on an estimated percentage distributions that nonpriority general unsecured creditors of Shuttle would have received in a standalone plan of reorganization for Republic Airline, in each case following the merger of Shuttle into Republic Airline pursuant to the *Order Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 6004 for Approval of (I) Merger of Shuttle America Corporation into Republic Airline Inc., and (II) Surrender of the Shuttle America Corporation Air Carrier Certificate* [ECF No. 1236] (the "Merger"), and after accounting for the effect of allowance of RAH recoveries on the distributions of non-priority general unsecured claims creditors of Shuttle following the Merger. In other words, the Debtors proposal would provide Residco with the amounts they would have recovered if the proposed limited substantive consolidation had not taken place. In addition, the Debtors agree to bear the burden of proof to establish the estimated percentage distributions that would have been received by general unsecured creditors under standalone plans for RAH and Republic Airline.