IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re SUPERIOR AIR CHARTER, LLC,[1] Debtor.	Chapter 11 Case No.: 20-11007 (CSS) **Re D.I. 168**

JOINT MEMORANDUM OF LAW IN SUPPORT OF APPROVAL AND CONFIRMATION OF THE DEBTOR AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS' FIRST AMENDED JOINT COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF REORGANIZATION

Dated: August 31, 2020

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[1] The Debtor in this chapter 11 case, together with the last four digits of the Debtor's federal tax identification number, is as follows: Superior Air Charter, LLC (2081). The mailing address for the Debtor, solely for purposes of notices and communications, is: 1341 W. Mockingbird Lane, Suite 600E, Dallas, Texas 75247.

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PRELIMINARY STATEMENT

Superior Air Charter, LLC (the "Debtor") and the Official Committee of Unsecured Creditors of Superior Air Charter, LLC (the "Committee") hereby submit this joint memorandum in support of the *Debtor and Official Committee of Unsecured Creditors' First Amended Joint Combined Disclosure Statement and Chapter 11 Plan of Reorganization* [D.I. 168] (the disclosure statement portion thereof, the "Disclosure Statement" and the chapter 11 plan portion thereof, the "Plan," each together with all exhibits and supplements thereto and as may be modified and/or amended from time to time).[2]

At the outset of this Chapter 11 Case, the Debtor initiated a marketing process with the DIP Lenders serving as the proposed stalking horse bidder, which was designed to solicit interest in bids and culminate in an auction in an effort to maximize the value of the Debtor's assets for the benefit of the Debtor, its Estate and all parties-in-interest. Due to the amount owed to the DIP Lenders compared with the value of the Debtor's assets, unsecured creditors would not receive any distribution as a result of a section 363 sale. As such, following the appointment of the Committee on May 12, 2020, the Debtor, the Committee, and the DIP Lenders, engaged in robust negotiations about the nature and terms of a transaction that would provide the maximum benefit to the Debtor's Estate and creditors, including holders of SuiteKey Claims, the largest group of unsecured creditors. As a result of those negotiations, the Debtor, in agreement with the Committee, determined to pivot from the marketing process and proceed instead with a reorganization under the terms of the Plan. The Plan is the result of extensive, arm's-length negotiations between the Debtor, the DIP Lenders, and the Committee, and represents the best

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[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan and Disclosure Statement, as context requires.

available restructuring proposal for the Debtor. Through the Plan, the Debtor will be reorganized following the Effective Date as the Reorganized Debtor and unsecured creditors will either receive their *pro rata* share of cash or credits for future flights on the Debtor's affiliate, Delux.

On the Effective Date, the GUC Trust Proceeds will vest in the GUC Trust and the Debtor shall fund certain amounts to the GUC Trust to make Distributions under the Plan. The Plan provides that Allowed Administrative Expense Claims, Priority Tax Claims, Professional Claims, Class 1 DIP Facility Claims, Class 2 Other Secured Claims, and Class 3 Other Priority Claims will be satisfied in full. It further provides that Allowed Class 4 General Unsecured Claims receive Distributions of their *Pro Rata* share of the proceeds of the GUC Trust Proceeds and Allowed Class 5 SuiteKey Claims will receive credits to be used against future flights hosted by the Debtor's affiliate, Delux, or Delux's successor. Alternatively, SuiteKey Claimants may elect to have their Claims treated as General Unsecured Claims under Class 4. The Plan further provides for the subordination of $16 million in unsecured notes in favor of the one of the DIP Lenders, JetSuiteX. Finally, the Plan provides that, at the direction of the DIP Lenders for the consideration provided to implement the Plan, JSI's Equity Interests in the Debtor will be reinstated in full in the Reorganized Debtor. The Debtor believes that confirmation of the Plan provides the only possible opportunity for distributions to unsecured creditors.

In light of the favorable treatment and outcomes the Plan achieves, the Plan is strongly supported by the Debtor's voting creditors. As of the date of this filing, objection deadlines related to the Disclosure Statement and Plan have passed and the only objections received were two narrow objections filed by the U.S. Trustee and two—out of hundreds—Holders of SuiteKey Claims. In contrast to these narrow objections, the overwhelming acceptance of the Plan demonstrates that the Plan is fair and in the best interests of all of the Debtor's stakeholders.

As set forth below, the Disclosure Statement contains adequate information as that term is defined in section 1125(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), and otherwise complies with applicable law. Further, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and has received overwhelming support from Holders of Claims entitled to vote thereon. Accordingly, the Debtor and the Committee submit that the Disclosure Statement should be approved and the Plan should be confirmed.

In addition to this memorandum, the Debtor has filed, or is contemporaneously filing, the following in support of approval of the Disclosure Statement and confirmation of the Plan:

(i) the *Certification of Bankruptcy Management Solutions, Inc. d/b/a Stretto Regarding Tabulation of Votes in Connection with the Debtor and Official Committee of Unsecured Creditors' First Amended Joint Combined Disclosure Statement and Chapter 11 Plan of Reorganization* [D.I. 200] (the "Voting Declaration");

(ii) the *Declaration of Edward T. Gavin, CTP in Support of Confirmation of the Debtor and Official Committee of Unsecured Creditors' First Amended Joint Combined Disclosure Statement and Chapter 11 Plan of Reorganization* [D.I. 201] (the "Gavin Declaration");

(iii) the *Declaration of Alex Wilcox in Support of Confirmation of the Debtor and Official Committee of Unsecured Creditors' First Amended Joint Combined Disclosure Statement and Chapter 11 Plan of Reorganization* [D.I. 202] (the "Wilcox Declaration");

(iv) the *Notice of Filing of Plan Supplement for Debtor and Official Committee of Unsecured Creditors' First Amended Joint Combined Disclosure Statement and Chapter 11 Plan of Reorganization* [D.I. 195] (the "Plan Supplement"); and

(v) the *Declaration of Randall McKinney in Support of Confirmation of the Debtor and Official Committee of Unsecured Creditors' First Amended Joint Combined Disclosure Statement and Chapter 11 Plan of Reorganization.*

BACKGROUND

A. General Background

The Debtor's bankruptcy filing was precipitated by a number of factors. Despite the significant investments made in the Debtor by its Non-Debtor Affiliates, and despite the popularity

of the Debtor's brand, the Debtor was unable to generate sufficient revenue to cover its expenses.[3] The thin margins common to the Debtor's industry were compounded by the loss of valuable salespeople for the Debtor, as well as the Debtor's unsuccessful attempt to expand its operations into the highly-competitive East Coast market; this latter endeavor was beset by entirely unreliable planes which ultimately culminated in costly and lengthy litigation over the same across three different courts. Thus, the arrival in early 2020 of the COVID-19 pandemic and its devastating impact on the economy at large and the Debtor's industry in particular proved to be a burden the already-strained Debtor could not bear. As a result, the Debtor realized it would not have sufficient cash to fund operations, including its payroll obligations due and payable on and after April 30, 2020, leaving it with no option other than commencing this Chapter 11 Case. In connection with its preparations for commencing this Chapter 11 Case, the Debtor installed Jonathan Solursh as an independent managed\r (the "Independent Manager").

On April 28, 2020 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtor has continued to manage its business as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this case. On May 12, 2020, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Committee [*see* D.I. 49].

On July 20, 2020, this Court entered the *Order (I) Approving on an Interim Basis the Combined Disclosure Statement and Plan as Containing Adequate Information for Solicitation Purposes, (II) Scheduling the Combined Hearing and the Deadline for Filing Objections, (III)*

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[3] These events, as well as a detailed factual background of the Debtor's business and operations, are more specifically detailed in the *Declaration of Edward T. Gavin, CTP, Chief Restructuring Officer of the Debtor in Support of Debtor's Chapter 11 Petition and First Day Motions,* which is incorporated herein by reference [D.I. 8] (the "First Day Declaration").

Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Combined Disclosure Statement and Plan, and Approving the Form of Ballots and Solicitation Package, (IV) Establishing the Voting Record Date, and (V) Approving the Notice Procedures [D.I. 165] (the "Conditional Approval and Procedures Order") that, among other things, (i) set several dates related to the Plan, including the hearing date for final approval of the Plan and Disclosure Statement and a general deadline for the filing of objections to the Plan and Disclosure Statement, (ii) approved related solicitation procedures (the "Solicitation Procedures"), and (iii) approved the form of certain notices and the Ballots, and related tabulation procedures.

B. **The Solicitation Process**

As set forth in the Voting Declaration, the Debtor's solicitation and balloting agent, Stretto ("Stretto") distributed packages (the "Solicitation Packages") to each Holder of a Claim in Class 4 (General Unsecured Claims) and Class 5 (SuiteKey Claims) containing: (a) a copy of the Disclosure Statement and Plan, (b) a Ballot, (c) the Conditional Approval and Procedures Order, (d) a notice outlining the dates and deadlines related to confirmation of the Plan (the "Confirmation Notice"), and (e) a letter from the Committee recommending that Holders of Claims in the Voting Classes vote in favor of the Plan. Stretto served holders of Claims in non-voting Classes and other parties in interest on the Debtor's mailing list with a notice of non-voting status and the Confirmation Notice, as appropriate.

As described in the Voting Declaration, the Debtor received overwhelming support for the Plan from the Voting Classes. Creditors holding 95.9% in amount and 95.4% in number in Class 4 voted to accept the Plan—this total includes 242 of Holders of SuiteKey Claims holding Claims in the aggregate amount of $20,552,859.43 that affirmatively elected for treatment under Class 4 rather than Class 5. Creditors holding 91.6% in amount and 95.8% in number electing to remain

in and voting in Class 5 voted to accept the Plan. In addition, the Plan contains certain third-party releases, which are conspicuously disclosed in the Plan, Disclosure Statement, and Ballots.

On August 27, 2020, the U.S. Trustee filed its *Objection of the United States Trustee to Confirmation of the Debtor and Committee's Chapter 11 Plan* [D.I. 198] (the "U.S. Trustee Objection"). The U.S. Trustee objects to confirmation of the Plan on two narrow bases—primarily, the U.S. Trustee objects to the Third-Party Releases, as defined below, on policy grounds. Additionally, the U.S. Trustee argues that the Plan is a "liquidating plan" and, therefore, the Debtor is not entitled to a discharge. Also on August 27, 2020, two SuiteKey Members, Richard Brown and Julius Glickman filed the *Objection of Richard Brown and Julius Glickman to Adequacy of Disclosure Statement and Confirmation of Chapter 11 Plan of Reorganization* [D.I. 199] (the "Brown and Glickman Objection"). The Brown and Glickman Objection also primarily objects to the releases contained in the Plan. As discussed below, each of the objections of the U.S. Trustee and Mr. Brown and Mr. Glickman ignore important facts about the nature of the Plan and the proposed Third-Party Releases and should be overruled.

ARGUMENT

I. THE DISCLOSURE STATEMENT COMPLIES WITH THE BANKRUPTCY CODE AND THE BANKRUPTCY RULES AND SHOULD BE APPROVED

Bankruptcy Code section 1126(b) requires that the Disclosure Statement and solicitation disclose "adequate information" as defined in section 1125 of the Bankruptcy Code:

> "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in

> determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a)(1). Thus, a debtor's disclosure statement must, as a whole, provide information that is reasonably practicable to permit an informed judgment by impaired creditors entitled to vote on the plan. *See Krystal Cadillac-Oldsmobile GMC Truck. Inc. v Gen. Motors Corp.*, 337 F.3d 314, 321–22 (3d Cir. 2003). A disclosure statement "must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

The bankruptcy court has broad discretion to determine the adequacy of the information contained in a disclosure statement. *See Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1156–57 (5th Cir. 1988). Accordingly, the determination of whether a disclosure statement contains adequate information is to be made on a case-by-case basis, focusing on the unique facts and circumstances of each case. *See In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001). In that regard, courts generally examine a number of factors to determine whether the disclosure statement contains adequate information. *See, e.g., In re Scioto Valley Mort. Co.,* 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (listing factors); *see also In re Ferretti*, 128 B.R. at 18-19 (listing similar factors). The factors are not meant to be comprehensive, nor must a debtor provide information on all factors. *Id.* Rather, the bankruptcy court must decide what is appropriate in each case. *Id.* (noting that not every debtor needs to provide information on each factor).

Here, the Disclosure Statement, contains adequate information with respect to the factors considered by courts, including, but not limited to, a discussion of: (i) an overview of the

circumstances giving rise to the bankruptcy filing (Disclosure Statement and Plan, Art. III.A.7); (ii) a description of the Debtor, its capital structure, and its assets and operations (Disclosure Statement and Plan, Art. III.A); (iii) a liquidation analysis (Disclosure Statement and Plan, Ex. A 1); (iv) a summary of the Plan, including information related to Claims against the Estate and the management of the Reorganized Debtor (Disclosure Statement and Plan, Arts. I and IV); (v) the conditions precedent for confirmation and effectiveness of the Plan (Disclosure Statement and Plan, Art. XIV); (vi) the provisions of the Plan governing releases, injunctions and exculpation (Disclosure Statement and Plan, Arts. III.F. and XII); (vii) the voting and confirmation process (Disclosure Statement and Plan, Art. V); (vii) alternatives of confirmation and consummation of the Plan (Disclosure Statement and Plan, Art. III.C and D); (viii) a summary of the Bankruptcy Code and other requirements for confirmation (Disclosure Statement and Plan, Art. V); (ix) tax consequences related to the Plan (Disclosure Statement and Plan, Art. III.C); (x) the anticipated future of the Debtor (Disclosure Statement and Plan, Art. V.B); and (xi) the relationship of the Debtor with its affiliates (Disclosure Statement and Plan, Art. III.A.6.).

Accordingly, the Debtor and the Committee submit that the Disclosure Statement contains the information typically considered by bankruptcy courts and found to be adequate and respectfully request that the Court approve the Disclosure Statement as containing "adequate information" as defined by section 1125(a) and required by of section 1126(b) of the Bankruptcy Code.

II. THE PLAN SHOULD BE CONFIRMED

To obtain confirmation of the Plan, the Debtor must demonstrate, by a preponderance of the evidence, that the Plan satisfies the applicable provisions of Bankruptcy Code section 1129. See *In re Armstrong World Indus., Inc*., 348 B.R. 111, 120 (D. Del. 2006).

Through the record in this Chapter 11 Case, the First Day Declaration, the Gavin Declaration, the Voting Declaration, the Wilcox Declaration, and testimonial evidence that may be adduced at or before the Confirmation Hearing, the Debtor will demonstrate, by a preponderance of the evidence, that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan.

A. **The Plan Satisfies the Requirements of Section 1129(a)(1) of the Bankruptcy Code**

Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Although broadly drafted, the legislative history and the case law make clear that this provision is directed at compliance with sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and interests and the contents of a plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re Texaco Inc.,* 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988) ("In determining whether a plan complies with section 1129(a)(1) [of the Bankruptcy Code], reference must be made to [Bankruptcy] Code §§ 1122 and 1123 with respect to the classification of claims and the contents of a plan of reorganization"), *appeal dismissed,* 92 B.R. 38 (S.D.N.Y. 1988).

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

The Plan's classification structure is proper and in accordance with section 1122(a) of the Bankruptcy Code. Specifically, in addition to Administrative Expense Claims, Priority Tax Claims, and Professional Claims, which do not require classification, the Plan divides Claims and Equity Interests as follows:

Class	Type of Claim or Interest
Class 1	DIP Facility Claims
Class 2	Other Secured Claims

Class 3	Other Priority Claims
Class 4	General Unsecured Claims
Class 5	SuiteKey Claims
Class 6	Subordinated Claims
Class 7	Existing Equity Claims

Section 1122(a) of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class if such claim or interest is substantially similar to the other claims or interests of such class. *See* 11 U.S.C. § 1122(a). "Substantially similar" generally has been interpreted to mean similar in legal character to other claims against a debtor's assets or to other interests in a debtor. *See In re Drexel Burnham Lambert Group Inc.,* 138 B.R. 714, 715- 716 (Bankr. S.D.N.Y. 1992), *order aff'd*, 140 B.R. 347 (S.D.N.Y. 1992).

Section 1122(a) of the Bankruptcy Code does "not require that similar classes be grouped together, but merely that any group be homogenous." *Drexel Burnham Lambert*, 138 B.R. at 715. Importantly, a plan proponent is afforded significant flexibility in classifying claims under section 1122(a) so long as there is a reasonable basis for the classification structure. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987). Here, the Plan's classification structure is straightforward and complies with section 1122(a) of the Bankruptcy Code. The Plan's classification scheme generally follows the Debtor's prepetition capital structure, classifying secured claims separately from unsecured claims and equity interests separately from claims. The Plan also separates claims of the Debtor's General Unsecured Creditors from the claims held by their SuiteKey Members. This distinction is appropriate because the nature of SuiteKey Claims differ from other unsecured creditors and these Claims are to be treated in a unique fashion under the Plan; specifically, the SuiteKey Members, who prepaid for flights on the Debtor's planes, are entitled to credits with the Debtor's affiliate (Delux Public Charter) for future flights. Importantly, if a Holder of a SuiteKey Claim would prefer a cash payment, it may opt to be treated as a Class

4 General Unsecured Claim, rather than receive credits as part of Class 5. The option to elect for credits on future flights was a key component of the global deal reached between the Debtor, the DIP Lenders and the Committee. At bottom, the Claims and Equity Interests in each Class described above are substantially similar in nature to the other Claims and Equity Interests in such Class. Accordingly, the classification structure embodied in the Plan complies with section 1122(a) of the Bankruptcy Code.

Section 1122(b) of the Bankruptcy Code is inapplicable here, as the Plan does not contain a convenience class.

2. *The Plan Satisfies the Requirements of Section 1123(a) of the Bankruptcy Code.*

To satisfy section 1129(a)(1) of the Bankruptcy Code, the Plan must comply with section 1123(a) of the Bankruptcy Code, which sets forth seven mandatory requirements for every chapter 11 plan.

Specifically, this section requires that a plan (i) designate classes of claims and interest; (ii) specify unimpaired classes of claims and interests; (iii) specify the treatment of impaired classes or claims and interests; (iv) provide equity or treatment within each class; (v) provide adequate means for the Plan's implementation; (vi) provide for prohibition of the issuance of non-voting equity securities and provide and appropriate distribution of voting power among classes or securities; and (vii) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors. *See* 11 U.S.C § 1123(a). As set forth below, the Plan complies with each such requirement.

(a) The Plan Designates Classes of Claims—11 U.S.C. § 1123(a)(1).

Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims and interests subject to section 1122 of the Bankruptcy Code. *See* 11 U.S.C. § 1123(a)(1). As discussed above, the Plan designates seven Classes of Claims and Equity Interests. Thus, the Plan complies with the requirements of section 1123(a)(1) of the Bankruptcy Code.

(b) The Plan Specifies Unimpaired Classes—11 U.S.C. § 1123(a)(2).

Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Articles IV and VI of the Plan specifies the Classes of Claims that are unimpaired under the Plan—specifically, Class 1 (DIP Facility Claims), Class 2 (Other Secured Claims), Class 3 (Other Priority Claims), and Class 7 (Existing Equity Interests). Therefore, the Plan complies with the requirements of section 1123(a)(2) of the Bankruptcy Code.

(c) The Plan Adequately Specifies the Treatment of Impaired Classes—11 U.S.C. § 1123(a)(3).

Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Articles IV and VIII of the Plan specifies the treatment of Claims and Equity Interests that are impaired under the Plan—specifically Class 4 (General Unsecured Claims) and Class 5 (SuiteKey Claims). Thus, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

(d) The Plan Provides the Same Treatment for Claims or Interests Within Each Class—11 U.S.C. §1123(a)(4).

Section 1123(a)(4) of the Bankruptcy Code requires that a plan provide the "same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). Pursuant to the Plan, the treatment of each Claim against or Equity Interest in the Debtor, in each respective Class, is the

same as the treatment of each other Claim or Equity Interest in such Class, except at the election of a particular Claim or Equity Interest Holder. Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code because each Claim or Equity Interest within each Class will receive the same treatment unless the Claim or Equity Interest Holder elects or agrees otherwise.

(e) The Plan Provides Adequate Means for its Implementation 11 U.S.C. § 1123(a)(5).

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). Article XI of the Plan sets forth the means for implementation of the Plan, which are more than adequate. Certain of these implementation mechanisms include, for example, procedures for or respecting: (i) the vesting of assets in the Reorganized Debtor and the vesting of the GUC Trust Proceeds in the GUC Trust; (ii) the creation, governance of, and administration of the GUC Trust; (iii) the Debtor's continued corporate existence as the Reorganized Debtor, (iv) the Reorganized Debtor's board and management composition; (vi) the preservation of Reorganized Debtor's equity interests, (vii) the execution of certain documents, and (viii) the transfer of the GUC Trust Proceeds, the Administrative and Priority Claim Reserve and the Professional Fee Reserve.

Further, the Debtor has filed with the Plan and Plan Supplement many of the documents necessary to implement the Plan, including, but not limited to (i) a list of individuals proposed to serve as directors and officers of the Reorganized Debtor; (ii) the identity of the GUC Trustee; and (iii) the GUC Trust Agreement.

Based upon the foregoing, the Debtor and Committee respectfully submits that the Plan contains appropriate implementation provisions and complies with the requirements of section 1123(a)(5) of the Bankruptcy Code.

(f) The Plan Does Not Provide for the Issuance of Non-Voting Equity Securities—11 U.S.C. § 1123(a)(6).

Section 1123(a)(6) of the Bankruptcy Code provides that a plan must:

> provide for the inclusion in the charter of the debtor, if the debtor is a corporation, . . . of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends.

11 U.S.C. § 1123(a)(6). Accordingly, the holders of new stock issued under a plan of reorganization must have voting rights. *See Acequia, Inc. v. Clinton*, 787 F.2d 1352, 1361 (9th Cir. 1986). Here, there are no new shares issued under the Plan, instead JSI will continue to own 100% of the shares of the Reorganized Debtor. Accordingly, the Plan satisfies the requirements of section 1123(a)(6) of the Bankruptcy Code.

(g) The Plan Contains Appropriate Provisions Respecting the Selection of Post-Confirmation Directors, Officers, and Trustees 11 U.S.C. § 1123(a)(7).

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). This provision is supplemented by section 1129(a)(5) of the Bankruptcy Code, which directs the scrutiny of the Court to the manner by which management of the reorganized corporation is to be chosen to provide adequate representation of those whose investments are involved in the organization.

Pursuant to section XI.B.2 of the Plan, on the Effective Date, the board of directors and management of the Reorganized Debtor shall consist of those individuals identified in the Plan

Supplement. Here, the DIP Lenders and JSI have selected the new board and management, which is appropriate since JSI will be the owner of the company upon emergence. In addition, the GUC Trustee, Gavin/Solmonese LLC, is identified in the Plan Supplement. Accordingly, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

3. *The Plan Complies with Section 1123(b) of the Bankruptcy Code*.

Section 1123(b) of the Bankruptcy Code specifies certain provisions that may be included in a plan of reorganization. The Plan contains certain of the provisions specifically contemplated by subsection 1123(b), including provisions regarding: (i) the impairment and unimpairment of Classes of Claims and Equity Interests as provided for in subsection 1123(b)(1) (*see* Plan, Art. VIII); (ii) the rejection of executory contracts and unexpired leases as provided for in subsection 1123(b)(2) (*see* Plan, Art. XIII); and (iii) the modification of the rights of holders of secured claims, here as they relate to the consensual treatment of the DIP Facility Claims, pursuant to subsection 1123(b)(5).

Other provisions of the Plan are permissible pursuant to the authority granted in section 1123(b)(6) of the Bankruptcy Code, which permits a plan to include other provisions not inconsistent with the applicable provisions of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(6). For example, section XI.A.5 of the Plan provides that securities issued under the Plan are exempt from transfer taxes pursuant to section 1146(a). Section 1146(a) of the Bankruptcy Code provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. §1146(a).

In addition and consistent with section 1123(b)(6), Article XII of the Plan contains certain release provisions, an exculpation provision, and an injunction provision prohibiting parties, from, among other things pursuing Claims and Equity Interests that were released under the Plan. These

discretionary provisions are appropriate because, among other things, they are (i) integral to the terms, conditions and settlements contained in the Plan; (ii) fair, equitable and reasonable and in the best interests of the Debtor and its estate; (iii) the product of extensive arm's length negotiations among sophisticated parties; and (iv) supported by fair consideration. Furthermore, creditors support the Plan overwhelmingly and, except for the U.S. Trustee Objection to the Third-Party Releases and the proposed discharge along with the Brown and Glickman Objection, both of which are addressed below, no party has objected to these provisions of the Plan.

The Plan's release, exculpation, and injunction provisions will eliminate the costs and risks of litigation and allow, among other things, the principals that remain with the Reorganized Debtor to focus entirely on operations after emergence. The release, exculpation, and injunction provisions have been critical to obtaining the DIP Lenders' support and, except for the U.S. Trustee Objection to the Third-Party Releases and the proposed discharge along with the Brown and Glickman Objection, no party has objected to them. Additionally, the proposed release, exculpation and injunction provisions were reviewed and approved by the Independent Manager. The Debtor and the Committee submit that the release, exculpation and injunction provisions of the Plan are necessary and appropriate under the circumstances and are not inconsistent with the Bankruptcy Code. As such, the requirements of section 1123(b) of the Bankruptcy Code are satisfied.

A. **The Injunction and Discharge Provisions Set Forth in Article XII of the Plan Comply with the Bankruptcy Code**

Article XII.E of the Plan provides for an injunction which, in general, enjoins all Persons that have held, currently hold, may hold, or allege they hold a Claim or other debt or liability that is discharged, released or exculpated under the Plan from taking certain actions against the Debtor, the Reorganized Debtor, or their respective property on account of such Claims, Equity Interests,

or other obligations. This injunction is necessary to preserve and enforce the release, discharge, and exculpation provisions of the Plan, and it is narrowly tailored to achieve that purpose. Accordingly, the Debtor and the Committee submit that the injunction provision should be approved.

Section XI.D.4 of the Plan provides for the broad discharge contemplated by section 1141(d) of the Bankruptcy Code. The U.S. Trustee takes issue with the proposed discharge on the basis that "because the Debtor is liquidating, it is not eligible for a discharge under Section 1141(d)(3)." U.S. Trustee Objection, at ¶ 20. This is not the case. Section 1141(d)(3) provides in relevant part that a debtor is not eligible for a discharge if (a) "the plan provides for the liquidation of all or substantially all of the property of the estate" and (b) "the debtor does not engage in business after consummation of the plan." 11 U.S.C. § 1141(d)(3). Here, neither factor is present. Under the Plan, the Debtor's property will revest in the Reorganized Debtor, it is not being liquidated.[4] As to the Debtor's future business, the U.S. Trustee's argument that the Debtor "will not operate flights post-confirmation" and the objection's focus on the fact that "[t]he Debtor has had no operations or revenue post-petition" each miss the point. U.S. Trustee Objection, at ¶ 20. While the U.S. Trustee is technically correct that since shortly prior to the Petition Date the Debtor has not operated, the U.S. Trustee Objection ignores the ever-changing impact of COVID-19 on the Debtor's industry. The Debtor maintains its most valuable assets—its Part 135 Certificate, its "core" staff to operate the same, and its owned planes—and is eager to resume flights and will do so the moment conditions are right; the most important of those conditions is

[4] In support of this argument, the U.S. Trustee curiously focuses on blacklined changes from a pre-solicitation draft of the Plan that is not before this Court. *See* U.S. Trustee Objection, at ¶ 19. These changes were made in response to comments received from the U.S. Trustee and the U.S. Trustee's observation that the changes are "formal, not substantive" (*id.*) is actually astute. The changes were simply made to clarify that the intent of the Plan has always been for the Reorganized Debtor to retain its assets.

seeing this Plan through to its confirmation and ultimate effective date. Indeed, the Debtor's principals have been actively engaged in discussions with potential customers eager for the Debtor to resume services. *See* Wilcox Declaration, at ¶ 6. While the initial impact of the COVID-19 pandemic was that the travel industry shut down and the Debtor had months with no flights, as the country has begun to reopen, a new segment of travelers have turned to chartered and other private alternatives to the traditional commercial airlines. *See* Wilcox Declaration, at ¶ 7. In stark contrast to the position in which it found itself mere months ago, the Debtor is seeing renewed and even expanded interest in its services. *Id*. As travelers navigate this new reality, charter jet companies like the Debtor will experience a surge in bookings and the majority of new bookings are made by new leisure travel customers for whom the Debtor's aircraft and operations are well suited. *See* Wilcox Declaration, at ¶ 8. Finally, the Debtor's post-emergence operations will also be significantly bolstered by the absence of its legacy debts and liabilities, including the costly litigation that stemmed from the Debtor's attempted expansion to the East Coast market. *See* Wilcox Declaration, at ¶ 9. Likewise, the Reorganized Debtor will also no longer be burdened by the expensive acquisition and maintenance costs associated with the defective East Coast fleet of aircraft, which led to a significant loss of clients and revenue costing the Debtor upwards of $24 million dollars (independent of litigation costs) over the years prior to the Petition Date and precipitated the litigation. *See id.* The Plan positions the Reorganized Debtor to resume flights as soon as it is safe to do so, which is likely to be sooner than anyone envisioned when this case was commenced in April. This is simply not a liquidation.

As evidenced by the votes accepting the Plan, and the fact that the Plan is a reorganizing plan and not a liquidating plan, the Debtor respectfully submits that the discharge and injunction

provisions contained in the Plan are reasonable and appropriate, consistent with the Bankruptcy Code, and should be approved.

B. **The Releases by the Debtor in Section XII.B of the Plan Are Fair, Reasonable, and in the Best Interests of the Estate**

Section XII.B of the Plan provides for releases of Claims and causes of action belonging to the Debtor, its estate, and the Reorganized Debtor (the "Debtor Releases"), as of the Effective Date, by such parties against the Released Parties.[5] A debtor may release claims in a plan "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 Nat'l Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) (citing *In re DBSD North America, Inc.*, 419 B.R. 149, 217 (Bankr. S.D.N.Y. 2009)); *see also* 11 U.S.C. § 1123(b)(3)(A). In determining whether the exercise of that business judgment is valid, courts consider the "specific facts and equities of each case," typically by reference to the five factors outlined in *In re Zenith Electronics Corp.,* 241 B.R. 92 (Bankr. D. Del. 1999). *See Spansion*, 426 B.R. at 142-43 (citing *Zenith*, 241 B.R. at 110).

Those factors are: (i) an identity of interest between the debtor and non-debtor, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (ii) a substantial contribution to the plan by the non-debtor; (iii) the necessity of the release to the reorganization; (iv) the overwhelming acceptance of the plan and release by creditors and interest holders; and (v) the payment of all or substantially all of the claims of the creditors and interest holders affected by the releases under the plan. *See Zenith,* 241 B.R. at 110; *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 348-50 (Bankr. D. Del. 2011). This five-factor test is not a list of

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[5] "Released Parties" means the following Entities, each in their capacity as such, (a) the Debtor and Reorganized Debtor; (b) the DIP Lenders; (c) the Committee and its members; and (d) the Related Parties of the foregoing.

conjunctive requirements, nor is it an exhaustive list of considerations. *See In re Master Mortgage Invest. Fund, Inc.,* 168 B.R. 903, 935 (Bankr. W.D. Mo. 1994). *See also In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013) (approving the releases although the third and fifth *Zenith* factors were not met where the record reflects overwhelming creditor support of the plan); *Spansion*, 426 B.R. at 143, n. 47 (referring to the *Master Mortgage* factors as "helpful in weighing the equities of the particular case after a fact-specific review").

Here, each of the factors is satisfied. *First*, there is an identity of interest among the Debtor and the Released Parties arising out of the shared "common goal" of confirming and implementing the Plan.[6] Accordingly, the Released Parties all have an identity of interest with the Debtor.

Second, the Released Parties have substantially contributed to the development and substance of the Plan, as well as to the overall consensual posture of this case. In particular, the Released Parties include the Debtor's directors, officers and employees, whose efforts during the Chapter 11 Case have been indispensable to administering the case smoothly and preserving value for creditors under exceedingly stressful and demanding circumstances, and constitute a substantial contribution to the Plan and a significant benefit to creditors. More importantly, the Released Parties also include the DIP Lenders, who have funded this Chapter 11 Case with the new-money DIP Facility. Moreover, as discussed in Section II(D) *infra*, the contributions of the DIP Lenders created significant distributable value (which would otherwise have been zero) for the Debtor's general unsecured creditors. Simply put, it is unlikely that without their efforts and dedication any value would have been preserved for creditors. In addition, many of the Released

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[6] The *Zenith* Court granted the releases sought by the debtor, holding that the various released parties had an identity of interest on the basis that they were instrumental in formulating the plan of reorganization. *Zenith*, 241 B.R. at 110; *see also In re Tribune Co.*, 2011 Bankr. LEXIS 4128, at *153 (Bankr. D. Del. Oct. 21, 2011) (holding that the debtors and their secured lenders "share the common goal of confirming the [] Plan" and implementing the consummation thereof, thus giving rise to an identity of interest between those parties).

Parties expected a release in exchange for their contributions to the Plan and as such the proposed releases constitute a necessary component of the consensual Plan process, without which the Plan would face considerable uncertainty. Without the releases, many of the Released Parties may have been unwilling to contribute to the Plan process—the DIP Lenders expressly would not have, which would have reduced the value available for distribution to creditors and would have negatively impacted the Debtor's restructuring. *See* Wilcox Declaration, at ¶ 12. Accordingly, in light of these considerations and the broad support from creditors for the Plan, the releases by the Debtor pursuant to Section XII.B of the Plan are appropriate and in the best interests of the Estate, and represent a valid settlement of any such claims that the Debtor may have pursuant to section 1123(b)(3)(A) and Bankruptcy Rule 9019.

Third, the discharges, injunctions, releases, and exculpations are integral to the Plan as a whole, which will ultimately result in distributions to the Debtor's creditors. Such provisions are "commonplace" in chapter 11 plans. *See generally In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000); *see also, e.g., Indianapolis Downs*, 486 B.R. at 306 (concluding that exculpation provisions are appropriate for estate fiduciaries and debtor directors and officers); *Tribune*, 464 B.R. at 189 (same). The threat of litigation—and any litigation that ultimately came to fruition, no matter how baseless—would be a significant distraction to the Released Parties, the result of which would be the incurrence of potentially tremendous cost, time and labor, all of which would be better spent on developing the Debtor's business post-emergence and administering the GUC Trust. Moreover, the Debtor and the Committee, who have a fiduciary obligation to maximize value for the estate, have determined after reasonable inquiry that, to the best of their knowledge, information and belief, no valid claims or causes of action exist against any of the Released Parties for which releases are being granted.

Fourth, the Debtor's creditors overwhelmingly accepted the Plan. As set forth in the Voting Declaration, the Plan has been accepted by over 95% of each of the voting Classes, who are the only parties that are arguably affected by the release of any underlying claims or causes of action. Consequently, the fourth factor weighs in favor of granting the Debtor Releases.

Fifth, the Debtor and Committee believe that the creation of the GUC Trust and the vesting of the GUC Trust Assets therein presents the best possible chance for recoveries for creditors. This includes Distributions to Holders of Allowed General Unsecured Claims, who as set forth herein, would not receive any distributions in liquidation.[7]

Accordingly, the Debtor and Committee believe that, under the specific facts and equities of this case, the Debtor Release constitutes a valid exercise of the Debtor's business judgment and should be approved.

C. **The Third-Party Releases Set Forth in Section XII.C of the Plan Are Appropriate and Therefore Should Be Approved**

Section XII.C of the Plan provides for certain releases of Claims and Causes of Action belonging to the Releasing Parties[8] (the "Third-Party Releases"), as of the Effective Date, by such parties against the Released Parties. While the Third-Party Releases sought under the Plan are non-consensual, the Debtor and Committee submit that the extraordinary circumstances of this Chapter 11 Case warrant the releases. Moreover, and contrary to the position taken by the U.S. Trustee in its objection, "[n]onconsensual third party releases are not per se impermissible in this

[7] *See Zenith*, 241 B.R. at 111 (explaining that the fifth factor was met because "the Plan does provide a distribution to the creditors in exchange for the Releases" and supporting that conclusion by explaining that creditors received more under the plan than they would have in a liquidation); *see also In re Exide Techs.*, 303 B.R. 48, 74 n.37 (Bankr. D. Del. 2003) (noting that the fifth factor may be satisfied "upon presentation of a consensual plan, in the absence of objection to the release/injunction provisions, or upon a [] meaningful distribution to unsecured creditors").

[8] "Releasing Parties" means the following Entities, each in their respective capacities as such, (a) the Debtor; (b) the DIP Lenders; (c) the Committee and its members; (d) each Holder of a Claim; (e) each Holder of an Equity Interest; and (f) the Related Parties of the foregoing.

Circuit." *In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 573 (D. Del. 2018) *aff'd* 945 F.3d 126 (3d Cir. 2019). Instead, non-consensual releases are appropriate and permissible where the circumstances of the case demonstrate that they are "necessary to the reorganization and [are] fair." *Id.*, at 584 (citing *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 206 (3d Cir. 2011)). The key to the Plan, and the reorganization of the Debtor generally, is the contribution of cash and other significant value by the Released Parties, which will fund the GUC Trust and permit the Reorganized Debtor to continue as a going concern. To put it bluntly, there was no other funding source for this Chapter 11 Case, and the Plan and the contributions of the DIP Lenders were expressly conditioned on approval of the Third-Party Releases. *See* Wilcox Declaration, at ¶ 12. Without the Third-Party Releases, there is no Plan, no Reorganized Debtor, and no GUC Trust. In other words, without the Third-Party Releases, there is no distributable value for the Holders of General Unsecured Claims and SuiteKey Claims.

There can be no dispute that non-consensual releases can be approved under governing Third Circuit precedent where, as here, the facts demonstrate that such releases are fair and necessary to the reorganization. Specifically, proposed non-consensual releases must satisfy the standards set forth in *Continental*. *See generally Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000) ("*Continental*"). Under *Continental*, courts within the Third Circuit may approve non-consensual third-party releases where specific findings support the following "hallmarks": (i) fairness, (ii) necessity to the reorganization, and (iii) fair consideration given in exchange for the release. *See id.*; *see also Walton v. Houlihan, Lokey, Howard & Zukin (In re UA Theatre Co.)*, 315 F.3d 217, 227 (3d Cir. 2003) (quoting *Continental*, 203 F.3d at 214-15). The record before the Court establishes that the Third-Party Releases in this Plan are

fundamentally fair, necessary to this reorganization, and were given in exchange for the significant contributions made by the DIP Lenders.

In analyzing whether the *Continental* hallmarks are satisfied, courts within the Third Circuit have considered the following factors (the "*Master Mortgage* Factors"):

1. 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

2. substantial contribution by the non-debtor of assets to the reorganization

3. the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success

4. an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and

5. provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.[9]

In re Zenith Elec. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)); *see also In re Millennium Lab Holdings, II, LLC*, Case No. 15-12284 (Bankr. D. Del. Dec. 11, 2015) (D.I. 206) (transcript ruling applying the *Master Mortgage* factors and approving non-consensual third-party releases)*; In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 607-08 (Bankr. D. Del. 2001); *In re Freedom Rings LLC*, Case No. 05-14268 (CSS), D.I. 385 (Bankr. D. Del. Apr. 20, 2006), at 117:14-23 ("…third party releases are fair and necessary to the reorganization,…. [if] there is material, specific and identifiable consideration flowing from the releases to the releasors, either directly or through the Plan, that is a fair exchange for the releases being granted, and two, it is unlikely that the Debtor

[9] Courts in this district have interpreted this factor as: "Whether the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release." *In re Tribune Co.*, 464 B.R. 126, at 178 (Bankr. D. Del. 2011); *In re Spansion, Inc.*, 426 B.R. 114, 145 (Bankr. D. Del. 2010)

will be able to confirm a Plan … absent such releases.”). Importantly, “[t]hese factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court’s determination of fairness.” *In re Tribune Co.*, 464 B.R. 126, 186 (Bankr. D. Del. 2011); *Millennium Lab*, 591 B.R. 126 (D. Del 2018) *aff’d* 945 F.3d 126 (3d Cir. 2019) (noting that the *Master Mortgage* factors, “while helpful guideposts; are not controlling and are not an exclusive list”). Thus, the thrust of the *Continental* hallmarks and the *Master Mortgage* Factors is that the Court should grant the Third-Party Releases if the record sufficiently demonstrates that such protections are fair, necessary to the reorganization, and being given for fair consideration.

As set forth below, the evidence before the Court overwhelmingly forms the basis for granting the requested Third-Party Releases and injunctions in favor of the Released Parties. Each of the *Master Mortgage* Factors supports approval of the Third-Party Releases proposed under the Plan.

With respect to the first *Master Mortgage* Factor, there is a substantial identity of interest between the Debtor and the Released Parties and their respective Related Parties, to the extent the Released Party or Related Party (as applicable) has indemnification rights against the Debtor. Here, the Released Parties share an identity of interest with the Debtor because they all “undoubtedly ‘share the common goal’ of confirming the [Plan] and implementing the [global settlement].” *In re 710 Long Ridge Rd. Operating Co., II*, Case No. 13-13653 (DHS), 2014 WL 886433, at *12 (Bankr. D.N.J. Mar. 5, 2014) (approving non-consensual third-party release); *see also Tribune*, 464 B.R. at 187 (debtors and releasees “sharing common goal” of confirming a plan dependent on settlement of complex multi-party litigation resulted in an “identity of interest” for purposes of the *Master Mortgage* Factors); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (“identity of interest” factor supported where releasees and debtor “share a common goal of

achieving a reorganization of the Debtors"); *Zenith*, 241 B.R. at 111 ("identity of interest" found where releasees "instrumental in formulating the plan" shared with the debtor the goal of "seeing that the Plan succeed and the company reorganize"). Absent confirmation of the Debtor's Plan and approval of the Third-Party Releases, the Debtor cannot fund the GUC Trust, and the Estate, including all creditors and parties in interest, will be harmed. Thus, this factor weighs in favor of approval of the Releases.

The second *Master Mortgage* Factor weighs especially heavily in favor of approval of the Third-Party Releases. The consideration that DIP Lenders provided to fund this Chapter 11 Case to a successful conclusion and to enable the Plan is substantial and includes:

(i) $3,600,000.00 in DIP Financing (which will not be repaid);

(ii) Funding the Cash that will constitute the GUC Trust Proceeds in the form of the GUC Plan Consideration and the MSA Reconciliation Payment;

(iii) Agreeing to the compromises set forth in the Plan regarding the DIP Lenders' claims and the treatment thereof;

(iv) Permitting distributions to be made to other creditors despite the DIP Lenders' secured claims not being repaid in full; and

(v) Agreeing to subordinate $16 million of Claims under the JetSuiteX Demand Note, in order to prevent the dilution of the recovery from the GUC Trust Proceeds.

The contribution made by the DIP Lenders is undoubtedly significant and meets the second *Master Mortgage* Factor. Indeed, the Debtor's management, the DIP Lenders, the Committee members, and the other Released Parties each have made unique and substantial commitments of time and effort to bring this Plan before the Court for confirmation. These financial and non-financial contributions to the Debtor's case directly led to the proposed return to general unsecured creditors, which otherwise, likely, would not have been available. Moreover, many members of the Debtor's current management will continue to work in their present roles for the Reorganized Debtor and,

as such, make indispensable contributions to the successful reorganization of the Debtor. *See In re Millennium Lab Holdings, II, LLC*, Case No. 15-12284 (Bankr. D. Del. Dec. 11, 2015) (D.I. 206) (recognizing that the "sweat equity" of the debtors' management supported their inclusion in non-consensual third-party releases); *Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, at 1080 (11th Cir. 2015) (debtor's key employees contributed substantial assets to reorganization in the form of continued service); *In re Mercedes Homes, Inc.*, 431 B.R. 869, at 881 (Bankr. S.D. Fla. 2009) (debtors' directors and officers made substantial contribution where they would continue to use their "expertise and knowledge to work for the reorganized debtors").

Following on the second factor, the record here establishes that the third *Master Mortgage* Factor is met. The DIP Lenders provided significant contributions that made the Plan possible and approval of the Third-Party Releases is an express condition to the provision of that contribution. Thus, the *Continental* hallmark and *Master Mortgage* Factor that the releases and injunctions be necessary to the reorganization has been met.

The voting record here plainly meets the fourth *Master Mortgage* Factor. The Third-Party Releases were prominently disclosed in the Solicitation Materials. As described in the Voting Declaration, the Debtor received overwhelming support for the Plan from the Voting Classes. Creditors holding 95.9% in amount and 95.4% in number in Class 4 voted to accept the Plan, and creditors holding 91.6% in amount and 95.8% in number electing to remain in and voting in Class 5 voted to accept the Plan. That the Voting Classes overwhelmingly support the Plan—including the Third-Party Releases—is the result of the fact that the fifth and final *Master Mortgage* Factor is likewise met. The "[Third-Party Release] is fair to the non-consenting creditors" and "the non-consenting creditors received reasonable compensation in exchange for the release." *In re Tribune Co.*, 464 B.R. 126, at 178 (Bankr. D. Del. 2011). The near unanimous support for the Plan from

the Voting Classes and other parties in interest demonstrates that the *Continental* "hallmarks" of fairness and fair consideration for the Third-Party Releases are present.

The U.S. Trustee Objection[10] does not focus on the *Continental* "hallmarks" or the *Master Mortgage* Factors, or the substantive, legal basis for the Third-Party Releases in general, but instead on the same argument raised against the discharge that the Plan is "liquidating" in nature and that the Third-Party Releases are, therefore, not necessary to the Debtor's reorganization. *See* U.S. Trustee Objection, at ¶¶ 18-19.[11] As discussed above, nothing could be further from truth; the Debtor intends to promptly resume flights when it is safe and feasible to do so, and the Debtor's principals have already engaged in discussions with potential customers for that very purpose. As this Court has noted, even if the Plan were liquidating in nature—which it is not—that is not relevant to the analysis of the Third-Party Releases. *See Freedom Rings LLC*, Case No. 05-14268 (CSS), D.I. 385, at 117:14-23 (approving non-consensual releases in connection with a liquidating plan).

Here, the Plan is a key component of the Debtor's resumption of its business and the Third-Party Releases are an integral and essential element of the Plan. Moreover, the Third-Party Releases are overwhelmingly supported by the Debtor's economic stakeholders and are eminently fair. Thus, the U.S. Trustee's objection to the Third-Party Releases should be overruled and the Plan, including the Third-Party Releases in section XII.C, should be confirmed.

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[10] The Brown and Glickman Objection, which likewise opposes the Third-Party Releases, will be addressed in its entirety *infra* at III.B.

[11] The sole case cited for this proposition is *In re Nickels Midway Pier*, *LLC*, 2010 WL 2034542 (Bankr. D. N.J. May 21, 2010). *Nickels Midway* is distinguishable from the case here because, in addition to being a liquidating plan, the *Nickels Midway* plan would make no distributions to releasing creditors and the proposed releasees provided no consideration in exchange for the proposed releases. This Plan could not be more different, as here each party that would be released under the Third-Party Releases made a significant contribution to the Plan in consideration for the proposed release and the Releasing Parties are receiving distributions made possible by that contribution.

D. **The Exculpation Provision Set Forth in Section XII.A of the Plan Is Appropriate and Should Be Approved**

An exculpatory provision is not a mandatory release of liability, but instead establishes the appropriate standard of liability with respect to the parties exculpated. *See In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (exculpation provision "does not affect the liability of third parties, but rather sets forth the appropriate standard of liability"). The exculpation provision set forth in the Plan is targeted, does not amount to a release, and has no effect on liability that is determined to have constituted willful misconduct, fraud or gross negligence. See Plan, Art. XII.A. The exculpation provision is limited to estate fiduciaries, namely: (a) the Debtor; (b) the Reorganized Debtor; (c) the Committee and its members; (d) the Professionals; and (e) all directors, managers and officers of the Debtor or Reorganized Debtor

It is well established in the Third Circuit that exculpation is appropriate for fiduciaries in a bankruptcy case, including the debtors' officers, directors, employees and professionals and a creditors' committee, its members and advisors. *In re PWS Holding Corp.*, 228 F.3d 224, 245-47 (3d Cir. 2000).

Without the availability of the exculpation, the Exculpated Parties may not have been willing to contribute to the Plan process, which would have dramatically reduced the distributions to Creditors. The Exculpated Parties have participated in good faith in formulating and negotiating the Plan and should be protected from exposure to lawsuits from disgruntled creditors. Further, as discussed further below, to confirm the Plan, the Court must find that the proponent has complied with the applicable provisions of the Bankruptcy Code and that the Plan has been proposed in good faith. *See* 11 U.S.C. §§ 1129(a)(2), (3). These findings apply to the Debtor, the Reorganized Debtor, the members of the Committee and, by extension, to each of those parties' officers,

directors, employees and professionals, and support the requested exculpation. Based upon the foregoing, the Plan's exculpation provision should be approved.

E. **The Plan Complies with Section 1123(d) of the Bankruptcy Code**

Section 1123(d) of the Bankruptcy Code provides that if a plan proposes to cure a default, the amount necessary to cure shall be determined in accordance with "the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d). The Plan provides for the rejection of all executory contracts, except for those that (i) previously have been assumed or rejected by the Debtor in the Chapter 11 Case, (ii) previously expired or terminated by their own terms, or (iii) are the subject of a separate motion to assume or reject such Executory Contract Filed by the Debtor under section 365 of the Bankruptcy Code prior to the Effective Date. Thus, the Plan complies with section 1123(d), to the extent it is relevant to the Plan.

F. **The Debtor and the Committee Have Complied With the Provisions of Title 11 as Required by Section 1129(a)(2) of the Bankruptcy Code**

Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent—here, the Debtor and the Committee—"compl[y] with the applicable provisions of [title 11]." 11 U.S.C. § 1129(a)(2). Generally, the inquiry under section 1129(a)(2) of the Bankruptcy Code focuses on whether the plan proponent has complied with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. *See In re Johns-Manville Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986) ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code. These sections provide for the appropriate manner of disclosure and solicitation of plan votes.") (internal citations omitted), *aff'd in relevant part*, 78 B.R. 407 (S.D.N.Y. 1987); *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); H.R. Rep. No. 95-595, at 412 (1977), *as reprinted in* 1978

U.S.C.C.A.N. 5963, 6368; S. Rep. No. 95-989, at 126 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (section 1129(a)(2) of the Bankruptcy Code "requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure").

As discussed above, the Disclosure Statement meets the requirements of the Bankruptcy Code. Further, the Debtor, in concert with the Committee, has complied with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and other applicable law in transmitting the Solicitation Packages and related notices and in soliciting and tabulating votes on the Plan. Accordingly, the Disclosure Statement and Plan fully comply with all provisions of the Bankruptcy Code, including section 1125, and the Debtor and the Committee have satisfied the requirements of plan proponents under section 1129(a)(2) of the Bankruptcy Code.

G. **The Plan Satisfies Section 1129(a)(3) Because the Plan Is Proposed in Good Faith and not by any Means Forbidden by Law**

Section 1129(a)(3) of the Bankruptcy Code requires that the Plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the term "good faith" is not defined in the Bankruptcy Code, courts within this Circuit and elsewhere have indicated that "for purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code" in light of the particular facts and circumstances of the case. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 247 (3d Cir. 2004); *In re Armstrong World Indus.*, 348 B.R. 136, 147 (Bankr. D. Del. 2006). This inquiry typically focuses on whether a plan has been proposed with a legitimate purpose and with a basis for expecting that reorganization consistent with the Bankruptcy Code's objectives can be effectuated. *See*, *e.g.*, *Zenith*, 241 B.R. 92, 107-08 (Bankr. D. Del. 1999) (quoting *In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988)) (finding good faith where the plan was "proposed with the legitimate

purpose of restructuring [the debtor's] finances to permit [the debtor] to reorganize successfully…exactly what chapter 11 of the Bankruptcy Code was designed to accomplish.")

"[D]enial of confirmation for failure to satisfy section 1129(a)(3) should be reserved for only the most extreme of cases." 7 *Collier on Bankruptcy* ¶ 1129.02 (16th ed. 2009); *see also In re Sound Radio, Inc.*, 93 B.R. 849 at 853 ("To find a lack of 'good faith' courts have examined whether the debtor intended to abuse the judicial process and the purposes of the reorganization provisions."). Good faith is not lacking simply because a plan "may not be one which the creditors would themselves design and indeed may not be confirmable." *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 803 (5th Cir. 1997); *Zenith*, 241 B.R. at 107 (fundamental fairness not offended by one group receiving better treatment than another under plan).

Throughout this case, the Debtor and its management has honored and upheld its fiduciary duties to all stakeholders, the Independent Manager has honored his fiduciary duties to the Debtor, and the Committee and its members have honored their fiduciary duties to general unsecured creditors. The Plan implements a substantial reorganization designed to enhance the value of the Debtor's estate and maximize the value of the Debtor's assets for all stakeholders in accordance with the priorities and provisions of the Bankruptcy Code. Moreover, the Plan is the result of extensive arm's length negotiations between the Debtor, the Committee, and the DIP Lenders. Finally, as described in Section II(D), *supra*, the DIP Lenders made significant contributions to the outcome of the Bankruptcy Case and the Plan.

In sum, the Plan achieves the primary objectives underlying a chapter 11 bankruptcy: the reorganization and continuation of the Debtor as a viable business and the distribution of value to creditors for amounts owing. *See NLRB. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an

attendant loss of jobs and possible misuse of economic resources."). Inasmuch as the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code and has garnered the overwhelming support of the parties voting on the Plan, the Plan and the related documents have been proposed in good faith and the Debtor and Committee have satisfied their obligations under section 1129(a)(3).

H. **The Plan Provides for Bankruptcy Court Approval of Payment for Services and Expenses—11 U.S.C. § 1129(a)(4)**

Section 1129(a)(4) of the Bankruptcy Code requires that payments for services or costs and expenses incurred in or in connection with a chapter 11 case, or in connection with a plan and incident to the case, either be approved by or be subject to approval of the court as reasonable. *See* 11 U.S.C. § 1129(a)(4). This section requires that all payments of compensation and reimbursement of expenses to professionals retained in a debtor's case be subject to bankruptcy court review and approval as to the reasonableness of such payments.

Article VI.A of the Plan provides for payment of Allowed Administrative Expense Claims in full. Article VI.B of the Plan provides for payment of Allowed Priority Tax Claims in full. Finally, Section VI.C also sets forth procedures for filing Professional Claims and procedures for the payment of professional fees. Moreover, the proposed Confirmation Order contains additional provisions regarding applications of Professionals for final approval of fees and expenses in this case.

I. **The Debtor and Committee Have Complied with Section 1129(a)(5) by Disclosing all Necessary Information Regarding Managers, Officers and Successors of the Reorganized Debtor**

Section 1129(a)(5)(A) of the Bankruptcy Code requires that the 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," and requires a finding that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(i)-(ii). Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan proponent to disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B).

The Plan Supplement discloses the Reorganized Debtor's directors and officers. Moreover, Gavin/Solmonese LLC was identified as the GUC Trustee in the Plan Supplement. The appointment of such directors, managers, and trustee is consistent with the interests of creditors and interest holders and with public policy. The identified directors and officers are competent, have relevant and solid business and industry expertise, and will give to the Reorganized Debtor their insight into running the business. The GUC Trustee is experienced in administering trusts and is competent to efficiently administer the GUC Trust. Additionally, the GUC Trustee served as the Debtor's independent Chief Restructuring Officer during the Chapter 11 Case, thus ensuring that the GUC Trustee is already familiar with the Claims that it will be administering and significantly reducing the costs of administering the GUC Trust. Accordingly, the Plan complies with the requirements of section 1129(a)(5) of the Bankruptcy Code.

J. The Plan Does not Contain Rate Changes Subject to the Jurisdiction of any Governmental Regulatory Commission—11 U.S.C. § 1129(a)(6)

Section 1129(a)(6) of the Bankruptcy Code requires that any governmental regulatory commission having jurisdiction over the rates charged by the post-confirmation debtor in the operation of its business approve any rate change provided for in the plan. Because the Plan does not propose any such rate changes, section 1129(a)(6) of the Bankruptcy Code has been satisfied.

K. **<u>The Plan Is in the Best Interests of Creditors—11 U.S.C. § 1129(a)(7)</u>**

The Bankruptcy Code protects creditors and equity holders who are impaired by the Plan and have not voted to accept the Plan through the "best interests test" of section 1129(a)(7) of the Bankruptcy Code. The "best interests" test requires that holders of impaired claims or interests who do not vote to accept the plan "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)(A). If the Court finds that each non-consenting member of an impaired class will receive at least as much under the Plan as it would receive in a chapter 7 liquidation, the Plan satisfies the best interests test. *See, e.g., In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990). This test "applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan." *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434, 442 n.13 (1999).

Under the best interests test, the court must find that each non-accepting creditor will receive or retain value that is not less than what would be received if the debtor were liquidated. *LaSalle*, 526 U.S. at 440. In determining the best interests of creditors, a court need not consider any alternative to the plan other than the recoveries projected in a liquidation of all the debtor's assets under chapter 7 of the Bankruptcy Code. *See, e.g., Crowthers McCall Pattern*, 120 B.R. at 297.

There is no dispute that the best interests test is satisfied as to each Holder of an Impaired Claim or Interest. With respect to Holders of Claims in Class 4 and Class 5 that did not vote to accept the Plan, the Debtor conducted a liquidation analysis (the "<u>Liquidation Analysis</u>") that establishes that the best interests test is satisfied by the Plan. *See* Disclosure Statement and Plan,

Exh. A and Gavin Declaration, ¶ 41. The Liquidation Analysis demonstrates that Holders of Claims in Class 4 and Class 5 would not receive any distributions in a hypothetical chapter 7 liquidation. A court, in considering whether a plan is in the "best interest" of creditors, is not required to consider any alternative to the plan other than the dividers projected in a liquidation of all of the debtor's assets.

Thus, the Plan satisfies the best interests test as to non-accepting Holders of Claims in Class 4 and Class 5 because, as the Liquidation Analysis demonstrates, the recovery under the Plan for Classes 4 and 5 is not less than the estimated recovery that would be available to such classes in a chapter 7 liquidation.

L. **The Plan Satisfies Section 1129(a)(8) With Respect to all Classes Except Class 6**

Pursuant to section 1129(a)(8) of the Bankruptcy Code, each class of claims and interests under a plan must either (a) have accepted the plan, or (b) be rendered unimpaired under the plan. 11 U.S.C. § 1129(a)(8). Whether a class of claims is impaired under a plan is determined by section 1124 of the Bankruptcy Code.

Under the Plan, Classes 1, 2, 3, and 7 are not impaired under the Plan and all Holders of Claims in such Classes are conclusively presumed to have accepted the Plan. *See* 11 U.S.C. §1124 and 1126(f); *Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber & Supply, Inc.)*, 850 F.2d 1338, 1340 n.3 (9th Cir. 1988). Classes 4 and 5 have overwhelmingly voted to accept the Plan. Notwithstanding the fact that Class 6 is deemed to reject the Plan, the Plan may be confirmed pursuant to section 1129(b) of the Bankruptcy Code as set forth in section II.R *infra*.

M. **The Plan Provides for Payment in Full of all Allowed Priority Claims—11 U.S.C. §1129(a)(9)**

Section 1129(a)(9) of the Bankruptcy Code requires that, except to the extent that the holder of a particular claim agrees to a different treatment of such claim, the plan provide for full payment of certain types of claims. *See* 11 U.S.C. § 1129(a)(9). Article VI and VIII of the Plan satisfy this requirement by providing for full payment of Administrative Expense Claims, Priority Tax Claims, and Other Priority Claims, unless the Holders of such Claims agree to less favorable treatment. Therefore, the Debtor and Committee respectfully submit that the Plan satisfies section 1129(a)(9) of the Bankruptcy Code.

N. **The Plan Has Been Accepted by at Least One Impaired Class of Claims that Is Entitled to Vote—11 U.S.C. § 1129(a)(10)**

Section 1129(a)(10) of the Bankruptcy Code requires that, if a class of claims is impaired under a plan, at least one class of impaired claims must have voted to accept the plan, as determined without including any acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10).

As set forth in the Voting Declaration, each Class that was entitled to vote, namely Classes 4 and 5, voted to accept the Plan without including any acceptance by any insider. Accordingly, the requirements of section 1129(a)(10) of the Bankruptcy Code are satisfied.

O. **The Plan Is Feasible—11 U.S.C. § 1129(a)(11).**

Section 1129(a)(11) of the Bankruptcy Code requires the Court to 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.

11 U.S.C. § 1129(a)(11). This requirement, commonly known as the "feasibility" standard, requires that "the Plan is workable and has a reasonable likelihood of success." *Drexel Burnham Lambert I*, 138 B.R. at 762. "It is not necessary that success be guaranteed, but only that the plan

present a workable scheme of organization and operation from which there may be a reasonable expectation of success." *Id.* (quoting 5 *Collier On Bankruptcy* ¶ 1129.02[1 1], at 1129-54 (15th Ed. 1991)); *see also In re Cellular Info. Sys. Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994) ("the plan proponent need only demonstrate that there exists the reasonable probability that the provisions of the Plan can be performed.") (internal citation omitted); *In re Washington Mut., Inc.*, 461 B.R. 200, 252 (Bankr. D. Del. 2011), *vacated in part*, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (("[I]t is clear that there is a relatively low threshold of proof necessary to satisfy the feasibility requirement") (citing *In re Briscoe Enters., Ltd., II,* 994 F.2d 1160, 1166 (5th Cir.1993)). Indeed, the "first, best indicator of feasibility is the position of the creditors whose economic interests are at stake. The support or opposition of creditors with skin in the game and an opportunity to study a debtor's proposal is more illuminating to the Court than any expert report or accountant's projections." *In re Indianapolis Downs, LLC*, 486 B.R. 286, 298 (Bankr. D. Del. 2013).

Here, by continuing as a separate, reorganized company while retaining its assets—specifically the Purchased and Financed Aircraft and the Part 135 Certificate[12]—but transferring the obligations to provide services to the remaining Class 5 SuiteKey Members to Delux, the Reorganized Debtor will be able pause its operations until market and other conditions make a resumption of services economically viable; in that regard, the Debtor's efforts are already well underway under the guidance of a highly experienced management team. *See* Wilcox Declaration, at ¶¶ 6-10; Gavin Declaration, at ¶ 46; Plan Supplement. Further, the Reorganized Debtor will emerge from bankruptcy debt free, as the Chapter 11 process has allowed the Debtor to deal with

[12] Critically, the Part 135 Certificate is specific to the Debtor and its planes, not the Non-Debtor Affiliates or any other entity. *See* Wilcox Declaration, at ¶10. Likewise, the Debtor's ARGUS Gold Rating under the prestigious ARGUS audit standard entitles the Debtor (and not any other affiliated entity, including the Non-Debtor Affiliates) to unparalleled access to the broker and charter market. *Id.*

continuing debts and liabilities (such as the Textron Litigation and costly leases) on a final basis as well as reject burdensome contracts; consequently, it will leave this process in a much stronger fashion than when it entered. On the other hand, the GUC Trust will be adequately capitalized to meet its commitments and make Distributions under the Plan. *See* Gavin Declaration, at ¶ 46. Moreover, as all distributions under the Plan are to be made from the GUC Trust, distributions are not dependent on any metrics related to the Reorganized Debtor's business and finances. Finally, as Judge Shannon found in *Indianapolis Downs*, the "best indicator of feasibility" is indisputably met here, as the creditors whose economic interests are at stake have given the Plan their overwhelming support. *See* Voting Declaration.

In the alternative to its argument that the Plan is "liquidating," the U.S. Trustee argues that "to the extent [the Plan] provides for the Debtor's reorganization, the Plan is not feasible." U.S. Trustee Objection, at ¶ 27. For the reasons discussed above, the Debtor respectfully submits that the Plan satisfies the feasibility standard and requirements of section 1129(a)(11) of the Bankruptcy Code and the U.S. Trustee's feasibility argument should be overruled.

P. **The Plan Provides For Full Payment of all Statutory Fees as Required by 11 U.S.C. § 1129(a)(12).**

Section 1129(a)(12) of the Bankruptcy Code requires that fees payable under 28 U.S.C. § 1930, as determined by the court at a hearing on confirmation of a plan, have been paid or are provided under the plan to be paid on its effective date. Section VI.D of the Plan provides that, on the Effective Date all fees payable pursuant to section 1930 of chapter 123 of title 28 of the United States Code shall be paid. After the Effective Date, the GUC Trust shall pay all such fees for the period after the Effective Date until the Debtor's case is closed. Thus, the Plan complies with the requirements of section 1129(a)(12) of the Bankruptcy Code.

Q. <u>Sections 1129(a)(13)-(16) are Inapplicable to the Plan</u>

Section 1129(a)(13) of the Bankruptcy Code requires a Plan to provide for the continuation of retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. The Debtor does not have retiree benefits to pay (within the meaning of section 1114 of the Bankruptcy Code). Sections 1129(a)(14)-(15) apply to individual debtors and are inapplicable to the Debtor. Section 1129(a)(16) applies to debtors that are non-profit entities or trusts and thus does not apply here.

R. The Plan Meets the Requirements For Cramdown Under <u>Section 1129(B) of the Bankruptcy Code</u>

Section 1129(a)(8) of the Bankruptcy Code requires that each Class of Claims or Equity Interests either (a) has accepted the Plan, or (b) is not impaired under the Plan. As set forth above, Class 6 is impaired and is deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code. Accordingly, the Debtor requests that the Court invoke the "cramdown" provisions of section 1129(b) of the Bankruptcy Code with respect to such Classes.

Under section 1129(b), a bankruptcy court may cramdown a plan over the rejection of an impaired class or classes of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting class. *See* 11 U.S.C. § 1129(b)(1); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999).

The Plan does not discriminate unfairly with respect to the non-accepting Class. Here, Class 6 Subordinated Claims are not similarly situated—legally or otherwise—to any other Class. Class 6 consists solely of the Claim on account of the JetSuiteX Unsecured Demand Notes, which consist of a series of promissory notes in favor of JetSuiteX, issued between September 2019 and March 2020, in the principal sum of $16.2 million. While the Class 7 (Existing Equity Interests) are being reinstated, the Debtor has a rational basis to reinstate the Equity Interests held by JSI in

the Reorganized Debtor as doing so advances an efficient reorganization by avoiding the need to unwind and recreate the corporate structure and relationships of the Reorganized Debtor and its Non-Debtor Affiliates. Nevertheless, this reinstatement does not affect the economic substance of the Plan for the Debtor's stakeholders, and, importantly, JetSuiteX has agreed to the subordination of its Claims under the JetSuiteX Unsecured Demand Notes and to the reinstatement of the Equity in Class 7. Accordingly, the Plan does not discriminate unfairly with respect to impaired Subordinated Claims and satisfies the requirements of section 1129(b).

S. Section 1129(c): Only One Plan.

Only one Plan is before the Court, therefore, section 1129(c) of the Bankruptcy Code is satisfied.

T. Section 1129(d): The Principal Purpose of the Plan is Not Avoidance of Taxes.

Section 1129(d) of the Bankruptcy Code provides that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." See 11 U.S.C. § 1129(d). The principal purpose of the Plan is not the avoidance of taxes or the application of section 5 of the Securities Act. Accordingly, section 1129(d) is satisfied.

III. THE CONFIRMATION OBJECTIONS SHOULD BE OVERRULED

A. The U.S. Trustee Objection Should be Overruled

In its objection to the Plan, the U.S. Trustee makes the following arguments against confirmation of the the Plan:

First, and primarily, it argues that the proposed Third-Party Releases are impermissible. As discussed in detail in Section II(D), *supra*, the Third-Party Releases are permissible under

applicable law and justified by the facts and circumstances of the Debtor's Chapter 11 Case. The U.S. Trustee's objection to the Third-Party Releases should be overruled.

Second, the U.S. Trustee argues that, because the Plan is a "liquidating" plan the Debtor is not entitled to a discharge under Section 1141(d). As discussed in detail in Section II(B), *supra*, the Plan is not a liquidating plan, but instead is a plan of reorganization. Thus, the U.S. Trustee's objection to the proposed discharge should be overruled.

Third, the U.S. Trustee argues, in the alternative, that if the Plan is not a liquidating plan, then it is not feasible. As discussed in detail in Section II(P), *supra*, the Plan is indeed feasible and the U.S. Trustee's feasibility objection should be overruled.

Each of the U.S. Trustee's arguments against confirmation of the Plan fail as a matter of law and fact. Thus, the U.S. Trustee Objection should be overruled in its entirety and the Court should confirm the Plan.

B. **The Brown and Glickman Objection Should be Overruled**

The Brown and Glickman Objection opens with a remarkable allegation that Mr. Brown and Mr. Glickman "have asserted claims against the Debtor and its officers, directors and managers for wrongful conduct and breach of fiduciary duties." Brown and Glickman Objection, at p. 1. Of course, other than a few sentence reservation in the attachments to each of their proofs of claim, neither has done anything of the sort. The goal of these wild accusations is clear, Mr. Brown and Mr. Glickman would like to avoid the reality that they are general unsecured creditors of the Debtor's Estate and will be limited to the recovery available to Class 4 (General Unsecured Creditors).[13] While their objection is replete with utterly unfounded allegations that the Debtor's

[13] Each of Mr. Brown and Mr. Glickman were SuiteKey members that elected to be treated in Class 4 when they cast their ballots.

management engaged in "wrongful conduct" and "breach of fiduciary duties" (*see, e.g.,* Brown and Glickman Objection, at p. 1), the Debtor need not address the substance of these allegations because they are irrelevant. Two things are true about these claims:

First, to the extent any officer or director of the Debtor engaged in misconduct that harmed the company or breached his fiduciary duties, that cause of action belongs to the Debtor and must be brought derivatively, if at all. *Beskrone v. OpenGate Capital Group, LLC (In re PennySaver USA Publ'g, LLC),* 587 B.R. 445, 466–67 (Bankr. D. Del. 2018) ("Creditors cannot seek direct claims for breach of fiduciary duty against LLCs and their officers or directors. The claim must be derivative in nature.") (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1039 (Del. 2011)). Indeed, because the Debtor is a Delaware limited liability company, even if Mr. Brown or Mr. Glickman were to attempt to bring those claims derivatively, they could not. Under black letter Delaware law, only a member of an LLC or its assignee may bring derivative claims for breach of fiduciary duty. *See id.* ("If the claim is derivative, it fails because derivative claims can only be brought by members or assignees of LLCs.") (citing *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101–02 (Del. 2007)); *Smith v. Weinshanker (In re Draw Another Circle.)*, 602 B.R. 878, 895 (Bankr. D. Del. 2019) ("The Delaware LLC statute is clear in requiring that a plaintiff "must be a member or an assignee of a limited liability company interest at the time of bringing the action.") (quoting 6 Del. C. § 18-1002); *Official Committee of Unsecured Creditors of HH Liquidation, LLC v. Comvest Group Holdings, LLC (In re HH Liquidation, LLC)*, 590 B.R. 211, 284 (Bankr. D. Del. 2018) ("the Delaware Limited Liability Company Act is clear and unambiguous about who can bring a derivative action: the plaintiff "must be a member or an assignee.""). Mr. Brown and Mr. Glickman are neither members nor assignees. Mr. Brown and

Mr. Glickman's only claims are general unsecured claims in the amount of the notional balances under their applicable SuiteKey Agreements.

Second, and importantly, the Committee investigated the possibility of those very same claims and chose to proceed with this Plan. Despite the Brown and Glickman Objection's allegations that the Debtor's business was a Ponzi scheme, the Committee concluded that there was absolutely no evidence to support such claims.

From the moment of its appointment, the Committee expressed concerns about the flow of funds in and out of the Debtor. The Committee, through its counsel, requested, received and reviewed extensive documentary discovery from the Debtor in order to determine that money was not improperly taken from the Debtor and put into the Non-Debtor Affiliates. As discussed in the Disclosure Statement, these documents reflect funding from the Non-Debtor Affiliates in excess of $50 million ***in favor*** of the Debtor and that this funding (as with the SuiteKey payments) was used solely to fund the Debtor's operations. *See Disclosure Statement,* Article II.A.6 (including the chart contained therein reflecting cash in and cash out from 2016, when Delux was formed, to 2020). The Committee also examined (i) the Debtor's and Non-Debtor Affiliates' investors to confirm that money and opportunities were not improperly taken from the Debtor to support the Non-Debtor Affiliates and (ii) the SuiteKey Agreements to conclude that the prepayments from SuiteKey members were used by the Debtor to support its operations, which use was authorized via the terms of the SuiteKey Agreements. *See Disclosure Statement,* Article III.A.1 (discussing that all funds from the SuiteKey Agreement payments were retained and used in the Debtor's general operations by the terms of the SuiteKey Agreements).

Throughout its investigation, the Committee extensively consulted with the Debtor, including its CRO Mr. Gavin—himself an independent fiduciary retained for the purpose of this

Chapter 11 Case—with respect to understanding the Debtor's history, the fact that the Debtor, despite its solid business model, did not have enough customers or hours a day flying to support the business, the Debtor's ongoing litigation related to its attempted East Coast expansion, and how the COVID-19 pandemic and mandatory government shutdowns negatively affected demand for the Debtor's service.

Despite the significant investments made in the Debtor by its Non-Debtor Affiliates, and despite the popularity of the Debtor's brand, the Debtor was unable to generate sufficient revenue to cover its expenses and all funds received by the Debtor, including from SuiteKey members, were used solely to fund operating expense. This conclusion is bolstered by the fact that $16.2 million in funds ***was infused into the Debtor*** by the Non-Debtor Affiliates in the six months leading up to the filing of the Chapter 11 Case to try and keep the business afloat. The arrival of the COVID-19 pandemic in March 2020 and its impact on both the Debtor's operations and the economy at large proved to be a burden the Debtor could not bear, and the Debtor was left with no choice but to file for chapter 11. Simply put, far from being a Ponzi scheme, the Debtor was simply operating in an industry with extraordinarily thin margins and was never able to generate sufficient revenue to do more than cover its operating expenses, especially in light of the (now resolved) litigation liabilities left in the wake of the Debtor's unsuccessful East Coast expansion.

The remainder of the Brown and Glickman Objection, which focuses on the Debtor's "D&O Insurance" (as defined in the objection) is a red herring. As the Committee determined that no credible claims exist against the Debtor's directors and officers, the D&O Insurance is not a viable source of recovery for unsecured creditors and is irrelevant to the Court's consideration of Mr. Brown and Mr. Glickman's claims or their objection.

Finally, with respect to the allegation that Mr. Glickman's funds were to be held in a segregated account, the Debtor never agreed to those provisions and indeed, the Debtor has no record of the purported February 6, 2011 agreement Mr. Glickman attaches to the objection as Exhibit C; notably, it is not countersigned by the Debtor. To the contrary, the Debtor *does* have a copy of a SuiteKey Agreement signed by Mr. Glickman himself and the Debtor a mere five days later, dated February 12, 2011. *See* Wilcox Declaration, Ex. A. This agreement contains no mention of any sort of segregated account (interlineated or otherwise, even assuming the validity of the same), and in any event trumps any earlier unsigned, interlineated version that Mr. Glickman wishes to rely upon instead.[14] Regardless, Mr. Glickman entered into several more SuiteKey Agreements in the years since 2011, by his own admission, the most recent of which being signed in May 2019. As expected, the May 2019 agreement does not include language relating to a segregated trust. *See, e.g.,* Brown and Glickman Objection, Exhibit B pp. 11-14.

To be clear, both of Mr. Brown and Mr. Glickman's agreements provide in no uncertain terms that their funds

> "shall be treated as a fully and irrevocably pre-paid purchase of services and payment of expenses hereunder and such payment shall be irrevocable and non-refundable in all circumstances. Furthermore, [the Debtor] shall have immediate and full right to use such funds. However, [the Debtor] shall maintain a notional balance in the Member's Account equal to the Non-Refundable Pre-Purchase Payment minus the value of services performed and expenses and charges incurred."

Id. at p. 13, ¶2.a.; Exhibit A at p. 14, ¶2.a. As such, by Mr. Brown and Mr. Glickman's own admission, the most recent (and thus controlling) contracts between them and the Debtor demonstrate that they had no interest in their funds the moment they were paid to the Debtor;

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[14] Notably, the February 6 contract anticipates a payment of $50,000, while the February 12 agreement is for a payment of $25,000, which correlates to the amount actually deposited by Mr. Glickman. See Wilcox Declaration, at ¶ 15.

moreover, they consented to the Debtor's use of their payments. Their allegations are thus baseless, both factually and legally.

At bottom, the Court should not disregard the vitality of this Plan, releases and all, which is supported by more than $40 million of the Debtor's unsecured creditors (and more than 95% of the voting creditors) solely because Mr. Brown and Mr. Glickman wish to rewrite the terms of their contracts. The Brown and Glickman Objection raises no basis for denial of the Disclosure Statement and Plan and it should be overruled in its entirety.

IV. CAUSE EXISTS TO WAIVE A STAY OF THE CONFIRMATION ORDER.

Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." *See* Fed. R. Bankr. P. 3020(e). Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale, or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon court order.

The Debtor and the Committee respectfully submit that cause exists for waiving the stay of the entry of the Confirmation Order such that the Confirmation Order will be effective immediately upon its entry. *See, e.g., In re Fred's Inc.*, Case No. 19-11984 (CSS) (Bankr. D. Del. June 4, 2020) (providing that confirmation order was effective immediately upon entry); *In re Anna Holdings, Inc.*, Case No. 19-12551 (CSS) (Bankr. D. Del December 16, 2019) (same).

As noted above, the Debtor has undertaken great efforts to facilitate its restructuring to exit chapter 11 as soon as practicable. Each day the Debtor remains in chapter 11 it incurs significant administrative and professional costs. The Debtor and the Committee believe that an expeditious effectuation of the Plan will reduce such costs and facilitate the maximization of value of The Debtor's Estate. The Debtor and the Committee, therefore, respectfully request that the Court

direct that the Confirmation Order be effective immediately upon its entry notwithstanding the stay otherwise imposed pursuant to Rule 3020(e).

V. CONCLUSION

The Disclosure Statement and Plan comply with all applicable provisions of the Bankruptcy Code, including those provisions of section 1125, 1129(a) and 1129(b). For all of the foregoing reasons, the Disclosure Statement should be approved and Plan should be confirmed.

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Dated: August 31, 2020
Wilmington, Delaware

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