Hearing Date: April 21, 2016 at 9:00 a.m. (Eastern)
Objection Deadline: April 15, 2016 at 10:00 a.m. (Eastern) (by Extension)

MORRISON & FOERSTER LLP
250 W 55th St.
New York, New York 10019
Telephone: (212) 468-8000
Facsimile: (212) 468-7900
Brett H. Miller
Todd M. Goren
Erica J. Richards

Proposed Counsel for the Official Committee of Unsecured Creditors of Republic Airways Holdings Inc., et al.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

LIMITED OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' MOTIONS TO (I) ASSUME DELTA AGREEMENTS AND SETTLE DELTA CLAIMS AND (II) AUTHORIZE THE DEBTORS TO OBTAIN POSTPETITION FINANCING PROVIDED BY DELTA

The Official Committee of Unsecured Creditors (the "Committee") of Republic Airways Holdings Inc. and certain of its wholly-owned direct and indirect subsidiaries in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the "Debtors"), by its proposed counsel, Morrison & Foerster LLP, hereby submits this limited objection (the "Objection") to the *Debtors' Motion Pursuant to Sections 363(b), 363(m), and 365(a) of the Bankruptcy Code and Bankruptcy Rules 6004, 6006 and 9019 for Authorization to (I) Assume Codeshare and Related Agreements, as Amended, with Delta Air Lines, Inc., (II) Lease Certain*

Property of the Estate and (III) Settle Claims Between Delta Air Lines, Inc. and the Debtors [Dkt. No. 244] (the "Settlement Motion") and the *Debtors' Motion for Entry of an Order Pursuant to 11 U.S.C. §§ 105, 361, 362(d)(1), 363(b), 364(c)(1), 364(c)(2), 364(c)(3), 364(d), 364(e), 503(b)(1) and 507(b) and Fed. R. Bankr. P. 4001 and 6004 (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay and (IV) Granting Related Relief* [Dkt. No. 246] (the "DIP Motion" and, together with the Settlement Motion, the "Delta Motions").[1] In support of the Objection, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Committee supports the Debtors' efforts to reach consensual resolutions with their three code share partners, Delta, American Airlines, and United (collectively, the "Code Share Partners"), each of which is a fundamental component of the Debtors' restructuring efforts. Indeed, no single Code Share Partner can sustain the Debtors' business following their exit from bankruptcy. Similarly, no single settlement with a Code Share Partner can provide the Debtors with certainty that they will be able to exit with a viable business plan. Notwithstanding that fact, the Debtors have insisted on pressing forward with a standalone settlement with Delta, which currently accounts for less than 20% of the Debtors' total flying.[2]

2. The Committee appreciates the Debtors' desire to inspire their other Code Share Partners to come to the negotiating table quickly by pursuing a "first come, first served" approach. However, the relief being sought in the Delta Motions will necessarily impact the

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[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the respective Delta Motions, as applicable.

[2] After the wind-down of the Debtors' ERJ-145 flying for Delta this fall, Delta's proportion of the Debtors' flying will be further reduced to approximately 15%.

Debtors' ability to reach satisfactory agreements with American Airlines and United—not least as a result of the proposed "most-favored-nation" clause (the "MFN Clause") in the proposed Settlement Order, which entitles Delta to an increase in the amount or priority of its allowed claim to the extent the other two Code Share Partners strike deals on more favorable terms. *See* proposed order annexed to the Settlement Motion (the "Settlement Order") at ¶ 7. Without at least one more code share settlement on the table, it is simply impossible for the Committee to evaluate whether that impact will be positive or negative, which will turn on how the assumed Delta contracts fit into the Debtors' overall business plan going forward, as well as the nature and size of any claims that may be asserted by the Debtors' other Code Share Partners under their own agreements.

3. Additionally, the Debtors are scheduled to start taking delivery of additional aircraft at the end of this summer, which will likely require third party financing, and is anticipated to form an integral part of the Debtors' flying for United going forward. However, the DIP Financing—for which the Debtors have no imminent need and may never be drawn—contains terms that may very well be unacceptable to third party financiers. Here again, the Committee is unable to evaluate the full impact of the proposed Delta deal without more information about where other code share negotiations will land and how the new aircraft will be financed.

4. Approval of the Delta settlement now also risks converting Delta's prepetition unsecured claims of uncertain value into massive post-petition administrative claims if the Debtors are unable to provide Delta with all of the agreed upon flying due to unforeseen developments during these cases. Uncertainty also remains regarding whether the Debtors will be able to achieve their goal of moving to a single operating certificate, since the Debtors fly

80-seat aircraft for other Code Share Partners, which is currently in conflict with the terms of the Delta agreements that are being assumed now. Thus, the Debtors' pursuit of the Delta transactions on a standalone basis poses enormous risk for the Debtors' estates and their creditors.

5. For these reasons, the Committee believes that the Debtors' request for approval of the Delta Motions should be adjourned pending a settlement with at least one of the other Code Share Partners who are equally (if not more) important pieces of the Debtors' restructuring puzzle. Fortunately, parties in interest may not have long to wait. As reported by Debtors' counsel at the April 9, 2016 status conference, the Committee understands that the Debtors are close to reaching a deal with United. But a deal between those parties has not yet been finalized. And, even assuming one is reached in the very near term, the Committee and its professionals will need a reasonable amount of time to evaluate that settlement in conjunction with the Delta settlement.[3]

6. Accordingly, the Committee requests that the Court further adjourn the Delta Motions to allow time for the Debtors to finalize a settlement with at least one more of its Code Share Partners, and for both the Debtors and the Committee to be able to fully evaluate the consequences of the relief being requested under the Delta Motions in the broader context of the Debtors' relationships with all three Code Share Partners.

RELEVANT BACKGROUND

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

[3] If the Debtors reach a settlement with United and the papers documenting that settlement are provided to the Committee in short order, the Committee will make every effort to review the transaction as quickly as possible.

8. On March 4, 2016, the United States Trustee for the Southern District of New York appointed the seven member Committee[4] pursuant to section 1102(a)(1) of the Bankruptcy Code. On that same date, the Committee selected Morrison & Foerster to serve as its counsel, and Imperial Capital, LLC and SkyWorks Capital, LLC to serve as its financial advisors.

9. On March 24, 2016, the Debtors filed the Settlement Motion, pursuant to which the Debtors request Court authorization to, among other things, (i) settle an action commenced on October 5, 2015, by Delta against Debtors RAH and Shuttle America in Georgia state court, (ii) enter into a number of new agreements with Delta, including an amended Delta Connection Agreements and a slot lease agreement for thirteen arrival and departure slots at LaGuardia Airport, (iii) assume an existing slot lease agreement for another two slots at LaGuardia (all fifteen slots are referred to collectively as the "LGA Slots"), and (iv) grant Delta an allowed prepetition general unsecured claim in the amount of $170 million against each of the Debtors (the "Delta Claim"), subject to the MFN Clause.

10. Also on March 24, 2016, the Debtors filed the DIP Motion, pursuant to which the Debtors seek authority to enter into a postpetition financing agreement, under which Delta will lend the Debtors up to $75 million in post-petition financing (the "DIP Facility"), secured by first priority liens on virtually all the Debtors' unencumbered assets, as well as first priority priming liens on the LGA Slots.

11. The relief sought in each Delta Motion is contingent on the other Delta Motion also being granted.

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[4] The members of the Committee are: (i) GE Engine Services, LLC, (ii) Pratt & Whitney Component Services, (iii) Embraer S.A., (iv) United Airlines, Inc., (v) American Airlines, Inc., (vi) NAC Aviation 23 Limited, and (vii) International Brotherhood of Teamsters Airline Division.

12. A hearing on the Delta Motions was initially scheduled to be held on April 14, 2016.

13. On April 30, 2016, the Ad Hoc Committee of Equity Holders filed the *Emergency Motion of Ad Hoc Committee of Equity Holders to Adjourn Hearing* [Dkt. No. 278] (the "Adjournment Motion"), which requested that the hearing date and deadline to object to the Delta Motions be adjourned by approximately thirty days.

14. On March 31, 2016, the Court held a telephonic status conference regarding the Adjournment Motion. The Court declined to schedule further proceedings on the Adjournment Motion at that time, and instead extended the objection deadline with respect to the Delta Motions from April 7, 2016 to April 11, 2016, to allow the parties to work with the Debtors to try to gain a better understanding of the relief being requested. *See Order Regarding The Emergency Motion Of Ad Hoc Committee Of Equity Holders To Adjourn Hearing* [Dkt. No. 290].

15. On April 6, 2016, the Debtors filed the proposed form of DIP Credit Agreement [Dkt. No. 308].

16. On April 9, 2016, the Court held another status conference regarding the Adjournment Motion. At the request of the Committee, and with the consent of the Debtors and Delta, the Court further adjourned the hearing on the Delta Motions to April 21, 2016 [Dkt. No. 321].

ARGUMENT

A. The Delta Transactions Pose Potential Risks for the Debtors' Estates on a Standalone Basis

17. Since the March 31st status conference, the Committee has worked closely with the Debtors, as well numerous other parties in interest including Delta, the Debtors' other Code

Share Partners, and certain aircraft lessors and financing parties to understand the potential consequences—both intended and unintended—of entering into the Delta transactions at this time. Although those discussions have been productive and informative, the Committee's concerns about the likely risks those transactions pose for the Debtors' estates if pursued on a standalone basis still remain.

18. The economic terms of the DIP Facility (*i.e.*, the fees, interest rate, prepayment terms) are generally reasonable.[5] However, the Debtors have no pressing need for post-petition financing any time soon, and may never need it if they are able to restructure certain of their aircraft financing facilities. Because the Debtors do not need the DIP Facility, they should not enter into the DIP Credit Agreement unless it is reasonably certain that the terms of the DIP Facility will not jeopardize their restructuring efforts in any meaningful way. There can be no such certainty at this point in time.

19. Among the Committee's concerns is the fact that the DIP Order does not permit the Debtors to grant a superpriority claim of equal or greater priority to other parties under any circumstances. However, the Debtors are scheduled to begin taking delivery of a number of new aircraft late this summer, which are slated to be flown for United. The new aircraft are critical to the Debtors' business plan following exit, as each one can provide the Debtors with several millions of dollars in additional revenues per year. Those new aircraft will require financing, although the source of that financing—and that party's willingness to provide financing that is subordinate to Delta—is not yet clear. Thus, the Debtors' ability to obtain necessary future aircraft financing is potentially being put at risk by the terms of DIP financing

[5] To be clear, the Committee does have objections to certain of the terms of the proposed DIP financing, which it has discussed with the Debtors and Delta. The Committee has made significant progress on these objections with Delta and is hopeful that its concerns will be consensually resolved in advance of the hearing on the DIP Motion. However, as set forth below, the Committee reserves the right to raise its objections with the Court at the hearing if a resolution is not reached.

they do not currently need. The Committee is hopeful that this concern will be a non-issue (whether because it is addressed as part of a United settlement or otherwise), but more time is required to determine what impact, if any, the inability to grant an equal superpriority claim might have on the Debtors' ability to take delivery of the new aircraft.

20. Turning to the Settlement Motion, the Committee also has significant concerns regarding the Delta Claim. Although it is presently proposed to be allowed in the amount of $170 million, that amount is "subject to upward adjustment depending on the potential more favorable treatment of similar claims of Republic's other Codeshare Partners than was accepted by Delta." *See* Settlement Motion at ¶ 26. More specifically, the MFN Clause of the Settlement Order provides for the "automatic" proportional adjustment of the allowed Delta Claim if any of the Debtors' other Code Share Partners receive an allowed claim against any of the Debtors in a greater proportion to such Code Share Partners' maximum reasonable damages or economic concessions to the Debtors, or with a priority higher than that of a general unsecured prepetition claim.[6]

21. As an initial matter, the language of the MFN Clause is not limited to allowed claims of other Code Share Partners reached through settlement. Thus, it is possible that another Code Share Partner will seek to litigate the amount of its claims and, if it prevails in that litigation and is granted an allowed claim for the full amount of its damages, Delta, too, will be entitled to the full amount of damages by operation of the MFN Clause. This could potentially leave Delta's claim open for years. It also allows Delta to get both the benefits of

[6] More specifically, paragraph 7 of the Settlement Order provides: that if any of the Debtors' other codeshare partners (American Airlines Group, Inc. or United Continental Holdings), receive an allowed claim against any of the Debtors (a "Codeshare Claim"), which Codeshare Claim is in a greater proportion to such codeshare partners' maximum reasonable damages or in a greater proportion of the economic concessions to the Debtors, than the Delta Claim is to Delta's maximum reasonable damages or economic concessions or has priority higher than that of a general unsecured prepetition claim (such proportion and priority, the "Codeshare Claim Proportion"), then the Delta Claim shall be automatically increased in amount or priority, as applicable such that its proportion to Delta's reasonable damages or priority equals the Codeshare Claim Proportion.

settling and the potential benefits of litigating its claims, without incurring any of the risks of litigation.

22. Further, the Settlement Order is unclear regarding whose views will determine what "maximum reasonable damages" means in this context, and it remains to be seen whether a direct comparison between the settlements with other Code Share Partners and the Delta Settlement will even be possible. While Delta has tentatively agreed that any adjustment of the Delta Claim pursuant to the MFN Clause will be subject to a further review and approval process, settlement of an additional Code Share Partner's claim will provide significant comfort as to whether an adjustment will be necessary and how the process will work.

23. The effect of the MFN Clause is that the Delta Claim is potentially subject to adjustment to up to the full $1.7 billion of Delta's asserted damage claims, depending on how successful the Debtors are in negotiating or litigating with their two other Code Share Partners, who each make up a much larger share of the Debtors' current flying. The Committee believes that a $170 million unsecured claim to resolve the Delta Litigation is reasonable. The Committee has no way to assess whether a claim in an unspecified priority and an unspecified amount somewhere between $170 million and $1.7 billion would be reasonable at this point, and neither do the Debtors or this Court. That uncertainty is compounded by the fact that the Debtors have not yet filed their schedules and statements of financial affairs. As a result, it is difficult to know if there are even assets at all of the Debtor entities against whom the Delta Claim is proposed to be allowed, or what share of the total claims pool at each Debtor the Delta Claim is likely to represent. Limiting the MFN Clause to apply only in the case of settlements of other Code Share Partners' claims would go a long way to resolving this concern.

24. The key question in approving a bankruptcy settlement is whether the compromise is fair and equitable, and in the best interests of the bankruptcy estate. *See, e.g.*, *Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. of Chi. (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 426 (S.D.N.Y. 1993), *aff'd sub nom.*, *Sobchack v. Am. Nat'l Bank & Trust Co. (In re Ionosphere Clubs, Inc.)*, 17 F.3d 600 (2d Cir. 1994). "The linchpin of the 'best interests of the estate' test is a comparison of the value of the settlement with the probable costs and benefits of litigating." *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007). As part of this test, the value of the settlement must be reasonably equivalent to the value of the claims surrendered. *Id*. Because the MFN Clause renders the value of the Delta Settlement indeterminate at this point in time (particularly in the absence of any information regarding the likely settlement ranges with respect to the other Code Share Partners' claims), the Debtors cannot satisfy the best interests of the estate test applicable under Bankruptcy Rule 9019.

25. Indeed, although case law involving most favored nation clauses is scarce, unconditional most favored nation clauses are often disfavored because they have several drawbacks, which can often inhibit later compromise and settlement. *See generally* Manual for Complex Litigation (Fourth) § 13.23 (2016) (noting that the potential liability under MFN clauses is indeterminate, making them risky, and the factors that induce parties to settle with different parties for different amounts, such as the time of settlement and the relative strength of claims, are nullified). The effect of most favored nation clauses can be particularly disruptive in the orderly disposition of litigation involving multiple defendants. For this reason, some courts have refused to enforce such clauses. *See, e.g.*, *In re Chicken Antitrust Litig.*, 560 F. Supp. 943, 946 (N.D. Ga. 1979) (striking most favored nation clauses from

settlement agreements because it "straight-jacketed" the plaintiffs from settling with other defendants and frustrated the public policy favoring settlements).[7] For similar reasons, this Court should decline to approve a settlement with Delta incorporating the MFN Clause until there is more clarity in these cases regarding the impact that clause will have on the Debtors' ability to reach settlements with its other Code Share Partners.

B. A Short Delay in the Approval of the Delta Transactions Will Not Harm the Debtors' Estates

26. As set forth above, approval of the Delta transactions now, while the outcome of negotiations with both of their two largest Code Share Partners remains uncertain, poses substantial risk for the Debtors' estates. In contrast, a short delay in seeking approval of those transactions now will not have any adverse effects. The Debtors have asserted that the Delta deal has motivated its other Code Share Partners, to cut their own deals, and that any delay in obtaining approval of the Delta transactions will slow that progress. But a brief delay, made for the express purpose of allowing those other parties to come to the negotiating table before a Court order sets in motion irrevocable transactions in favor of their competitor, is surely motivation enough.

27. The Debtors further contend that the certainty provided by entering into the Delta deal now will have a stabilizing effect on their pilot retention and recruitment efforts. It is questionable how meaningful a deal with a code share partner that currently makes up less

[7] Although bankruptcy courts have approved MFN clauses in the context of settlements, they are typically used to set a ceiling, rather than a floor, on the amount of the claims being settled. *See, e.g., Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Secs. LLC)*, Adv. No. 08-01789 (SMB), 2014 Bankr. LEXIS 4348 (Bankr. S.D.N.Y. Oct. 10, 2014) (discussing terms of a settlement of avoidance claims between the trustee and a creditor, which included an MFN clause, requiring the trustee to refund a portion of the settlement payment made by the creditor if the trustee entered into similar future settlements with other defendants for a lower percentage of the claimed amount). Even in those cases, subsequent disputes regarding the applicabililty and meaning of the MFN clause can arise. *Id.* at *18 (The Court subsequently held an evidentiary hearing on July 30, 2014. The evidence consisted primarily of the various drafts of the Optimal Settlement and the testimony of the two attorneys involved in drafting the agreement. For the most part, they testified about what they contended the MFN clause meant, but did not provide evidence, beyond the exchange of drafts, that touched on their negotiations, or specifically, who said what to who about the MFN clause and its various iterations.)

than 20% of the Debtors' flying will be to labor. Reaching deals with Code Share Partners that collectively make up a majority of the Debtors' flying (an outcome that may be easier to achieve before the Delta transaction is heard by the Court), on the other hand, would send a much stronger message to their pilots and other parties in interest regarding the Debtors' prospects for exiting bankruptcy with all three Code Share Partners still in place.

28. The Debtors have also argued that they must progress in reaching consensus with their Code Share Partners in advance of the upcoming section 1110(a)(2) deadline of April 25, 2016. More specifically, they have stated that they need certainty on the Delta deal so that they can make major decisions on aircraft retention and/or surrender by that date. This argument is a red herring. Whether there is an approved Delta deal in place or not, the Debtors are unlikely to have made all their fleet decisions before April 25th. As a result, they will need to engage in the section 1110 process either way (and the Committee understands they are in fact already doing so). In all likelihood, section 1110(b) agreements will be achievable particularly as to those aircraft the Debtors are uncertain about, which are generally less marketable. And the Debtors are likely to make section 1110(a) elections with respect to the aircraft they know they want to keep, regardless of whether the Delta deal is approved now. Accordingly, from a section 1110 perspective, the only meaningful difference between approving the Delta transactions now or waiting until the Debtors have another code share settlement in hand is that, if the Settlement Motion is adjourned, the section 1110 process will not also be accompanied by the assumption of large contracts before the full consequences of such an assumption are understood.

29. The Debtors have also suggested that they need to have DIP financing in place to provide additional liquidity to fund section 1110 expenses and other cash needs. However,

based on their own projections, the Debtors currently have sufficient cash to operate through at least October, even after making expected section 1110 payments and without taking into account any cost savings under the amended Delta contracts realized in the meantime.

30. In summary, the Debtors have articulated no concrete benefits to entering into the deal now as opposed to in a few weeks, and any speculative benefits are overwhelmed by the additional risks the proposed transactions pose for the estates on a standalone basis. By their own terms, the Delta transactions do not need to be approved until May 14, 2016. And as noted above, the Debtors have no immediate need for DIP financing. Accordingly, a further limited adjournment of the Delta Motions will allow the parties to gain more certainty regarding the impact of the Delta transactions and will not adversely impact the ability of the Debtors to actually close on those transactions in the near future.

C. Reservation of Rights

31. In addition to its concerns regarding timing, the MFN Clause, and the Superpriority Claim, as discussed above, the Committee raised various other issues with the Debtors and Delta, and requested certain modifications to the documents to address those issues. The Committee understands (subject to seeing proposed final drafts of the operative documents) that Delta has agreed to accept a number of those modifications, including the following:

- DIP Order:
  - Providing the Committee with advance notice of any material amendments, waivers, consents or other modifications to and under the DIP Credit Agreement agreed to by the Debtors pursuant to paragraph 3(b) of the DIP Order;
  - Providing the Committee's professionals with copies of any reporting or notices that are required to be provided to the Lender or by the Lender pursuant to the DIP Credit Agreement.

- Settlement Order:
    - Clarifying that the Delta Claim will only be allowed against RAH and Shuttle, as the Debtors against whom Delta has actually asserted claims;
    - Clarifying that, notwithstanding any change of control provisions in the Assumed Agreements, an equity transaction in the context of a plan that does not result in single person or entity obtaining a majority interest in the Debtors will not be deemed an event of default under the Assumed Agreements.
- DIP Credit Agreement:
    - Limiting the cross-default between the DIP Credit Agreement and the Delta Connection Agreements to material defaults;
    - Limiting the waiver of the right to seek relief under Bankruptcy Code section 105 upon the occurrence of an event of default to the Debtors.

32. The Committee has also requested the following modifications, which are still under discussion among the parties:

- Settlement Order:
    - Limiting the Delta Claim to a single satisfaction (*i.e.*, Delta cannot receive more than $170 million in total on account of the Delta Claim from both RAH and Shuttle);
- DIP Credit Agreement:
    - Revising the budget requirements and covenant provisions to take into account future aircraft deliveries and potential changes in delivery dates;
    - Removing the event of default resulting from any Credit Party objecting to "any claim of Delta";
    - Making the exercise of Delta's right to setoff amounts under the Delta Connection Agreements subject to the five business days' notice requirement contemplated under the DIP Order.

33. The Committee is optimistic that the parties will be able to fully resolve their remaining issues in advance of the hearing. To the extent a full resolution is not reached, however, the Committee reserves the right to raise such objections at the hearing.

CONCLUSION

34. For the foregoing reasons, the Committee respectfully requests that this Court further adjourn the hearing or, in the alternative, deny the DIP Motion and Settlement Motion without prejudice to the Debtors' ability to refile upon reaching a settlement with another Code Share Partner.

Dated: April 15, 2016
New York, New York

Respectfully submitted,

/s/ Brett H. Miller

MORRISON & FOERSTER LLP
Brett H. Miller
Todd M. Goren
Erica J. Richards
250 W 55th St.
New York, NY 10019
Telephone: (212) 468-8000
Facsimile: (212) 468-7900

Proposed Counsel for the Official Committee of Unsecured Creditors of Republic Airways Holdings Inc., et al.