**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| **In re** | : | **Chapter 11 Case No.** |
| **AMR CORPORATION, *et al.*,** | : | **11-15463 (SHL)** |
| **Debtors.** | : | **(Jointly Administered)** |

**DEBTORS' MEMORANDUM OF LAW REGARDING IMPACT OF DEPARTMENT OF JUSTICE ACTION ON ENTRY OF ORDER CONFIRMING DEBTORS' THIRD AMENDED JOINT CHAPTER 11 PLAN**

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## FEDERAL STATUTES

TO THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:

AMR Corporation ("**AMR**") and its related debtors, as debtors and debtors in possession (collectively, the "**Debtors**" or "**American**"), respectfully represent:

## PRELIMINARY STATEMENT

The Debtors' Third Amended Joint Chapter 11 Plan (as the same has been or may be amended, modified, supplemented, or restated, the "**Plan**")[1] represents the culmination of extraordinary efforts to achieve a consensual plan of reorganization that maximizes value for all of the Debtors' stakeholders in accordance with the intent and purpose of chapter 11 of the Bankruptcy Code. The Plan, and the Merger on which it is premised, fully contemplated that, following entry of the Confirmation Order, the occurrence of the Effective Date of the Plan and the simultaneous Closing of the Merger would be subject to the satisfaction of certain conditions, including regulatory approvals. It also was fully contemplated that the period between entry of the Confirmation Order and the occurrence of the Effective Date and Closing of the Merger could be significant – extending well into December 2013 or perhaps later. The Debtors are now at this stage of the administration of their Chapter 11 Cases.

As demonstrated at the Confirmation Hearing on August 15, 2013, the Plan satisfies all of the requirements for confirmation set forth in section 1129(a) of the Bankruptcy Code, and the fact that the Effective Date of the Plan may not occur for several months does not in any way alter that conclusion. Consistent with the orderly administration of these Chapter 11 Cases and the reasonable expectations of all parties in interest, including the Debtors' customers,

[1] Capitalized terms used and not otherwise defined herein shall have the meaning ascribed to such terms in the Plan or the Disclosure Statement for Debtors' Second Amended Joint Chapter 11 Plan, dated June 5, 2013 (ECF No. 8591) (the "**Disclosure Statement**").

vendors, suppliers, employees, stakeholders, and business partners, the Confirmation Order should be entered.

At this juncture of the Chapter 11 Cases, all parties are aware of the Complaint filed by the United States Department of Justice and others in the United States District Court for the District of Columbia to enjoin the Merger (the "**DOJ Action**") and that the DOJ Action effectively is the only impediment to the occurrence of the Effective Date under the Plan and the consummation of the Merger. Under these circumstances, the failure to enter the Confirmation Order, when all objections to confirmation have been addressed and compliance with section 1129(a) of the Bankruptcy Code has been demonstrated, would add an unwarranted element of uncertainty to the administration of the Chapter 11 Cases and would introduce a destabilizing factor to the detriment and prejudice of all parties in interest.

As set forth in the Disclosure Statement, a mechanism exists which fully addresses the inability to satisfy a condition to the occurrence of the Effective Date of the Plan and to the consummation of the Merger. That mechanism operates to vacate the Confirmation Order and nullify the Plan. Additionally, if the DOJ Action is settled, that settlement will be brought to this Court for approval, and this Court, in accordance with the provisions of the Bankruptcy Code, will have the ability to determine whether the settlement is of such a material nature as to require further proceedings with respect to the Plan.

As stated, the Plan, the Disclosure Statement, and the Merger Agreement contemplate the current posture of these Chapter 11 Cases. Consistent with the orderly administration of the Chapter 11 Cases, the Confirmation Order should be entered.

## FACTS

The pertinent facts are set forth in the Disclosure Statement, the Plan, and the record of the Confirmation Hearing. Such facts are incorporated herein as if fully set forth herein.

## ARGUMENT

### I.

### ENTRY OF THE CONFIRMATION ORDER PRIOR TO RESOLUTION OF THE DOJ ACTION IS APPROPRIATE AND WAS EXPRESSLY RECOGNIZED AND FULLY DISCLOSED

The entry of the Confirmation Order prior to the resolution of the DOJ Action is appropriate and consistent with the orderly administration of these Chapter 11 Cases. In fact, this potential scenario is contemplated by the express terms of the Merger Agreement, the Disclosure Statement, and the Plan, and these documents set forth the procedures to be followed in the event such a scenario were to arise. Accordingly, the circumstances before the Court are fully within the expectation of the Debtors' stakeholders, employees, business partners, and other parties in interest, and because the Debtors have demonstrated compliance with section 1129(a) of the Bankruptcy Code, the Confirmation Order should be entered.

#### A. The Merger Agreement

Section 5.1 of the Merger Agreement sets forth the conditions to each party's obligation to close the Merger, one of which is obtaining certain regulatory approvals:

> The respective obligation of each party to effect the Merger is subject to the satisfaction or waiver at or prior to the Effective Time[2] of each of the following conditions:
> . . . .

[2] Capitalized terms used and not otherwise defined in this Section I.A shall have the meaning ascribed to such terms in the Merger Agreement. The Effective Time under the Merger Agreement and the Effective Date of the Plan are the same.

> (b) Regulatory Approvals. (i) The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been earlier terminated, and any approval or authorization required to be obtained under the EU Merger Regulation in connection with the consummation of the Merger shall have been obtained, (ii) any approval or authorization required to be obtained from the FAA and DOT in connection with the consummation of the Merger shall have been obtained, (iii) any approval or authorization required to be obtained from any other Governmental Entity for the consummation of the Merger shall have been obtained, and (iv) any approval or authorization required under any other foreign antitrust, competition or similar Laws, in each case in connection with the consummation of the Merger and the transactions contemplated by this Agreement, shall have been obtained
> . . . .

(Merger Agreement § 5.1(b); *see also id.* § 4.7(b) ("American and US Airways shall cooperate with each other and use . . . their respective reasonable best efforts to take or cause to be taken all actions, and do or cause to be done all things, necessary, proper or advisable on its part under this Agreement and applicable Laws . . . to obtain as promptly as practicable all material consents, registrations, approvals, permits and authorizations necessary or advisable to be obtained from any third party and/or any Governmental Entity in order to consummate the Merger or any of the other transactions contemplated by this Agreement. . . .").)

In addition, Section 4.7(e) of the Merger Agreement contemplates that an action such as the DOJ Action might be commenced and sets forth the parties' obligations to address such an occurrence:

> American's and US Airways' obligations under this Section 4.7 shall include the obligation to cooperate with each other and use . . . their respective reasonable best efforts to *defend any lawsuits or legal proceedings, whether judicial or administrative, or any actions by a Governmental Entity, challenging the consummation of the Merger or the other transactions contemplated hereby*, including using reasonable best efforts to seek to have any stay or other injunctive relief which would prevent or materially delay or impair the consummation of

> the transactions contemplated by this Agreement entered by any court or other Governmental Entity reversed on appeal or vacated. For purposes of this Section 4.7, "*reasonable best efforts*" shall include each of American's and US Airways' agreement to, (i) sell, hold separate or otherwise dispose of its assets or the assets of its Subsidiaries or conduct its business in a specified manner or (ii) permit its assets or the assets of its Subsidiaries to be sold, held separate or disposed of or permit its business to be conducted in a specified manner; provided, however, that nothing in this Agreement will require, or be deemed to require, American . . . to agree to or effect any divestiture or take any other action . . . (z) . . . *that is not permitted by the Bankruptcy Court; provided that American has used its reasonable best efforts to, and taken all action reasonably necessary to, promptly obtain permission to take such action from the Bankruptcy Court*. . . .

(*Id.* § 4.7(e) (emphasis added).)

The Merger Agreement also sets out a framework and timetable to deal with the possibility that required regulatory approvals are not timely addressed, including after entry of the Confirmation Order:

> This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time by duly authorized action of either American or US Airways if: (a) the Merger shall not have been consummated by October 14, 2013, *whether such date is before or after* receipt of the Stockholder Approval or the *entry of the Confirmation Order*, provided, that in the event that, (i) as of October 14, 2013, the condition set forth in Section 5.1(b) [regulatory approvals] has not been satisfied (or waived), the termination date may be extended from time to time by American or US Airways one or more times to a date not beyond December 13, 2013[3] . . . , or (ii) as of October 14, 2013, the condition set forth in either Section 5.2(e) [Confirmation Order] or Section 5.3(e) [Confirmation Order] has not been satisfied (or waived), the termination date may be extended from time to time by American or US Airways one or more times to a date not beyond December 13, 2013 (such date, including any such extensions thereof, the "*Termination Date*"); . . . or (e) any Order permanently restraining, enjoining or otherwise prohibiting consummation of the Merger shall become final and non-appealable, except for Orders the existence of which would not

[3] This date has been extended to December 17, 2013, under the terms of the Merger Agreement.

> result in the failure of the condition set forth in Section 5.1(c); provided, however, that the right to terminate this Agreement pursuant to this Section 6.2 shall not be available to any party that has breached its obligations under this Agreement in any manner that shall have been the principal contributing factor to the occurrence of the events giving rise to the right to terminate this Agreement.

(*Id.* § 6.2 (emphasis added).)

Section 4.20 of the Merger Agreement requires the Debtors, "subject to the terms and provisions of [the Merger] Agreement, [to] diligently pursue confirmation and consummation of the Plan;" and requires US Airways, "[u]pon request" of AMR, "to use reasonable best efforts to . . . assist the Debtors in obtaining entry of the Confirmation Order." (*Id.* § 4.20(a)(vi), (c).)

### B. The Disclosure Statement and the Plan

The Disclosure Statement and the Plan, which were transmitted to parties in interest in these Chapter 11 Cases as set forth in the Affidavit of Service, sworn to on July 2, 2013 (ECF No. 9013), fully disclosed the construct and timetable discussed above and set forth the consequences of the failure to obtain regulatory approval of the Merger.

The Plan unambiguously sets forth the temporal sequence of events by segregating the conditions to confirmation of the Plan from the subsequent conditions to the occurrence of the Effective Date of the Plan. Specifically, Section 9.1 of the Plan sets forth the conditions precedent to confirmation of the Plan:

> The following are conditions precedent to confirmation of the Plan:
>
> (a) The Bankruptcy Court shall have entered the Confirmation Order in form and substance satisfactory to the Debtors and US Airways and reasonably satisfactory to the Creditors' Committee and the Majority of the Requisite Consenting Creditors.

> . . . .

(Plan § 9.1(a).) Section 9.2 of the Plan sets forth the conditions precedent to the occurrence of the Effective Date of the Plan:

> The following are conditions precedent to the Effective Date of the Plan:
>
> (a) The Confirmation Order shall be in full force and effect, and no stay thereof shall be in effect;
>
> . . .
>
> (c) The Debtors shall have received any authorizations, consents, regulatory approvals, rulings, letters, no-action letters, opinions, or documents that are necessary to implement the Plan and are required by law, regulation, or order;
>
> . . .
>
> (e) All conditions precedent to consummation of the Merger, pursuant to the Merger Agreement, shall have been satisfied or waived in accordance with the Merger Agreement, and the Merger Closing shall occur contemporaneously with the Effective Date . . . .

(*Id.* § 9.2(a), (c), (e).)

As Sections 9.1 and 9.2 of the Plan make clear, entry of the Confirmation Order necessarily will precede the occurrence of the Effective Date, and there may be a period of time thereafter before the conditions to the Effective Date of the Plan can be satisfied, or they may not be capable of being satisfied at all. And if all requisite conditions to the occurrence of the Effective Date cannot be satisfied, then Section 9.3 of the Plan provides:

> the Debtors shall file a notice of the failure of the Effective Date with the Bankruptcy Court.

(*Id.* § 9.3.)

The foregoing also is set forth in the Disclosure Statement, which provides a detailed overview of the Merger Agreement and the Plan, including the temporal relationship

between entry of the Confirmation Order and the occurrence of the Effective Date. (Disclosure Statement at 140–42.)

Moreover, the risks that the conditions to the consummation of the Merger might not be satisfied and, accordingly, the Effective Date of the Plan would not occur, were fully disclosed in Section VIII of the Disclosure Statement, entitled "Factors to Consider Before Voting." (*Id.* at 169.) In that Section, the Debtors clearly alert creditors and equity security holders as follows:

> A. Risks Associated with the Merger
>
> 1. Conditions to Consummation of Merger
>
> The Merger Agreement contains a number of customary conditions precedent to consummation of a merger of the size and complexity of the Merger. The failure to satisfy such conditions may cause the termination of the Merger Agreement. These conditions include, among others, (i) the accuracy of representations and warranties in all material respects, (ii) the fulfillment of obligations set out in covenants, (iii) that certain *consents and regulatory approvals have been obtained*, (iv) that there are no legal prohibitions against consummation of the Merger, (v) that the approval of US Airways's stockholders has been received, (vi) that the *Confirmation Order is in effect*, (vii) that the Plan conforms to the requirements set out in the Merger Agreement, and (viii) that secured indebtedness of the Debtors and certain other Claims not exceed specified levels. . . .
>
> Many of the conditions precedent to consummation of the Merger are not within the Debtors' control and the Debtors cannot predict when or if these conditions will be satisfied. *If any of these conditions are not satisfied or waived prior to the termination date set forth in the Merger Agreement (October 14, 2013, as it may be extended), it is possible that the Merger will not be consummated.*
> . . .

(*Id.* at 170 (emphasis added).)

Finally, the Disclosure Statement sets forth what happens to the Confirmation Order and the Plan if the conditions to the Effective Date of the Plan are not satisfied:

> In addition, ***if the Merger is not consummated pursuant to the Plan, the Confirmation Order will be vacated, the Plan shall be null and void, and the administration of the Chapter 11 Cases will continue.***

(*Id.* at 170 (emphasis added).)

Accordingly, it is abundantly clear that the construct of the Plan and the Merger Agreement expressly contemplate the entry of the Confirmation Order with the actual Effective Date of the Plan occurring some time thereafter upon the satisfaction of certain conditions specifically set forth therein; and that construct was fully described and disclosed to all parties in interest. Under these circumstances, entry of the Confirmation Order at this time is entirely appropriate and there is no reason to delay its entry based on a concern with the ability to satisfy a condition to the occurrence of the Effective Date. If that condition cannot be satisfied, the consequences thereof are fully addressed in the applicable documents.

As stated, the Debtors have provided all parties in interest with a roadmap of how the Plan and Merger process will unfold. The failure to enter the Confirmation Order in a scenario clearly contemplated by that roadmap, and within the parties' reasonable expectations, would introduce an element of uncertainty to the administration of these Chapter 11 Cases with an unwarranted and unnecessary destabilizing impact on the Debtors' employees, vendors, and business partners.

## II.

## THE PENDENCY OF THE DOJ ACTION DOES NOT ALTER THE FACT THAT THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1129(A) OF THE BANKRUPTCY CODE

As demonstrated by the Debtors at the Confirmation Hearing, the Plan satisfies all of the requirements of section 1129(a) of the Bankruptcy Code and, therefore, the Confirmation Order should be entered at this time. The pendency of the DOJ Action does not alter this

conclusion. Indeed, a review of the provisions of section 1129(a) reflects that the only sections that the pendency of the DOJ Action potentially implicates are section 1129(a)(7) ("best interests") and section 1129(a)(11) ("feasibility"). As demonstrated below, these provisions are easily satisfied notwithstanding the pendency of the DOJ Action and do not in any way serve as an impediment to entry of the Confirmation Order at this time.

### A. Section 1129(a) of the Bankruptcy Code

#### 1. Best Interests (11 U.S.C. § 1129(a)(7))

The "best interests" test set forth in section 1129(a)(7) is easily disposed of. As set forth in the Declaration of Kevin Carmody in Support of Confirmation of the Plan (ECF No. 9522) and admitted into evidence at the Confirmation Hearing, the liquidation analysis annexed to the Disclosure Statement as Exhibit "C" reflects recoveries for unsecured creditors in a chapter 7 liquidation scenario ranging from 0% - 1.55% on their claims, and no recovery for existing AMR stockholders. Under any rational scenario, whether the Debtors prevail in the DOJ Action or the DOJ Action is settled, recoveries by creditors and shareholders under the Plan will exceed such liquidation amounts by orders of magnitude. Simply stated, based on the evidence before the Bankruptcy Court, a finding that the Plan satisfies section 1129(a)(7) of the Bankruptcy Code cannot possibly be impacted by the pendency of the DOJ Action.

#### 2. Feasibility (11 U.S.C. § 1129(a)(11))

The pendency of the DOJ Action similarly does not prevent the Bankruptcy Court from determining that the Plan is feasible at this time. Section 1129(a)(11) requires the Bankruptcy 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). Generally, to satisfy the feasibility test, the plan must present a workable business model that has a reasonable likelihood of success. *See Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."). In assessing feasibility, Courts typically consider a number of factors, including the soundness and adequacy of the capital structure and working capital for the business in which the debtor will engage post-confirmation; the prospective availability of credit; whether the reorganized debtor will have the ability to meet its requirements for capital expenditures; and economic and market conditions. *See In re DBSD N. Am., Inc.*, 419 B.R. 179, 202 (Bankr. S.D.N.Y. 2009), *aff'd sub nom. Sprint Nextel Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, Nos. 09 Civ. 10156, 09 Civ. 10372, 09 Civ. 10373 (LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part on other grounds sub nom. DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79 (2d Cir. 2011).

As an initial matter, feasibility necessarily must be tested based upon the Plan becoming effective; it is not a test of the likelihood of a condition to the actual effectiveness and implementation of the Plan occurring. Further, feasibility is a relatively low threshold. *See id.*; *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756, 762 (Bankr. D. Nev. 1998) ("only 'a relatively low threshold of proof [is] necessary to satisfy the feasibility requirement'") (quoting *Berkeley Fed. Bank & Trust v. Sea Garden Motel & Apartments (In re Sea Garden Motel & Apartments)*, 195 B.R. 294, 305 (D.N.J. 1996)); *In re Applied Safety, Inc.*, 200 B.R. 576, 584 (Bankr. E.D. Pa. 1996) (the feasibility requirement is generally not viewed as rigorous). In order to demonstrate that the plan is feasible, it is not necessary to guarantee the plan's success. *See*

*DBSD*, 419 B.R. at 202 ("'a bankruptcy court does not need to know to a certainty or even a substantial probability, that the plan will succeed'") (collecting cases); *Johns-Manville*, 843 F.2d at 649; *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11)."). Rather, "'[i]n making determinations as to feasibility, . . . [a]ll [the bankruptcy court] needs to know is that the plan has *a reasonable likelihood of success*.'" *DBSD*, 419 B.R. at 201–02 (collecting cases) (emphasis added); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1166 (5th Cir. 1993) (a plan is feasible if there is a "reasonable assurance of commercial viability"); *In re Adelphia Bus. Solutions, Inc.*, 341 B.R. 415, 421–22 (Bankr. S.D.N.Y. 2003).

Moreover, just as speculative prospects of success cannot sustain feasibility, speculative prospects of postemergence failure cannot defeat it. *See In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986). Section 1129(a)(11) is not intended to assure that a plan has absolutely no risk or contingencies. Rather "'[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.'" *Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (quoting 5 Collier on Bankruptcy ¶ 1129.02[11] at 1129–34 (15th ed. 1984)).

**B. The Plan Is Feasible**

Notably, the feasibility of the Plan has not been challenged by a single party in interest, nor could it be. The Debtors' projections for their post-Plan Effective Date, post-Merger business and operations are sound and conservative, and satisfy feasibility under any

conceivable circumstances. As stated in the Declaration of Beverly Goulet in Support of Confirmation of the Plan (ECF No. 9520) (the "**Goulet Declaration**"), admitted into evidence at the Confirmation Hearing, the financial projections for New AAG that are contained in the Disclosure Statement reflect that the Debtors' stakeholders are expected to benefit from the significant upside potential of New AAG, which is projected to have approximately $40 billion in annual revenues, based upon the combination of American's and US Airways's projected 2013 performance, and growing to approximately $47 billion in annual revenues based on 2017 performance. (*See* Goulet Decl. ¶ 48.) In addition, as a result of, among other things, significant actions taken by the Debtors during the pendency of their Chapter 11 Cases to reduce their employee and non-labor related expenses and their balance sheet liabilities, the Debtors returned to profitability during their Chapter 11 Cases. (*Id*. ¶¶ 49–50.) For example, for the quarterly period ended June 30, 2013, the Debtors recorded net income of $228 million. Moreover, as of June 30, 2013, the Debtors had $6.2 billion in unrestricted cash and short-term investments and $863 million in restricted cash and short-term investments. (*Id*. ¶ 50.) The Bankruptcy Court also authorized the Debtors to enter into postpetition term financing in an aggregate amount of up to $2.25 billion and post-emergence revolving financing in an aggregate amount up to $1 billion. (*Id*.) Finally, as noted in the Goulet Declaration, as of June 30, 2013, US Airways holds approximately $3.6 billion in cash and cash equivalents. (*Id*.)

The delay attendant to the DOJ Action does not in any way undermine the Plan's feasibility. The projected capital structure of New AAG has been intentionally designed to limit funded debt to levels that provide New AAG with more than adequate flexibility to address any reasonable volatility in the airline business such as spikes in fuel costs. In addition, pursuant to

the Plan, virtually all of the Debtors' prepetition unsecured debt is being satisfied with equity in New AAG, thereby eliminating those obligations as liabilities of the reorganized entity.

Under these circumstances, it is inconceivable that the Plan, the Effective Date and implementation of which are conditioned on the consummation of the Merger, is "likely to be followed by . . . liquidation, or the need for further reorganization." As stated above, no party has challenged the feasibility of the Plan. To the contrary, the parties with an economic interest in these Chapter 11 Cases, including creditors, AMR shareholders, the Creditors' Committee, and the Ad Hoc Committee, overwhelmingly endorse the Plan – which in and of itself supports a determination that the Plan is feasible. *See In re Leslie Fay Cos.*, 207 B.R. 764, 789 (Bankr. S.D.N.Y. 1997) ("The overwhelming support of the creditors, garnered after their professionals reviewed the debtors' projections, lends credence to the debtors' belief in the feasibility of the plan. The debtors fully and fairly disclosed the risks . . . associated with the plan.").

Under the facts and circumstances of these Chapter 11 Cases, the DOJ Action does not render the Plan a speculative "visionary scheme" sufficient to find that the Plan is not feasible. This is particularly the case because the analysis of whether the Plan is feasible necessarily must assume that the Plan becomes effective and the Merger is consummated, because otherwise there is no plan to consider for feasibility purposes.

All parties involved are well aware that if a satisfactory resolution of the DOJ Action is not obtained, the Merger will not be consummated and the Plan will be withdrawn. Consistent with the underlying purpose of section 1129(a)(11), the determination of a plan's feasibility must focus on the business of the reorganized debtors after the Effective Date of the Plan and the consummation of the Merger, and not on whether the conditions to effectiveness of the plan may or may not occur. As stated, a determination of a plan's feasibility only is relevant

or applicable if the plan becomes effective. In the absence of an effective plan, there is nothing to consider for feasibility purposes. *See Leslie Fay*, 207 B.R. at 789 ("feasibility involves the question of the *emergence of the reorganized debtor* in a solvent condition and with reasonable prospects of financial stability and success") (emphasis added). For purposes of determining the feasibility of the Plan before the Bankruptcy Court, the Debtors will not emerge from chapter 11 unless the Merger closes. Indeed, the proposed finding in the Confirmation Order as to feasibility is expressly conditioned on the occurrence of the Effective Date of the Plan and consummation of the Merger. And, it is absolutely clear from the projections that if the Plan becomes effective and contemporaneously therewith the Merger closes, feasibility is easily satisfied – even if the Effective Date of the Plan and the Closing do not occur for several months.

Moreover, if the parties settle the DOJ Action, not only will the Court have an opportunity to consider such settlement and whether it has any material impact on distributions under the Plan, but also it is inconceivable that the Debtors would enter into a settlement that would materially alter their ability to carry out their business plan to such a degree that the Debtors' emergence from chapter 11 would likely "be followed by the liquidation, or the need for further financial reorganization." Indeed, to do so would be a complete dereliction of the Debtors' fiduciary duties.

Although certain Courts in evaluating feasibility in the context of a regulatory condition have considered whether the reorganized debtor will "face material hurdles to achieve the necessary regulatory approvals," *see, e.g.*, *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011),[4] that analysis is irrelevant with respect to the Plan. As stated above, the Plan does not become effective in the absence of a resolution of the regulatory issues and an actual closing

[4] *See also In re Indianapolis Downs, LLC,* 486 B.R. 286, 299 (Bankr. D. Del. 2013); *In re TCI 2 Holdings, LLC,* 428 B.R. 117, 148 (Bankr. D.N.J. 2010).

of the Merger. It is in this context – a consummated Merger – that feasibility must be determined, and, in those circumstances, there can be no question that the Plan is not "likely to be followed by liquidation, or the need for further reorganization," even if the DOJ Action is settled.[5]

[5] *In re Granite Broadcasting Corp.*, 369 B.R. 120 (Bankr. S.D.N.Y. 2007) also does not alter that conclusion. In that case, certain preferred equity holders objected to the debtors' plan, arguing that they were entitled to a greater recovery. One basis of the equity holders' objection was that the preferred equity holders had previously offered a superior restructuring transaction that proved that their valuation was correct. *Id.* at 143–45. In overruling their objection, the Court found that the preferred equity holders' plan proposal would not have been feasible, primarily because "the reorganized Debtors would be left with a level of debt that they cannot afford and an unconfirmable plan of reorganization." *Id.* at 145. While the Court also concluded that the equity holders' plan proposal would not be feasible because it was subject to a regulatory condition that needed to be satisfied by a fixed date before the equity holders would be required to fund their obligations, the Court was not considering the feasibility of the equity holders' plan for purposes of confirmation. Rather, the Court was evaluating the equity holders' proposal in the context of their objection to confirmation of the debtors' plan. Indeed, no plan was ever filed by the equity holders.

## CONCLUSION

The Confirmation Order should be entered at this time.

Dated: New York, New York
August 23, 2013

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