Sheron Korpus
David S. Rosner
David J. Mark
Andrew Golden
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

Counsel for USAVflow Limited

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
AVIANCA HOLDINGS S.A., *et al.*,[1]	Case No. 20-11133 (MG)
Debtors.	Jointly Administered
AVIANCA HOLDINGS S.A., *et al.*,	
Plaintiffs,	
v.	Adv. Proc. No.: 20-01189 (MG)
USAVFLOW LIMITED,	
Defendant.	

[1] The Debtors in these chapter 11 cases, and each Debtor's federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A); Aero Transporte de Carga Unión, S.A. de C.V. (N/A); Aeroinversiones de Honduras, S.A. (N/A); Aerovías del Continente Americano S.A. Avianca (N/A); Airlease Holdings One Ltd. (N/A); America Central (Canada) Corp. (00-1071563); America Central Corp. (65-0444665); AV International Holdco S.A. (N/A); AV International Holdings S.A. (N/A); AV International Investments S.A. (N/A); AV International Ventures S.A. (N/A); AV Investments One Colombia S.A.S. (N/A); AV Investments Two Colombia S.A.S. (N/A); AV Taca International Holdco S.A. (N/A); Avianca Costa Rica S.A. (N/A); Avianca Leasing, LLC (47-2628716); Avianca, Inc. (13-1868573); Avianca-Ecuador S.A. (N/A); Aviaservicios, S.A. (N/A); Aviateca, S.A. (N/A); Avifreight Holding Mexico, S.A.P.I. de C.V. (N/A); C.R. Int'l Enterprises, Inc. (59- 2240957); Grupo Taca Holdings Limited (N/A); International Trade Marks Agency Inc. (N/A); Inversiones del Caribe, S.A. (N/A); Isleña de Inversiones, S.A. de C.V. (N/A); Latin Airways Corp. (N/A); Latin Logistics, LLC (41-2187926); Nicaraguense de Aviación, Sociedad Anónima (Nica, S.A.) (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aereo y Rampa S.A. (N/A); Servicios Aeroportuarios Integrados SAI S.A.S. (92-4006439); Taca

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT PURSUANT TO BANKRUPTCY RULE 7012 OR IN THE ALTERNATIVE TO STAY PROCEEDING PENDING APPEAL OF REJECTION ORDER

de Honduras, S.A. de C.V. (N/A); Taca de México, S.A. (N/A); Taca International Airlines S.A. (N/A); Taca S.A. (N/A); Tampa Cargo S.A.S. (N/A); Technical and Training Services, S.A. de C.V. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

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Defendant USAVflow Limited ("Defendant" or "USAV"), by its undersigned attorneys, respectfully submits this memorandum of law in support of its motion (the "Motion") to dismiss the complaint (the "Complaint") of the Debtors Avianca Holdings, S.A. *et al*. (the "Debtors") in the above-captioned action pursuant to Rule 7012 of the Federal Rule of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), or, in the alternative, stay Adv. Proc. No. 20-01189 (MG) pending appeal of the Rejection Order (defined herein).[1]

PRELIMINARY STATEMENT

Through the Complaint, the Debtors seek to recharacterize the RSPA and Undertaking Agreement (along with the remaining USAV Transactions) as a disguised financing. The relief that the Debtors seek is plainly inconsistent with, and contradictory to, the relief that they just obtained from this Court, as the Debtors themselves acknowledge: "To the extent the Court grants the relief requested in this [Rejection] Motion, it will not be necessary for the Court to reach the issues raised in the [Adversary] Complaint]." *See* [ECF 20-11133 D.I. 306] (the "Rejection Motion") at 1 n.1.[2] Indeed, the very foundational predicate to the Rejection Motion was that the RSPA and the Undertaking Agreement are sale agreements and therefore subject to rejection, and ***not*** financings, which cannot be rejected. It is unclear why the Debtors now insist on wasting the Court's and the parties' resources pressing these inconsistent and contradictory claims, when the parties and the Court invested an incredible amount of time on the Rejection Motion. USAV requested the Debtors' consent to stay any response to the Complaint until a resolution of the pending appeals on the Rejection Motion, which will impact the relief sought in the Complaint.

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[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Complaint and Opinion (as defined herein).

[2] References in the form of "[D.I. ____]" are to the Court's docket in Case No. 20-11133(MG).

The Debtors refused this request and insisted that USAV expend the resources to respond to the Complaint. The Complaint should be dismissed.

First, the Debtors are collaterally and judicially estopped from maintaining this action, and the Complaint should be dismissed, because the relief sought in the Complaint has already been fully and fairly litigated in connection with the Rejection Motion. Because the Court has already held that the Debtors may reject the RSPA, but that the credit card processing Receivables, Contract Rights and related proceeds are the property of USAV, not the Debtors' estates, the relief sought in the Complaint is inconsistent with and contradictory to the Opinion and the Rejection Order, and the Debtors are not entitled to a second bite at the apple. Indeed, having the Court undertake the recharacterization analysis is wasteful, duplicative, and unnecessary. The Court has already found that the RSPA is an executory contract which can be rejected; if the Court also finds that the USAV Transaction consummated under the RSPA and Undertaking Agreement actually constitutes a disguised financing arrangement, then the RSPA and Undertaking Agreement could not be rejected under section 365. The Debtors cannot pursue substantial, predicate factual findings that are contradictory to each other, in order to obtain two forms of relief that are each barred by the other. Finally, whether or not the RSPA may be rejected – as a financing arrangement or as an executory sale agreement – has no impact on the ownership of the credit card processing Receivables, Contract Rights and related proceeds because the Court has already determined these assets are property of USAV and not of the Debtors' estates.

Second, the Complaint should be dismissed for failing to state a claim upon which relief can be granted. As this Court already found, the USAV Transaction constitutes a sale under applicable Colombian law which cannot be unwound in light of the Supreme Court's holding in *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019). *See Opinion* at 33

(citing *Tempnology*, 139 S. Ct. at 1657-58, 1661-63). As a result, and as the Court also found, the credit card processing Receivables and Contract Rights were sold by the Debtors to USAV in December 2017, and thus are (and never were) property of the Debtors' estates. The Debtors' own counsel confirmed this fact in 2017.

Third, in the alternative to dismissing the Complaint, USAV requests a stay of this action pending appeal of the Rejection Order. For the reasons stated above, the appeal of the Rejection Order will address the same issues that are the subject of this action and will likely be dispositive of those issues. Accordingly, a stay is in the interests of conserving judicial resources and avoiding duplicative litigation.

The relief that the Debtors seek in the Complaint is self-contradictory and legally barred. For all of these reasons, the Court should either (i) dismiss the Complaint or (ii) in the alternative, stay these proceedings pending appeal of the Rejection Motion.

FACTUAL AND PROCEDURAL BACKGROUND

The background to this proceeding is set forth in this Court's September 4, 2020 memorandum opinion (the "Opinion") granting in part and denying in part the Debtors' motion to reject the USAV Agreements (as defined in the Opinion) as executory contracts (the "Rejection Order"). *See Memorandum Opinion Granting in Part and Denying in Part Debtors' Motion to Reject the USAV Agreements* [D.I. 850]. In the rejection motion (the "Rejection Motion") [D.I. 306], filed the same day as the Complaint in this action, Debtors sought authority to reject as executory contracts each of the agreements that underlie the relief sought in this adversary proceeding. In support of the Rejection Motion, Debtors contended that if the USAV Agreements are rejected, the receivables generated by the Contract Rights will become property of the Debtors' estates. *See Rejection Motion*, ¶¶ 35, 37.

As recounted in the Opinion, on December 12, 2017, the Debtors and USAV entered into the Contract Rights and Receivables Sale, Purchase and Servicing Agreement (the "RSPA"). *See Opinion* at 6.[3] The RSPA is governed by the law of Colombia. On its face, the RSPA memorializes a sale of the Debtors' accrued credit card receivables (the " Receivables") and the Debtors' rights under card processing agreements, including the Debtors' rights to receive all cash collections and other cash proceeds from or of such rights (the "Contract Rights") with (i) American Express Travel Related Services Company, Inc. and American Express Payment Services Limited ("AMEX") (the "AMEX Agreement") and (ii) BAC International Bank Inc. and its subsidiaries ("Credomatic") (the "Credomatic Agreement" and, together with the AMEX Agreement, the "Credit Card Processing Agreements") related to the purchase in the United States of airline tickets and related services with American Express, Visa, and MasterCard credit cards. *See Opinion* at 7, *Complaint* ¶ 14 and the *RSPA*, Recitals and § 2.01.

In exchange for the sale of the Contract Rights and Receivables, Avianca received $150 million plus the potential for additional purchase price (the "Additional Purchase Price") equal to future credit card cash proceeds generated in any payment period less an amount generally equal to the amount required for USAV's monthly amortization and other payments plus certain amounts USAV is obligated to maintain in reserve under the USAV Loan Agreement (defined below). *Id.*

Contemporaneously with the execution of the RSPA, USAV entered into a loan agreement (the "USAV Loan Agreement") with the USAV Secured Lender Group, certain Debtors as guarantors, and Citibank, N.A. as administrative agent and collateral agent (in such capacities, "Citibank").[4] The USAV Loan Agreement is governed by New York law. Under the USAV Loan

[3] The RSPA is Exhibit A to the Complaint.

[4] The USAV Loan Agreement is Exhibit B to the Complaint.

Agreement, the USAV Secured Lender Group advanced to USAV $150 million – the same amount USAV used to pay Avianca under the RSPA. To repay the loan, USAV retains a portion of the collections – paid into a New York-based bank account (the "New York Pass-Through Account") – sufficient to make the required amortization payments under the USAV Loan Agreement. Any surplus above what is required to be repaid or reserved under the USAV Loan Agreement is remitted to the Debtors as the Additional Purchase Price. *See Opinion* at 7-8, citing *Complaint*, ¶¶ 15-16; *see also* the USAV Loan Agreement, § 8.9.1, and the Cash Management Agreement among Avianca, USAV and Citibank (the "Cash Management Agreement"), §§ 2.02, 2.1.1.[5]

The RSPA contains numerous provisions that indicate an intent to effectuate a sale of the Receivables and the Contract Rights. The RSPA provides that on the "Effective Date," December 12, 2017, "the Seller sells to the Purchaser, and the Purchaser buys from the Seller, finally, definitively, and irrevocably, the existing (as of the date hereof) Contract Rights arising under and the Receivables accrued under the AMEX Contract and the Credomatic Contract." *See RSPA* § 2.01(a)(i). "Contract Rights" are defined in the RSPA as the contract rights of Avianca under the Card Processing Agreements "to (i) receive any kind of payments, indemnities or economic compensation derived therefrom on account of Specified Sales, including the right, among other things, to receive all future Collections derived therefrom; and (ii) to enforce the rights referred to in (i) against the respective Card Processors thereunder." *See id.* § 1.01.[6] The Receivables are defined in the RSPA as "any and all Collections accrued under the Card Processing Agreements that are due on account of Specified Sales from …AMEX or Credomatic to the Seller immediately

[5] The Cash Management Agreement is Exhibit C to the Complaint.

[6] The RSPA defines Card Processing Agreements to mean the Credomatic Contract, the AMEX Contract, and each Additional Card Purchasing Agreement.

prior to giving effect to this Agreement on the Effective Date (and due to the Purchaser immediately upon giving effect to this Agreement on the Effective Date)." *See id.* § 1.01; *see also Opinion* at 11-12.

Also in connection with the execution of the USAV Agreements, the Debtors' special counsel, Gomez-Pinzón Abogados S.A.S., issued an opinion to Debtor Avianca and to USAV regarding the irrevocable sale and title-transferring legal effect of the USAV Agreements under Colombian law (the "Colombian Law Opinion").[7] Among other matters, Debtors' Colombian counsel opined that:

- "[T]he sale and transfer of the Receivables and the Contract Rights under the RSPA (and the right to receive all present **and future** Collections as a consequence of the exercise of such Contract Rights under the Card Processing Agreements) **constitutes a valid and irrevocable sale and transfer of the Receivables and the Contract Rights existing on the date of execution of the RSPA.** As a consequence of such sale and transfer**, the Purchaser has the right to receive all future Collections derived from the exercise of such Contract Rights."** *See Colombian Law Opinion*, at ¶ 8 (emphasis added).
- "Upon the sale and transfer to the Purchaser of the Contract Rights and the sale and transfer of the Receivables pursuant to the RSPA and the Notice and Consents, **the Receivables and the Contract Rights (and the right to receive all present and future Collections as a consequence of the exercise of such Contract Rights under the terms of the Card Processing Agreements) will not constitute right or property, as the case may be, of the Seller.**" *See id.* at ¶ 9 (emphasis added).

[7] A copy of the Colombian Law Opinion is Exhibit A to the accompanying Declaration of Sheron Korpus filed contemporaneously herewith.

On September 4, 2020, after extensive briefing and hearing arguments as to whether the USAV Agreements were executory contracts, the Court issued its Opinion, holding that the RSPA was an executory contract that could be rejected pursuant to section 365 of the Bankruptcy Code. Although the Court found that pursuant to the RSPA, USAV had purchased from the Debtors all legal and economic interests in those Receivables arising from the Credit Card Processing Agreements, *see Opinion* at 35-7, the Court determined that the Debtors' obligation under RSPA § 2.01(a)(ii) to sell to USAV the contract rights arising under *new* credit card processing agreements that the Debtors may enter into with new credit card processors was a sufficiently material obligation and that USAV similarly had sufficiently material obligations to render the RSPA and Undertaking Agreement executory. *See Opinion* at 35-7. Specifically, the Court found that the Debtors sold to USAV its rights to receive payments of all sales processed under the Amex Agreement and the Credomatic Agreement and any replacement card processing contracts. USAV and the USAV Secured Lender Group each filed notices of appeal from certain findings and determinations in the Rejection Order on September 18, 2020. *See USAV Notice of Appeal*, [D.I. 960]; *USAV Secured Lender Group Notice of Appeal* [D.I. 959].

The Complaint seeks to recharacterize the sale transaction set forth in the RSPA as a financing transaction on the ground that under both Colombian Law and New York law the "economic substance" of the transaction was a financing, not a sale. *See Complaint*, ¶ 22. But the Debtors have already prevailed on characterizing the transaction as a sale, so as to allow rejection. The Debtors cannot treat the transaction as a sale in order to allow rejection, and then as a financing to seek other contradictory relief. If the transaction was a financing, as alleged in the Complaint, then the Debtors could not reject the RSPA or the Undertaking Agreement. The Debtors cannot have it both ways.

LEGAL STANDARD

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Dismissal is appropriate when "it is clear from the face of the complaint, and matters of which the court can take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopo, Inc. v. Roll Int'l*, 231 F. 3d 82, 86 (2d Cir. 2000).[8]

ARGUMENT

I. The Complaint is Barred by the Doctrines of Issue Preclusion, Judicial Estoppel, and Law of the Case.

The Opinion held that the Debtors sold the Receivables and Contract Rights to USAV and that USAV is entitled to the cash generated under the Credit Card Processing Agreements. As such, the Court held that these assets are not property of the Debtors' estates even if the sale agreement, the RSPA, could be rejected pursuant to Bankruptcy Code section 365. *See Opinion* at 35-6 ("[r]ejection of the RSPA and Undertaking Agreement does not terminate USAV rights to receive payment of any sales processed" under the Amex and Credomatic Agreements); ("The

[8] USAV cites to the Colombian Law Opinion because it is integral to the Debtors' Complaint even if the Debtors did not themselves reference it. In a FRCP 12(b)(6) proceeding, this Court may judicially notice documents upon which the Debtors relied in bringing suit and documents that are "integral" to the Complaint. *Cortec Indus., v. Sum Holding L.P.*, 948 F. 2d 42, 47-48 (2d Cir. 1991). *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint.") (citation omitted). In particular, Paragraph 22 of the Complaint alleges, as the basis for the relief the Debtors are seeking, that "[u]nder…Colombia Law… the economic substance of the USAV Transaction was that of a financing, and not a sale." Thus, the Colombia Law Opinion should have been referenced in the Complaint but was apparently excluded because referencing it would have undermined the basis for the relief sought by the Debtors. *See Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (citation omitted) (Document is integral to a complaint if it is a "legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim - was not attached to the complaint…The exception thus prevents plaintiffs from generating complaints invulnerable to Rule 12(b)(6) simply by clever drafting.").

result of rejection here is not a [rescission] of the RSPA or Undertaking Agreement and rejection *does not* allow the Debtors to take back the Contract Rights…") (emphasis added).

Here, the dispute underlying this proceeding addresses the exact same factual and legal issues argued in the Rejection Motion: whether USAV or the Debtors own the Receivables, Contract Rights and proceeds of the Credit Card Processing Agreements. *See Rejection Motion*, ¶¶ 35, 37. In addition, the Court has already ruled that the RSPA, pursuant to which the Debtors sold the Receivables, Contract Rights and related proceeds, is a rejectable executory contract. If the USAV Transaction is rejectable, then the target assets are beyond the Debtors' reach. The Debtors' action seeking recharacterization is estopped by the doctrine of issue preclusion.

The Debtors' Complaint is also barred by judicial estoppel. In their Rejection Motion, the Debtors argued that the contracts underlying the USAV Transaction were executory; in their Complaint, they advance the contradictory position that the USAV Transaction is a disguised financing. The Debtors are judicially estopped from taking this contrary stance in their Complaint, as set forth below.

A. The Pertinent Factors Favor Application of the Issue Preclusion Doctrine to the Recharacterization Action.

The issue preclusion doctrine bars the Debtors' Complaint seeking recharacterization of the USAV Transaction because the Complaint requires relitigation of the same issues already decided by the Court: (i) whether the USAV Transaction (and RSPA) may be rejected, and (ii) which party owns the Receivables, Contract Rights and proceeds generated from the Credit Card Processing Agreements. The Court's Opinion found that the RSPA is a rejectable executory contract but that the Contract Rights belong to USAV. Indeed, it makes little sense (and wastes judicial resources) to demand the Court recharacterize the USAV Transaction, (including the RSPA) as a secured financing arrangement because the Court already issued its Rejection Order

granting the Debtors authorization to reject the RSPA. The Court, having decided upon these issues of law and fact, should halt the present proceeding on grounds of collateral estoppel.

In the Second Circuit: "Federal principles of collateral estoppel, which we apply to establish the preclusive effect of a prior federal judgment, require that: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *See Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006) (citing *Purdy v. Zeldes*, 337 F.3d 253, 258 & n. 5 (2d Cir. 2003). Furthermore, "[b]y 'preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,' [the doctrine] protect[s] against 'the expense and vexation attending multiple lawsuits, conserv[es] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *See New York City Dist. Council of Carpenters Pension Fund v. Forde*, 2018 WL 2455437, at *16 (S.D.N.Y. June 1, 2018), *report and recommendation adopted as modified*, 341 F. Supp. 3d 334 (S.D.N.Y. 2018), *appeal withdrawn sub nom. New York City Dist. Council of Carpenters Pension Fund by Spencer v. Olivieri*, 2019 WL 1222841 (2d Cir. Feb. 1, 2019) (citing *Montana v. United States*, 440 U.S. 147, 153-154 (1979)).

Here, factor one is satisfied because the Rejection Motion raised the same issues that are raised here. The Rejection Motion raised the issue of whether the agreements were a sale, so as to permit rejection. Financings cannot be rejected. *See In re Montgomery Ward, LLC*, 469 B.R. 522, 527 (Bankr. D. Del. 2012) ("A financing agreement … is not an executory contract and cannot be rejected under section 365."); *In re Penn Traffic Co.*, 466 F.3d 75, 77 (2d Cir. 2006) (noting that a disguised financing arrangement is ineligible for treatment as an executory contract); *In re Hudson*

Valley Care Ctrs., Inc., 2007 U.S. Dist. LEXIS 56885, at *6 (N.D.N.Y. Aug. 2, 2007) (citing *In re Penn Traffic Co.*, 466 F.3d at 77)); *Hotel Syracuse, Inc. v. City of Syracuse Indus. Dev. Agency*, 155 B.R. 824, 843-44 (Bankr. N.D.N.Y. 1993) (finding that the "true nature" of a lease was "a financing vehicle," and subsequently rejecting the argument that the agreement was an executory contract for the sale of property because "the Court has already concluded that the Lease constitutes an agreement in the nature of security…and is, therefore, not an executory contract within the meaning of Code § 365(a)" (citing *In re Pac. Express, Inc.*, 780 F.2d 1482, 1487 (9th Cir. 1986)).

Here, the issue of the ownership of the Receivables was raised in both the Rejection Motion and the Complaint. *See Complaint*, ¶ 28 ("[t]he [ ] Receivables (and any proceeds thereof) constitute property acquired by the Debtors' estate after the commencement of these chapter 11 cases.") *compared with Rejection Motion*, ¶¶ 35, 37 ("...if the USAV Agreements are rejected, the receivables generated by the Debtors will flow into the estates [and] must be delivered to the Debtors [upon rejection]."). As such, factor one supports applying the doctrine of issue preclusion.

Factor two is satisfied because the issues of ownership and rejectability were actually and necessarily decided in the Rejection Motion proceeding. This Court found that the transaction at issue was a sale in order to allow rejection, which again is not available for financings. *See Opinion* at 35-6; *supra* at 11. Additionally, the Court found that the Receivables, the Contract Rights to the proceeds processed from the sales, and any cash generated therefrom belonged to USAV. *See Opinion*, ¶ 36-7:

> The result of rejection here is not a [rescission] of the RSPA or Undertaking Agreement and rejection does not allow the Debtors to take back the Contract Rights to Specified Sales processed by the [Credit Card Processing Agreements] the Debtors sold in 2017. Rather, the result of rejection is to relieve the Debtors of their future performance obligations to USAV including…to sell to USAV the contract rights arising under new credit card

> processing agreements that the Debtors may seek to enter with new credit card processors.

Through recharacterization, the Debtors again seek to recoup the Receivables and proceeds that the Court has made clear are beyond their reach.

Factor three is satisfied here because the Debtors clearly had full and fair opportunity to litigate the issue of ownership of the Receivables, Contract Rights, and cash proceeds through extensive briefing and the court hearing in the Rejection Motion proceedings. In determining whether a party has had a "full and fair opportunity to litigate" such that collateral estoppel is warranted, courts will typically look to: "1) the level of participation in the prior litigation and 2) the nature of the record." *Fuller v. Rea (In re Rea)*, 606 B.R. 531, 539 (Bankr. S.D.N.Y. 2019). Here, there is no question that the Debtors fully participated in the Rejection Motion proceedings: they filed three briefs, attached 16 exhibits, submitted an expert declaration with over one thousand pages of Colombian legal sources, and actively participated in a lengthy hearing before this Court. *See id.* (finding defendant was collaterally estopped from raising argument where "[d]efendant was a named respondent in the [prior] proceeding, was represented by counsel in the original hearing as well as the appeal, testified at the hearing, and submitted post-hearing briefs."). The Committee also fully participated, filing a reply brief and supplement response to the Court's questions, and also arguing before this Court.

Factor four is also satisfied. The treatment of the agreements at issue was necessary to the decision because the Debtors could not reject a financing. The issue that USAV owns the Receivables was also necessary to the decision because a contrary finding was exactly what the Debtors asked for in the Rejection Motion. Indeed, the entire point of seeking rejection of the USAV Agreements or recharacterization of the USAV Transaction was to obtain the Receivables and the cash processed therefrom; the Debtors have repeatedly stated that recouping the

Receivables, Contract Rights, and proceeds for the benefit of the estates was the aim of both the Rejection Motion and the Complaint, and the Court needed to decide who owned the Receivables, Contract Rights, and proceeds to determine the consequences of rejecting the USAV Agreements.

The Court has already decided that USAV owns the Receivables, Contract Rights and proceeds. Issue preclusion thus bars the recharacterization action.

B. Judicial Estoppel Also Bars the Recharacterization Action.

In their Complaint, the Debtors seek to recharacterize the USAV Transaction as a disguised financing, a position that clearly contradicts their earlier stance that the contracts underlying the USAV Transaction are executory. The doctrine of judicial estoppel thus also bars the Debtors' Complaint.

Judicial estoppel "prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that is successfully advanced in another proceeding." *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 204 (Bankr. S.D.N.Y. 2017). Courts will find judicial estoppel where three factors are present: (1) "a party's later position is clearly inconsistent with its earlier position"; (2) "the party's former position has been adopted in some way by the court in the earlier proceeding"; and (3) "the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *Id.* (citations omitted); *see also In re CCT Communs., Inc.*, 420 B.R. 160, 169 (Bankr. S.D.N.Y. 2009) (citations omitted). These three factors are easily satisfied here.

First, the Debtors' position in their Complaint that the USAV Transaction is a secured financing is "clearly contradictory" to their position in the Rejection Motion that the contracts underlying the USAV Transaction were executory. Courts consistently hold that financing agreements are not executory contracts that can be rejected. *See supra* at 12; *In re Montgomery*

Ward, 469 B.R. at 527 ("A financing agreement … is not an executory contract and cannot be rejected under section 365."); *In re Penn Traffic Co*., 466 F.3d at 77 (same); *In re Hudson Valley Care Ctrs.*, 2007 U.S. Dist. LEXIS 56885, at *6 (same); *Hotel Syracuse*, 155 B.R. at 843-44 (same).

Second, the Debtors' former position – that the RSPA was executory – has "been adopted in some way" by this Court, which held that the RSPA was an executory contract that could be rejected pursuant to section 365 of the Bankruptcy Code. *See Opinion* at 22.

Third, allowing the Debtors to assert these two contradictory positions would unfairly advantage them against USAV. The Debtors asserted in their Rejection Motion that the RSPA was executory and were subsequently granted the right to reject that contract. The Debtors cannot now assert a theory that contradicts and undermines their basis for rejection in a second attempt to secure those same rights.

In re Snelson, 305 B.R. 255 (Bankr. N.D. Tex. 2004), is instructive. In that case, applying the doctrine of judicial estoppel, the court rejected the debtor's request to permit recharacterization of a lease as a disguised financing agreement after the debtor had successfully asserted that the lease was an executory contract subject to section 365. *See id.* at 258-59 (holding "that the Debtor was judicially estopped from making its secured financing argument"). This Court should likewise judicially estop the Debtors from claiming that the contracts underlying the USAV Transaction are a secured financing.

C. The Court's Determination that the Contract Rights were Sold in 2017 is Law of the Case.

The Court should also dismiss the Complaint for the additional reason that the Court's determination in the Opinion that the Contract Rights were sold in 2017 is the law of these cases. In the Opinion, the Court found that the Debtors was "sold [to USAV] in 2017" the Contract Rights.

See Opinion at 36. That determination is law of the case. *See Geltzer v. Soshkin (In re Brizinova),* 588 B.R. 311, 323 (Bankr. E.D.N.Y. 2018) (explaining that the law of the case doctrine "generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'" (quoting *Musacchio v. U.S.*, 136 S. Ct. 709, 716 (2016))); *see also id.* at 324 ("Adversary proceedings in bankruptcy are not distinct pieces of litigation; they are components of a single bankruptcy case.") (citing *Bourdeau Bros., Inc. v. Montagne (In re Montagne),* 2010 Bankr. LEXIS 212, 2010 WL 271347, at *6 (Bankr. D. Vt. Jan. 22, 2010)).

The law of the case doctrine applies where (i) "there is identity of parties between the prior and subsequent matters" and (ii) "the prior decision is a final one." *Id*. at 323-24 (discussing authorities). Here, both requirements are easily met as the recharacterization proceeding involves the exact same counterparties to the USAV Agreements as the rejection dispute, and the Rejection Order constitutes a final order of the Court. *See In re United Pan-Europe Communs. N.V.*, 2004 U.S. Dist. LEXIS 223, at *7-8 (S.D.N.Y. Jan. 8, 2004) ("[A] rejection order in a bankruptcy proceeding is a final order."); *In re Alert Holdings*, 1993 U.S. Dist. LEXIS 6507, at *11-17 (S.D.N.Y. May 15, 1993) (same).

For these reasons, the Court's determination that the Contract Rights were sold to USAV in 2017 constitutes the law of the case and, therefore, the transaction cannot be a financing. *See Liona Corp. v. PCH Assocs. (In re PCH Assocs.),* 949 F.2d 585, 589, 592-93 (2d Cir. 1991) (agreeing that the bankruptcy court and district court properly applied the law of the case doctrine to the "findings and conclusions reached…during the course of the section 365 proceedings" in regard to the rights and interests of the parties (although the doctrine did not bar the Second Circuit's appellate review)). For this additional reason, the Complaint should be dismissed.

II. The Complaint Does Not State a Claim Because the USAV Transaction is a Sale, Not a Financing Transaction.

Even if the Court determines that the Debtors are not estopped from relitigating the ownership of the Receivables and Contract Rights, the Complaint must nevertheless be dismissed because it demands recharacterization of the USAV Transaction but this Court has already held that, under applicable Colombian Law, the USAV Transaction constitutes a sale. Indeed, there is no claim to act upon or for which relief may be granted. The Debtors cannot now make a recharacterization demand after they provided to USAV the Colombian Law Opinion, which unambiguously and expressly states that under Colombian law, the core RSPA and many other USAV Transaction agreements memorialize a sale transaction, not a secured financing transaction. Therefore, pursuant to the USAV Transaction, the Debtors conveyed their entire interest in the Receivables sold under the Card Processing Agreements, and therefore the USAV Transaction cannot be recharacterized as a financing agreement, and any sale of Receivables pursuant to the USAV Transaction cannot be unwound.

A. Whether the USAV Transaction Constitutes a True Sale is a Matter of Nonbankruptcy Law.

The Debtors do not appear to dispute that the determination of whether a transaction is a true sale or lending arrangement is the province of nonbankruptcy law. *See Complaint,* ¶ 22 (referring Colombian law in support of Debtors' recharacterization claim). As discussed in the Opinion, the RSPA is governed by Colombian law. *See Opinion*, p, 7, 10, 21. The Court accordingly applied Colombia law to determine whether the USAV Agreements could be treated as a single agreement for purposes of rejection. *See Opinion* at 29. Similarly, the nature of the property rights at issue here will also be determined by the applicable nonbankruptcy law. *See e.g. In re WorldCom, Inc.*, 339 B.R. 56, 63 (Bankr. S.D.N.Y. 2006) (citing *Butner v. United States,* 440

U.S. 48, 54 (1979)) (determining whether a transaction is a true lease or security arrangement is a question of nonbankruptcy law: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."). *See also In re Sterling Optical Corp.*, 371 B.R. 680, 687 (Bankr. S.D.N.Y. 2007) (applying Illinois law to recharacterization dispute). As such, the question of whether USAV or the Debtors own the Receivables or the Contract Rights is to be decided under applicable nonbankruptcy law, which in this proceeding is Colombian law.

B. The USAV Transactions Constitute a True Sale under Colombian Law.

At the closing of the RSPA, the Debtors' Colombian Counsel provided the Colombian Law Opinion to USAV. The Colombian Law Opinion opined that under Colombian Law, the sale and transfer of the Receivables, Contract Rights, and related sale proceeds constituted a valid and irrevocable sale by the Debtors of such rights existing on the date of execution of the RSPA and, as a result, USAV, as purchaser, (i) has the right to receive all future collections derived from the exercise of such Contract Rights and (ii) the Receivables and Contract Rights will not constitute the property of the seller, and the seller has no rights to these assets. *See Colombian Law Opinion*, ¶¶ 8-9. Furthermore, in the *Second Declaration of Jorge Suescún Melo in Support of Objection of the USAV Secured Lender Group to Debtors' Motion for Entry of an Order authorizing Rejection of Certain Executory Contracts* [D.I. 720], submitted August 19, 2020, (the "Second Suescun Declaration"), the USAV Secured Lender Group's Colombian Law expert, Jorge Suescun Melo, agreed with the findings of the Colombian Law Opinion, stating, "In the case of the RSPA, it is clear that the *nomen juris*, or 'real intent,' of the parties was to execute a true and definite sale, as the essential obligations of the RSPA are the ones of a sale and purchase agreement." (citation omitted). *See Second Suescun Declaration*, ¶ 39.[9] Moreover, Professor Suescun opined that it "is

[9] The Court relied on the Second Suescun Declaration to decide that each of the USAV Agreements could not be evaluated as a single economic transaction. *See Opinion*, at 30. Here, the Court may also consider the Colombian

mandatory" that the parties have "an accord . . . that seek[s] to hide the real agreement from third parties." *Id.* ¶ 41. Therefore, under Colombian law, the USAV Transaction is unequivocally a sale, not a financing transaction, and the Debtors should not be allowed to use this recharacterization proceeding to redo the legal analysis upon which the parties have heretofore relied.

In consummating the USAV Transaction, the Debtors and USAV relied upon the Colombian Law Opinion as an authoritative statement of Colombian law. By its terms, it is binding on the Debtors and USAV and makes clear that the parties intended and understood the USAV Transaction to be a sale, not financing, transaction, thus requiring dismissal of the Complaint. *See Colombian Law Opinion*, ¶ 5 ("[t]he Opinion Documents are legal, valid and binding obligations enforceable against the Seller in accordance with their terms."). This Court has previously recognized that "to discern intent a court must look to the words and deeds [of the parties] which constitute objective signs in a given set of circumstances." *See In re Kaplan Breslaw Ash, LLC*, 264 B.R. 309, 325 (Bankr. S.D.N.Y. 2001) (citations and quotations omitted). Here, the Court need not undertake an in-depth analysis of what was intended by the USAV Transaction parties, because the Colombian Law Opinion (and Second Suescun Declaration) make clear, unambiguously, that the RSPA was an irrevocable and legally binding sale, under Colombian law,. The parties thus consummated the USAV Transaction under the understanding that it was for the

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Law Opinion and the Second Suescun Declaration in the instant proceeding because numerous decisions have relied on or acknowledged the usefulness of foreign law opinions when evaluating a motion to dismiss pursuant to FRCP 12(b)(6). *See Winn v. Schafer*, 499 F. Supp. 2d 390, 395-96 n. 28 (S.D.N.Y. 2007) (in dismissing complaint pursuant to either FRCP 12(b)(6) or FCRP 12(b)(1), the difference between the two rules in that instance being "immaterial" for purposes of evaluating dismissal, Court acknowledges that a "court may thus consider a foreign law expert's opinion even on ultimate legal conclusions."); *United States v. A 10th Century Cambodian Sandstone Sculpture*, 2013 WL 1290515, at *8 (S.D.N.Y. Mar. 28, 2013) (In evaluating motion to dismiss complaint pursuant to FRCP 12(b)(6), Court indicates that reliance on a foreign law expert would be appropriate and even necessary when translation of foreign law at issue is ambiguous); *United States v. One Tyrannosaurus Bataar Skeleton*, 2012 WL 5834899, at *9, n. 8 (S.D.N.Y. Nov. 14, 2012) (When considering a motion to dismiss the complaint under FRCP 12(b)(6), court acknowledges that one of the complaint's arguments "raises a question of foreign law that the Court could decide on a motion to dismiss" and further references FRCP 44.1, which states that a court may consider any relevant material or source, including testimony, in determining foreign law.).

sale of the Receivables, Contract Rights, and related proceeds, and the Complaint's allegations to the contrary do not amount to a claim for which relief can be granted and thus must be dismissed.[10]

III. The Recharacterization Proceeding Should be Stayed while the Opinion is Appealed.

If the Court does not dismiss the Complaint, it should stay this action pending the appeals of the Rejection Order. Because the matters decided in the Rejection Order directly weigh on the outcome of this proceeding, this proceeding should be stayed until the appeal of the Rejection Order is decided, which could obviate or moot the need for this Court to undertake the recharacterization analysis at all. Notably, the relief that the Debtors seek in the Complaint could upend the multi-trillion dollar structured finance industry, which includes hundreds of billions of dollars in credit card receivable transactions annually. As this Court noted in *In re Sterling Optical Corp.*, 371 B.R. 680, 684, n. 4 (Bankr. S.D.N.Y. 2007), there are significant negative consequences of recharacterizing a purported sale transaction as a secured financing transaction: "[w]hether a Court should 'recharacterize' a transaction denominated as a sale as, in fact, involving a secured financing is controversial, to say the least. Asset-backed transactions, using bankruptcy-remote special purpose entities as financing vehicles, ostensibly involving 'true sales,' are now a very significant means for raising capital. Caution is clearly in order when articulating legal principles supporting recharacterization because of the potential for unintended consequences for the capital markets."

[10] Because the recharacterization claim should be dismissed on estoppel or law of the case grounds, or for failure to state a claim, the Debtors' claim that USAV's back-up security interests are cut off under section 552(a), which is predicated on the Debtors successfully recharacterizing the sale as a secured financing, necessarily must also fail. *See Complaint* ¶ 3, 25. Even if the Debtors could successfully argue a recharacterization claim, however, their second count fails because USAV's back up security interests would extend to all proceeds of the Contract Rights (i.e., Collections (as defined in the RSPA) and therefore the exception to section 552(a) set forth in section 552(b) applies. *See Second Suescun Decl.* ¶¶ 62-66; *Declaration of V. Lines in Support of the USAV Lender Group's Supplemental Brief and Sur-Reply* [D.I. 719] ¶¶ 11-12.

With respect to a court's power to stay a proceeding, the Supreme Court has held, "…the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). The Supreme Court further explained that the party seeking the stay must make a "clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else" and furthermore, that such suspension of the proceedings must not be indefinite. *See id*. at 255. Courts in the Second Circuit consider several factors to further determine the appropriateness of a stay: "(1) the private interests of the plaintiffs in proceeding expeditiously with the [] litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. *See Readick v. Avis Budget Grp., Inc.*, 2014 WL 1683799, at *2 (S.D.N.Y. Apr. 28, 2014). The Second Circuit has further affirmed that: "[t]hese factors are to be balanced, with the principal objective being the avoidance of unfair prejudice." *Id*. at *2 (citing *Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc. v. Lafarge N. Am., Inc.*, 474 F.Supp.2d 474, 482 (S.D.N.Y. 2007) *aff'd sub nom. New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102 (2d Cir. 2010)).

The *Readick* factors are particularly applicable in this instance because here, as in *Readick*, there is an ongoing proceeding whose final outcome will weigh directly on the resolution of the present proceeding. In *Readick*, the Court agreed to stay one putative class action filed in the Southern District of New York pending resolution of a parallel putative class action filed in the District of New Jersey. Applying and balancing the factors, the Court found, (i) although a lengthy

delay was not in the interest of the plaintiffs, New York consumers, and would be inconvenient to them, they would likely be bound by the a Court decision in the New Jersey action, which was in a more advanced stage than the New York action, and both proceedings involved substantially similar factual and legal issues (customers alleged they were wrongly charged a convenience fee for Avis' electronic toll collection devices), thus favoring delay of the New York Action; (ii) Defendant Avis would not be prejudiced because suspending the New York class action would save Avis costs on "defending duplicative litigation in multiple forums;" (iii) the stay was in the Court's interest because its implementation would "conserve judicial resources [and] eliminate the risk of inconsistent adjudications;" and (iv) because staying the action was in the interest of judicial economy, it was also in the public interest. *See id.* at *2-6. The Court did not address whether staying the action would impact the interests of persons not parties to the litigation because neither party addressed that factor.

Here, many of the factors that favored granting the stay in *Readick* also favor granting a stay in the present proceeding. First, the stay of the recharacterization proceeding would be for a limited duration, only until the appeal of the Opinion is decided, and all parties would benefit from obtaining that ruling. Indeed, the analysis on which both proceedings revolve is whether the RSPA constitutes a sale agreement and undertaking this analysis again would be a waste of resources because the outcome of both proceedings will be identical if the District Court ultimately decides, (as this Court has already done previously), that the Receivables, Contract Rights, and proceeds are property of USAV, not the estates. Also, as in *Readick*, the Rejection Motion preceded the current proceeding, and both proceedings deal with substantially similar facts and circumstances (indeed, many of the very same agreements), such that it would save expense and improve judicial

economy if the current proceeding is stayed to allow the first proceeding to continue to its conclusion. For that reason, the stay is also in the public's interest.

In conclusion, because the stay of the recharacterization proceeding would be for a limited duration, only until the appeal of the Rejection Order is decided upon, it would benefit all parties by avoiding duplicative and unnecessary litigation. In addition, both proceedings concern the same issues concerning the interpretation of the RSPA and this Court will be bound by the decision of the District Court in connection with the appeal of the Rejection Order.

CONCLUSION

For the reasons discussed herein, USAV respectfully requests that the Court dismiss the Complaint, or, in the alternative, stay the recharacterization proceeding, and grant such other and further relief as is just and proper.

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New York, New York

/s/ Sheron Korpus

Sheron Korpus
David S. Rosner
David J. Mark
Andrew Golden
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800
Email: SKorpus@kasowitz.com
DRosner@kasowitz.com
DMark@kasowitz.com
AGolden@kasowitz.com

Counsel for USAVflow Limited