IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SUPERIOR AIR CHARTER, LLC,	Case No. 20-11007 (CSS)
Debtor.	Re: D.I. 168 Hearing Date: Sept. 3, 2020, at 2:00 p.m. Obj. Deadline: Aug. 27, 2020, at 4:00 p.m.

OBJECTION OF THE UNITED STATES TRUSTEE TO CONFIRMATION OF THE DEBTOR AND COMMITTEE'S CHAPTER 11 PLAN

Andrew R. Vara, the United States Trustee for Region 3 (the "U.S. Trustee"), through his undersigned counsel, objects to confirmation 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 "Plan"), and in support of his objection respectfully states as follows:

PRELIMINARY STATEMENT

1. The Plan has non-consensual third-party releases that do not satisfy Third Circuit jurisprudence. The Plan would also give the Debtor a discharge, in contravention of Section 1141(d)(3). Even if the Debtor were truly reorganizing, the Plan is not feasible as required by Section 1129(a)(11). Confirmation should be denied.

JURISDICTION

2. Pursuant to 28 U.S.C. § 1334, applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and resolve this objection.

3. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with monitoring the federal bankruptcy system, including the confirmation of chapter 11 plans. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that 11 U.S.C. § 307 gives the U.S. Trustee "public interest standing"); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.),* 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog"); 28 U.S.C. § 586(a)(3)(B) (authorizing the U.S. Trustee to monitor chapter 11 plans and file comments about them).

4. The U.S. Trustee has standing to be heard on confirmation of the Plan pursuant to 11 U.S.C. § 307.

BACKGROUND

5. On April 28, 2020, the above-captioned debtor (the "Debtor") filed a chapter 11 petition in this Court.

6. The Debtor operated a charter air carrier on the West Coast. *See* Declaration of Edward T. Gavin, CTP, Chief Restructuring Officer of the Debtor, in Support of Debtor's Chapter 11 Petition and First Day Motions (D.I. 8) (the "Gavin Decl.") ¶ 6.

7. Pre-petition, the Debtor ceased operations. *See id.* ¶¶ 8 (the COVID-19 pandemic "decimated the Debtor's operations"); 15 (Debtor's "operations are presently shuttered and generate[] no revenue."); and 23 (COVID-19 pandemic "quickly rendered [the Debtor's] operations no longer viable.").

8. The Debtor furloughed substantially all of its 100 employees across its departments. *See id.* ¶ 17.

9. During this case, the Debtor has realized no revenue from operations. *See* July 2020 MOR (D.I. 196) at 18.

10. Up until the COVID-19 pandemic, the Debtor operated a fleet of 12 aircraft. *See* Plan § III.A.1. Nine of the aircraft were leased. *See id.* Pre-petition, two of the leased aircraft were repossessed by the lessor. *See id.* Post-petition, all aircraft leases were rejected. *See id. See also* D.I. 36, D.I. 48, 118 & 150. Thus, the Debtor's fleet is down to three aircraft.

ARGUMENT

A. Non-Consensual Third-Party Releases Should Be Denied

11. Confirmation should be denied because the Plan has non-consensual third-party releases that do not satisfy the Third Circuit's *Continental* decision.

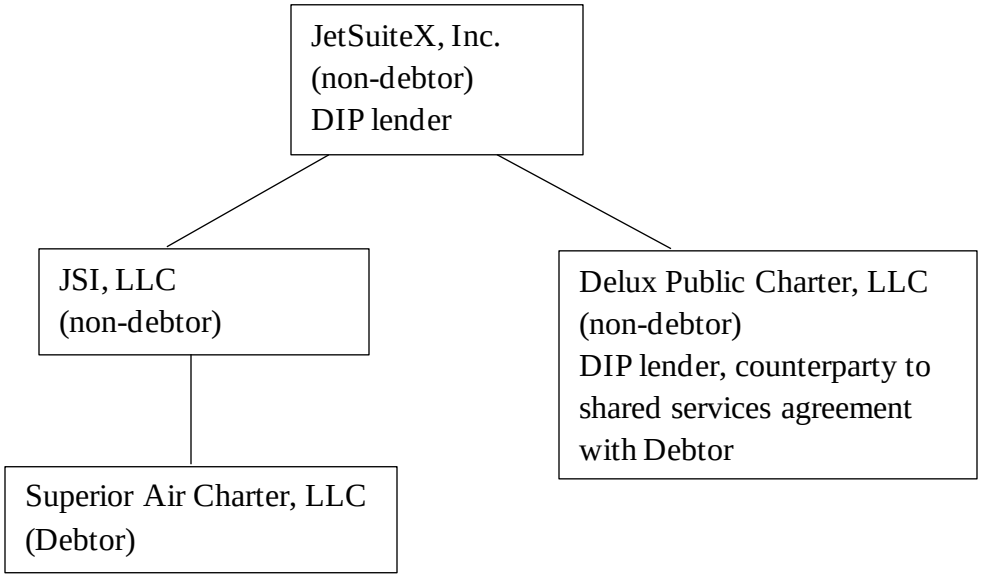
12. The Plan provides for third-party releases by each "Releasing Party." *See* Plan § XII.C. "Releasing Parties" includes "each Holder of a Claim[.]" Plan § II.A.105.

13. Cases in this District hold that third-party releases are permissible only where the releasing third party consents to the release. *See In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (a release of third-party claims against a non-debtor "cannot be accomplished without the affirmative agreement of the creditor affected."); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335-36 (Bankr. D. Del. 2004) ("The Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties. . . . However, a Plan is a contract that may bind those who vote in favor of it. . . . Therefore, to the extent creditors or shareholders voted in favor of the Trustee's Plan, which provides for the release of claims they may have against the Noteholders, they are bound by that."); *In re Washington Mutual, Inc.*, 442 B.R. 314, 352-55 (Bankr. D. Del. 2011) (third-party releases are effective "only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases.").

14. The Third Circuit has not foreclosed the possibility that non-consensual third-party releases may be permissible in certain circumstances, provided such releases are necessary, given for fair consideration, and there are specific factual findings to support those conclusions. *See In re Continental Airlines*, 203 F.3d 203, 213-14 (3d Cir. 2000). The Third Circuit has observed that non-consensual third-party releases have been approved by certain other courts only "in the context of extraordinary circumstances." *Id.* at 212-13 (citing Second Circuit cases where releases were upheld for "widespread claims against co-liable parties" and a Fourth Circuit mass tort case. "A central focus of these three reorganizations was the global settlement of massive liabilities against the debtors and co-liable parties. Substantial debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities and made these reorganizations feasible." *Id.* at 213). *See also In re Washington Mutual, Inc.*, 442 B.R. at 351 ("While the Third Circuit has not barred third party releases, it has recognized that they are the exception, not the rule."). "Our precedents regarding nonconsensual third-party releases and injunctions in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest that courts considering such releases do so with caution." *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019). The Court must approach nonconsensual third-party releases in plans of reorganization with the "utmost care" and to "thoroughly explain the justification for any such inclusion." *Id.*

15. The Plan's third-party releases are nonconsensual because creditors were not able to opt out.

16. The "caution" and "utmost care" that the Third Circuit described in *Millennium Lab Holdings* are heightened here, because the Plan is an insider transaction. The Debtor's corporate structure is:



See Plan § III.A.2.

17. JetSuiteX, Inc. and Delux Public Charter, LLC are the Debtor's DIP lenders. *See* Plan § II.A.44. As such, they are Released Parties. *See id.* § II.A.104.

18. The plan proponents have not shown that the third-party releases are necessary to the Debtor's reorganization. The Debtor was founded in 2009. *See* Gavin Decl. ¶ 6. The Debtor:

> was beset by the incredibly tight margins common to the charter airline industry and was never able to operate profitably. Despite maintaining consistent bookings and flights, the Debtor was unable to meet a level of daily flight hours which would allow it to do more than break even on operating costs, leaving aside the burden of its fixed expenses.

Id. ¶ 7.

19. Nothing about the third-party releases would help the Debtor improve its margins or profitability. The Plan as originally filed did not even contemplate a reorganization; it provided for the Debtor's assets to be transferred to its insider DIP lender, and for the Debtor to be liquidated. After the U.S. Trustee informally commented that the Debtor appeared to be ineligible for a discharge under Section 1141(d)(3), the proponents revised the Plan so that certain assets would "revest" in the Debtor, rather than being acquired by its non-debtor affiliate(s). *See* D.I. 159 §§ I ("except for the GUC Trust Proceeds, all of the property and assets of the Debtor . . . shall be ~~acquired by the DIP Lenders~~revested in the Reorganized Debtor"); III.B.8 ("upon the Effective Date, the following assets, among others ~~shall be acquired by the DIP Lenders (or their assignee), through a credit bid of their DIP Commitment~~, shall revest in the Reorganized Debtor"); V.B.2 ("by retaining its assets . . . but transferring the obligations to provide services to SuiteKey members to Delux, the Debtor can pause its operations until market and other conditions make a resumption of operations feasible."); and XI.C.2 ("On the Effective Date, all rights to commence, prosecute, or settle all Avoidance Actions, shall ~~vest~~ revest in the ~~DIP Lenders. The DIP Lenders~~ Reorganized Debtor."). These changes are formal, not substantive. The Debtor has had no operations or revenue post-petition. *See* D.I. 196 at 18. It has already largely divested its fleet of aircraft. It furloughed substantially all of its 100 employees and will not operate flights post-confirmation. *See* Gavin Decl. ¶ 17 *and* Plan §§ V.B.2 & VIII.A.5 (under the Plan, Delux Public Charter, LLC—not the Debtor—will offer flights to the Debtor's customers). Upon information and belief, the Debtor's customers have largely chosen to cash out their claims under class 4. By default, the Plan operates to reject executory contracts. *See* Plan § XIII.A.1. The Plan waives all avoidance actions. *See id.* § III.B.8. The Plan ascribes no value to intellectual property.

See id. In substance, this is a plan of liquidation, the post hoc changes to Sections I, III.B.8, V.B.2, and XI.C.2 notwithstanding. Third-party releases are not necessary to the Debtor's reorganization because the Debtor has no business to reorganize. *See, e.g., In re Nickels Midway Pier, LLC*, No. 03-49462, 2010 WL 2034542 at *13 (Bankr. D.N.J. May 21, 2010) (rejecting non-consensual third-party releases in favor of creditor; "The Plan provides for liquidation, which can be successfully accomplished whether or not [the creditor] is released from third parties' claims."). Therefore, *Continental*'s necessity hallmark is absent.

B. Debtor Is Not Eligible for Discharge

20. Because the Debtor is liquidating, it is not eligible for a discharge under Section 1141(d)(3).

21. Section 1141(d)(3) of the Bankruptcy Code provides:

> The confirmation of a plan does not discharge a debtor if—
>
> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
> (B) the debtor does not engage in business after consummation of the plan; and
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

22. Section XII.D.4 of the Plan would give the Debtor a discharge. However, for the reasons stated above, the Plan is a plan of liquidation. Therefore, the Debtor is not eligible for a discharge.

C. Alternatively, Plan Is Not Feasible

23. Assuming for the sake of argument that the Debtor is truly reorganizing, the proponents have not demonstrated that the Plan is feasible. Section 1129(a)(11) of the

Bankruptcy Code provides that a plan shall be confirmed only if confirmation "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."

24. Feasibility means that a plan must be "reasonably likely to succeed on its own terms without a need for further reorganization on the debtor's part." *In re American Capital Equipment, LLC*, 688 F.3d 145, 156 (3d Cir. 2012) (citations, brackets omitted).

25. When considering a plan, the Court has "an affirmative obligation to scrutinize the plan and determine whether it is feasible." *In re Young Broadcasting Inc.*, 430 B.R. 99, 128 (Bankr. S.D.N.Y. 2010) (citing cases). The Court has this duty "regardless of whether there is any objection raised by a party in interest." *In re Mid-State Raceway, Inc.*, 2006 WL 4050809 at *19 (Bankr. N.D.N.Y. Feb. 10, 2006). Similarly, the Court must determine a plan's feasibility even if the plan has received overwhelming creditor support. *See In re Las Vegas Monorail Co.*, 462 B.R. 795, 803-04 (Bankr. D. Nev. 2011).

26. A plan proponent must show feasibility by a preponderance of the evidence. *See In re W.R. Grace & Co.*, 475 B.R. 34, 114 (D. Del. 2012) (citing cases). A "debtor's own unsupported sincerity and belief that its plan is feasible is insufficient to satisfy the inquiry." *Id.* at 115.

27. Section V.B.2 of the Plan addresses feasibility. The plan proponents assert that "by retaining its assets . . . but transferring the obligations to provide services to SuiteKey members to Delux, the Debtor can pause its operations until market and other conditions make a resumption of operations feasible." There is no showing that the Debtor can resume its operations profitably. The Debtor was founded in 2009. It has never been

profitable. *See* Gavin Decl. ¶ 7 (due to "incredibly tight margins" in charter airline industry, Debtor "was never able to operate profitably."). At its peak, the Debtor had 18 aircraft. *See id.* ¶ 6. But despite a fleet of that size, the Debtor "was unable to meet a level of daily flight hours which would allow it to do more than break even on operating costs, leaving aside the burden of its fixed expenses." *Id.* The Debtor ceased operations more than four months ago and furloughed substantially all of its 100 employees. *See* Plan § III.A.7 ("the Debtor ceased its services and acquiring new customers on or about April 10"). Since then, the Debtor's fleet has been reduced to three aircraft. The Debtor has not shown that it can operate those aircraft profitably, especially given the Debtor's prior inability break even with a fleet of 18. If SuiteKey customers choose to cash out their claims under class 4, then the Debtor's go-forward customer base may shrink significantly. Finally, the Debtor has not shown that it can weather the COVID-19 pandemic, which "decimated the Debtor's operations" and is expected to make demand "remain very weak for many months to come." Gavin Decl. ¶ 8. The Debtor has not realized any revenue from operations during the four months its chapter 11 case has been pending. The Debtor has not shown that it can resume operations at all, let alone profitably. To the extent it provides for the Debtor's reorganization, the Plan is not feasible.

CONCLUSION

28. The U.S. Trustee reserves any and all rights, remedies and obligations to complement, supplement, augment, alter and/or modify this objection, file an appropriate motion or conduct any and all discovery as may be deemed necessary or as may be required, and to object on such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny confirmation of the Plan unless third party releases are limited to creditors who voted to accept

the Plan, and the confirmation order provides that notwithstanding anything to the contrary in the Plan, the Debtor shall not receive a discharge. Alternatively, the Court should deny confirmation because the Plan is not feasible.

Dated: August 27, 2020
Wilmington, DE

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE,
REGIONS 3 & 9

By: */s/ Benjamin Hackman*
Benjamin A. Hackman
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491 (Phone)
(302) 573-6497 (Fax)
benjamin.a.hackman@usdoj.gov

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SUPERIOR AIR CHARTER, LLC,	Case No. 20-11007 (CSS)
Debtor.	

CERTIFICATE OF SERVICE

I hereby certify that on or about August 27, 2020, I caused to be served a copy of the OBJECTION OF THE UNITED STATES TRUSTEE TO CONFIRMATION OF THE DEBTOR AND COMMITTEE'S CHAPTER 11 PLAN (D.I. 198) in the above-captioned bankruptcy proceeding upon the following persons via e-mail:

Counsel to the Debtor
Bayard, P.A.
600 North King Street, Suite 400,
Wilmington, DE 19801
Attn: Evan T. Miller, Esq.
emiller@bayardlaw.com

Counsel to the Committee
Troutman Pepper Hamilton Sanders LLP
1313 N. Market Street, Suite 5100
Wilmington, DE 19801
Attn: David B. Stratton, Esq. and
Evelyn J. Meltzer, Esq.
david.stratton@troutman.com
evelyn.meltzer@troutman.com

Counsel to the DIP Lenders
Vedder Price P.C.
1633 Broadway, 31st Floor
New York, NY 10019,
Attn: Michael J. Edelman, Esq. and
Jeremiah Vandermark, Esq.
MJEdelman@VedderPrice.com
JVandermark@VedderPrice.com

Vedder Price P.C.
222 North LaSalle Street
Chicago, IL 60601
Attn: Douglas J. Lipke, Esq.
DLipke@VedderPrice.com

Potter Anderson & Corroon LLP,
1313 N. Market Street, Sixth Floor
Wilmington, DE 19801
Attn: Jeremy W. Ryan, Esq.
jryan@potteranderson.com

Dated: August 27, 2020
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE,
REGIONS 3 & 9

By: */s/ Benjamin Hackman*

Benjamin A. Hackman
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 (fax)
benjamin.a.hackman@usdoj.gov