UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
SOUTHERN AIR HOLDINGS, INC., *et al.*,	:	**Case No. 12-12690 (CSS)**
Debtors.[1]	:	**Jointly Administered**

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE SECOND AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

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[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: (i) Southern Air Holdings, Inc., 6605; (ii) Cargo 360, Inc., 4233; (iii) Southern Air Inc., 2187; (iv) Air Mobility Inc., 3824; (v) 21110 LLC, 3761; (vi) 21111 LLC, 8100; (vii) 21221 LLC, 1567; (viii) 21550 LLC, 8103; (ix) 21576 LLC, 6341; (x) 21590 LLC, 8105; (xi) 21787 LLC, 0617; (xii) 21832 LLC, 7893; (xiii) 23138 LLC, 7192; (xiv) 24067 LLC, 6360; (xv) 46914 LLC, 0322; (xvi) Aircraft 21255, LLC, 5500; (xvii) Aircraft 21380, LLC, 1753; and (xviii) CF6-50, LLC, 9733.

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Southern Air Holdings Inc. ("Holdings") and its affiliated debtors, as debtors and debtors in possession in the above captioned chapter 11 cases (together, the "Debtors"), submit this Memorandum of Law (the "Memorandum"),[2] in support of confirmation of the *Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated January 18, 2013 (as amended, modified or supplemented from time to time, the "Plan"), pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code").

PRELIMINARY STATEMENT

In anticipation of commencing these chapter 11 cases, the Debtors engaged in extensive arm's length and good faith negotiations with their key economic stakeholders in an effort to alleviate certain financial and practical realities facing the Debtors. The negotiations resulted in the formulation of an agreed upon strategy to effectuate a comprehensive financial and operational restructuring that would bridge the Debtors' short-term lack of liquidity, significantly reduce the amount of debt on the Debtors' consolidated balance sheet, and position the Debtors to stabilize their economic and operating platforms to enable them to pursue growth opportunities, including a restructuring of the Debtors' aircraft lease agreements and workforce reductions. The parties to the negotiations memorialized their agreement in that certain Plan Support Agreement, dated September 27, 2012 (the "Plan Support Agreement").

The Plan is a finely constructed reflection of the plan term sheet attached to the Plan Support Agreement and the subsequent consensus achieved and maintained between the Debtors, the parties to the Plan Support Agreement, and various other significant creditor constituencies during these chapter 11 cases, including the Creditors' Committee and the Exit

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or Disclosure Statement (each as defined herein), as applicable.

Lenders. In that regard, the Plan represents the culmination of the earnest efforts of the Debtors to achieve a consensual reorganization. The consensual nature of the Plan is underscored by the fact that the Plan has been accepted by overwhelming majorities in every Class of impaired creditors entitled to vote on the Plan. Not a single Class voted to reject the Plan.

In addition to this Memorandum, in further support of confirmation of the Plan, the following have been filed prior to or contemporaneously herewith:

a. *Affidavit of Service*, dated February 8, 2013, signed by Michael J. Paque [Docket No. 546], attesting to the service of the solicitation materials approved by the Bankruptcy Court pursuant to the order approving the *Disclosure Statement for the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* (as amended, modified or supplemented from time to time, the "KCC Affidavit");

b. *Declaration of Michael J. Paque on Behalf of Kurtzman Carson Consultants LLC Certifying the Methodology for the Tabulation of Votes on and Results of Voting With Respect to the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated March 11, 2013 [Docket No. 642], certifying the solicitation process, tabulation process, voting results, and results of certain elections (the "Paque Declaration" and together with the KCC Affidavit, the "Voting Certification");

c. *Plan Supplement in Support of Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated February 19, 2013, as amended [Docket Nos. 573, 598, 615 and 631] (the "Plan Supplement");

d. *Schedule of Assumed and Assigned Executory Contracts and Unexpired Leases*, dated February 26, 2013 [Docket No. 599], setting each executory contract or unexpired lease to be assumed or assumed and assigned by the Debtors and the cure amounts related thereto (the "Assumption Schedule");

e. *Notice of Proposed Directors and Officers of the Reorganized Debtors Pursuant to Section 1129(a)(5) of the Bankruptcy Code*, dated March 11, 2013, disclosing the identity and affiliations of the individuals proposed to serve as a director or officer of the Reorganized Debtors [Docket No. 640] (the "Reorganized D&O Notice");

f. *Declaration of William B. Murphy in Support of Entry of an Order Confirming the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated March 11, 2013, and filed contemporaneously herewith (the "Murphy Declaration").

The Plan satisfies all of the confirmation standards of section 1129 of the Bankruptcy Code, achieves the objectives of chapter 11 and should be confirmed.

BACKGROUND

The Chapter 11 Cases

On September 28, 2012 (the "Petition Date"), each of the Debtors commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors' chapter 11 cases (the "Chapter 11 Cases") have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

On November 21, 2012, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") filed a notice [Docket No. 293] appointing a statutory committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Creditors' Committee"). The Creditors' Committee is comprised of (i) Arrow Air Unsecured Creditor Trust, (ii) Williams Aerospace, LLC, and (iii) Aquinas Consulting, LLC. No trustee or examiner has been appointed in these Chapter 11 Cases.

The Plan and Disclosure Statement

On October 18, 2012, the Debtors filed the *Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 165] (the "Initial Plan")[3] and a disclosure statement relating thereto [Docket No. 167].[4] On December 18, 2012,

[3] The Initial Plan was amended on December 13, 2012 [Docket No. 376] and January 18, 2013 [Docket No. 470].

[4] The disclosure statement relating to the Initial Plan was amended on December 13, 2012 [Docket No. 378] and January 18, 2013 [Docket No. 472], and modified on January 28, 2013 [Docket No. 520].

the Bankruptcy Court held a hearing at which it approved the disclosure statement relating to the Initial Plan, and on December 19, 2012, entered an order with respect thereto [Docket No. 408].

Shortly thereafter, the Creditors' Committee advised the Debtors that it had certain objections to the Initial Plan. Additionally, the Debtors learned that one of their customers would not renew its contract, which affected the assumptions and financial projections underlying both the terms of the Initial Plan and the agreement reached with respect to the aforementioned objections raised by the Creditors' Committee. The Debtors addressed their new economics in the Plan and the accompanying *Disclosure Statement for the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* (the "Disclosure Statement"), which were filed on January 18, 2013. On January 29, 2013, the Bankruptcy Court held a hearing to consider the adequacy of the information contained in the Disclosure Statement and entered the *Order (I) Approving the Proposed Disclosure Statement and the Form and Manner of the Notice of a Hearing Thereon, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Plan, Pursuant to Sections 105, 502, 1125, 1126, and 1128 of the Bankruptcy Code, Bankruptcy Rules 2002, 3003, 3017, 3018, and 3020, and Local Rules 2002-1, 3017-1, and 9006-1* [Docket No. 518] (the "Disclosure Statement Order"). Pursuant to the Disclosure Statement Order, the Court approved the Disclosure Statement and the proposed solicitation and voting procedures.

On February 19, 2013, the Debtors filed a supplement to the Plan [Docket No. 573] (as amended, supplemented, or modified, the "Plan Supplement"), which included the following documents: (i) the form of Reorganized Debtors By-Laws; (ii) the form of Reorganized Debtors Certificate of Incorporation; (iii) the form of Oak Hill Warrants; (iv) the

form of Reorganized Southern Air Parent Stockholders Agreement; (v) the form of OHAA Funding Agreement; (vi) the form of Prepetition Lender Warrants; and (vii) the form of Litigation Trust Agreement, including, without limitation, schedules and exhibits to the Litigation Trust Agreement. On February 26, 2013, the Debtors filed the first amendment to the Plan Supplement [Docket No. 598], amending both the form of Reorganized Southern Air Stockholders Agreement and the form of Litigation Trust Agreement, in their entirety. On March 1, 2013 the Debtors filed the second amendment to the Plan Supplement [Docket No. 615], containing the following documents: (i) the form of Southern Management Warrants; (ii) the form of Management Equity; and (iii) the form of Management Agreement. On March 7, 2013, the Debtors filed the third amendment to the Plan Supplement [Docket No. 631], containing the form of Exit Credit Agreement, and that certain Commitment Letter, dated March 7, 2013, relating to the Exit Facility (the "Commitment Letter"), and that certain Fee Letter, dated March 7, 2013, relating to the Exit Facility (the "Fee Letter").

The Plan contemplates and is predicated upon the deemed substantive consolidation of the Debtors for the purpose of all actions pursuant to the Plan. Solely for purposes of the Plan: (i) all of the Debtors' assets and liabilities shall be treated as though they were merged; (ii) all guarantees of one Debtor's obligations by another of the Debtors shall be eliminated; and (iii) any claim filed against any of the Debtors shall be deemed filed against the Debtors collectively and shall constitute one claim against the consolidated Debtors. If entered, the Confirmation Order shall constitute approval pursuant to section 105(a) of the Bankruptcy Code, effective as of the Effective Date, of the deemed substantive consolidation of the Chapter 11 Cases for all purposes related to the Plan, including, without limitation, for purposes of voting, confirmation and distribution.

FACTS

Except as set forth herein, the pertinent and salient facts relating to the Debtors' Chapter 11 Cases and the Plan are set forth in the Disclosure Statement and the Murphy Declaration, and are incorporated herein as if set forth fully and at length. Certain additional facts may be provided by live testimony at the Confirmation Hearing. As necessary, specific, salient facts will be referred to in connection with the discussion of applicable legal principles.

THE PLAN COMPLIES WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE

To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. As set forth in *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160 (5th Cir. 1993):

> The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown.

Id. at 1165; *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006). The Debtors have received objections (collectively, the "Objections") from certain parties to confirmation of the Plan. A detailed response to the Objections is set forth herein and in the *Debtors' Omnibus Response to Objections to Confirmation of the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated March 11, 2013 [Docket No. 641] (the "Omnibus Response"). Through filings with the Court, the record of these Chapter 11 Cases, the Murphy Declaration, the Omnibus Response and additional testimonial evidence which may be adduced at the Confirmation Hearing, the Debtors will demonstrate, by a

preponderance of the evidence, that the Plan satisfies all applicable subsections of section 1129 of the Bankruptcy Code.

A. Section 1129(a)(1)

Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) indicates that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, governing classification of claims and contents of a plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008); *In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636 (2d Cir. 1988); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984). As demonstrated below, the Plan fully complies with the requirements of the Bankruptcy Code.

1. The Plan Complies with Section 1122 of the Bankruptcy Code

Section 1122 of the Bankruptcy Code provides in pertinent part as follows:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122. Pursuant to section 1122(a), not all substantially similar claims or interests must be designated in the same class for a classification structure. However, claims or interests designated to a particular class must be substantially similar to each other.

The default rule is that substantially similar claims and equity interests will be placed in the same class. *See Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1278 (5th Cir. 1991) ("A fair reading of both subsections suggests that ordinarily 'substantially similar claims,' those which share common priority and rights against the debtor's estate, should be placed in the same class."); *In re Frascella Enters., Inc.*, 360 B.R. 435, 442 (Bankr. E.D. Pa. 2007) ("Similar claims are generally placed in the same class."). However, courts generally grant the debtor broad discretion in classifying claims and equity interests under a reorganization plan, subject to the requirements of section 1122(a) of the Bankruptcy Code. *See Olympia & York Fla. Equity Corp. v. Bank of N.Y. (In re Holywell Corp.)*, 913 F.2d 873, 880 (11th Cir. 1990) (plan proponent allowed considerable discretion to classify claims and equity interests according to facts and circumstances of case so long as classification scheme does not violate basic priority rights or manipulate voting); *In re Piece Goods Shops Co.*, 188 B.R. 778, 788 (Bankr. M.D.N.C. 1995) ("Plan proponents are to be given considerable discretion in classifying claims according to the facts and circumstances of their cases.") (citation omitted); *In re Apex Oil Co.*, 118 B.R. 683, 696 (Bankr. E.D. Mo. 1990) ("Subject to the 'substantially similar' requirement under section 1122(a) of the Bankruptcy Code, the Debtors have broad discretion in designating the Classes under the Plan.").

Notwithstanding the default rule that substantially similar claims be classified together, the United States Court of Appeals for the Third Circuit (the "Third Circuit") has held that (i) a debtor has discretion to place similar claims in different classes when proposing a plan, and (ii) the debtor may place similar claims in different classes as long as the classification is "reasonable." *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987). In *Jersey City Medical Center*, the Third Circuit approved the separate classification of the unsecured

claims of the debtor hospital's physicians and the claims of general unsecured creditors. The Third Circuit remarked that:

> [N]othing in the Bankruptcy Code precludes the debtor from variously classifying the unsecured claims here . . . . The express language of this statute explicitly forbids a plan from placing dissimilar claims in the same class; it does not, though, address the presence of similar claims in different classes. Although the legislative history behind § 1122 is inconclusive regarding the significance (if any) of this omission, it remains clear that Congress intended to afford bankruptcy judges broad discretion to decide the propriety of plans in light of the facts of each case. . . . Accordingly, we agree with the general view which permits the grouping of similar claims in different classes.

Id. With the exception of the DIP Lender Claims, the Oak Hill Entities' Claims, Administrative Expense Claims and Priority Tax Claims, which need not be classified, Article IV of the Plan provides for the separate classification of Claims against, and Equity Interests in, each of the Debtors based upon differences in the legal nature and/or priority of such Claims and Equity Interests. The Plan designates the following twenty-six (26) Classes of Claims and Equity Interests:

- Class 1 contains Priority Non-Tax Claims
- Class 2 contains Prepetition Lender Claims
- Class 3 contains Other Secured Claims
- Class 4 contains General Unsecured Claims
- Class 5 contains Convenience Claims
- Class 6 contains General Liability Insured Litigation Claims
- Class 7 contains Subordinated Claims
- Class 8 contains Preferred Equity Interests
- Classes 9 through 26 contain Common Equity Interests

The Claims or Equity Interests in each particular Class are substantially similar to the other Claims or Equity Interests, as the case may be, in each such Class. To the extent that unsecured Claims or Equity Interests of equal priority are placed in different classes, a valid business, factual, and/or legal reason exists for such separate classification and is set forth below.

With respect to the separate classification of unsecured claims of equal priority, the Debtors submit the following justifications for the separate classification thereof:

- The Claims in Class 6 relate to those Claims or causes of action against the Debtors for which the claimant or the Debtors may recover under a General Liability Insurance Policy.

- Class 7 is comprised of Claims that (i) have been determined pursuant to a Final Order to be subordinated in accordance with section 510(c) of the Bankruptcy Code under the principles of equitable subordination or otherwise, or (ii) are subordinated because the proof of claim filed for such Claim was submitted on or after the date designated by the Bankruptcy Court or established by the Bankruptcy Code as the last date for filing such proof of claim that has not become an Allowed Claim.

Thus, there are legitimate bases to classify these claims separately from other general unsecured claims asserted against the Debtors.

With respect to the separate classification of Equity Interests of equal priority, the Debtors submit the following:

- All the Preferred Equity Interests in Class 8 are substantially similar because, among other things, (i) the Preferred Equity Interests are separately designated series of an issued and outstanding share and preferred stock of Holdings prior to the Petition Date, and (ii) each of the series of Preferred Equity Interests ranks on parity with each of the others in terms of those aspects of such interests affecting their legal status in relation to the Debtors' assets, namely, their relative dividend rights and right to priority of payment in the event of a liquidation.

- All Equity Interests in Classes 9 through 26, respectively, represent common stock interests but have been separately classified to reflect that such Equity Interests are for each of the eighteen (18) Debtor entities.

In addition to the above justifications, as set forth in further detail below, such separate classification does not unfairly discriminate between holders of similar Claims and Equity Interests.

The Plan also complies with section 1122(b) of the Bankruptcy Code. Consistent with section 1122(b) of the Bankruptcy Code, for administrative convenience, the Plan separately classifies, subject to certain exclusions, those General Unsecured Claims equal to, less than, or reduced to Two Thousand Dollars ($2,000.00). The inclusion of Class 5 will permit the Debtors to make a single distribution and avoid the administrative burden of tracking the transfers of Convenience Claims, repeating the calculations of the distributions to holders of such Claims, and preparing and mailing or wiring distributions to holders of such Claims on each distribution date. The definition of Convenience Claims is reasonable and necessary for administrative convenience.

Based upon the foregoing, the Debtors submit that the proposed classification of Claims and Equity Interests in the Plan is reasonable, appropriate, and within the Debtors' exercise of their discretion. Accordingly, the Debtors submit that the Plan satisfies the requirements of sections 1122(a) and (b) of the Bankruptcy Code.

2. <u>The Plan Complies with Section 1123(a) of the Bankruptcy Code</u>

Section 1123(a) of the Bankruptcy Code sets forth seven (7) requirements with which every chapter 11 plan must comply. As demonstrated herein, the Plan fully complies with each enumerated requirement.

i. Section 1123(a)(1): Designation of Classes of Claims and Equity Interests

Section 1123(a)(1) requires that a plan must designate, subject to section 1122 of the Bankruptcy Code, classes of claims and equity interests. As discussed above, the Plan designates twenty-six (26) different Classes of Claims and Equity Interests, subject to section 1122. *See* Plan Arts. V–XIII. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

ii. Section 1123(a)(2): Classes that Are Not Impaired by the Plan

Section 1123(a)(2) of the Bankruptcy Code requires that a plan specify which classes of claims or interests are unimpaired by the plan. Pursuant to Articles V, VII, and XIII, and Section 19.1 of the Plan, Claims in Class 1 (Priority Non-Tax Claims), Class 3 (Other Secured Claims), Class 10 (Cargo 360 Equity Interests), Class 11 (Southern Air Equity Interests) and Class 12 (Air Mobility Equity Interests) are unimpaired under the Plan. *See* Plan Arts. V, VII and XIII and Sec. 19.1. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

iii. Section 1123(a)(3): Treatment of Classes that Are Impaired by the Plan

Section 1123(a)(3) of the Bankruptcy Code requires that a plan specify how it will treat impaired classes of claims or interests. Articles VI and VIII through XIII of the Plan designates the following Class of Claims and Equity Interests as impaired: Class 2 (Prepetition Lender Claims), Class 4 (General Unsecured Claims), Class 5 (Convenience Claims), Class 6 (General Liability Insured Litigation Claims), Class 7 (Subordinated Claims), Class 8 (Preferred Equity Interests), Class 9 (Holdings Equity Interest), Class 13 (21110 LLC Equity Interests), Class 14 (21111 LLC Equity Interests), Class 15 (21221 LLC Equity Interests), Class 16 (21550 LLC Equity Interests), Class 17 (21576 LLC Equity Interests), Class 18 (21590 LLC Equity Interests), Class 19 (21787 LLC Equity Interests), Class 20 (21832 LLC Equity Interests), Class 21 (23138 LLC Equity Interests), Class 22 (24067 LLC Equity Interests), Class 23 (46914 LLC Equity Interests), Class 24 (CF6-50 LLC Equity Interests), Class 25 (Aircraft 21380 LLC Equity Interests) and Class 26 (Aircraft 21255 LLC Equity Interests). The treatment of each Claim or Equity Interest in those Classes designated under the Plan as impaired is set forth in Articles VI

and VIII through XIII of the Plan. Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

iv. Section 1123(a)(4): Equal Treatment Within Each Class

Section 1123(a)(4) requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Equity Interest in the Debtors in each respective Class is the same as the treatment of every other Claim or Equity Interest in such Class unless the holder of a particular Claim or Equity Interest has agreed to a less favorable treatment for such Claim or Equity Interest. *See* Plan Art. V–XIII. Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

v. Section 1123(a)(5): Adequate Means for Implementation

Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). In addition to the Plan and the funding contemplated thereunder, the Reorganized Debtors, the Requisite Lenders, the Required DIP Lenders, the Exit Lenders, the Oak Hill Entities, and the Creditors' Committee, as applicable, will execute, pursuant to the Plan, the documentation necessary to implement the terms of the Plan. Accordingly, the Plan and the various documents and agreements set forth in the Plan Supplement provide adequate and proper means for the implementation of the Plan, including, without limitation, (i) adoption and filing of the Reorganized Debtors Certificates of Incorporation and the Reorganized Debtors By-Laws, (ii) issuance of Reorganized Southern Air Parent Common Stock, Prepetition Lender Warrants, Southern Management Warrants, and Oak Hill Warrants, (iii) execution, delivery, and consummation of the OHAA Funding Agreement,

the Exit Credit Agreement and any documents in connection with the Exit Credit Facility, including, without limitation, the Commitment Letter, the Fee Letter, and any guarantees and security documents, and (iv) creation of the Litigation Trust and the transfer of the Litigation Trust Assets thereto, (v) distribution and/or issuance, as the case may be, of Cash, Reorganized Southern Air Parent Common Stock, Prepetition Lender Warrants, Southern Management Warrants, Oak Hill Warrants, and the Litigation Trust Interests, and (vi) cure of defaults with respect to assumed executory contracts and unexpired leases.

The Plan provides for the creation of a Litigation Trust to administer the liquidation and distribution of the proceeds of the Litigation Trust Assets, and to otherwise facilitate the implementation of the Plan. The Litigation Trustee and members of the board of the Litigation Trust (the "Litigation Trust Board") will be tasked with overseeing the administration of the Litigation Trust. Pursuant to the Litigation Trust Agreement, the Litigation Trust Board will initially consist of three (3) members selected solely by the Creditors' Committee. The initial members of the Litigation Trust Board are disclosed in Exhibit B of the Litigation Trust Agreement. *See* Plan Supplement, Ex. 7 (Litigation Trust Agreement, Ex. B).

Accordingly, the Plan, together with the documents and agreements contemplated therein and in the Plan Supplement, provides the means for implementation of the Plan as required by section 1123(a)(5) of the Bankruptcy Code.

vi. Section 1123(a)(6): Prohibitions on the Issuance of Non-Voting Securities

Section 1123(a)(6) of the Bankruptcy Code prohibits the issuance of nonvoting equity securities and requires amendment of a debtor's charter to so provide. Section 29.1 of the Plan provides that, on or prior to the Effective Date, the Debtors will file the Reorganized Debtors Certificate of Incorporation and the Reorganized Debtors By-Laws under the general

supervision of the Office of the Attorney General. *See* Plan Sec. 29.1. The Reorganized Debtors Certificates of Incorporation and the Reorganized Debtor By-Laws, and the terms governing the issuance of the stock of the Reorganized Debtors, comply in all respects with section 1123(a)(6) of the Bankruptcy Code. *See* Plan Supplement Exs. 1 and 2.

vii. Section 1123(a)(7): Provisions Regarding Directors and Officers

Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). On March 11, 2013, the Debtors filed the Reorganized D&O Notice, disclosing the identity and affiliations of the individuals proposed to serve as a director or officer of the Reorganized Southern Air Parent after the Effective Date. Section 28.1 of the Plan contains provisions with respect to the manner of selection of directors and officers of the Reorganized Debtors that are consistent with the interests of creditors, equity security holders, and public policy, thereby satisfying section 1123(a)(7) of the Bankruptcy Code.

3. <u>The Plan Complies with Section 1123(b) of the Bankruptcy Code</u>

Section 1123(b) of the Bankruptcy Code sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. Each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

i. Section 1123(b)(1): Impairment/Unimpairment of Claims and Equity Interests

Section 1123(b)(1) provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). Consistent with section 1123(b)(1) of the Bankruptcy Code, pursuant to the Plan, Claims in Class 2 (Prepetition

Lender Claims), Class 4 (General Unsecured Claims), Class 5 (Convenience Claims), Class 6 (General Liability Insured Litigation Claims), Class 7 (Subordinated Claims), Class 8 (Preferred Equity Interests), Class 9 (Holdings Equity Interests) and Classes 13 through 26 (Common Equity Interests) are impaired. *See* Plan Arts. VI, VIII through XIII, and XIX. The Plan designates Claims in Class 1 (Priority Non-Tax Claims), Class 3 (Other Secured Claims) and Classes 10 through 12 (Common Equity Interests) are unimpaired under the Plan. *See* Plan Arts. V, VII, XIII, and XIX. Accordingly, the Plan satisfies section 1123(b)(1) of the Bankruptcy Code.

ii. Section 1123(b)(2): Assumption/Rejection of Executory Contracts and Unexpired Leases

Section 1123(b)(2) of the Bankruptcy Code allows a plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. Section 365 of the Bankruptcy Code allows a debtor in possession to "maximize the value of the debtor's estate" by assuming executory contracts or unexpired leases that "benefit the estate" and rejecting those that do not. *Cinicola v. Scharffenberger*, 248 F.3d 110, 119 (3d Cir. 2001) (citation omitted). Courts apply the "business judgment" standard in evaluating a debtor's decision to assume or reject an executory contract or unexpired lease. *In re Armstrong World Indus.*, 348 B.R. at 162; *Official Comm. of Unsecured Creditors v. Aust (In re Network Access Solutions, Corp.)*, 330 B.R. 67, 75 (Bankr. D. Del. 2005) (stating that "[t]he standard for approving the assumption of an executory contract is the business judgment rule" and noting that the bankruptcy court had to find that the debtor was acting on an informed basis, in good faith, and with the honest belief that assumption was in the best interests of the debtor and its estate in order to approve a motion to assume prepetition agreements); *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 53 (Bankr. D. Del. 2001) ("The Debtor's decision to assume

or reject an executory contract is based upon its business judgment.") (citation omitted); *see also Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) (per curiam) ("More exacting scrutiny would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially. . . .").

In the event that there has been a default in the debtor's performance of its obligations under an executory contract or unexpired lease, section 365(b)(1) of the Bankruptcy Code provides that the debtor may not assume such contract or lease unless the debtor:

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . .
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1). Thus, section 365(b)(1) of the Bankruptcy Code requires that a debtor cure, or provide adequate assurance that it will promptly cure, any outstanding defaults under executory contracts in connection with the assumption and assignment of such agreements. Section 365(b)(1) does not apply, however, to a default that is a breach of a provision relating to:

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title;
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> (D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor

> to perform nonmonetary obligations under the executory contract or unexpired lease.

11 U.S.C. § 365(b)(2).

Pursuant to section 365(f)(2) of the Bankruptcy Code, a debtor in possession may assign an executory contract or lease if:

> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *See Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988); *see also In re DBSI, Inc.*, 405 B.R. 698, 708 (Bankr. D. Del. 2009) (noting that adequate assurance of future performance does not mean an absolute guarantee of performance). Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease has financial resources and expressed willingness to devote sufficient funding to business to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid).

Section 22.1 of the Plan provides, in relevant part, that:

> On the Effective Date, the Debtors shall reject all executory contracts and unexpired leases that (i) have not previously been assumed and assigned or rejected with the approval of the Bankruptcy Court, (ii) are not as of the Confirmation Date the subject of a motion to assume or reject, (iii) have not expired by their own terms on or prior to the Confirmation Date (iv) are not

> listed on the Schedule of "Assumed and Assigned Executory Contracts and Unexpired Leases" filed with the Bankruptcy Court, and served on parties whose executory contracts and unexpired leases are intended to be assumed, seven (7) days prior to the Ballot Date, which executory contracts and unexpired leases will be assumed and assigned to Reorganized Southern Air as of the Effective Date.

Plan Sec. 22.1. On February 26, 2013, the Debtors filed the Assumption Schedule, setting forth those executory contracts and unexpired leases that the Debtors intend to assume and assign. The Debtors reserve the right, upon consultation with the Requisite Lenders and the Oak Hill Entities, to modify and amend the Assumption Schedule to add or delete any executory contract or unexpired lease therefrom or modify any cure amount at any time through and including fifteen (15) days after the Effective Date. *Id.* The Debtors shall provide any such amendments to the parties to the executory contracts and unexpired leases.

Accordingly, the Plan provides for the assumption or rejection of executory contracts and unexpired leases that have not been previously assumed or rejected under section 365 of the Bankruptcy Code, as contemplated by section 1123(b)(2) of the Bankruptcy Code.

iii. Section 1123(b)(3): Settlement/Retention of Claims and Causes of Action

Section 1123(b)(3) states that a plan may "provide for — (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or (B) the retention and enforcement by the debtor . . . or by a representative of the estate appointed for such purpose, of any such claim or interest." 11 U.S.C. § 1123(b)(3).

a. Settlement of Claims

As the Plan does not settle or adjust any claim or interest that belongs to the Debtors or their estates, section 1123(b)(3)(A) of the Bankruptcy Code does not apply.

b. Retained Causes of Action

Pursuant to Section 17.1 of the Plan, from and after the Effective Date, except as otherwise expressly provided in the Plan, including, without limitation, Article XVI and XXXI of the Plan, the Reorganized Debtors, as successor to the rights of the estates of the Debtors, shall have the sole and exclusive right to litigate (or abandon) any claims or causes of action that constituted Assets of the Debtors or Debtors in Possession, including, without limitation, any avoidance or recovery actions under sections 541, 544, 545, 547, 548, 549, 550, 551 and 553 of the Bankruptcy Code and any other causes of action or rights to payments of claims that may be pending on the Effective Date, to a Final Order, and may compromise and settle such claims, without further approval of the Bankruptcy Court. *See* Murphy Decl. ¶ 27. Based on the foregoing, the Plan and the retention of claims referenced therein, are consistent with section 1123(b)(3)(B) of the Bankruptcy Code.

iv. Section 1123(b)(4): Sale of All or Substantially All Assets

Section 1123(b)(4) of the Bankruptcy Code provides that a plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. § 1123(b)(4). Pursuant to the Plan and the Litigation Trust Agreement, the Debtors are conveying or otherwise transferring the Litigation Trust Assets to the Litigation Trust. This transfer does not constitute a sale of all or substantially all of the Debtors' property and, therefore, section 1123(b)(4) of the Bankruptcy Code is inapplicable.

v. Section 1123(b)(5): Modification of Creditor Rights

Section 1123(b)(5) of the Bankruptcy Code provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave

unaffected the rights of holders of any class of claims." 11 U.S.C. § 1123(b)(5). As set forth in Article XIX of the Plan, and described above, the Plan modifies the rights of holders of Claims and Equity Interests in Class 2, Class 4, Class 5, Class 6, Class 7, Class 8, Class 9 and Classes 13 through 26, each of which constitutes an impaired Class. The Plan leaves unaffected the rights of holders of Claims and Equity Interests in Class 1, Class 3, Class 10, Class 11, and Class 12, each of which constitutes an unimpaired Class. No Claim in any Class is secured only by a security interest in real property that is one of the Debtors' principal residences. Accordingly, the Plan is consistent with section 1123(b)(5) of the Bankruptcy Code.

vi. Section 1123(b)(6): Releases, Exculpation, Injunctions and Jurisdiction

Section 1123(b)(6) of the Bankruptcy Code provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). In addition, section 105(a) of the Bankruptcy Code provides that the Court may issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In accordance therewith, Article XXXI of the Plan contains certain release, exculpation and injunction provisions — including releases by the Debtors, reciprocal and consensual releases among Released Parties, consensual releases of non-Debtor third parties by certain holders of Claims (to the extent they affirmatively elect to grant such releases or are entitled to receive and accept a distribution under the Plan), and an exculpation provision limiting the liability of the Debtors and certain non-Debtor third parties for actions taken during these Chapter 11 Cases, but specifically excluding claims based on gross negligence or willful misconduct — all of which comply with the relevant provisions of the Bankruptcy Code and conform to the requirements of Third Circuit case law.

Based upon the facts and circumstances of these Chapter 11 Cases, the release, exculpation, and injunction provisions in the Plan are fair, equitable and reasonable, are supported by sufficient and valuable consideration, are an integral component of compromises and settlements underlying the Plan, are necessary for the Debtors' reorganization and the realization of value for stakeholders, are the product of extensive arm's length negotiations, were necessary to the formation of the consensus embodied in the Plan Support Agreement, the Plan, and the Plan Supplement documents, are in the best interests of the Debtors, the Reorganized Debtors, and their estates, creditors, and equity holders, and are, in light of the foregoing, appropriate. *See* Murphy Decl. ¶ 32. The failure to implement the release, exculpation, and injunction provisions would seriously impair the Debtors' ability to confirm and consummate the Plan, and would likely lead to liquidation of the Debtors' estates. *Id*.

Releases by the Debtors. Section 31.4 of the Plan sets forth certain releases to be given by the Debtors of, among other things, Claims from or relating to the period prior to the Effective Date. Pursuant to this section, the Debtors are releasing the Released Parties — including the following non-Debtor entities: (i) the Oak Hill Entities, (ii) Canadian Imperial Bank of Commerce, New York Agency ("CIBC"), in its capacity as the DIP Agent and the Prepetition Agent, the DIP Lenders, (iii) the Consenting Lenders, (iv) the Exit Lenders, and (v) except with respect to the Lender Parties, each of their respective current and former (to the extent employed or serving at any time during the Chapter 11 Cases) direct and indirect members, direct and indirect partners, officers, shareholders, directors, employees, managers, attorneys, consultants, advisors and agents. These releases are critical to the successful implementation and confirmation of the Plan, and should be approved pursuant to the standards established in the Third Circuit.

Notwithstanding the provisions of section 524(e) of the Bankruptcy Code, debtors are generally allowed to release claims pursuant to section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank N.A. v. Wilmington Trust Co*. (*In re Spansion*), 426 B.R. 114, 143 (Bankr. D. Del. 2010). Courts in this district have held that a plan may provide for the release by a debtor of non-debtor third parties after considering the specific facts and equities of each case. *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999). Bankruptcy courts consider the following factors, known as the *Master Mortgage* factors, to determine whether a release by a debtor should be approved: (i) whether there is an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (ii) whether the non-debtor has made a substantial contribution of assets to the reorganization; (iii) the essential nature of the release to the reorganization to the extent that, without the release, there is little likelihood of success; (iv) an agreement by a substantial majority of creditors to support the release, specifically if the impacted class or classes "overwhelmingly" vote to accept the plan; and (v) whether there is a provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the release. *Id*. (citing *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)); *see also Spansion*, 426 B.R. at 143 n.47. Importantly, a court need not find that **all** of the Master Mortgage factors apply to approve a debtor's release of claims against non-debtors. *Zenith Elecs. Corp.*, 241 B.R. at 110 (citing *Master Mortgage*, 168 B.R. at 935).

The proposed releases granted by the Debtors to the Oak Hill Entities, CIBC, the DIP Lenders, the Consenting Lenders, and the Exit Lenders meet the *Master Mortgage* factors.

First, the releases are essential to the Debtors' reorganization because without such releases the compromises and settlements embodied in the Plan would not have been achieved, and the Debtors would not have received the necessary funds to satisfy their working capital needs and fund their reorganization. The releases set forth in section 31.4 of the Plan enabled the Debtors to build consensus around the Plan Support Agreement, the Plan and the Plan Supplement documents, which was necessary to ensure an expedient reorganization. *See* Murphy Decl. ¶ 33. The efforts of the members of Southern Management prior to and during these Chapter 11 Cases have been instrumental in building and maintaining support among the Debtors' key constituents for a reorganization that will preserve the value of the Debtors as a going concern for the benefit of all stakeholders, and have obviated a potentially litigious, lengthy, and costly restructuring process that could have materially delayed and possibly reduced distributions to all creditors. Absent agreement by the Released Parties over the terms of the Plan Support Agreement, the Plan and the Plan Supplement, it is unlikely that such key constituencies would have consented to the Plan. Second, the non-Debtor Released Parties made a substantial contribution to the Debtors. The Prepetition Lenders have agreed to forgo a portion of their recovery in the amount of One Million Six Hundred Twenty-Five Thousand Dollars ($1,625,000.00) to facilitate distributions to holders of general unsecured claims that would otherwise recover nothing under the Plan and have agreed to waive their rights to receive any Creditor Cash on account of their deficiency claims. *See* Murphy Decl. ¶ 34. The DIP Lenders provided, in part, a senior secured, super-priority term loan facility in an aggregate principal amount of Sixty-Two Million Five Hundred Thousand Dollars ($62,500,000.00), Twenty-Five Million Dollars ($25,000,000.00) of which represented a new money loan. The DIP Lenders have also agreed to "roll" their Claims into the Exit Term Loan in lieu of receiving Cash, to which they would otherwise be entitled.

See Murphy Decl. ¶ 35. The Oak Hill Entities have provided and will continue to provide the Debtors with additional cash in the aggregate amount of Twenty Million Dollars ($20,000,000.00) as well as use commercially reasonable efforts to assist the Debtors to utilize the Oak Hill Entities deposit with Boeing in the amount of One Million Nine Hundred Twenty Five Thousand Dollar ($1,925,000.00) to offset the general unsecured claims asserted by Boeing's affiliates. *See* Murphy Decl. ¶ 37. Additionally, the Oak Hill Entities will provide Eight Hundred Seventy-Five Thousand Dollars ($875,000.00) to fund recoveries for general unsecured creditors under the Plan. *Id*. Further, the Oak Hill Entities have agreed to amend the Oak Hill Leases pursuant to the Oak Hill Lease Amendments, to refrain from taking a worthless stock deduction, which will preserve valuable tax attributes for the Reorganized Debtors, and to withdraw proofs of claim and forgo any recovery on claims of over Two Million Three Hundred Thousand Dollars ($2,300,000.00) against the Debtors. *Id*. Lastly, the Exit Lenders are providing a senior secured exit facility consisting of (i) a senior secured revolving loan facility in the aggregate amount of $10 million; (ii) a senior secured letter of credit facility in the aggregate principal amount of $4 million; and (iii) the term loans to be extended on the Effective Date in connection with (x) the satisfaction of the DIP Lender Claims and (y) distributions to be made on account of Allowed Prepetition Lender Claims. The Exit Facility will provide the necessary working capital to run the reorganized business and implement the provisions of the Plan. *See* Murphy Decl. ¶ 38.

Additionally, the Released Parties were significantly involved in the negotiation, design, drafting and implementation of the Plan. Indeed, each of the Released Parties expended considerable time, energy and expense to negotiate and effectuate the comprehensive restructuring reflected in the Plan Support Agreement, the Plan and the Plan Supplement. *See*

Murphy Decl. ¶¶ 32–38. The members of Southern Management were, at the Debtors' expense, advised by separate counsel with respect to the management-related provisions of the Plan, including, without limitation, Article XXXI of the Plan, the Southern Management Agreements, the Southern Management Warrants, the Management Equity Plan, and the granting of releases in connection with the Plan. *See* Murphy Decl. ¶ 33. Based upon these contributions, including the terms of the Management Agreements, the Management Equity Plan and the Southern Management Warrants, the members of Southern Management have determined to grant, in their respective individual capacities, the releases to the other Released Parties and their Related Persons contained in the Plan. Moreover, the Creditors' Committee, representing the rights and interest of the Debtors' general unsecured creditors, included a letter in support of the Plan in the Solicitation Packages encouraging general unsecured creditors to vote in favor of the Plan. *See* Murphy Decl. ¶ 40; KCC Aff. ¶ 4(d). For the foregoing reasons, the proposed releases meet the *Master Mortgage* factors.

Reciprocal Releases Among Released Parties. Further, pursuant to Section 31.5 of the Plan, each of the Released Parties and each of their respective Related Persons have consensually agreed to release all of the other Released Parties and their Related Persons (in each other than with respect to the Related Persons of the Lender Parties). *Spansion*, 426 B.R. at 144 (recognizing the "[c]ourts have determined that a third party release may be included in a plan if the release is consensual"). Accordingly, the reciprocal releases in Section 31.5 of the Plan should be approved because they are fully consensual.

Voluntary Releases by Holders of Claims. In addition to the releases granted by the Debtors in Section 31.4 of the Plan, Section 31.6 of the Plan provides for the release of the Released Parties by holders of Claims. Section 31.6 of the Plan grants releases to certain non-

Debtor third parties, but applies only to those entities that elect to grant the releases **or** are entitled to receive and accept a distribution under the Plan.

A plan may provide for a release of third party claims against a non-debtor upon "affirmative agreement" of the releasing party. *See In re Wash. Mut., Inc*., 442 B.R. 314, 354 (MFW) (Bankr. D. Del. 2011) (holding that third party releases are effective with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases); *In re Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004) (stating that a plan "is a contract that may bind those who vote in favor of it. . . . [T]o the extent creditors or shareholders voted in favor of [the Plan], which provides for the release of claims they may have against the Noteholders, they are bound by that."); *Zenith*, 241 B.R. at 111 (approving non-debtor releases for creditors that voted in favor of plan); *see also Spansion*, 426 B.R. at 144 (finding that third party releases contained in a plan are valid, if consensual). Once consent is demonstrated, no other or further analysis is required. *See In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) ("The 'Releases by Holders of Claims' provision . . . binds only those creditors and equity holders who accept the terms of the Plan. *Because it is consensual, there is no need to consider the* [*Master Mortgage*] *factors*." (emphasis added)).

Consistent with established case law in this District, the plain language of Section 31.6 of the Plan clearly demonstrates that the releases contained in that section are entirely consensual. Pursuant to Section 31.6 of the Plan, to the extent the holder of a Claim elects not to grant the releases, such holder shall still be entitled to distribution pursuant to the Plan.[5] Additionally, upon receipt of its distribution, any Claim holder not granting the release is still

[5] Pursuant to the Plan and the Disclosure Statement Order, the Ballots and election forms distributed to certain holders of Claims and Equity Interests provided each party with the opportunity to check the box to "opt in" — granting the releases set forth in section 31.6 of the Plan. Section 31.6 of the Plan explicitly states that only those stakeholders who elect to grant the releases or are entitled to receive and accepts a distribution pursuant to Plan will be bound by the releases set forth therein.

entitled to reject such distribution and the release in Section 31.6 of the Plan. Accordingly, the third party releases in Section 31.6 of the Plan should be approved because they are fully consensual.

Exculpation. The exculpation provision set forth in Section 31.8 of the Plan limits the liability of the Released Parties, the Creditors' Committee and the Creditors' Committee's professionals for actions in connection with these chapter 11 cases, including, without limitation, the formulation, preparation, dissemination, implementation, and confirmation of the Plan. The provision exculpates certain entities that have played significant roles in the Debtors' fully consensual reorganization, funded the Debtors' Chapter 11 Cases, made provision to fund the Debtors' future operations or have agreed to fund recoveries for general unsecured creditors: the Debtors, Oak Hill Entities, DIP Agent, DIP Lenders, Prepetition Agent, Exit Lenders, Consenting Lenders, and members of the Creditors' Committee. Further, the exculpation provision is limited to a qualified immunity for acts of negligence and does not relieve any party of liability for gross negligence or willful misconduct.

The standard within the Third Circuit for approving exculpation provisions in a plan of reorganization provides that they are appropriate when the protection is necessary and given in exchange for fair consideration. *See Gillman v. Cont'l Airlines* (*In re Cont'l Airlines*), 203 F.3d 203, 211–14 (3d Cir. 2000). Accordingly, courts within this District have approved exculpation provisions when parties are exculpated for acts or omissions in connection with, or related to, "the pursuit of confirmation of the Plan, the consummation of the Plan or the Administration of the Plan or the property to be distributed under the Plan, except for willful misconduct or gross negligence . . . ." *In re PWS Holding Co.*, 228 F.3d 224, 245-6 (3d Cir. 2000) (approving an exculpation clause releasing a creditors' committee and its professionals

from third party claims); *see also In re W.R. Grace & Co.*, 446 B.R. 96, 132–33 (Bankr. D. Del. 2011) (approving an exculpation clause exculpating non-debtor parties who were party to a settlement agreement); *Western Mining & Inv., LLC v. Bankers Trust Co.*, 2003 WL 503403 at * 4 (D. Del. Feb. 19, 2003) (noting there is nothing inherently suspect about a plan provision releasing, among others, the DIP lenders, bank lenders, and the committee, from any liability for past, present, and future actions taken or omitted to be taken in connection with the sale and liquidation of the debtors' assets, other than because of gross negligence or willful misconduct). Importantly, however, courts within this District, and this Court in particular, have approved exculpation provisions similar to the one in Section 31.8 of the Plan, when such provisions afford proper protection to those entities intricately involved in negotiating a debtor's plan of reorganization. *In re NewPage Corp.*, Case No. 11-12804 (KG) (Bankr. D. Del. Dec. 14, 2012) [Docket No. 2945] (confirming a plan of reorganization containing a provision exculpating entities (including the debtors' prepetition noteholders and exit lenders) that played a central role in the formulation of such plan regardless of such entities' status as an estate fiduciary); *In re Premier Int'l Holdings, Inc.*, Case No. 09-12019 (CSS), 2010 WL 2745964 (Bankr. D. Del. Apr. 29, 2010) (approving a provision that exculpated, among others, the debtors' lenders for acts or omissions in connection with or related to the plan of reorganization).

Exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition"). Without protection from liability relating to postpetition activity in

connection with the prosecution of a chapter 11 case, key constituents in a debtor's reorganization might be unwilling or abandon efforts to restructure a debtor's affairs. As discussed more fully in the Murphy Declaration, each of the Released Parties played an important and active role in negotiating and formulating the Plan and the cooperation of each party was necessary to implement the provisions of the Plan, as well as to assure any recovery for general unsecured creditors under the Plan. *See* Murphy Decl. ¶¶ 32–38. Moreover, affording the Released Parties the protections provided by the exculpation provision was important to the Plan negotiation process, as it was necessary to build consensus around the Debtors' Plan. *Id.* Thus, insofar as the exculpation provision set forth in Section 31.8 of the Plan: (i) exculpates only those entities that have significantly contributed to the Debtors' reorganization; (ii) is a necessary component of the Debtors' settlement with key constituents embodied in the Plan and the Plan Supplement; and (iii) is limited to claims connected with, or arising out of, these reorganization cases, such provision is appropriate and consistent with the applicable law of this District and the standard set forth in *Continental Airlines*, *NewPage* and *Premier Holdings*.

In its objection to the Plan, the U.S. Trustee contends that the list of exculpated parties covered under Section 31.8 of the Plan is overbroad and should be limited to "parties who served in the capacity of estate fiduciaries, *i.e.* estate professionals and the Debtors' directors and officers." *See* U.S. Trustee Objection, [Docket No. 614], ¶ 9. As noted above, neither the Bankruptcy Code nor the law within this District mandates such a limited scope for exculpation provisions contained in plans of reorganization.

In support of its position, the U.S. Trustee references *In re Washington Mutual, Inc*., where the court mistakenly relied on the Third Circuit's holding in *PWS Holding* in finding

that exculpation clauses should be limited to estate fiduciaries, namely, estate professionals, appointed committees and their members, and the debtors' directors and officers. *In re Wash. Mut. Inc.*, 442 B.R. 314 (noting that exculpation provisions should be limited to estate fiduciaries because they merely state the standard to which estate fiduciaries should be held). In *PWS Holding*, the Third Circuit found that a clause exculpating the debtor, the creditor's committee, and professionals was not inappropriate (and had no practical effect) because such parties remained liable for gross negligence and willful misconduct, which is the applicable standard for estate fiduciaries. *In re PWS Holding Co.*, 228 F.3d at 246–47. The Third Circuit, however, did not explicitly limit the scope of exculpation provisions, but, instead, merely noted that the particular provision at issue restated the pre-existing standard of liability for fiduciaries of the estate and, therefore, was appropriate. *Id*. Indeed, the court clarified that the holding in *Continental Airlines*, should not be read to bar any plan provision limiting the liability of third parties, so long as such provision complied with the existing standard. *Id.* at 247.

Moreover, subsequent to the decision in *PWS Holding*, this Court, and others within this District, have continued to grant exculpations to entities similar to the Released Parties. *See, e.g.*, *In re NewPage Corp.* Case No. 11-12804 (KG) (Bankr. D. Del. Dec. 14, 2012) [Docket No. 2945] (approving an exculpation provision that included, among others, the debtors' exit lenders); *In re Constar Int'l*, Case No. 11–10109 (CSS) (Bankr. D. Del. May 20, 2011) [Docket No. 439] (confirming a plan exculpating, among others, the holders of certain note claims and several of the debtors' lenders); *In re Leslie Controls, Inc.*, Case No. 10-12199 (CSS), 2010 WL 4386935, at *25 (Bankr. D. Del. Oct. 28, 2010) (finding that an exculpation provision exculpating, among others, the debtor-in-possession lender and the future claimants representative, was "fair and equitable, are given for valuable consideration, and are in the best

interests of the Debtor and its chapter 11 estate" and satisfied the requirements of the law in the Third Circuit); *In re Premier Int'l Holdings, Inc.*, 2010 WL 2745964, at *10 (finding that the exculpation provision, including, among others, prepetition lenders, set forth in the debtors' plan was "appropriately tailored to protect the Released Parties from inappropriate litigation and do not relieve any party of liability for gross negligence or willful misconduct"); *In re ACG Holdings*, Case No. 08-11467 (CSS) (Bankr. D. Del. Aug. 26, 2008) [Docket No. 155] (confirming a plan that exculpates, among others, the second lien note holder group, the indenture trustee and any note holder signatory to the restructuring agreement).

Notably, the court in *NewPage Corp.*, overruled a similar objection made by the U.S. Trustee that the list of exculpated parties, was "too broad" and found that the exculpation provision in question was "fair, equitable, and necessary to the reorganization." Case No. 11-12804 (KG) (Bankr. D. Del. Dec. 14, 2012) [Docket No. 2945]. Specifically, in *NewPage Corp.*, the exculpated parties played key roles in the development of the plan and the global settlement agreement and the negotiations surrounding the plan and the global settlement agreement could not have occurred without the appropriate plan exculpation provision. Similarly, in these Chapter 11 Cases, all of the exculpated parties were indispensable to the formulation of the Plan Support Agreement and the Plan and the exculpation provision is a key component of the Debtors' negotiations and agreement among the Oak Hill Entities, the DIP Agent, the DIP Lenders, the Prepetition Agent, Exit Lenders, and the Consenting Lenders, each of which is enabling the Debtors to successfully emerge from these Chapter 11 Cases and have sufficient working capital going forward. *See* Murphy Decl. ¶¶ 34–38. Further, there is neither pending litigation relating to a claim against the Released Parties or their Related Persons, nor threatened litigation or claim, and the Debtors are not aware of the existence of any such claim.

In light of the foregoing, the exculpation provision in Section 31.8 of the Plan is consistent with applicable law and should be approved.

Injunctions. Sections 31.2, 31.7 and 31.11 of the Plan provide for an injunction against all holders of Claims and Equity Interests from undertaking any action to recover and/or collect from the Released Parties on account of their Claims, liabilities and equity interests that are released, discharged, terminated or cancelled pursuant to the Plan. The injunction provisions are necessary to preserve and enforce the release and exculpation provisions, and are narrowly tailored to achieve that purpose. *See* Murphy Decl. ¶ 39.

Jurisdiction

Article XXVI of the Plan provides that the Court will retain jurisdiction over, among other things, all matters involving the Plan, the claims allowance and distribution process, and the prosecution of Claims. This is consistent with applicable law. *See, e.g.*, *In re EBHI Holdings, Inc.*, Case No. 09-12099 (MFW), 2010 WL 3493027, at *5 (Bankr. D. Del. Mar. 18, 2010) (approving retention of jurisdiction by the court over certain matters after the applicable effective date); *In re Kaiser Aluminum Corp.*, Case No. 02-10429 (JKF), 2006 WL 616243, at *8 (Bankr. D. Del. Feb. 6, 2006), *aff'd*, 343 B.R. 88 (D. Del. 2006) (same). The Internal Revenue Service and the United States both filed objections to the retention of jurisdiction by the Bankruptcy Court. As noted above, retention of jurisdiction over matters pertaining to the Chapter 11 Cases is consistent with applicable law within this District. *See* Omnibus Response, Ex. A at 3. Moreover, by providing that the Bankruptcy Court retain jurisdiction, the Plan does not create jurisdiction; rather, it merely states that the Bankruptcy Court will retain any jurisdiction it may already have. Further, providing that the Bankruptcy Court will retain jurisdiction does not preclude a party from requesting that a case be heard in a different court.

Accordingly, the Court's continued jurisdiction with respect to these matters is consistent with section 1123(b)(6) of the Bankruptcy Code.

4. Section 1123(c): Exempt Property

Section 1123(c) of the Bankruptcy Code prohibits the use, sale, or lease of property exempted under section 522 of the Bankruptcy Code in a case concerning an individual. *See* 11 U.S.C. § 1123(c). The Debtors are not "individuals" (as that term is defined in the Bankruptcy Code) and, accordingly, section 1123(c) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

5. Section 1123(d): Cure of Defaults

Section 1123(d) of the Bankruptcy Code provides that, "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d). Section 22.3 of the Plan provides for the satisfaction of default claims associated with each executory contract and unexpired lease to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. All cure amounts, as set forth in the Assumption Schedule, were determined in accordance with the underlying agreements and applicable bankruptcy and nonbankruptcy law. Also, the Plan further provides that, on the Effective Date, the Oak Hill Leases, shall be assumed as amended in the form of the Oak Hill Lease Amendments pursuant to the Confirmation Order, and any and all defaults under the Oak Hill Leases outstanding on or before the Effective Date shall be cured (or waived, as set forth in the Oak Hill Lease Amendments) in accordance with section 365(b) of the Bankruptcy Code.

In the event of a dispute regarding (i) the amount of any cure payment, (ii) the ability of Reorganized Southern Air to provide "adequate assurance of future performance"

(within the meaning of section 365 of the Bankruptcy Code) under the contract or lease to be assumed or (iii) any other matter pertaining to assumption arises, the cure payments required by section 365(b)(1) of the Bankruptcy Code shall be subject to the jurisdiction of the Court and made following the entry of a Final Order resolving such dispute; *provided, however*, that any objection to the cure amount must be filed by the later of (i) thirty (30) days after any amendment to the Assumption Schedule has been filed or (ii) thirty (30) days after the Effective Date. *See* Plan Sec. 22.4. Accordingly, the Plan complies with section 1123(d) of the Bankruptcy Code.

B. Section 1129(a)(2)

Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Johns-Manville Corp.*, 68 B.R. at 630; *In re Toy & Sports Warehouse, Inc.*, 37 B.R. at 149.

As set forth more fully below, the Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and the Disclosure Statement Order in transmitting the Plan, the Plan Supplement, the Disclosure Statement, the Disclosure Statement Order, the Ballots, and related documents and notices and in soliciting and tabulating the votes on the Plan.

1. Section 1125: Postpetition Disclosure and Solicitation

Section 1125(b) of the Bankruptcy Code provides, in pertinent part:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. . . .

11 U.S.C § 1125(b). By entry of the Disclosure Statement Order, the Court approved the Disclosure Statement as containing "adequate information" pursuant to section 1125(b) of the Bankruptcy Code.

In compliance with the Disclosure Statement Order, on February 1, 2013, the Debtors commenced their solicitation of votes to accept or reject the Plan. *See* KCC Aff. ¶¶ 6 – 12. As set forth in the Voting Certification, in accordance with the Disclosure Statement Order, the Debtors' voting and tabulation agent, Kurtzman Carson Consultants LLC ("KCC"), transmitted to each Claim or Equity Interest holder that was entitled to vote to accept or reject the Plan, (i) a CD-ROM containing the Disclosure Statement Order (without attachments) and the Disclosure Statement (which shall include the Plan as an attachment), (ii) the notice regarding the Confirmation Hearing, (iii) Debtors' letter in support of the Second Amended Plan, and the Creditors' Committee's letter in support of the Second Amended Plan, (iv) a Class-specific Ballot for that stakeholder, and (v) a postage-prepaid return envelope. *See* KCC Aff. ¶ 4; Paque Decl. ¶ 12.

The Debtors did not solicit votes for the Plan by any holder of Claims in Class 1 (Priority Non-Tax Claims), Class 3 (Other Secured Claims), Class 10 (Cargo 360 Equity Interest), Class 11 (Southern Air Equity Interest) and Class 12 (Air Mobility Equity Interests)

(collectively, the "Unimpaired Classes") because such Classes are unimpaired pursuant to the Plan and, therefore, are deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. In accordance with the Disclosure Statement Order, KCC distributed the Notice of Non-Voting Status – Unimpaired Class and the Confirmation Hearing Notice to holders of Claims in the Unimpaired Classes. *See* KCC Aff. ¶ 9.

Additionally, the Debtors did not solicit votes for the Plan by any individual holder of a Claim in Class 7 (Subordinated Claims), Class 8 (Preferred Equity Interests), Class 9 (Holdings Equity Interests) and Classes 13 through 26 (Common Equity Interests) (collectively, the "Non-Voting Impaired Classes"), because such Classes are not receiving any distributions or retaining their Equity Interests pursuant to the Plan and, therefore, are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. In accordance with the Disclosure Statement Order, KCC distributed the Confirmation Hearing Notice and the Notice of Non-Voting Status – Impaired Class to all of the Non-Voting Impaired Classes. *See* KCC Aff. ¶ 10.

The deadline for voting to accept or reject the Plan was March 5, 2013. The Paque Declaration describes KCC's transmission of the aforementioned documents and the methodology for tabulating results of voting and elections with respect to the Plan. *See* Paque Decl. ¶¶ 12, 13 and 15. The results of the vote in respect of the Plan are discussed in more detail below.

2. Section 1126: Acceptance of the Plan

Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Pursuant to section 1126, only holders of allowed claims or equity interests, as the case may be, in impaired classes of claims or equity interests that will receive or

retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. Section 1126 provides, in pertinent part, as follows:

> a. The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.
>
> * * *
>
> f. Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> g. Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. §§ 1126(a), (f) and (g).

As set forth in the Paque Declaration and above, the Debtors solicited acceptances of the Plan from the holders of all Claims the Debtors, in each Class of impaired Claims entitled to receive distributions pursuant to the Plan in accordance with section 1126 of the Bankruptcy Code. The impaired Classes entitled to vote on the Plan are Claims, as applicable, in Class 2 (Prepetition Lender Claims), Class 4 (General Unsecured Claims), Class 5 (Convenience Claims), and Class 6 (General Liability Insured Litigation Claims). *See* Plan Art. XIX; Paque Decl. ¶ 10. The Debtors did not solicit votes for the Plan by any holder of Claims in Unimpaired Classes as such Classes are deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Further, the Debtors did not solicit votes for the Plan by any holder of Claims in Class 6 (General Liability Insured Litigation Claims) because no such holders exist.

Section 1126(c) – (d) of the Bankruptcy Code specifies the requirements for acceptance of a plan by impaired classes entitled to vote to accept or reject the plan:

> c. A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.
>
> d. A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. §§ 1126(c) and (d).

As evidenced in the Paque Declaration, aside from the Classes of Claims deemed to have accepted or rejected the Plan, the Plan has been accepted by holders of Claims in Classes 2, 4 and 5, holding in excess of two-thirds in amount and one-half in number of the Claims in such Class.[6] *See* Paque Decl. ¶ 16.

Notwithstanding the fact that seventeen (17) Classes are deemed to have rejected the Plan, as set forth below, pursuant to section 1129(b) of the Bankruptcy Code, the Plan may be confirmed because the Plan does not discriminate unfairly and is fair and equitable with respect to each such Class. Based upon the foregoing, the Debtors submit that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

[6] Class 6 contains no claims, and thus, no votes were cast on behalf of this class.

C. Section 1129(a)(3)

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Third Circuit has found that good faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11. *See In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999); *see also Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636, 649 (2d Cir. 1988) (interpreting the standard as requiring a showing that "the plan was proposed with honesty and good intentions." (quoting *Koelbl v. Glessing (In re Koelbl),* 751 F.2d 137, 139 (2d Cir. 1984) (internal quotation marks omitted)). Moreover, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." *Brite v. Sun Country Dev., Inc.* (*In re Sun Country Dev., Inc.*), 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Id*.

Here, the Plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' estates, and maximizing distributions to all creditors. The Plan achieves not only a reorganization of the Debtors, but also one of the primary objectives underlying a chapter 11 bankruptcy: the equitable distribution of value to creditors for amounts owing. *See Pereira v. Foong (In re Ngan Gung Rest.),* 254 B.R. 566, 570 (Bankr. S.D.N.Y. 2000) (stressing the importance of payment of creditors in chapter 11 cases). The Plan accomplishes these goals through implementation of various agreements among the Oak Hill Entities, the DIP Lenders, the Consenting Lenders, the Exit Lenders and the Creditors' Committee, all of which provide the means through which the Debtors may effectuate timely and

prompt distributions to their creditors. The Plan (including the Plan Supplement and all other documents necessary to effectuate the Plan) reflects the culmination of the combined efforts of the Debtors, their key creditor constituencies, and their respective professionals. The Plan maximizes the value of the estates' assets and properly distributes such value to creditors. Additionally, the acceptance of the Plan by creditors in Classes entitled to vote thereon demonstrates that the Plan achieves the goal of consensual reorganization embodied in the Bankruptcy Code.

Given that the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code, the Debtors submit that the Plan and the related documents have been filed in good faith and the Debtors, as well as the Oak Hill Entities, the DIP Lenders, the Consenting Lenders, the Exit Lenders and the Creditors Committee, have acted in good faith and satisfied their obligations under section 1129(a)(3) of the Bankruptcy Code.

D. Section 1129(a)(4)

Section 1129(a)(4) of the Bankruptcy Code requires that any payment made or to be made by the plan proponent, the debtor, or a person issuing securities or acquiring property under the plan be subject to approval by the bankruptcy court as reasonable. *See* 11 U.S.C. § 1129(a)(4). Any payment made or to be made by the Debtors or by a person issuing securities or acquiring property under the Plan, for services, or for costs and expenses in or in connection with section these Chapter 1129 Cases, or in connection with the Plan and incident to these Chapter 11 Cases, has been approved by, or shall be subject to the approval of, the Bankruptcy Court as reasonable.

Section 1129(a)(4) has been construed to require that all payments of professional fees which are made from estate assets be subject to review and approval as to their

reasonableness by the court. *In re S. Canaan Cellular Invs. Inc*., 427 B.R. 44, 83 (Bankr. E.D. Pa. 2010); *see In re Burns and Roe Enters., Inc*., Case No. 00–41610, 05–47946(RG), 2009 WL 438694, at *28 (D.N.J. 2009) (holding that where a plan provides for court review of professional fees to be paid by the plan proponent for services rendered prior to the effective date of the plan, the requirements of section 1129(a)(4) are met); *In re River Vill. Assocs.*, 161 B.R. 127, 141 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995) (holding that only fees paid from the assets of the estate must be approved by the court). Pursuant to the interim compensation procedures established in these Chapter 11 Cases, the Court has authorized and approved the payment of certain fees and expenses of retained professionals, subject to final review for reasonableness by the Court pursuant to section 330 of the Bankruptcy Code.[7] The Creditors' Committee and its attorneys, accountants, and other agents must also comply with such procedures and submit an application for final allowance of compensation for professional services rendered and reimbursement of expenses incurred. Additionally, Section 21.1 of the Plan establishes a cap in the amount of Four Hundred Ninety-Five Thousand Dollars ($495,000.00) for the aggregate amount of fees and expenses to be paid to the Creditors' Committee and its attorneys, accountants, and other agents. *See* Plan Sec. 21.1. Pursuant to the Plan, the Court shall retain exclusive jurisdiction over all applications for awards of compensation for services rendered and reimbursement of expenses incurred prior to the Effective Date. *See* Plan Sec. 26.1(i). Furthermore, the Plan only provides for the payment of *Allowed* Administrative Expense Claims.

The foregoing procedures for the Court's review and ultimate determination of the fees and expenses to be paid by the Debtors satisfy the objectives of section 1129(a)(4). *See*

[7] *See* Order Establishing Procedures for Interim Monthly Compensation and Reimbursement of Expenses of Professionals, dated October 24, 2012 [Docket No. 199].

In re Elsinore Shore Assocs., 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (requirements of section 1129(a)(4) satisfied where plan provided for payment of only "allowed" administrative expenses); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) ("Court approval of payments for services and expenses is governed by various Code provisions — e.g., §§ 328, 329, 330, 331, and 503(b) — and need not be explicitly provided for in a Chapter 11 plan.").

E. Section 1129(a)(5)

Section 1129(a)(5) of the Bankruptcy Code requires that a plan proponent disclose "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or a successor to the debtor under the plan." 11 U.S.C. § 1129(a)(5)(A)(i). Further, section 1129(a)(5) requires that the appointment of such individual be "consistent with the interests of creditors and equity security holders and with public policy . . . ." 11 U.S.C. § 1129(a)(5)(A)(ii).

The Plan complies with section 1129(a)(5) of the Bankruptcy Code. The identity and affiliations of the persons proposed to serve as the initial directors and officers of the Reorganized Debtors after confirmation of the Plan have been fully disclosed to the extent such information is available, and the appointment to, or continuance in, such offices of such persons is consistent with the interests of holders of Claims against and Equity Interests in the Debtors and with public policy. As set forth in the Reorganized Debtors D&O Notice, on the Effective Date, the new board of directors of the Reorganized Southern Air Parent shall be comprised of the following five (5) members: Daniel J. McHugh, Hank Halter, Jonathan G. Ornstein, Robert A. Peiser and Michael J. Warren. Additionally, the officers of the Reorganized Southern Air Parent shall be: Daniel J. McHugh (Chief Executive Officer); David R. Soaper (Chief Operating

Officer); Jon E. Olin (Chief Legal Officer); and a Chief Financial Officer to be identified after the Confirmation Date. Each such member will serve in accordance with the terms and subject to the conditions of the Reorganized Debtors Certificates of Incorporation, the Reorganized Debtors By-Laws, and other relevant organizational documents, each as applicable. The identity of any insider that will be employed or retained by the Reorganized Debtors and the nature of such insider's compensation have also been disclosed, to the extent necessary. Thus, the identity and affiliations of the persons proposed to serve as the initial directors and officers of the Reorganized Debtors have been fully disclosed, and the appointment to, or continuance in, such offices of such persons is consistent with the interests of holders of Claims against and Equity Interests in the Debtors and with public policy. Based upon the foregoing, the Debtors submit that the provisions of the Plan are consistent with the interests of creditors, equity security holders, and public policy and, therefore, satisfy the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. Section 1129(a)(6)

Bankruptcy Code section 1129(a)(6) provides that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). The Debtors are not changing any rates that require approval of a governmental agency and the Plan does not provide for any changes in any rates subject to such regulatory approval. The Debtors submit that this provision of the Bankruptcy Code is not applicable because no rate change is provided for in the Plan.

G. Section 1129(a)(7)

Section 1129(a)(7) of the Bankruptcy Code provides, in relevant part:

> With respect to each impaired class of claims or interests –
>
> (A) each holder of a claim or interest of such class –
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date. . . .

11 U.S.C. § 1129(a)(7).

Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test." The best interests test focuses on individual dissenting stakeholders rather than classes of claims or interests. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 (1999). Under this test, when evaluating a chapter 11 plan, the court must find that each non-accepting creditor will receive or retain value that is not less than the amount he would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code.

As set forth below, the best interests test is satisfied as to each holder of a Claim in an impaired Class of Claims, as well as with respect to each holder of an Equity Interest, that has rejected the Plan.

Exhibit D to the Disclosure Statement sets forth the Debtors' liquidation analysis (the "Liquidation Analysis"). The Liquidation Analysis demonstrates that the Debtors' creditors will receive more value under the Plan than they would receive in a hypothetical chapter 7 liquidation and that, in either case, holders of Equity Interests and Subordinated Claims will recover nothing. *See* Disclosure Statement, Ex. D.

The Plan provides for satisfaction in full to holders of the following Allowed Claims: Priority Non-Tax Claims, DIP Lender Claims, Administrative Expenses Claims, Priority

Non-Tax Claims, and Other Secured Claims. In contrast, in a chapter 7 liquidation, the Debtors would not have enough funds to pay in full any holder of Allowed Claims. Specifically, as described in more detail in the Disclosure Statement, the Liquidation Analysis presumes that the Debtors would cease operations immediately and the liquidation would be performed over a period of three (3) months. Also, the Liquidation Analysis presumes that, under chapter 7, the cash available for distribution to creditors would consist mainly of the cash on hand and the proceeds from the sale of all of the assets that comprise the Debtors' business operations. Cash distributions in a chapter 7 liquidation, however, would be significantly reduced, as the chapter 7 trustee would apply the cash proceeds from the liquidation to satisfy the DIP Lender Claims, Secured OHAA Payment Obligations, the Prepetition Lender Claims, and the costs and expenses of the liquidation, including wind-down costs and chapter 7 trustee fees prior to satisfaction of other Allowed Claims. Additionally, the Liquidation Analysis presumes that, under chapter 7, there would be no recovery from accounts receivable due to (i) rights of setoff against amounts due from Southern Air to its customers for fuel and (ii) damage claims arising from the significant disruption to customers due to Southern Air ceasing its operations. The Liquidation Analysis also takes into account that, in chapter 7, the Debtors would reject their aircraft leases and consequently have rejection claims asserted against them.

The Liquidation Analysis concludes that creditors with prepetition unsecured claims will recover substantially more value under the proposed Plan than through an orderly liquidation and sale process. In fact, absent the agreement with the Consenting Lenders to forgo a portion of their recoveries under the Plan, holders of Allowed General Unsecured Claims and Allowed Convenience Claims would otherwise receive no recovery at all. The Liquidation Analysis illustrates that the prepetition and postpetition secured obligations that encumber the

Debtors, even if using the high estimation of liquidation proceeds (after taking into consideration the wind-down expenses), far exceed the estimated liquidation proceeds that would be available to pay the secured creditors.

Based on the foregoing, if these cases were converted to cases under chapter 7 of the Bankruptcy Code, there could be at least a three (3) month delay in returns to secured creditors to conduct a liquidation that would result in the estimated liquidation proceeds set forth in the Liquidation Analysis, as compared with the certainty and timing of distributions under the Plan. Furthermore, the value that secured creditors would recover would drop precipitously and there would be no recovery to general unsecured creditors. Due to the value destruction, delay and uncertainties inherent in a conversion to chapter 7, the claimants in each Class of Claims and Equity Interests will receive the same or a greater distribution under the Plan than they would in a chapter 7 liquidation. Based upon the foregoing, the Plan Proponents submit that the best interest test has been satisfied.

H. Section 1129(a)(8)

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept the plan or not be impaired by the plan. As set forth above and in the Paque Declaration, holders of Claims in Classes 2, 4 and 5 voted overwhelmingly to accept the Plan. *See* Paque Decl. ¶ 16. As such, section 1129(a)(8) is satisfied with respect to those Classes.

As set forth above and in the Paque Declaration, holders of Claims in the Non-Voting Impaired Classes were deemed to reject the Plan. *See* Paque Decl. ¶ 13. Nonetheless, as set forth below, the Plan may be confirmed pursuant to the "cram down" provisions of section 1129(b) of the Bankruptcy Code.

I. Section 1129(a)(9)

Section 1129(a)(9) of the Bankruptcy Code requires that persons holding claims entitled to priority under section 507(a) of the Bankruptcy Code receive specified cash payments under the Plan. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) requires that a plan to provide as follows:

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
>
> (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of [the Bankruptcy Code], each holder of a claim of such class will receive –
>
> (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;
>
> (C) with respect to a claim of a kind specified in section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive on account of such claim regular installment payments in cash –
>
> (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;
>
> (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and
>
> (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and
>
> (D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

11 U.S.C. § 1129(a)(9).

For each of these categories, the Plan provides for payments consistent with these sections.

1. Section 1129(a)(9)(A): Administrative Expense Claims

With respect to Administrative Expense Claims, in accordance with section 1129(a)(9)(A) of the Bankruptcy Code, Sections 3.1 of the Plan provide that, on the later to occur of (a) the Effective Date and (b) the date on which an Administrative Expense Claim shall become an Allowed Claim, the Disbursing Agent shall, unless otherwise mutually agreed by the holder of an Allowed Administrative Expense Claim and the Debtors, upon consultation with the Requisite Lenders, the Required DIP Lenders and the Oak Hill Entities, (i) pay to each holder of an Allowed Administrative Expense Claim, in Cash, the full amount of such Allowed Administrative Expense Claim or (ii) satisfy and discharge such Allowed Administrative Expense Claim in accordance with the terms and conditions of the agreements with respect thereto. *See* Plan Sec. 3.1. Thus, the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code.

2. Section 1129(a)(9)(B): Priority Non-Tax Claims

With respect to Priority Non-Tax Claims, in accordance with section 1129(a)(9)(B) of the Bankruptcy Code, Section 5.1 of the Plan provides that, unless otherwise mutually agreed upon by the holder of an Allowed Priority Non-Tax Claim and the Debtors, upon consultation with the Requisite Lenders, the Required DIP Lenders and the Oak Hill Entities, each holder of an Allowed Priority Non-Tax Claim shall receive from the Disbursing Agent in full satisfaction, settlement, release, and discharge of, and in exchange for such Allowed Priority Non-Tax Claim, Cash in an amount equal to such Allowed Priority Non-Tax Claim on the later of the Effective Date and the date such Allowed Priority Non-Tax Claim

becomes an Allowed Priority Non-Tax Claim, or as soon thereafter as is possible. *See* Plan Sec. 5.1. Thus, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code.

3. Section 1129(a)(9)(C): Priority Tax Claims

With respect to Priority Tax Claims, in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, Section 3.2 of the Plan provides that, on the Effective Date, each holder of an Allowed Priority Tax Claim shall be entitled to receive distributions in an amount equal to the full amount of such Allowed Priority Tax Claim. At the option and discretion of the Debtors, which option shall be exercised, in writing, on or prior to the commencement of the Confirmation Hearing, such payment shall be made by the Disbursing Agent (a) in full, in Cash, on the Effective Date, (b) in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, in full, in Cash, in equal quarterly installments, commencing on the first (1st) Business Day following the Effective Date and ending on the fifth (5th) anniversary of the commencement of the Chapter 11 Cases, together with interest accrued thereon at the applicable non-bankruptcy rate as of the Confirmation Date, or (c) by mutual agreement of the holder of such Allowed Priority Tax Claim and the Debtors or Reorganized Debtors, as the case may be, upon consultation with the Requisite Lenders, the Required DIP Lenders and the Oak Hill Entities. *See* Plan Sec. 3.2.

In its objection to the Plan, the Los Angeles County Treasurer and Tax Collector ("LA County") asserts that Section 3.2(b) of the Plan, providing for payment in full plus accrued interest at the applicable nonbankruptcy rate, violates the Bankruptcy Code because it fails to specify that the Debtors will make penalty and interest payments as allowed under California state law. *See* LA County Objection ¶¶ 8–10. To the extent that such interest and penalty amounts are consistent with applicable nonbankruptcy law, which includes California state law,

Section 3.2(b) of the Plan clearly provides that such payments will be made. *See* Plan Sec. 3.2(b) (. . . "together with interest accrued thereon at the *applicable nonbankruptcy rate*. . .") (emphasis added); *see also* Omnibus Response, Ex. A at 7. Moreover, the prior addition of language to the Disclosure Statement to make clear that state law is included within "applicable nonbankruptcy law" disclosed to holders of Priority Tax Claims that state law shall be considered when calculating such claims. Accordingly, the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code.[8]

J. Section 1129(a)(10)

Section 1129(a)(9)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider" if a class of claims is impaired by the plan. Three (3) impaired Classes entitled to vote affirmatively accepted the Plan by the requisite majorities, determined without including any acceptance of the Plan by any insider, thereby satisfying the requirements of section 1129(a)(10) of the Bankruptcy Code. *See* Paque Decl. ¶ 16.

K. Section 1129(a)(11)

Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition to confirmation, the court determine that a plan is feasible. Specifically, the court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

[8] The same principal applies to the LA County's objection with respect to treatment of Other Secured Claims in Section 7.1 of the Plan, as detailed more fully in the Omnibus Response.

11 U.S.C. § 1129(a)(11). The feasibility test set forth in section 1129(a)(11) requires the Court to determine whether the Plan may be implemented and has a reasonable likelihood of success. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *Kane v. Johns-Mansville Corp.*, 843 F.2d at 649.

In the context of the Plan, feasibility is established by demonstrating the Debtors' ability to (i) implement a successful reorganization that is not likely followed by the need for further financial reorganization, (ii) satisfy the conditions precedent to the Effective Date, and (iii) otherwise have sufficient funds to meet their post-Confirmation Date obligations, including paying for the costs of administering and fully consummating the Plan and closing these Chapter 11 Cases. As set forth in the Murphy Declaration, the Debtors will have sufficient funds to administer and consummate the Plan and to close the Chapter 11 Cases. *See* Murphy Decl. ¶¶ 59 and 61.

From and after the Effective Date, with the assistance of the Litigation Trustee, to the extent applicable, the Reorganized Debtors will implement and consummate the transactions contemplated under the Plan, including the establishment of the Litigation Trust. Through the creation of the Litigation Trust, the Plan contemplates a controlled and supervised divestiture of certain of the Debtors' assets to maximize recoveries and to provide periodic distributions to creditors. The Litigation Trust will consist of the Liquidation Trust Assets, which include, among other things, the Creditor Cash. *See* Plan Secs. 1.88 and 16.3. Pursuant to the Litigation Trust Agreement, a Cash reserve will be established to fund the activities of the Litigation Trust. *See* Plan Sec. 16.9. The provisions of the Plan and the Litigation Trust Agreement demonstrate that the Litigation Trust will have sufficient funds to manage the Liquidating Trust, maintain the Liquidation Trust Assets, and make payments to the Litigation Trust Beneficiaries.

Additionally, in connection with developing the Plan and determining whether the Plan meets the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code, the Debtors, in conjunction with their financial advisor, Zolfo Cooper, LLC ("Zolfo Cooper") analyzed the Debtors' ability to satisfy their post-Effective Date financial obligations while maintaining sufficient liquidity and capital resources. *See* Disclosure Statement, Art. VI. In this regard, the Debtors prepared financial projections (the "Projections") for the period from April 1, 2013 through December 31, 2015 to present the anticipated impact of the Plan. *Id*. The Projections are based on forecasts of key economic variables and illustrate that confirmation of the Plan is not likely to be followed by the eventual liquidation of the Reorganized Debtors. *Id*. In light of expected cash flows derived from operating assets and the funds to be available under the Exit Credit Agreement and the OHAA Funding Agreement, the Reorganized Debtors will have sufficient funds to continue to manage their assets and satisfy their liabilities. Additionally, the Debtors' post-Effective Date business is not expected to change materially from the ongoing business operations conducted during these Chapter 11 Cases. Based upon the Debtors' estimates and prior course of conduct, the Debtors will be able to continue to administer their assets as required by the Plan and make all payments and distributions as contemplated by the Plan.

Consequently, the Plan satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code. There are no objections to the Plan based upon a failure to satisfy section 1129(a)(11).

L. Section 1129(a)(12)

Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 [of title 28 of the United States Code], as determined by the court at

the hearing on confirmation of the plan." 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2). In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, Section 31.12 of the Plan provides that all fees payable pursuant to section 1930 of title 28 of the United States Code, and, if applicable, any interest payable pursuant to section 3717 of title 31 of the United States Code, as determined by the Bankruptcy Court shall be paid on the Effective Date or thereafter as and when they become due and owing. Thus, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

M. Section 1129(a)(13)

Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation of all retiree benefits, as defined, and at the levels established pursuant to, section 1114 of the Bankruptcy Code. Pursuant to Section 31.13 of the Plan, from and after the Effective Date, the Reorganized Debtors shall assume and pay all retiree benefits (within the meaning of section 1114 of the Bankruptcy Code) and contribute to the Pension Plans the amount necessary to satisfy the minimum funding standards under sections 302 and 303 of ERISA, 29 U.S.C. §§ 1082 and 1083, and sections 412 and 430 of the Internal Revenue Code, 26 U.S.C. §§ 412 and 430, if any, relating to the Pension Plans, at the level established in accordance with subsection (e)(1)(B) or (g) of section 1114 of the Bankruptcy Code, at any time prior to the Confirmation Date, and for the duration of the period during which the Debtors have obligated themselves to provide such benefits; *provided, however*, that the Reorganized Debtors may modify such benefits to the extent permitted by applicable law. Thus, the Plan satisfies section 1129(a)(13) of the Bankruptcy Code.

N. Sections 1129(a)(14), 1129(a)(15) and 1129(a)(16)

Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations and, as such, section 1129(a)(14) does not apply. Section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). The Debtors are not "individuals" and, accordingly, section 1129(a)(15) is inapplicable. Section 1129(a)(16) of the Bankruptcy Code applies to transfers of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. The Debtors are each a moneyed, business, or commercial corporation and, accordingly, section 1129(a)(16) is inapplicable.

O. The Plan Satisfies Section 1129(b) of the Bankruptcy Code

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where not all impaired classes of claims and equity interests accept a plan. This mechanism is known colloquially as "cram down."

Section 1129(b) provides, in pertinent part:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1). Thus, pursuant to section 1129(b), a court may "cram down" a plan over the rejection of such plan by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes. *See*, e.g., *Kane v. Johns-Manville Corp.*, 843 F.2d at 650.

Holders of Claims in the Non-Voting Impaired Classes are not receiving any distribution under the Plan, and thus, are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. As set forth above, all impaired Classes entitled to vote have accepted the Plan[9] and, accordingly, the Debtors must satisfy section 1129(b) only with respect to the Classes of Equity Interests and Subordinated Claims that are deemed to reject the Plan. The Debtors submit that the Plan may be confirmed as to each of these Classes pursuant to the "cram down" provisions of section 1129(b) of the Bankruptcy Code.

1. The Plan Does Not Discriminate Unfairly

The unfair discrimination standard of section 1129(b) ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly situated classes. *In re Barney & Carey Co.*, 170 B.R. 17, 25 (Bankr. D. Mass 1994). Section 1129(b)(1) does not prohibit all discrimination between classes; it prohibits only discrimination that is unfair. *In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990). The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment. *See In re Buttonwood Partners, Ltd.*, 111 B.R. 57 (Bankr. S.D.N.Y. 1990); *In re Furlow*, 70 B.R. 973, 978 (Bankr. E.D. Pa. 1987) ("[D]ifferent treatment is permissible if and only if the debtor is able to prove a reasonable basis for the degree of discrimination contemplated by the Plan."); *See also In re Johns-Manville Corp.*, 68 B.R. at 636. Accordingly, as between two classes of claims or two classes of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, or (ii) taking into account the particular facts and circumstances of

[9] As Class 6 contained no Claims, no votes were cast on behalf of this Class and it neither accepts nor rejects the Plan.

the case, there is a reasonable basis for such disparate treatment. *See*, e.g., *Johns-Manville Corp.*, 68 B.R. at 636; *In re Buttonwood Partners*, 111 B.R. at 63; *In re Rivera Echevarria*, 129 B.R. 11, 13 (Bankr. D.P.R. 1991). In addition, courts in this jurisdiction have adopted the *Dow Corning* test, which requires a materially different distribution before finding "unfair discrimination" between classes. *See In re Armstrong World Indus.*, 348 B.R. at 122; *In re Lernout & Hauspie Speech Prods, N.V.*, 301 B.R. 651, 660 (Bankr. D. Del. 2003), *aff'd*, 308 B.R. 672 (D. Del. 2004); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 228 (Bankr. D.N.J. 2000).

Although Class 7 (Subordinated Claims) is treated differently than other Classes of Claims pursuant to the Plan, this is reasonable and does not constitute "unfair discrimination." The Plan treatment of holders of Subordinated Claims is based upon the statutory mandates of section 510. Indeed, in order to comply with section 1129(a)(1) of the Bankruptcy Code, which requires that the plan comply with applicable provisions of the Bankruptcy Code, section 510 must be enforced. Thus, Class 7 is not similarly situated to any other class against the Debtors and the disparate treatment of such Class in comparison to other Classes of Claims that are not subordinated is not unfair.

With respect to Class 8 (Preferred Equity Interests), there is no unfair discrimination because Class 8 consists solely of Preferred Equity Interests. There are no similar Classes; all Classes that are higher in the distribution waterfall are Classes that consist of Claims against the Debtors, and not equity interests in the Debtors, and Classes 9 and 13 through 26, consist of Common Equity Interests and are equal in priority, so there is a reasonable basis for the separate classification of preferred and common equity interests as well.

Lastly, the Plan does not "discriminate unfairly" with respect to each impaired Equity Interest because, with respect to each Debtor, all Equity Interests in such Debtor are classified together and afforded the same treatment under the Plan. Accordingly, the treatment under the Plan of Classes 9 and 13 through 26 does not constitute unfair discrimination.

Accordingly, based upon the foregoing, there is no unfair discrimination with respect to any of the rejecting Classes.

2. The Plan is Fair and Equitable

Section 1129(b)(2) of the Bankruptcy Code defines the phrase "fair and equitable" as follows, as applicable:

> (i) As to a class of unsecured claims that rejects a plan: Either (a) each holder of a claim in such class will receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim or (b) the holder of any claim or interest that is junior to the claims of such class will not receive or retain any property under the plan. 11 U.S.C. § 1129(b)(2)(B).
>
> (ii) As to a class of equity interests: Either (a) each holder of an equity interest in such class will receive or retain under the plan property of a value equal to the greatest of the fixed liquidation preference to which such holder is entitled, the fixed redemption price to which such holder is entitled, or the value of the interest or (b) the holder of an interest that is junior to the interests of such class will not receive or retain any property under the plan.

11 U.S.C. § 1129(b)(2). This often is referred to as the "absolute priority rule."

Distributions under the Plan are made in the order of priority proscribed by the Bankruptcy Code and in accordance with the absolute priority rule. Pursuant to the Plan, holders of Allowed Claims in a given class must be paid in full before a distribution is made to a more junior class. The Plan provides that the holders of Claims in Classes 4 through 6 will receive less than a value equal to the amount of the holder's Claim, but no holder of a Subordinated Claim or an Equity Interest will receive a distribution under the Plan at all. Holders of Allowed

Claims in Class 7 (Subordinated Claims) will not realize a recovery under the Plan as a result of enforcement of section 510 of the Bankruptcy Code and not because consideration is being provided to junior classes. Accordingly, the Plan meets the "fair and equitable" test with respect to unsecured Claims. Additionally, pursuant to the Plan, no holder of an Equity Interest will receive a distribution. Accordingly, the Plan meets the "fair and equitable" test with respect to Equity Interests.

P. Section 1129(c)

Subject to certain conditions, section 1129(c) of the Bankruptcy Code requires that the Court confirm only one plan. In this case, the Plan is the only current plan filed in these cases and, as such, this section of the Bankruptcy Code does not apply.

Q. Section 1129(d)

The principal purpose of the Plan is not the avoidance of taxes or the application of section 5 of the Securities Act of 1933, *see* Murphy Decl. ¶ 67, and no governmental unit has objected to confirmation of the Plan on any such grounds. The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

R. Section 1129(e)

The Chapter 11 Cases are not "small business cases" as defined in the Bankruptcy Code and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

PLAN MODIFICATIONS

Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation so long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code and the proponent of the modification complies with section 1125 of the Bankruptcy Code. In addition, with respect to modifications

made after acceptance but prior to confirmation, Bankruptcy Rule 3019 provides, in relevant part:

> [A]fter a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Fed. R. Bankr. P. 3019(a).

The Debtors have filed non-material, technical adjustments and modifications to the Plan in accordance with Section 27.1 of the Plan. None of the modifications constitute material modifications. A modification is material if it "so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance." 9 COLLIER ON BANKRUPTCY ¶ 3019.01 (16th ed. 2009); *see also In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988). Re-solicitation is appropriate only if "the modification adversely affects the interests of a creditor who has previously accepted the plan, in more than a purely ministerial *de minimis* manner . . . ." *In re Frontier Airlines, Inc.*, 93 B.R. 1014, 1023 (Bankr. D. Colo. 1988). The modifications do not have an adverse impact on the treatment of any Claims or Equity Interests and, thus, re-solicitation is unnecessary and acceptances of the Plan should be deemed acceptances of the Plan, as modified.

Furthermore, certain technical and minor modifications may be made to the Plan at the Confirmation Hearing. As will be demonstrated at the Confirmation Hearing, such modifications likely will have no impact on the treatment of any Claims and, thus, pursuant to

Bankruptcy Rule 3019, all acceptances of the Plan should also be deemed acceptances of the Plan as may be modified by the Confirmation Order.

CONCLUSION

The Plan complies with and satisfies all of the requirements of section 1129 of the Bankruptcy Code. The Objections should, therefore, be overruled and the Plan confirmed.

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Wilmington, Delaware

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