

DEBEVOISE & PLIMPTON LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 909-6000  
Facsimile: (212) 909-6836  
Michael E. Wiles (MW 0962)  
Richard F. Hahn (RH 5391)  
Special Aircraft Attorneys for Debtors and  
Debtors in Possession

**Response Deadline: May 16, 2007**  
**Hearing Date: To be determined**

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

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**In re:** : **Chapter 11**  
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**DELTA AIR LINES, INC. et al.,** : **Case No. 05-17923 (ASH)**  
:   
: **Debtors.**<sup>1</sup> : **(Jointly Administered)**  
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**TIA/SLV OBJECTION 3G: OBJECTION BY DELTA AIR LINES, INC. TO CERTAIN CLAIMS  
FILED BY WALT DISNEY PICTURES AND TELEVISION AND THE BANK OF NEW YORK  
FOR TAX INDEMNITIES AND STIPULATED LOSS VALUES**

**This Objection Relates To:**

**Tail Nos.: N180DN, N181DN, N801DE, N802DE and N811DE**

**Claim Nos.: 4066, 4067, 4068, 4092, 4093 (filed by Walt Disney Pictures and Television)  
5328, 5329, 5335, 5337 (filed by The Bank of New York, as Indenture Trustee)**

Delta Air Lines, Inc. (“**Delta**”), through its undersigned counsel, submits this Objection (the “**Objection**”) to Proof of Claim Nos. 4066, 4067, 4068, 4092 and 4093 (the “**Disney Claims**” or the “**TIA Claims**”) asserted by Walt Disney Pictures and Television (“**Disney**”), seeking tax indemnities with respect to leveraged lease transactions involving the aircraft bearing the registration (“**tail**”) numbers identified above (the “**Aircraft**”); and to Proof of Claim Nos.

<sup>1</sup> The Debtors are: ASA Holdings, Inc.; Comair Holdings, LLC; Comair, Inc.; Comair Services, Inc.; Crown Rooms, Inc.; DAL Aircraft Trading, Inc.; DAL Global Services, LLC; DAL Moscow, Inc.; Delta AirElite Business Jets, Inc.; Delta Air Lines, Inc.; Delta Benefits Management, Inc.; Delta Connection Academy, Inc.; Delta Corporate Identity, Inc.; Delta Loyalty Management Services, LLC; Delta Technology, LLC; Delta Ventures III, LLC; Epsilon Trading, Inc.; Kappa Capital Management, Inc.; and Song, LLC.

5328, 5329, 5335 and 5337 (“**BNY Claims**” or the “**SLV Claims**”) asserted by The Bank Of New York (“**BNY**”) as Indenture Trustee, seeking payment of stipulated loss values with respect to the same transactions and Aircraft.

### **Summary of the Objection**

The Disney Claims and the BNY Claims seek recovery for the same matters. The agreements that govern the leveraged lease transactions at issue in this Objection contain a number of provisions that recognize the overlap among Disney’s tax indemnity claims and BNY’s stipulated loss value claims. Among other provisions:

- Section 6(c) of each tax indemnity agreement states that no payment is due if “the Lessee is required to pay Stipulated Loss Value or Termination Value to the extent such amounts have been paid, except to the extent that the calculation of Stipulated Loss Value or Termination Value does not accurately reflect the timing of any such event for Federal income tax purposes.”
- Section 6(d) of each Participation Agreement states that “[i]f any amount is paid by the Lessee to the Owner Participant pursuant to the Indemnity Agreement, the amounts of Stipulated Loss Value and Termination Value set forth in Exhibit C to the Lease and Schedule 1 to the Indemnity Agreement shall be recomputed in the manner set forth in Section 3(e) of the Lease.”<sup>2</sup>

The contracts that govern the Disney Claims and the BNY Claims therefore recognize the overlap among the TIA Claims and SLV Claims and require that the claims be adjusted to take account of each other.

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<sup>2</sup> Section 6(d) of the Participation Agreement for Tail Number 811DE refers to Exhibit B to the Lease (instead of Exhibit C to the Lease).

Delta submits that a single loss gives rise to a single claim, and that overlapping claims cannot be allowed. Accordingly, the Disney Claims and the BNY Claims cannot be allowed for each transaction. Instead, the Disney Claims and the BNY Claims must be adjusted to eliminate the overlaps among them.

### **Reservation of Other Objections**

This Objection applies only to the extent that the Disney Claims seek payments pursuant to tax indemnity agreements, and to the extent that the BNY Claims seek payments of stipulated loss value, with respect to leveraged lease transactions involving the Aircraft. Delta reserves the right to assert additional objections to the Disney Claims and the BNY Claims at a later date, including without limitation (i) additional objections to the extent that the Disney Claims and the BNY Claims relate to other aircraft, (ii) additional objections to the portions of the Disney Claims that seek recovery pursuant to tax indemnity agreements with respect to the Aircraft, (iii) additional objections to the BNY Claims to the extent they seek stipulated loss value for the aircraft with Tail Numbers N801DE, N802DE, and N811DE,<sup>3</sup> and (iv) objections to other amounts, such as for legal fees or general indemnity, encompassed within the Disney Claims and the BNY Claims.

### **Background**

#### **A. Procedural History and Jurisdiction**

1. On September 14, 2005, Delta and a number of its affiliates (collectively, the “Debtors”) each filed a voluntary Chapter 11 petition. The Debtors are debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On September 28, 2005, the

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<sup>3</sup> Pursuant to a court-approved term sheet, Delta has previously agreed not to object to claims seeking stipulated loss value with respect to Tail Numbers N180DN and N181DN, except to the extent set forth in this Objection. Delta has reserved its rights to assert challenges to stipulated loss value calculations in claims not covered by the foregoing term sheet.

Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the “**Committee**”) pursuant to section 1102 of the Bankruptcy Code.

2. The Debtors and the Committee previously sought to resolve certain issues relating to leveraged lease claims pursuant to procedures that were approved by the Court in an Order entered October 12, 2006. During a conference on January 31, 2007, the Court suggested that it would prefer that the Debtors assert objections to individual claims, with the aim of identifying different transactions that would provide representative samples of the ways in which various of the Debtors’ leveraged lease agreements were worded. Pursuant to the Court’s request, the Debtors have grouped claims bearing similar characteristics into several categories and have filed objections with the Court based on a sample of tails from each of these categories. This Objection falls within the category represented by TIA/SLV Objection 3, filed with the Court on March 9, 2007 [Docket No. 5110]. The Debtors request that this Objection not proceed to hearing until TIA/SLV Objection 3 has been resolved.

3. This Objection relates to five separate leveraged lease transactions. The Objection is asserted under section 502 of the Bankruptcy Code and Bankruptcy Rule 3007. This Court has subject matter jurisdiction to consider this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper in this District under 28 U.S.C. §§ 1408 and 1409.

**B. Leveraged Leases Generally**

4. Many of the Debtors’ aircraft are subject to leveraged lease financing transactions. A typical leveraged lease transaction includes these components:

- (a) The parties enter into a master agreement (called a “**Participation Agreement**”) that, among other things, specifies the roles of the parties and that identifies the other agreements that are to be executed.

(b) A trust (the “**Owner Trust**”) obtains ownership of one or more aircraft. The Owner Trust finances its acquisition of the aircraft through (i) an equity contribution from the entity that is the beneficiary of the Owner Trust (the “**Owner Participant**”) and (ii) borrowings from one or more lenders (the “**Lenders**” or “**Lender Participants**”). In more complicated structures, the borrowings may include various forms of public debt financing.

(c) The Owner Trust enters into an aircraft lease (the “**Lease**”) with Delta and/or Comair, Inc. The Lease is usually a “net” lease which requires the lessee to pay all taxes and operating expenses. Basic rent payments are normally sufficient to amortize the debt payments to the Lenders, and often also provide a cash return – referred to as “equity free cash” – for the Owner Participant.

(d) In order to provide security for the borrowed funds, the Owner Trustee typically grants a security interest in its ownership interests in the aircraft, and also assigns (for security purposes) its interests in the Lease (subject to certain exceptions), to an indenture trustee acting for the lenders (the “**Indenture Trustee**”). The Indenture Trustee makes debt payments from the lease rentals and distributes the excess (if any) to the Owner Trust. The Indenture Trustee usually is entitled to control the exercise of remedies upon the occurrence of an event of a default.

(e) For some transactions, a pass through trustee (the “**Pass Through Trustee**”) facilitates financing by aggregating the debt relating to multiple owner trusts into a single undivided pool of debt, financing this in turn by issuing pass through certificates to investors. In addition, some transactions are structured with multiple tranches of pass through trusts and other credit enhancement features.

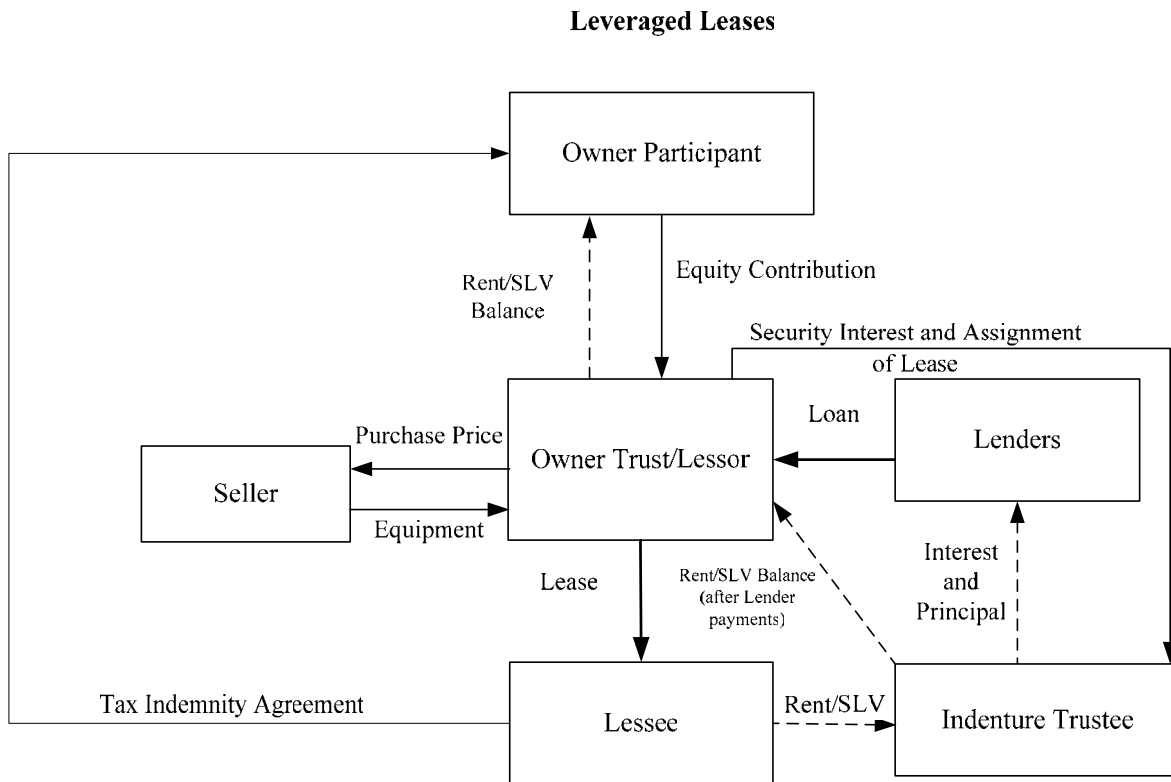
5. Leveraged lease transactions provide significant tax benefits to Owner Participants. Rental payments are treated as income, but interest payments on the outstanding debt are deductible, as are transaction expenses (over time). More importantly, the Owner Participant in a leveraged lease transaction is entitled to take accelerated depreciation deductions with respect to the aircraft. The excess of these deductions over the rental income may be used to offset other income that the Owner Participant has, or other income in the consolidated tax group of which the Owner Participant is a member.

6. Leases in leveraged lease transactions typically provide for the payment of a “stipulated loss value” or a “termination value” (“**SLV**”) in the event of a foreclosure or other event. SLV is usually determined by reference to a schedule attached to the Lease that lists either dollar amounts to be paid (depending on the date of a triggering event) or SLV percentages which are multiplied by a fixed number (such as the Lessor’s cost) to generate the dollar amount of SLV. SLV can be calculated in different ways, but typically it is calculated (i) to permit the payoff of the remaining debt, and (ii) to allow the Owner Participant to earn an agreed-upon return through the date of termination. The calculation of SLV takes account of, among other things, the adverse tax consequences to the Owner Participant from a foreclosure or other event.

7. Lessees in leveraged lease transactions usually enter into Tax Indemnity Agreements (“**TIAs**”) with Owner Participants that also relate to the potential tax consequences of various events. Some TIAs provide either (a) indemnification to the Owner Participant if the Lessee’s acts or omissions result in the “recapture” of prior depreciation deductions or (b) indemnification for unexpected inclusions in the Owner Participant’s taxable income as a result of certain listed causes. Other TIAs provide indemnification to the Owner Participant for both (a) and (b) above.

8. As noted above, Leases typically are assigned to an Indenture Trustee. The assignments usually include an assignment (in whole or in part) of rights to collect SLV and to use payments to repay principal and interest on the outstanding debt plus certain fees and expenses. The assignment documents typically provide that the balance of any SLV payment is to be returned to the Owner Trustee. On the other hand, TIAs usually are not assigned to other parties.

9. A diagram of a typical leveraged lease structure is set forth below:



10. As described above, stipulated loss value calculations and tax indemnity agreement claims each typically address the tax consequences, to an Owner Participant (or the tax group of which it is a member), that result from a foreclosure or from other specified events. In fact, the governing contracts usually contain provisions that recognize the overlaps between SLV and TIA Claims. Regardless of whether or not the overlap is discussed in the contracts

themselves, however, the fact remains that SLV and TIA Claims typically include contractual rights to recovery for the same matters. *See* William A. Macan IV, “Review of US Tax Issues That Drive the Deals,” Thirteenth Annual US Cross-Border Leasing & Structured Finance Conference, p.19 (2002) (“Also noted is the somewhat duplicative claim to which the documents entitle the Investor when a T[ermination] V[alue]/SLV event occurs – the right to receive a TIA payment for the adverse tax consequences unless and until T[ermination] V[alue]/SLV has been paid in full.”).

**C. The Leveraged Leases At Issue in This Objection**

11. In 1992 and 1994, Delta entered into leveraged lease transactions for three McDonnell Douglas MD-11 aircraft with tail numbers N801DE, N802DE and N811DE, and two Boeing 767-332ER aircraft with tail numbers N180DN and N181DN. In each of the transactions, Disney was the Owner Participant, Wilmington Trust Company (“**WTC**”) was the Owner Trustee, and NationsBank of Georgia, National Association (“**NationsBank of Georgia**”) was the Indenture Trustee. Trust Company Bank was the Lender in the transactions relating to N180DN, N801DE and N802DE; ABN Amro Bank N.V., Atlanta Agency was the Lender in the transaction relating to N181DN; and The Sumitomo Bank, Limited, Atlanta Agency, was the Lender in the transaction relating to N811DE. NationsBank of South Carolina, National Association (“**NationsBank of South Carolina**”) was the Pass Through Trustee in the transactions relating to N180DN, N181DN, N801DE and N802DE.

12. In the relevant respects, the governing documents for these five transactions contain substantially the same provisions. The five transactions involved primarily the following agreements:

- (a) Delta, Disney (the Owner Participant), WTC (as Owner Trustee), NationsBank of Georgia (as Indenture Trustee), the applicable Lender and, where

applicable, NationsBank of South Carolina (as Pass Through Trustee) all entered into a Participation Agreement.

(b) WTC (as Owner Trustee) and Delta entered into a Lease.

(c) WTC and NationsBank of Georgia entered into a Trust Indenture and Security Agreement (a “**Trust Indenture**”) granting to NationsBank of Georgia a security interest in WTC’s ownership interests in the Aircraft and assigning for security purposes WTC’s interests in the Leases to NationsBank of Georgia. From the lease rentals, NationsBank of Georgia made debt payments to the Lenders and distributed any excess to the Owner Trust.

(d) Delta entered into an Indemnity Agreement (as previously defined, a “TIA”) with Disney (the Owner Participant), as described in the following paragraphs.<sup>4</sup>

13. Delta understands that, in each of the foregoing transactions, BNY is the successor to NationsBank of Georgia as Indenture Trustee.

14. Each of the Disney Claims seeks payment pursuant to a TIA. Each of the BNY Claims seeks payment of SLV pursuant to a Lease.

### **Grounds for the Objection**

15. Disney’s TIA Claims and BNY’s SLV Claims seek compensation for the same alleged loss and overlap with each other. The overlap between the Disney Claims and the BNY Claims is also recognized in the contracts themselves. Section 1 of each Lease includes a definition of “Net Economic Return” that makes clear that the calculation of SLV includes an

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<sup>4</sup> Upon execution of appropriate confidentiality agreements, copies of the Leases, Participation Agreements, Trust Indentures and TIAs for these transactions will be supplied to the parties named in this Objection and to other parties who have claims in connection with these leveraged lease transactions and who wish to obtain copies.

amount that is calculated to take the Owner Participant's taxes into account and to preserve the Owner Participant's anticipated after-tax returns. For example, Section 1 of the Leases for Tail Nos. N180DN, N181DN, N801DE and N802DE states as follows:

“Net Economic Return” means the Owner Participant's anticipated after-tax yield, utilizing the multiple investment sinking fund method of analysis, aggregate after-tax cash flow and no less than 85% of the amount of annual FASB 13 earnings, in each case computed on the basis of the same methodology and assumptions as were utilized by the Owner Participant in determining Basic Rent, Stipulated Loss Value and Termination Value percentages as such assumptions may be adjusted for events which have been the basis of adjustments to Rent pursuant to Section 3(c) or as such yield may be adjusted pursuant to Section 15(k) of the Participation Agreement.<sup>5</sup>

In addition, Section 6(c) of the TIA in each transaction states that no payment is owing under the TIA with respect to any event as to which the Lessee is “required to pay” SLV, “to the extent such amounts have been paid” (which, in the context of bankruptcy, means to the extent such SLV Claim has been allowed). Section 6(d) of each Participation Agreement similarly provides that “[i]f any amount is paid by the Lessee to the Owner Participant pursuant to the Indemnity Agreement, the amounts of Stipulated Loss Value and Termination Value ... shall be recomputed in the manner set forth in Section 3(e) of the Lease.”

16. Delta submits that to the extent the Disney Claims and the BNY Claims overlap and seek compensation for the same loss, only one such claim may be allowed. In addition, based on the language of the contracts in these transactions, Disney's TIA Claims should be disallowed. Alternatively, the Court should reduce the Disney Claims and/or the BNY Claims to eliminate the overlaps among them.

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<sup>5</sup> The definition of “net economic return” in Section 1 of the Lease for Tail No. N811DE is substantially the same.

**A. The TIA Claims and SLV Claims Overlap And Seek Recovery For The Same Loss, And To The Extent Of That Overlap Only One Claim Can Be Allowed**

17. It is common, in the law, that a claimant may be entitled to recover for a single injury based on multiple legal theories. Persons injured by defective products, for example, may be entitled to recover compensation under theories of strict product liability, negligence, and/or breach of warranty. Persons who are deceived in connection with financial investments may be entitled to recover compensation under claims of fraud, negligent misrepresentation, breach of fiduciary duty, breach of contractual representations or warranties, and/or violations of federal or state disclosure statutes. Officers and directors who seek indemnification may be entitled to rely on statutory principles, corporate by-laws or individual employment contracts to provide such indemnification. There are a host of other examples that can easily be identified and that commonly arise both within bankruptcy and outside bankruptcy.

18. It is generally recognized that a loss provides a claimant with only one right of payment, no matter how many separate legal theories may be invoked in support of that right of payment. *See Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 295 (8th Cir. 1989) (“Regardless of whether the harm was the result of negligence or breach of fiduciary duty or a combination of both, there is only a single injury and there may only be a single recovery”). This rule applies in bankruptcy cases as well. For bankruptcy purposes, a claim constitutes a “right to payment.” *See* 11 U.S.C. § 101. The existence of multiple *theories* under which recovery may be sought from a debtor does not change the fact that a single loss gives rise to a single right to payment and therefore a single “claim” against the debtor for bankruptcy purposes.

19. In bankruptcy, therefore, “multiple recoveries for an identical injury are generally disallowed.” *See In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*,

160 B.R. 882, 894 (Bankr. S.D.N.Y. 1993). In *Finley*, the debtor had failed to make required pension plan contributions, resulting in an underfunding of its pension plan. *Id.* at 893. The pension plan trustee, on one hand, filed a claim against the debtor to collect the unpaid plan contributions. *Id.* at 887. The Pension Benefit Guaranty Corporation (“PBGC”), on the other hand, filed a claim against the debtor for the amount of the debtor’s unfunded benefit liabilities that were insured by the government. *Id.* Each claim was based on a different legal theory, but each claim related to the same “loss”: that is, the economic effect (on the pension plan) of the debtor’s failure to make a required payment. The bankruptcy trustee objected to the claims, arguing that both claims sought recovery for an identical injury. *Id.* at 893.

20. The pension plan trustee and PBGC argued in *Finley* that their claims arose from different legal rights and that, even if they overlapped, the claims should only be reduced to the extent that the debtor’s estate actually paid the separate claims in “tiny bankruptcy dollars,” not to the extent that the claims were allowed in pre-bankruptcy dollars. *Id.* The Bankruptcy Court rejected this position, finding it to be “entirely at odds with fundamental bankruptcy policy favoring equality of distribution among similarly situated creditors.” *Id.* at 894. The Bankruptcy Court noted that the claims sought compensation for the same loss (the debtor’s missed pension contribution), and that the allowance of both claims, or the reduction of the claims only to the extent of actual payment in “tiny bankruptcy dollars,” would result in a distribution with respect to that loss that would exceed the ratable distribution to all other unsecured creditors. *Id.* at 894. The Bankruptcy Court held that such an outcome would be “inconsistent with the letter and spirit of Title 11,” and disallowed the claims to the extent that they sought compensation for the same loss. *Id.*

21. Guided by the principles of ratable distribution and of uniform treatment for creditors, other bankruptcy courts also have stricken claims to the extent they overlap and to the extent they seek recovery for the same loss. *See, e.g., In re Simetco, Inc.*, No. 93-61772, 1996 WL 651001, at \*3 (Bankr. N.D. Ohio Feb. 15, 1996) (disallowing claim to the extent it related to the same loss that was covered by another claim in light of the potential windfall to the creditor, and holding that multiple recoveries for the same loss “would violate the principles of ratable distribution and offend the notion of uniform treatment for creditors”); *In re Chateaugay Corp.*, 115 B.R. 760, 784 (Bankr. S.D.N.Y. 1990), *aff’d*, 130 B.R. 690 (Bankr. S.D.N.Y. 1991), *vacated by agreement of the parties*, 17 Employee Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993)<sup>6</sup> (holding that claims for unpaid contributions and claims for “plan insufficiency” were duplicative of each other, and that allowing “two dollars of claims against the same Debtor for one dollar of loss violates the principles of equality of distribution and uniformity of treatment of creditors that are fundamental to the Code”); *In the Matter of Brinke Transp., Inc.*, No. 87-03785, 1989 WL 233147, at \*3 (Bankr. D.N.J. Jan. 23, 1989) (where claims substantially overlapped, striking claim that was subsumed in other claims). The same result is necessary in the present case to prevent the affront to bankruptcy policy identified in *Finley* and in the other cases cited above.

22. The policy against duplicative recoveries is also reflected in 11 U.S.C. § 502(e), which bars duplicative claims by a creditor and by a guarantor of the creditor’s claim. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 65 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5851; H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 354 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6310 (stating that Section 502(e) “prevents competition

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<sup>6</sup> Although the bankruptcy court’s decision in *Chateaugay* was vacated by agreement, the *Simetco* court still found the reasoning persuasive with respect to its holding that duplicative claims should be disallowed based on bankruptcy policy. *In re Simetco, Inc.*, 1996 WL 651001, at \*3 n.3.

between a creditor and its guarantor for the limited proceeds in the estate”); *Fine Organics Corp. v. Hexcel Corp. (In re Hexcel Corp.)*, 174 B.R. 807, 811 (Bankr. N.D. Cal. 1994) (“The legislative history surrounding the enactment of 11 U.S.C. § 502(e)(1)(B) reveals that § 502(e)(1)(B) was primarily intended to protect the limited assets of a bankruptcy estate from duplicative claims”).

23. The SLV Claims asserted by BNY, and the TIA Claims asserted by Disney, are set forth in separate contracts. However, to the extent that SLV Claims and TIA Claims provide compensation for the same economic consequences (the effect of a triggering event on the expected economic returns of the Owner Participant and the tax group of which the Owner Participant is a member), they simply represent multiple legal theories upon which the same loss may be recovered. For bankruptcy purposes, a single loss can give rise to only one “right to payment” and only one claim against the debtor, regardless of how many separate contractual theories of recovery may be asserted.

24. In the transactions at issue in this Objection, Leases (and SLV Claims) were assigned to the Indenture Trustee (now BNY) as security for loans that were made, with the result that TIA Claims and SLV Claims have been asserted by different parties. However, to the extent that the SLV Claims and TIA Claims address the same losses, only one claim may be allowed, and that is true regardless of whether one of the overlapping contract claims was assigned to a different party. The fact that the same loss is addressed in two separate contracts, and the fact that one contract is assigned to an Indenture Trustee while another is retained by the Owner Participant, cannot convert a single right to payment into two separate rights to payment.

**B. The Total Of The “Allowed” TIA Claims and SLV Claims Cannot Exceed The Collective “Right to Payment” Under The Parties’ Contracts**

25. Delta’s maximum payment obligation with respect to the TIA Claims and SLV Claims would be equal, in each relevant transaction, to the amount specified as SLV for that transaction. More specifically:

(a) Section 6(c) of each TIA states that no payment is due if “the Lessee is required to pay Stipulated Loss Value or Termination Value to the extent such amounts have been paid....” Accordingly, if the Lessee were to pay SLV, then the TIA Claim would be eliminated in its entirety.

(b) Section 6(d) of each Participation Agreement states that “[i]f any amount is paid by the Lessee to the Owner Participant pursuant to the Indemnity Agreement, the amounts of Stipulated Loss Value and Termination Value ... shall be recomputed in the manner set forth in Section 3(e) of the Lease.” Accordingly, if any amount were to be paid on a TIA Claim, the SLV Claim would have to be reduced by that amount.

26. In bankruptcy, a “claim” is a “right to payment.” *See* 11 U.S.C. § 101. By definition, the total amount of the “allowed” TIA Claims and SLV Claims cannot exceed the collective “right of payment” that the holders of those claims would have had outside of bankruptcy. In the case of the claims that are the subject of this Objection, this means that the collective allowed amount of the Disney Claims and the BNY Claims cannot exceed the SLV that is specified for each transaction.

27. If this Court were to allow both the Disney Claims and the BNY Claims, without adjustment for the overlaps between them, then (a) the allowed claims would exceed the collective “right of payment” that the claimants have, and (b) Disney and BNY would receive a

higher percentage recovery with respect to their “right of payment” than other creditors would receive. An example helps to illustrate this:

(a) Assume, for purposes of illustration, that the required SLV payment in a given transaction were \$100, of which \$75 represented payment of outstanding debt and \$25 represented compensation to the Owner Participant for its anticipated actual losses.

(b) Assume also that Delta’s distributions to unsecured creditors (in bankruptcy) would be equal to 60% of creditors’ claims.

(c) Outside of bankruptcy, if Delta satisfied the \$100 SLV obligation, then (i) \$75 would be used to repay lenders, (ii) the remaining \$25 would be paid to the Owner Participant to cover its losses, and (iii) the TIA Claim would be extinguished. In that case, Delta’s total out-of-bankruptcy payment obligation – or the collective “right of payment” possessed by the Indenture Trustee and the Owner Participant – would be \$100.

(d) In bankruptcy, the collective “claims” asserted by the Indenture Trustee and the Owner Participant similarly should be equal to \$100 – the amount of the collective “right to payment” that they would have outside of bankruptcy.

(e) If the Court were instead to allow an SLV Claim in the amount of \$100, and also to allow a TIA Claim in the amount of \$25, then the total of the allowed claims would not reflect the actual “right of payment” that those claimants possess. Instead, the allowed claims would equal \$125, compared to a collective “right of payment” of only \$100.

(f) Similarly, if the Court were to allow both the SLV Claim and the TIA Claim, Delta would then distribute a total of \$75 with respect to those two claims (60%

times \$125). That would mean a distribution of 75% with respect to an out-of-bankruptcy payment obligation of \$100, or a recovery of 75% – compared to a recovery by other unsecured creditors of only 60%.

As the courts have consistently found, such an inequitable distribution would be entirely “inconsistent with the letter and spirit of Title 11.” *See Finley*, 160 B.R. at 894.

28. In light of the fact that the Disney Claims overlap with the BNY Claims, Delta submits that the total allowable amount for both claims cannot exceed the amount of the SLV Claims asserted by BNY.

**C. The Disney Claims And The BNY Claims Should Be Adjusted To Eliminate Overlaps Between Them**

29. In the transactions covered by this Objection, the parties’ agreements make clear that the TIA Claims and SLV Claims must be adjusted to take account of each other, based primarily on the timing of payments that are made. If SLV has been paid, Section 6(c) of each tax indemnity agreement provides that the tax indemnity claim is extinguished. If an amount has been paid under the tax indemnity agreement, Section 6(d) of the Participation Agreement requires that SLV be reduced.

30. The parties’ agreements are less clear, however, in defining which agreement should take priority over the other. On the one hand, the documents make clear that the rights to collect Stipulated Loss Value have been assigned to the Indenture Trustee. On the other hand, the documents also state that the Owner Participant retained the TIA Claims and that those claims are not part of the trust estate held by indenture trustee. Since the TIA Claims and the SLV Claims overlap with each other, those provisions simply are in conflict with each other

31. The parties' contracts appear to make timing the only decisive factor in determining the priority of the parties' respective claims, requiring that one claim be adjusted if any part of the overlapping claim is paid. In this regard:

(a) The Leases and the Trust and Indenture Agreements make clear that BNY (as Indenture Trustee) is entitled to claim payment of stipulated loss value upon the occurrence of certain events of default, including failures to make the full payments specified in each underlying Lease. Leases, §§ 14, 15; Indentures, §§7.01, 7.02. BNY has asserted claims to recover SLV pursuant to those provisions.

(b) By contrast, claims under the TIAs accrue only as and when the Owner Participant actually incurs an increase in tax liabilities for a given tax year and pays those increased taxes. TIA, § 5.

In the ordinary course of events, therefore, BNY's SLV Claims likely would have accrued prior to the time when the Disney TIA Claims would have accrued.

32. BNY has informed Delta that it believes that the prior accrual of its SLV Claim should give it priority over the TIA Claims arising out of the same transaction. To the extent that this Court agrees, it would appear to Delta that the terms of the agreements would give priority to BNY's SLV Claims over Disney's TIA Claims. To the extent the Court concludes otherwise, Delta respectfully requests that the Court adjust the Disney Claims and the BNY Claims in such other manner as the Court deems just based on the underlying circumstances and equities. In either event, Delta submits that an Order must be entered eliminating the overlaps in those claims, with the result that the total of the allowed TIA Claims and SLV Claims does not exceed the SLV that is specified for each transaction.

### **Procedure for Responses to Objection**

33. Any party wishing to oppose the relief requested herein must file a response in accordance with the Court's Order Establishing Procedures for Claims Objections entered October 12, 2006, docket number 3381 (the "**Claims Objection Procedures Order**"), a copy of which is available at no charge on the Debtors' Case Information Website (located at *www.deltadocket.com*). In the event a party does not wish to oppose the relief requested herein, it is not necessary for such party to file any response with the Court, notify Delta and the Committee or their counsel or undertake any further action.

34. The deadline to file a response to this Objection is noted on the cover page hereof. Consistent with the Claims Objection Procedures Order, no response shall be accepted or considered unless, prior to such deadline, it is filed with the Court, 300 Quarropas Street, White Plains, New York 10601 and actually received by (a) counsel to the Debtors, Debevoise & Plimpton LLP, 919 Third Avenue, New York, NY 10022, Attn: Michael E. Wiles, and (b) the attorneys for the Official Committee of Unsecured Creditors, Akin Gump Strauss Hauer & Feld LLP, 590 Madison Avenue, New York, New York 10022, attn: David H. Botter, Esq. In addition, as set forth in the Claims Objection Procedures Order, no response shall be accepted or considered by the Court unless it includes, among other things, the following:

- (a) an appropriate caption, including the title and date of the objection to which the response is directed;
- (b) the name of the claimant, the claim number of the proof of claim (as identified on the claims register maintained on the Debtors' case information website (located at *www.deltadocket.com*)) and a description of the basis for the amount of the proof of claim;

(c) a concise statement setting forth the reasons why the Court should not sustain the objection, including, but not limited to, the specific factual and legal bases upon which the claimant relies in opposing the objection;

(d) copies of any documentation and other evidence upon which the claimant will rely in opposing the objection at a hearing;<sup>7</sup>

(e) sworn declarations of persons with personal knowledge of any new facts relied upon to support the response;<sup>8</sup> and

(f) the name, address, telephone number and facsimile number of a person authorized to reconcile, settle or otherwise resolve the claim on the claimant's behalf.

35. A failure by the Claimant to file a response in such manner shall be deemed a waiver by the Claimant of all rights to respond to this Objection and consent by the Claimant to the relief requested in this Objection with respect to the Claim.

36. Pursuant to the Claims Objection Procedures Order, if a proper and timely response with respect to the Claim is not filed and served in compliance with the procedures specified therein, the Court may sustain this Objection with regard to the Claim without further notice or a hearing.

37. If the relief requested herein is granted, Bankruptcy Services, LLC, as the Debtors' authorized claims agent, will be authorized and directed to amend the claims register accordingly.

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<sup>7</sup> If the claimant cannot timely provide such documentation and other evidence, the claimant is required to provide a detailed explanation in the response as to why it was not possible to timely provide such documentation and other evidence.

<sup>8</sup> If the claimant cannot timely provide such declarations, the claimant is required to provide a detailed explanation in the response as to why it was not possible to timely submit such declarations.

### **Service of Notice**

38. Delta has served notice of this Objection consistent with the procedures set forth in the Claims Objection Procedures Order. In addition, consistent with the procedures described in the Court's Order Approving Notice, Case Management and Administrative Procedures entered October 6, 2005 (the "**Case Management Order**"), Delta has served notice of this Objection on (a) the Core Parties (as that term is defined in the Case Management Order) and (b) the Non-ECF Service Parties (as that term is defined in the Case Management Order).

### **Relief Requested**

39. For the foregoing reasons, Delta respectfully requests (a) a determination that only one claim be allowed for a single tax-related loss in each transaction; (b) the disallowance and/or reduction of the Disney Claims and/or the BNY Claims to eliminate the overlaps among them; and (c) such other and further relief as is deemed just and proper.

Dated: New York, New York  
April 16, 2007

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

/s/ Michael E. Wiles

Michael E. Wiles (MW 0962)

Joseph P. Moodhe (JM 6068)

Richard F. Hahn (RH 5391)

919 Third Avenue

New York, New York 10022

Telephone: (212) 909-6000

Facsimile: (212) 909-6836

Special Aircraft Attorneys for Debtors and  
Debtors in Possession