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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
GRUPO AEROMÉXICO, S.A.B. de C.V., *et al.,*	)	Case No. 20-11563 (SCC)
Debtors.[1]	)	(Jointly Administered)

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION SEEKING APPROVAL OF COMMITMENT PREMIUM

[1] The Debtors in these cases, along with each Debtor's registration number in the applicable jurisdiction, are as follows: Grupo Aeroméxico, S.A.B. de C.V. 286676; Aerovías de México, S.A. de C.V. 108984; Aerolitoral, S.A. de C.V. 217315; Aerovías Empresa de Cargo, S.A. de C.V. 437094-1. The Debtors' corporate headquarters is located at Paseo de la Reforma No. 243, piso 25 Colonia Cuauhtémoc, Mexico City, C.P. 06500.

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The Official Committee of Unsecured Creditors (the "Committee") of Grupo Aeroméxico, S.A.B. de C.V. ("Grupo Aeroméxico"), *et al*. (collectively, the "Debtors") respectfully submits this objection (this "Objection") to the Debtors' motion seeking approval of, among other things, the Commitment Premium in connection with the Debtors' proposed exit financing.[2]

PRELIMINARY STATEMENT

1. The Court should deny the Exit Financing Motion or, at a minimum, condition payment of the Commitment Premium on confirmation of the Plan (as defined herein). A third option proposed by the Committee and discussed herein is to condition approval of the Exit Financing Motion on the inclusion of a reasonable, market-based break-up fee—in other words, if the Exit Financing Motion is approved but the Plan is not confirmed, the Commitment Premium would be reduced to a reasonable break-up fee (*i.e.*, 1-3%). Although the Committee and the proponents of the Plan have discussed this concept, as of the filing of this Objection, the parties have a fundamental disagreement on what percentage would be appropriate for the break-up fee. Without these protections, the Exit Financing Motion simply cannot satisfy the applicable "heightened scrutiny" and "entire fairness" standard of approval governing insider transactions.

2. The Committee's primary concern with the Exit Financing Motion is that it is inextricably linked to a plan of reorganization that is fatally flawed due to, among other things, the

[2] See *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors' Entry Into, and Performance Under, the Debt Financing Commitment Letter, (II) Authorizing the Debtors' Entry Into, and Performance Under, the Equity Commitment Letter, (III) Authorizing the Debtors' Entry Into, and Performance Under, the Subscription Agreement and (IV) Authorizing Incurrence, Payment, and Allowance of Related Premiums, Fees, Costs, and Expenses as Superpriority Administrative Expense Claims* [Docket No. 1860] (the "Motion") and the *Supplement to Debtors' Exit Financing Motion and Notice of Filing of Revised Equity and Debt Commitment Letters* [Docket No. 2168] (the "Supplement" and together with the Motion, the "Exit Financing Motion"). Capitalized terms used but not defined herein have the meanings given to them in the Exit Financing Motion. This Objection incorporates by reference the *Declaration of James Dugan* (the "Dugan Declaration") in support hereof, and incorporates by reference the *Objection of the Official Committee of Unsecured Creditors to Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Grupo Aeroméxico, S.A.B. de C.V. and its Affiliated Debtors*, filed simultaneously herewith (the "Disclosure Statement Objection").

allocation of approximately $268 million in value to insider shareholders that collectively control a majority of Grupo Aeroméxico's board of directors—specifically, Delta Air Lines, Inc. ("Delta") and certain current Mexican shareholders (the "Insider Mexican Shareholders," and together with Delta, the "Insiders")—over and above the amount being invested by such parties under the Plan in violation of the absolute priority rule. Specifically, the Plan proposes to distribute reorganized equity with a value of approximately $182.3 million to Delta merely for performing services that the Committee believes Delta is already contractually obligated to provide. In the case of the Insider Mexican Shareholders, the Plan proposes to distribute reorganized equity to them with a value of approximately $85.3 million simply for performing services that they are currently providing as board members and are required to perform in accordance with their fiduciary duties under Mexican law, and are already being paid for (and would continue to be paid for if they remain as board members). The evidence also shows that the Insiders exerted undue influence over the so-called "Independent Directors" throughout the plan process, which has resulted in hundreds of millions of dollars of distributable value being siphoned from unsecured creditors and given to the Insiders. Delta, as described in further detail herein, was also previously an undisclosed participant in Apollo's DIP investment, all while actively advising the Debtors with respect to the business plan that served as the basis for the Debtors' exit financing proposals.

3. The centerpiece of the Plan and the basis for the Exit Financing Motion has been described by the proponents of the Plan as an "integrated transaction" among the Debtors, Delta, the Insider Mexican Shareholders, the Ad Hoc Group of Senior Noteholders, and the BSPO Investors. As a result of the inclusion and generous treatment of Delta and the Insider Mexican Shareholders in the transactions embodied in the Plan,[3] the proper standard for review of the Exit

[3] Delta and the Insider Mexican Shareholders stand to receive part of the Commitment Premium if the Exit Financing Motion is approved and approximately 24% of the reorganized equity under the Plan, which is

Financing Motion is not the business judgment standard, but heightened scrutiny—a burden that the Debtors cannot meet based upon the record before the Court. *In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) (Chapman, J.) ("In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a proposed transaction not only appear fair but are fair and whether fiduciary duties were properly taken into consideration.") Although the Committee acknowledges that the December 6 hearing to consider the Exit Financing Motion is not the confirmation hearing, without a full understanding and explanation of the insider transactions under the Plan, the Court should not approve a Commitment Premium of more than $100 million to be paid in reorganized equity (a significant portion of which is to be paid directly to the Insiders) that will severely prejudice unsecured creditors if the Plan's fatal flaws are exposed and the Plan is later not confirmed.

4. Of further import is the fact that an alternative proposal was submitted to the Debtors by certain of the Debtors' operating subsidiary creditors (the "Ad Hoc Group of OpCo Creditors") on November 12, 2021, and filed with the Court on November 26, 2021 (the "Alternative Proposal"),[4] which provides far more favorable economics for unsecured creditors and which the Committee understands is being supplemented with a toggle for a transaction that would not require the participation of Apollo or the Insiders. The Committee supports the efforts of the Ad Hoc Group of OpCo Creditors to construct an alternative plan that will increase distributions for unsecured creditors and create a consensual pathway to confirmation. The

approximately 10% (equating to a value of approximately $267.6 million) more than the amount of reorganized equity they should receive as a result of their investment.

[4] The Alternative Proposal is memorialized in the term sheet attached as **Exhibit 2** to the Ad Hoc Group of OpCo Creditors' preliminary objection to the Exit Financing Motion [Docket No. 2178].

Debtors have been too quick, however, to dismiss the Alternative Proposal, which would resolve a number of the Committee's concerns regarding the Exit Financing Motion and the Plan.

5. As laid out in detail below, the plan formulation and negotiation process to date has been a series of shifting alliances and backroom deals. As a result of the Debtors telling exit financing parties that they could not proceed without the support of both Delta and the Insider Mexican Shareholders, each of the potential plan proponents spent months wooing the Insiders. First, it was Apollo that had the support of the Insiders, but Apollo's proposal would have provided unsecured creditors with only [redacted] in value. The Committee at that point teamed with the Ad Hoc Group of Senior Noteholders, the BSPO Investors (together, the "Investor Group"), and later, the Ad Hoc Group of Unsecured Claimholders in opposing the Apollo proposal and crafting a plan proposal that generated over $1 billion in value for unsecured creditors. Unbeknownst to the Committee, however, its partners offered 14% of the reorganized equity to the Insiders, which would come directly and solely out of operating subsidiary unsecured creditor recoveries (thus leaving the Committee on the outside again). [redacted] Apollo and the Investor Group

5 [redacted]

negotiated the current Plan, which is supported by the Insiders yet inexplicably provides reduced distributable value to unsecured creditors in the amount of approximately $1.06 billion—which is approximately [redacted]

6. Despite the Debtors' commendable desire to emerge from chapter 11 expeditiously, the Debtors cannot be permitted to force that process forward by running roughshod over general unsecured creditors who are not participants in the transactions contemplated by the Exit Financing Motion and the Plan.[6] By aggressively pursuing confirmation of the Plan, the Debtors are ignoring the reality that the Plan does not treat most general unsecured creditors fairly or equitably. Although the Plan contemplates that some creditors holding claims against certain of the Debtors, including members of the Ad Hoc Group of Senior Noteholders, will receive 100% recoveries on their claims through a combination of reorganized equity and cash, a majority of holders of general unsecured claims stand to receive distributions between 3% and 17% in cash and reorganized equity. As a result, and based on conversations with unsecured creditors holding approximately $750 million in claims, the Committee anticipates that one or more of the classes at the operating subsidiary Debtors are very likely to reject the Plan.

7. The Committee respectfully submits that the Debtors will not be able to meet their burden at trial to demonstrate that their decision to enter into the Revised Exit Financing

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6 Although the Committee believes the Debtors and all parties in interest should move forward together to facilitate the Debtors' swift exit from bankruptcy, the process should appropriately balance speed with maximizing value for the estates. The Committee acknowledges that there is uncertainty regarding the demand environment for the Debtors in the near future, given concerns about the spread of the new COVID variant. However, the Committee also notes that the Debtors have substantially and consistently outperformed their business plans and cash forecasts over the past year, as set forth on **Exhibit A** attached to the Dugan Declaration—even during periods of weaker and more uncertain demand and elevated COVID spread, including during January to February 2021, and during the spread of the Delta variant in July to August 2021. This outperformance has given the Debtors substantial additional cash resources to weather continued uncertainty in the COVID recovery trajectory. And the Debtors' consistent outperformance gives the Committee confidence that the Debtors can continue to meet or exceed plan targets even if the new COVID variant has a significant impact on near-term demand.

Documents satisfies the heightened scrutiny and entire fairness standard. The Debtors simply have not conducted a fair exit financing process and cannot establish that the currently proposed exit financing transaction is the only option available to them. To date, the Debtors have only paid lip service to alternative proposals, citing the support the Plan supposedly enjoys and the need to bring these cases to a swift conclusion. The reality is, however, that the Debtors have done very little to advance any alternative proposals since their original chapter 11 plan was filed in October.

8. Illustrative of this failure is that since July, the total consideration (*i.e.*, total enterprise value) offered under the numerous iterations of plan proposals has not increased from $5.4 billion—all while more and more creditors have expressed interest in participating in an equity raise and while the Debtors have substantially outperformed their business plan[7] every month during these cases in terms of revenue and adjusted EBITDAR. Rather than encourage a "vertical" bidding process to maximize the value of subsequent bids, the Debtors have turned their exit financing process into a "horizontal" bidding process whereby the focus has been solely on winning the support of the Insiders rather than enhancing unsecured creditor recoveries. The Committee cannot stand idly by while general unsecured creditors—many of whom keep the Debtors' business flying—are left with recoveries that pale in comparison to the value the market is clearly demonstrating should be available to them if value was not being siphoned off to the Insiders and those fortunate enough to be invited to invest in the Plan.

9. Without the Court's intervention, these cases are at risk for becoming a poster child for improper insider influence in a restructuring. The Court should not countenance this behavior and must intervene, especially in light of the Debtors' remarkable business performance

[7] As used in this sentence, the term "business plan" refers to the business plans utilized by the bidders during the Debtors' exit financing process, including those prepared by the Debtors in April 2021 and July 2021.

throughout these cases and favorable prospects for the future. For the foregoing reasons and as set forth in more detail below, the Exit Financing Motion should be denied. Alternatively, if the Court is inclined to grant the Exit Financing Motion but is concerned by the allegations set forth herein, payment of the Commitment Premium should be conditioned on confirmation of the Plan, or the Commitment Premium should be reduced to a reasonable, market-based break-up fee.

BACKGROUND

I. Procedural Background

10. On June 30, 2020, the Debtors each commenced in this Court a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

11. The Debtors' chapter 11 cases (the "Chapter 11 Cases") are being jointly administered for procedural purposes only pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure. *See Order Directing Joint Administration of Chapter 11 Cases* [Docket No. 30].

12. On July 13, 2020, the United States Trustee for the Southern District of New York appointed the Committee pursuant to section 1102 of the Bankruptcy Code. *See Notice of Appointment of Official Committee of Unsecured Creditors* [Docket No. 92]. No trustee or examiner has been appointed in the Chapter 11 Cases.

13. On August 6, 2021, the Court entered the *Order Appointing the Honorable Sean H. Lane as Mediator* [Docket No. 1527] and directed the Debtors, the Committee, and other key stakeholders in the Chapter 11 Cases to mediate certain issues relating to the Debtors' exit financing process.

14. On October 1, 2021, the Debtors filed the *Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 1806] (as may be amended, modified, or supplemented, the "Plan") and *Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of Grupo Aeroméxico, S.A.B. de C.V. and its Affiliated Debtors* [Docket No. 1807] (as may be amended, modified, or supplemented, the "Disclosure Statement"). The Debtors filed revised versions of the Plan and the Disclosure Statement on October 15, 2021 [Docket Nos. 1896 and 1897]. On November 30, 2021, the Debtors filed further revised versions of the Plan and the Disclosure Statement [Docket Nos. 2184 and 2186], which embody the exit financing transactions included in the Revised Exit Financing Documents.

15. On October 8, 2021, the Debtors filed the Motion and scheduled a hearing on the Motion to be held on October 21, 2021 at 9:00 a.m. (prevailing Eastern Time).

16. On October 15, 2021, the Committee filed the *Official Committee of Unsecured Creditors' (A) Objection to Debtors' Motion to Approve Shortened Notice and Objection Periods for Debtors' Disclosure Statement Motion and (B) Request to Adjourn Certain Matters Scheduled for Hearing on October 21, 2021* [Docket No. 1894].

17. On October 16, 2021, following a chambers conference, the Debtors filed the *Notice of Adjournment of Hearings Regarding the Debtors' Disclosure Statement Motion, Commitment Letter Motion, and ALC Motion* [Docket No. 1905] and agreed to adjourn the Disclosure Statement hearing and the hearing on the Motion from October 21, 2021 to November 10, 2021 at 10:00 a.m. (prevailing Eastern Time). The Debtors adjourned the hearings again [Docket No. 2031] to November 17, 2021 at 11:00 a.m. (prevailing Eastern Time), and ultimately cancelled the hearings on November 12, 2021 [Docket No. 2108].

18. On November 19, 2021, the Debtors filed the Supplement [Docket No. 2168] and a corresponding notice of hearing on November 23, 2021 [Docket No. 2173], setting the Disclosure Statement hearing and the hearing on the Exit Financing Motion for December 6, 2021 at 10:00 a.m. (prevailing Eastern Time).

II. Factual Background

19. As the Court is well aware, the Committee has been active and vocal throughout the Debtors' exit financing and plan development process and has attempted to participate in plan negotiations. Unfortunately, the Committee's good faith efforts have been thwarted at every turn of that process.

20. In May of 2021, the Debtors commenced their exit financing process to determine the terms on which they could raise sufficient debt and/or equity financing to pay the obligations under their DIP Credit Agreement in full and emerge from chapter 11. Deposition of Homer Parkhill, 28:15-17, attached to the Dugan Declaration as **Exhibit B**. The Debtors requested that interested parties submit non-binding exit financing bids by June 9, 2021 and binding exit financing bids by July 5, 2021 (which deadline was later extended to July 26). Disclosure Statement IV.C.22.

21. The DIP Credit Agreement provides holders of Tranche 2 DIP Obligations the right to convert their holdings into reorganized equity. In addition to Apollo, Delta also holds $185 million in Tranche 2 DIP Obligations—a fact that, notably, was obscured from the Committee and other parties in interest for several months. On June 30, 2021, Delta publicly disclosed, for the first time, via a letter to Grupo Aeroméxico's board of directors (the "Delta Board Letter"), that it had entered into a funding agreement (the "Funding Agreement") with Apollo in November 2020, more than seven months prior. Pursuant to the terms of that Funding Agreement, Delta obtained the option to purchase $185 million (plus certain interest and fees) of Apollo's Tranche 2 DIP

Obligations, and Apollo was granted a corresponding put right. Delta exercised its option on October 8, 2021. The Committee was not aware of the existence or substance of the Funding Agreement until the Delta Board Letter was filed publicly on the docket on June 30, 2021 [Docket No. 1375]. Over the course of those same seven months, Delta's three officers and/or directors serving on Grupo Aeroméxico's board, as well as certain Delta employees seconded to the Debtors, were involved in key decision-making processes throughout the Chapter 11 Cases, and may have been closely involved in the development and revision of the Debtors' business plan.

22. Ultimately, in addition to Apollo's and Delta's option to convert their Tranche 2 DIP Obligations into reorganized equity, the Debtors received two additional indications of interest, each of which involved a significantly higher valuation than Apollo had proposed:

a. On June 14, 2021, the Investor Group submitted an initial indication of interest giving the Debtors a total enterprise value of $5.3 billion and providing commitments to invest at a 12% commitment premium. This proposal also called for a backstopped rights offering so that the opportunity to invest in the reorganized Debtors could be shared among all creditors. Investor Group Term Sheet (June 14, 2021), attached to the Dugan Declaration as **Exhibit C**.

b. On July 26, 2021, an ad hoc group of unsecured claimholders represented by Gibson Dunn & Crutcher LLP (the "Ad Hoc Group of Unsecured Claimholders") submitted an initial indication of interest giving the Debtors a total enterprise value of $5.4 billion and providing commitments to invest at a 12% commitment premium. This proposal also contemplated a rights offering for creditors. Ad Hoc Group of Unsecured Claimholders Term Sheet (July 26, 2021), attached to the Dugan Declaration as **Exhibit D**.

23. In late July, the Debtors indicated to the Committee that they were likely to select Apollo's proposal to convert its Tranche 2 DIP Obligations into reorganized equity as the basis for their chapter 11 plan, despite the Committee's push for an auction to determine which proposal would maximize the Debtors' value.[8] On July 28, 2021, Grupo Aeroméxico's board of directors

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[8] [redacted]

approved the Apollo conversion transaction, which would have locked in Apollo's unfavorable valuation to the detriment of the Debtors' general unsecured creditors.[9]

24. The Debtors favored Apollo's proposal because the other two proposals did not have the support of Delta and the Insider Mexican Shareholders. [redacted]

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9 [redacted]

10 [redacted]

25. At that juncture, the Committee was prepared to file a motion seeking a temporary restraining order and preliminary injunction given its concerns that delivery of the "Final Valuation Materials" (as defined in and required by the DIP Credit Agreement) could potentially lock in Apollo's low valuation for purposes of a chapter 11 plan. Following an emergency chambers conference on July 29, the Court ordered the key parties, including the Debtors, the Committee, Apollo, Delta, the Insider Mexican Shareholders, the Investor Group, and the Ad Hoc Group of Unsecured Claimholders, to participate in mediation designed to develop consensus regarding the Debtors' exit financing process. By August 20, the Investor Group had combined with the Ad Hoc Group of Unsecured Claimholders (collectively, the "Joint Creditor Group") to propose an alternative to Apollo's initial proposal (the "Joint Creditor Proposal"). *See* Joint Creditor Proposal (August 20, 2021), attached to the Dugan Declaration as **Exhibit G.**

26. During the subsequent negotiations, the Debtors' exit financing process developed a significant and misplaced focus on (a) Delta, which controls three seats on Grupo Aeroméxico's board of directors, and (b) the Insider Mexican Shareholders, all four of whom are also directors (and whom, together with family members of the Insider Mexican Shareholders, control eight out of fifteen seats on the board—and, including the three Delta seats, eleven out of fifteen seats). [redacted]

[redacted]

27. Similarly, the Debtors' communications evidenced a need for the bidders to arrange the support of Delta and the Insider Mexican Shareholders. [redacted]

28. After further discussions among the key parties in interest, the Joint Creditor Proposal served as the basis for the transaction embodied in the exit equity term sheet included in

11 [redacted]

the Debtors' Final Valuation Materials delivered pursuant to the DIP Credit Agreement on September 10, 2021 (the "Final Valuation Materials"), attached to the Dugan Declaration as **Exhibit J**. That transaction would have provided general unsecured creditors with at least $1.3 billion in value. *Id.* Although the Committee initially supported the Joint Creditor Proposal, the Joint Creditor Group agreed to material changes in the following weeks that were adverse to general unsecured creditors. These included generous allocations of reorganized equity to Delta and the Insider Mexican Shareholders, as well as an increase in the Commitment Premium from 12% to 15%.[12] Moreover, the modified proposal siphoned this value directly and solely from the value available to holders of general unsecured claims against the Debtors' operating subsidiaries.[13] Holders of the Debtors' unsecured notes, as well as other claims guaranteed by parent company Grupo Aeroméxico, would receive a par recovery.[14] All told, the new proposal decreased distributable value to general unsecured creditors to approximately $996 million. The Debtors memorialized this transaction in the October 1 and October 15 iterations of the Plan, without the agreement of the Committee.

29. [redacted]

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12 *See* Dugan Declaration, **Ex. J**, Final Valuation Materials, reflecting a plan enterprise value of $5.4 billion and a commitment premium of 12%, and Revised Exit Financing Documents, reflecting a plan enterprise value of $5.4 billion and a commitment premium of 15%.

13 The Debtors' operating subsidiaries are Aerovías de México, S.A. de C.V.; Aerolitoral, S.A. de C.V.; and Aerovías Empresa de Cargo, S.A. de C.V.

14 Notably, under the proposed Plan, creditors whose claims are guaranteed by parent company Grupo Aeroméxico receive the first $800 million of value distributed under the Plan, with the remaining approximately $265 million in consideration to be shared among creditors of the Debtors' operating subsidiaries. (To put that figure in context, it is less than the $267.6 million in value being distributed to the Insiders.) Given the low recovery percentage faced by creditors of the Debtors' operating subsidiaries, every incremental dollar in recovery is highly meaningful.

[redacted]

30. [redacted]

[redacted]

[redacted]

[redacted]

31. [redacted] and reached consensus with Delta and the Insider Mexican Shareholders on the terms of a combined proposal that forms the basis of the transactions contained in the Revised Exit Financing Documents and the Plan (the "Combined Proposal"), which siphoned $250 million in value that had been available to general unsecured creditors under each of the bidder's individual proposals back to the Insiders and the investor parties. Due to its depressed recoveries to general unsecured creditors and generous allocations of reorganized equity to the Insiders for inadequate or no consideration, the Combined Proposal does not have the Committee's support. Despite the Debtors' representations that there is overwhelming creditor support for the Plan, the vast majority of those creditors are either investors in the Plan that are proposed to receive generous equity allocations and commitment fees, and in most cases, a par recovery on their claims, or creditors that have agreed to support a "Complying Plan" as part of a claims settlement, despite the fact that there was no approved disclosure statement on file at the time those settlements were entered into.

32. The significant value shift embodied in the Combined Proposal has resulted in the Ad Hoc Group of OpCo Creditors formulating the Alternative Proposal. As compared to the Combined Proposal, the Alternative Proposal would provide a significantly greater recovery to general unsecured creditors. [redacted]

17 [redacted]

[redacted] The Alternative Proposal would also unimpair operating subsidiary claims that are guaranteed by Grupo Aeroméxico.[18] The Committee expects that the Alternative Proposal will have committed debt and equity financing in the immediate near term and could be consummated on the same timeline as the Combined Proposal. Nonetheless, the Debtors do not consider the Alternative Proposal to be "actionable," and have refused to speak to Delta and the Insider Mexican Shareholders about the Alternative Proposal because Apollo considers it unworkable.[19] [redacted]

OBJECTION

I. The Exit Financing Motion Does Not Meet The Heightened Scrutiny Standard.

33. The Debtors incorrectly assert that the business judgment standard protects their decision to enter into the transactions embodied in the Revised Exit Financing Documents. *See* Motion ¶ 38. Because several of those transactions are among the Debtors and certain of their key insiders—specifically, Delta and the Insider Mexican Shareholders,[20] who stand to receive both a

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[18] To be clear, the Committee does not support the lucrative payments being made to Delta and the Insider Mexican Shareholders and does not believe there is any justification for such payments. However, as it has throughout the Chapter 11 Cases, the Committee is willing to consent to such payments as part of a plan of reorganization that appropriately compensates general unsecured creditors.

[19] [redacted]

[20] Both Delta and the Insider Mexican Shareholders are "insiders" as defined in section 101 of the Bankruptcy Code. *See* 11 U.S.C. § 101(31). As an owner of 49% of the voting rights in Grupo Aeroméxico, Delta is an "affiliate" of the Debtors, as such term is defined in the Bankruptcy Code. 11 U.S.C. § 101(31)(E);

portion of the Commitment Premium and sizeable distributions of reorganized equity pursuant to the underlying transaction—the Revised Exit Financing Documents are in fact subject to the heightened scrutiny standard that bankruptcy courts in this district and others apply when assessing insider transactions. *See In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) (Chapman, J.) ("[T]he 'heightened scrutiny' standard . . . closely examines transactions involving insiders") ("In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a proposed transaction not only appear fair but are fair and whether fiduciary duties were properly taken into consideration."); *see also Pepper v. Litton*, 308 U.S. 295, 306–307 (1939) (controlling shareholder's "dealings with the corporation are subjected to rigorous scrutiny"); *In re Latam Airlines Group S.A.*, 620 B.R. 722, 769 (Bankr. S.D.N.Y. 2020) ("By definition, the business judgment rule is not applicable to transactions among a debtor and an insider of the debtor."); *In re MSR Hotels & Resorts, Inc.*, No. 13-11512 (SHL), 2013 WL 5716897, at *1 (Bankr. S.D.N.Y. Oct. 1, 2013) ("[C]ourts in this jurisdiction have generally applied a heightened standard of scrutiny when the transaction in question is with an insider of the debtor.").

34. Bankruptcy courts have determined that the deferential business judgment standard is inappropriate in insider transactions because they are inherently suspect. *See In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997) (insider transactions "are rife with the possibility of abuse") (internal citation omitted); *see also In re Anchorage Boat Sales, Inc.*, 29

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§ 101(2)(A). Similarly, the Insider Mexican Shareholders are "insiders" because they serve on Grupo Aeroméxico's board of directors. 11 U.S.C. § 101(31)(B)(i).

Moreover, courts uniformly treat this definition of 'insider' as illustrative of types of insider relationships but not exclusive, and instead refer to the definition as "'one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor.'" *Pan Am Corp. v. Delta Air Lines*, 175 B.R. 438, 449-500 (S.D.N.Y. 1994). By their course of conduct throughout the Chapter 11 Cases, both Delta and the Insider Mexican Shareholders have amply demonstrated that they do not deal with the Debtors on an arm's-length basis.

B.R. 275, 278 (Bankr. E.D.N.Y. 1983) ("rigorous scrutiny" required because of "the opportunities which tempt the principals of interlocking businesses to forsake and loot the bankrupt estate in an effort to enhance their personal interests"). To show that the Revised Exit Financing Documents meet the heightened scrutiny and entire fairness standard, the Debtors must show that both (a) the process leading to the transactions and (b) the price and terms of the transactions included therein "not only appear fair but are fair." *Innkeepers USA Trust*, 442 B.R. at 231; *see Pepper v. Litton*, 308 U.S. at 306–07; *see also In re Los Angeles Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) (insider DIP financing "requires proof of fair dealing and fair price and terms"); *Bidermann Indus. U.S.A., Inc.*, 203 B.R. at 549 ("the conduct of bankruptcy proceedings not only should be right but must seem right"). As the Supreme Court has explained, this standard "is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." *Pepper v. Litton*, 308 U.S. at 307.

35. The Debtors make no effort to show either that the process leading to their entry into the Revised Exit Financing Documents or the price and terms of the transactions contemplated therein are fair. No member of the Restructuring Committee has provided testimony in support of the Debtors' decision making here—the Debtors are relying entirely on the testimony of a single advisor. For this reason alone, the Exit Financing Motion must be denied. Even if the Debtors had attempted to show that the transactions contemplated by the Revised Exit Financing Documents meet the heightened scrutiny and entire fairness standard, they would have failed to do so given the flagrant self-dealing that led to the agreements embodied therein among the Debtors and the Insiders.

36. To say that the process leading to these insider arrangements was unfair would be an understatement. Under the Revised Exit Financing Documents and the Plan, the Insiders stand

to collectively receive approximately 10% in reorganized equity (equating to a value of approximately $267.6 million) on account of *nothing* (the "Insider Distributions"). The Debtors' purported justification for Delta's receipt of a portion of its distribution of reorganized equity (the "Contract Fee") is (a) the assumption, amendment and extension of a joint cooperation agreement between the Debtors and Delta (the "Delta JCA") and (b) the entry into a service agreement which shall document the continuation of the scope and level of support services Delta currently provides in support of the joint venture and strategic alliance between Delta and the Debtors. Said another way, the Debtors are proposing an allocation of reorganized equity to Delta in exchange for services that Delta is already contractually obligated to provide.[21] As for the Insider Mexican Shareholders, the Debtors have not articulated any concrete justification for why they should receive a distribution of reorganized equity on account of anything other than their equity investment. The "Mexican Investor Covenants" described in Section 4.10 of the Plan, which constitute the purported justification for the distribution of reorganized equity to the Insider Mexican Shareholders over and above the amount of their equity investment, are merely services that the Insider Mexican Shareholders are currently required to perform as board members and/or in accordance with their fiduciary duties under Mexican law, and for which they are already paid.[22]

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[21] The Debtors' Equity Exit Financing Term Sheet provides that the Contract Fee to be allocated to Delta shall equal 20% of the reorganized equity, less the reorganized equity that Delta receives on account of (a) its purchase of $100 million of shares pursuant to the Subscription Agreement, (b) its conversion of its Tranche 2 DIP Obligations, and (c) the Commitment Premium as of the Effective Date. [redacted]

[22] The Debtors' Equity Exit Financing Term Sheet provides that the Insider Mexican Shareholders are to receive 3.2% of the reorganized equity in exchange for nebulous "covenants" and "services" as members of the New Board. [redacted]

Moreover, there is no need for the Insider Mexican Shareholders to satisfy foreign ownership requirements under Mexican law, as a sufficient number of shares in the reorganized equity are proposed to be distributed to a Mexican pension fund and the Debtors' management team under the proposed Plan.

37. From the Committee's perspective, although several of the key parties in interest in the Chapter 11 Cases attempted to participate in constructive discussions for months, Delta and the Insider Mexican Shareholders repeatedly thwarted that process by failing to engage with the other parties and insisting upon a right to invest at a price well below the price that other third-party investors had committed to invest. The evidence is clear that the Insider Distributions are an obvious attempt to grant Delta and the Insider Mexican Shareholders a discounted investment price that is not on account of any legitimate services being provided by such parties. Delta's obligations pursuant to the long-standing Delta JCA are so broad and robust so as to completely subsume any amendment or new agreement, and the Insider Mexican Shareholders are already required to render a wide array of services in their capacity as board members pursuant to Mexican law and the Debtors' bylaws, and for which they already get paid (and would continue to be paid if they were to remain as board members). [redacted]

38. Moreover, the existence and relative amounts of the respective Insider Distributions were set in stone before the Debtors even agreed on the terms of the purported services Delta and

23 *See supra* Footnote 11.

the Insider Mexican Shareholders would provide in exchange.[24] To add insult to injury, the proposed distributions to Delta and the Insider Mexican Shareholders were reallocated *exclusively* from recoveries that would otherwise have been distributed to the Debtors' operating subsidiary general unsecured creditors. The members of the Ad Hoc Group of Senior Noteholders would not part with a cent to provide that value to general unsecured creditors. Instead, those holders—who actively negotiated the deals with Delta and the Insider Mexican Shareholders—would enjoy a 100% recovery regardless of how much value was available to general unsecured creditors under the Plan.

39. [redacted]

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24 As noted above and set forth in further detail in the Disclosure Statement Objection, the Committee believes that there are no services that could be provided by Delta and the Insider Mexican Shareholders that they are not already legally obligated to provide to the Debtors, and that the Plan violates the absolute priority rule as a result. To the extent the Court approves the Exit Financing Motion and the Disclosure Statement, the Committee will be prepared to present extensive evidence at confirmation that the Insider Distributions are substantially in excess of the value provided by those parties. For purposes of the Exit Financing Motion, the Committee submits it is the Debtors' burden to demonstrate that the Insider Distributions are entirely fair and the Debtors have utterly failed to meet that burden.

25 *See* Disclosure Statement Objection at IV.

26 [redacted]

[redacted]

40. The Debtors, for their part, have apparently abandoned their fiduciary duty to maximize the value of their estates for the benefit of all stakeholders. Instead, they have unilaterally decided that a competitive exit financing process is not possible, have affirmatively chosen to ignore [redacted] in favor of a proposal that provides $1.06 billion,[27] and now seek to provide approximately 10% of their reorganized equity—for inadequate or no consideration—to the Insiders whose support is wholly unnecessary to confirm a chapter 11 plan. *See Innkeepers USA Trust*, 442 B.R. at 235 (Chapman, J.) ("... it is "Bankruptcy 101" that a debtor and its board of directors owe fiduciary duties to the debtor's creditors to maximize the value of the estate. . . ."); *see also In re Adelphia Commc'ns Corp.*, 336 B.R. 610, 669–70 (Bankr. S.D.N.Y. 2006), *aff'd*, 342 B.R. 122 (S.D.N.Y. 2006) ("[D]ebtors in possession have fiduciary duties, which include, among others, the duty of loyalty. . . The duty of loyalty 'includes an obligation to refrain from self-dealing, to avoid conflicts of interests and the appearance of impropriety, to treat all

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[redacted] In fact, the plan enterprise value under both proposals was $5.4 billion. *See* Final Valuation Materials, reflecting a plan enterprise value of $5.4 billion and a commitment premium of 12%, and Revised Exit Financing Documents, reflecting a plan enterprise value of $5.4 billion and a commitment premium of 15%.

[27] The Committee also notes that the Combined Proposal assumes that the Debtors' excess cash upon the consummation of the transaction will be $200 million. Based on the Debtors' ongoing outperformance of their business plan, however, the Committee believes that the Debtors will have closer to [redacted] in excess cash at that time. This is another deal term the Court should scrutinize before approving the Exit Financing Motion, as the Commitment Parties should not be receiving this additional value for free. It is more appropriately distributed to the Debtors' general unsecured creditors.

parties to the case fairly, and to maximize the value of the estate.'") (quoting *In re Hampton Hotel Investors, L.P.*, 270 B.R. 346, 362 (Bankr. S.D.N.Y. 2001)). Accordingly, the Debtors' entry into the Revised Exit Financing Documents neither appears fair nor actually is fair.

41. If the Court does not find the heightened scrutiny and entire fairness standard applicable, the Court should apply its own judgment regarding whether the Commitment Premium is reasonable. As Judge Wiles aptly noted in *In re Pacific Drilling S.A.*, where the Debtors sought approval of a backstop fee pursuant to the business judgment standard, ". . . the principle to be guarded here is one that requires equal treatment of similarly situated creditors, **which is more of a matter of bankruptcy philosophy than it is a matter of business judgment** . . . [debtors] can agree to reasonable fees as part of a financing, **but it is for the courts to decide whether fees *are* reasonable or not**, and to decide whether, in effect, some larger creditors are really being given an unequal and preferential treatment that is disguised as a financing term." No. 17-13193 (MEW), 2018 Bankr. LEXIS 3024, at *14 (Bankr. S.D.N.Y. Oct. 1, 2018) (emphasis added). Further, Judge Wiles questioned the need for a backstop fee at all, since, similar to the situation here, the parties "seem[ed] to be fighting for the chance to buy the equity." *Id*. at *5. He also noted that the ad hoc group in that case participated in structuring its rights to "make them attractive to themselves," and that the backstop fee in that case potentially "[was] just an extra payment and an extra recovery rather than a reasonable, stand-alone financing term." *Id*. at *14.

42. Although Judge Wiles approved the financing arrangements in *In re Pacific Drilling S.A.*, he expressed the type of skepticism that is necessary here, where (a) Apollo and the Investor Group have joined forces to artificially deflate the value of the reorganized equity,[28]

[28] The Committee has significant concerns that the formulation of the Combined Proposal may be the result of collusion in violation of established Second Circuit law, especially considering that the total amount of consideration being distributed to general unsecured creditors is $1.06 billion in the Plan [redacted]

(b) the Ad Hoc Group of Senior Noteholders is siphoning its proposed recovery from amounts that rightfully belong to creditors of the Debtors' operating subsidiaries, (c) Delta and the Insider Mexican Shareholders are baselessly receiving favorable treatment simply by withholding their support and hindering any semblance of a competitive process, in each case, to the detriment of the Debtors' general unsecured creditors, and (d) creditors are literally lining up for the opportunity to invest. The Court should independently determine whether the Commitment Premium is reasonable under these factual circumstances. *See also* June 19, 2014 Hr'g Tr. 187:10-13, *In re MPM Silicones, LLC*, Case No. 14-22503 (RDD) (Bankr. S.D.N.Y.), attached to the Dugan Declaration as **Exhibit N** (stating in the context of approving an exit financing transaction with a backstop fee that ". . . the Court ultimately must make its own decision as to whether the proposed transaction makes good business sense and it is in the best interests of the debtor and fair and equitable.").

II. The Commitment Premium Should Not Be Approved Because Superior Transactions Exist.

43. On November 12, 2021, the Ad Hoc Group of OpCo Creditors proposed the Alternative Proposal, which they have advised the Committee they have subsequently revised to improve further (and clarify the treatment of creditors of Aerolitoral, S.A. de C.V.). As compared to the Combined Proposal embodied in the Revised Exit Financing Documents, the Alternative Proposal would provide significantly higher recoveries to general unsecured creditors by lowering the Commitment Premium to 12% and investing the funds at a higher valuation, and would also grant to operating subsidiary creditors the right to participate in the investment (which right would be transferrable and could generate additional value for creditors). The Alternative Proposal

[redacted] *See In re New York Trap Rock Corp.*, 42 F.3d 747, 752 (2d Cir. 1994) (determining that section 363(n) of the Bankruptcy Code prohibits agreements among potential bidders that are intended to control a sale price).

would unimpair claims against the Debtors' operating subsidiaries that are guaranteed by Grupo Aeroméxico (making the support, or lack thereof, of the Investor Group irrelevant).

44. The Committee understands that the Alternative Proposal will have committed financing in the immediate near term and could be consummated on the same timeline as the Combined Proposal in the event the other parties elect to participate (on terms that are largely identical to the existing Plan). The Alternative Proposal will provide significantly higher distributable value to the Debtors' general unsecured creditors than the $1.06 billion under the Combined Proposal. While the Committee remains concerned with the substantial distributions to Insiders, and in response to comments from the Debtors regarding the willingness of Apollo and the Insiders to consent to the Proposal, the Committee understands that the Ad Hoc Group of OpCo Creditors are also prepared to include a toggle mechanism that would permit the transaction to proceed without investments from Delta, the Insider Mexican Shareholders or Apollo (and without the additional equity grants to the Insiders). The Ad Hoc Group of OpCo Creditors are currently supplementing their existing commitments to permit this approach. To the extent they are successful in raising such funds, the Committee believes that this alternative represents a clearly superior alternative, which would require the Debtors to exercise their fiduciary duty to opt out of the existing proposal and pursue. Such an alternative, however, would be all but eliminated by approval of a more than $100 million Commitment Premium that could only be paid in equity (plus tens of millions in additional professionals).

45. [redacted]

[redacted]

46. [redacted]

[redacted]

47. [redacted] Even if the Court were to apply the lenient business judgment standard to the Debtors' decision to enter into the Revised Exit Financing Documents, the Debtors would not be able to meet it. The burden of proving that the proposed use of estate property under section 363 of the Bankruptcy Code is supported by sound business judgment lies with the debtor, and such business judgment must be exercised fairly. *See, e.g.*, *In re Nortel Networks, Inc.*, No. 09-10138 (KG), 2011 Bankr. LEXIS 3971, at *23 (Bankr. D. Del. July 11, 2011) (finding that transaction met the business judgment standard because it was "in the best interests of the debtors, their estates, and creditors, and all other parties in interest"); *see also Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071-72 (2d Cir. 1983) (holding that the application of section 363(b) must be supported by "some articulated business justification, other than appeasement of major creditors" and that "a judge determining a §363(b) application [must] expressly find from the evidence presented before him at the hearing a good business reason to grant such an application").

[29] Dugan Declaration, **Ex. B**, Parkhill Dep. 100:16-101:21.

The Debtors have not shown that the Combined Proposal is the highest, best, and otherwise most fair exit financing transaction available to the Debtors, their estates, and their creditors under the circumstances. They have failed to present a single fact justifying their pursuit of a proposal that would provide general unsecured creditors a $1.06 billion recovery [redacted]

48. Notably, with respect to the Alternative Proposal, the factual circumstances hereunder are markedly different from the only recent case the Committee is aware of in this District in which a similar issue arose, *In re SunEdison, Inc*. In that case, Judge Bernstein approved an equity commitment agreement despite the existence of an alternative proposal. *In re SunEdison, Inc.*, Case No. 16-10992 (SMB) (Bankr. S.D.N.Y. June 6, 2017) [Docket No. 3283]. However, the proponents of that alternative proposal lodged a late-filed objection to the equity commitment agreement and only submitted their alternative proposal to the debtors forty minutes before the hearing on the equity commitment agreement. May 19, 2017 Hr'g Tr. 208:3-8, *In re SunEdison, Inc.*, Case No. 16-10992 (SMB) (Bankr. S.D.N.Y.), attached to the Dugan Declaration as **Exhibit O**. Moreover, the alternative proposal remained subject to a diligence out. *Id*. at 208:9-11. Here, the Alternative Proposal is anything but a last-minute deal. The Ad Hoc Group of OpCo Creditors presented their term sheet to the Debtors weeks in advance of the filing of the term sheets governing the Combined Proposal, and the Committee expects the Alternative Proposal will have committed debt and equity financing imminently. There are no notice or due process issues, and no broad walk rights or other terms that would render the proposal illusory for the Ad Hoc Group of OpCo Creditors.

III. If The Commitment Premium Is Approved, It Should Be Conditioned On Confirmation Of The Plan

49. The Court should condition payment of the Commitment Premium on confirmation of the Plan, especially considering the Committee's aforementioned doubts that the Plan, in its current form, is confirmable. As set forth in further detail in the Disclosure Statement Objection, the Committee intends to object to confirmation of the Plan on several grounds, including, but not limited to: (a) for the reasons explained above, the Combined Proposal is the result of a deeply flawed exit financing process and should not be pursued in light of a clearly superior, committed, and immediately executable alternative proposal; (b) the Combined Proposal embodied in the Plan undervalues the Debtors (in part because the Debtors' business plan does not accurately reflect their value) and does not entitle holders of claims against the Debtors' operating subsidiaries without parent company guarantees to a par recovery; (c) the Plan is subject to, and fails to meet, the heightened scrutiny and entire fairness standard; and (d) the Plan violates the absolute priority rule.

50. If the Court approves the Commitment Premium, the Court should defer its payment until entry of a final order confirming the Plan. There is no basis for giving the Commitment Premium superpriority administrative expense status at this juncture: if the Plan is not confirmed, the Commitment Parties would not have provided any actual benefit to the estates justifying the payment of the Commitment Premium. Judge Sontchi addressed this issue in *In re Energy Future Holdings Corp.*, where he took the "extraordinary" step of reconsidering an order granting a termination fee that was triggered upon the Debtors' termination of a merger agreement as a result of a regulatory body not approving the agreement. 575 B.R. 616, 622 (Bankr. D. Del. 2017). Judge Sontchi analogized the situation to one in which a stalking horse bidder receives a break-up fee where a bankruptcy court declines to approve a sale, asking: "How would serving as

a stalking horse in a sale that fails to garner court approval possibly provide an actual benefit to the debtor's estate? The Court posits that it could not." *Id.* at 635. Judge Sontchi granted the motion for reconsideration, denying payment of the termination fee as an administrative expense claim because, under the circumstances, "there could not be any actual benefit to the Debtors' estate by payment of the fee." *Id*. at 620; *see In re Windstream Holdings, Inc.*, No. 19-22312 (RDD) (Bankr. S.D.N.Y. May 12, 2020) [Docket No. 1806] (conditioning payment of full backstop fee on confirmation of the plan) attached to the Dugan Declaration as **Exhibit P**; *see also In re MagnaChip Semiconductor Fin. Co.,* No. 09-12008 (PJW) (Bankr. D. Del. June 12, 2009) [Docket No. 250] (order approving backstop commitment agreement, whereby payment of backstop fee would be paid in the event the plan was confirmed), attached to the Dugan Declaration as **Exhibit Q**. Similarly, here, the Commitment Parties will not have provided a benefit to the Debtors' estates if the Plan is not confirmed. Rather, the Debtors would be harmed if the Commitment Premium is required to be paid regardless of whether the Plan is confirmed: the estates will simply be required to pay out $108 million to the Commitment Parties, which, because it must be in the form of reorganized equity, would significantly complicate negotiating an alternative plan. The only consequences of approving the Commitment Premium at this stage would be to provide a windfall to the Commitment Parties simply for committing to fund an inferior transaction that the Debtors should not, in a proper exercise of their fiduciary duties, pursue further—and to ensure that the Commitment Parties receive this fee regardless of whether their transaction is even consummated.

51. The Commitment Premium should similarly not be payable if the Debtors choose to exercise their fiduciary out to pursue an alternative transaction. Forcing the Debtors to pay the Commitment Premium as a break-up fee in that scenario would render their right illusory. The

extremely high dollar amount of the fee could wrongfully chill alternative transactions (namely the viable Alternative Proposal, which would be subject to a punitive overbid amount given the size of the Commitment Premium). It would also harm the Debtors' unsecured creditors, who absorb the cost of the Commitment Premium. *See In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527, 534 (3d Cir. 1999) (noting that, among the factors to be considered in determining the propriety of a break-up fee in an asset sale context, are "whether the dollar amount of the break-up fee is so substantial that it provides a 'chilling effect' on other potential bidders," "whether the principal secured creditors and the official creditors committee are supportive of the concession," and "whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break-up fee").

52. If the Court believes that some type of break-up fee is appropriate to compensate the Commitment Parties if the Plan is not confirmed or the Debtors pursue an alternative transaction, the Court should limit the Commitment Premium to an amount equal to 1–3%[30] of the Committed Equity Amount. This relief is similar to that crafted by Judge Drain in *In re Windstream Holdings, Inc.*, in which the backstop parties had negotiated an 8% backstop premium. The official committee of unsecured creditors in that case raised the concern that the proposed chapter 11 plan was not confirmable, and that the backstop commitment agreement presented to the court would entitle the backstop parties to a $60 million fee even if the plan was not confirmed. May 8, 2020 Hr'g Tr. at 69:3–11, *In re Windstream Holdings, Inc.*, Case No. 19-22312 (RDD) (Bankr. S.D.N.Y. Feb. 25, 2019), attached to the Dugan Declaration as **<u>Exhibit R</u>**. Judge Drain

[30] 1-3% is the market range for break-up fees in chapter 11 asset sales in this District. *See, e.g., In re Fairway Grp. Holdings Corp.*, Case No. 20-10161 (Bankr. S.D.N.Y. Feb. 21, 2020) [Docket No. 202] (approving 3% break-up fee); *In re Barneys New York, Inc.*, Case No. 19-36300 (Bankr. S.D.N.Y. Aug. 22, 2019) [Docket No. 156] (approving 2.4% break-up fee); *In re Nine West Holdings, Inc.*, Case No. 18-10947 (Bankr. S.D.N.Y. May 7, 2018) [Docket No. 223] (approving 3.0% break-up fee); *In re Hostess Brands, Inc.*, Case No. 12-22052 (RDD) (Bankr. S.D.N.Y. Mar. 20, 2013) [Docket No. 2455] (approving 3% break-up fee).

noted that he was "not in a position today to say that the plan that's on the table . . . it's assured it's going to be confirmed." *Id*. at 71:21-24. He continued to say that this concern was "a problem for [him]," *Id*. at 71: 24-25, and that he would approve "a two tier . . . breakup fee . . . which is a smaller cash fee if it's because the plan doesn't get confirmed, and the regular breakup fee otherwise." *Id*. at 71:12-19. Judge Drain ultimately granted the order approving the backstop commitment agreement with the modification that the 8% backstop fee would be reduced to 4% in the event that the proposed chapter 11 plan was not confirmed. Dugan Declaration, **Ex. P**, *In re Windstream Holdings, Inc.*, Case No. 19-22312 (RDD), at 2.

IV. The Commitment Premium, If Approved, Should Be Limited To 12% Of The Committed Equity Amount.

53. If the Court determines that a commitment fee is reasonable under the circumstances, it should limit the Commitment Premium to, at most, 12% of the Committed Equity Amount (*i.e.*, $86.4 million). Neither the Debtors nor the Commitment Parties have offered support for the size of the Commitment Premium, which unjustifiably rose to 15% in the Exit Financing Motion from 12% in the Final Valuation Materials. The Debtors have not provided a satisfactory response as to why the Commitment Premium increased, stating only that [redacted] Dugan Declaration, **Ex. B**, Parkhill Dep. 153:25-154:11, Nov. 30, 2021. Following delivery of the Final Valuation Materials, the total enterprise value of the Debtors has not changed from $5.4 billion, nor was the Commitment Premium offered to incentivize new parties to invest, as the deal was already fully subscribed at the time the Final Valuation Materials were delivered. Nor was the sweetener offered in an attempt to increase the Committed Equity Amount, as the Commitment Parties are funding a lower amount of equity than that set forth in the Final Valuation Materials.

54. Granting the Commitment Parties any amount in excess of their previously agreed 12% fee would baselessly award them tens of millions of dollars directly from the pool of distributable value available to the Debtors' unsecured creditors without offering the estates any corresponding benefit. Moreover, the Alternative Proposal—a useful market check on the terms of the exit financing package embodied in the Combined Proposal—similarly contemplates a lower commitment premium of 12%. In light of an immediately viable alternative with a 12% commitment premium, the Debtors cannot justify seeking the Commitment Premium of 15%.

CONCLUSION

55. Based on the foregoing, the Committee respectfully requests that the Court deny the Exit Financing Motion. In the event that the Court is inclined to grant the Exit Financing Motion, the Committee respectfully requests that the Court (a) revise the proposed order to expressly state that all confirmation-related issues shall be determined at the hearing to approve confirmation of the Plan, which, for the avoidance of doubt, include (but are not limited to) the Debtors' valuation, the Debtors' satisfaction of the heightened scrutiny and entire fairness standard with respect to the Plan and the transactions embodied therein, and the Debtors' violation of the absolute priority rule; and (b) if the Commitment Premium is approved, condition its payment on confirmation of the Plan (and in the event the Plan is not confirmed, limit the Commitment Premium, if any, to an amount equal to 1-3% of the Committed Equity Amount).

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