Dennis F. Dunne
Evan R. Fleck
MILBANK LLP
55 Hudson Yards
New York, New York 10001
Telephone: (212) 530-5000
Facsimile: (212) 530-5219

Gregory Bray
MILBANK LLP
2029 Century Park East
33rd Floor
Los Angeles, CA 90067
Telephone: (424) 386-4000
Facsimile: (213) 629-5063

Andrew M. Leblanc
Aaron L. Renenger
MILBANK LLP
1850 K Street NW
Suite 1100
Washington, D.C. 20006
Telephone: (202) 835-7500
Facsimile: (202) 263-7586

Counsel for Debtors and Debtors-In-Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
AVIANCA HOLDINGS S.A., *et al.*,	Chapter 11
Debtors.[1]	Case No. 20-11133 (MG)
	(Jointly Administered)
AVIANCA HOLDINGS S.A., *et al.*,	
Plaintiffs.	**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**
v.	
USAVFLOW LIMITED,	
Defendant.	Adv. Proc. 20-1189

[1] The Debtors in these 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 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 2

ARGUMENT 4

I. ISSUE PRECLUSION, ESTOPPEL, AND LAW OF THE CASE DO NOT WARRANT DISMISSAL OF THE DEBTORS' COMPLAINT 4

A. The Rejection Litigation Did Not Trigger Issue Preclusion 5

i. The True Nature of the USAV Transaction Was Not Raised in the Rejection Litigation 5

ii. The True Nature of the USAV Transaction Was Never "Actually Litigated and Decided" in the Rejection Litigation 10

iii. The Debtors Did Not Have a Full and Fair Opportunity to Litigate the True Nature of the USAV Transaction 12

iv. Resolution of the True Nature of the USAV Transaction Was Not Necessary to Support a Valid and Final Judgment on the Merits of the Rejection Motion 13

B. The Debtors Are Not Judicially Estopped from Seeking Recharacterization 13

C. There Is No Law of the Case that Prevents Recharacterization 15

II. THE COMPLAINT STATES A CLAIM TO RECHARACTERIZE THE USAV TRANSACTION AS A FINANCING 16

A. Either Colombian Law or New York Law Will Apply to the Debtors' Recharacterization Claim 17

B. Under Either Colombian or New York Law, the USAV Transaction Likely Would Be Recharacterized As a Financing 19

C. Recharacterization Claims Are Rarely Resolved on Motions to Dismiss 23

III. THERE IS NO CAUSE TO STAY THIS ADVERSARY PROCEEDING PENDING THE REJECTION APPEAL 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....16

Autobacs Strauss, Inc. v. Autobacs Seven Co. (In re Autobacs Strauss, Inc.),
473 B.R. 525 (Bankr. D. Del. 2012).....23

Ball v. A.O. Smith Corp.,
451 F.3d 66 (2d Cir. 2006).....5, 11

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....16

Huntington Nat'l Bank Co. v. Alix (In re Cardinal Indus., Inc.),
146 B.R. 720 (Bankr. S.D. Ohio 1992).....7

Cayuga Indian Nation of N.Y. v. Pataki,
188 F. Supp. 2d 223 (N.D.N.Y. 2002).....14

Chambers v. Time Warner, Inc.,
282 F.3d 147 (2d Cir. 2002).....24

In re Cole Bros., Inc,
137 B.R. 647 (Bankr. W.D. Mich. 1992).....8

Control Data Corp. v. Zelman (In re Minges),
602 F.2d 38 (2d Cir. 1979).....4

Statek Corp. v. Dev. Specialists, Inc. (In re Coudert Bros. LLP),
673 F.3d 180 (2d Cir. 2012).....17

Endico Potatoes v. CIT Grp./Factoring,
67 F.3d 1063 (2d Cir. 1995).....21

Friedman's Liquidating Tr. v. Goldman Sachs Credit Partners, L.P. (In re Friedman's Inc.),
452 B.R. 512 (Bankr. D. Del. 2011).....23

Bianco v. Erkins (In re Gaston & Snow),
243 F.3d 599 (2d Cir. 2001).....17, 18

Geltzer v. Soshkin (In re Brizinova),
588 B.R. 311 (Bankr. E.D.N.Y. 2018).....15

In re Homeplace Stores, Inc.,
228 B.R. 88 (Bankr. D. Del. 1998).....23

Hotel Syracuse, Inc. v. City of Syracuse Industrial Development Agency (In re Hotel Syracuse, Inc.),
155 B.R. 824 (Bankr. N.D.N.Y. 1993).....9, 10, 11

Columbia County Industrial Development Agency v. Hudson Valley Care Centers, Inc. (In re Hudson Valley Care Centers, Inc.),
2007 WL 2261585 (N.D.N.Y. Aug. 2, 2007).....9

Hugh O'Kane Elec. Co., LLC v. MasTec N. Am., Inc.,
19 A.D. 3d 126, 127 (1st Dep't 2005).....18

Levin v. City Tr. Co. (In re Joseph Kanner Hat Co.),
482 F.2d 937 (2d Cir. 1973).....22

Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Mgmt.,
628 F. Supp. 2d 312 (E.D.N.Y. 2009).....15

L.J. Hooker Int'l Fla., Inc. v. Gelina (In re Hooker Invs., Inc.),
131 B.R. 922 (Bankr. S.D.N.Y. 1991).....5, 13, 15

Lamonica v. Tilton (In re TransCare Corp.),
602 B.R. 234 (Bankr. S.D.N.Y. 2019).....23

Major's Furniture Mart, Inc. v. Castle Credit Corporation, Inc.,
602 F.2d 538 (3d Cir. 1979).....22

Marvel Characters, Inc. v. Simon,
310 F.3d 280 (2d Cir. 2002).....12

In re Montgomery Ward, L.L.C.,
469 B.R. 522 (Bankr. D. Del. 2012).....8

Morgan Art Found. Ltd. v. McKenzie,
2019 U.S. Dist. LEXIS 109997 (S.D.N.Y. July 1, 2019).....25

New Hampshire v. Maine,
532 U.S. 742 (2001).....14

In re O.P.M. Leasing Servs., Inc.,
79 B.R. 161 (S.D.N.Y. 1987).....4

Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.),
4 F.3d 1095 (2d Cir. 1993).....5

Liona Corp. v. PCH Assocs. (In re PCH Assocs.),
949 F.2d 585 (2d Cir. 1991).....23

COR Route 5 v. Penn Traffic Co. (In re Penn Traffic Co.),
466 F.3d 75 (2d Cir. 2006).....9

Duke Energy Royal, LLC v. Pillowtex Corp. (In re Pillowtex, Inc.),
349 F.3d 711 (3d Cir. 2003).....23

In re Pittsburgh Sports Assocs. Holding Co.,
239 B.R. 75 (Bankr. W.D. Pa. 1999).....8

Purdy v. Zeldes,
337 F.3d 253 (2d Cir. 2003).....11

Fuller v. Rea (In re Rea),
606 B.R. 531 (Bankr. S.D.N.Y. 2019).....12, 13

Readick v. Avis Budget Group, Inc.,
2014 U.S. Dist. LEXIS 58784 (S.D.N.Y. Apr. 25, 2014).....25

In re Snelson,
305 B.R. 255 (Bankr. N.D. Tex. 2003).....15

Sportsman's Warehouse, Inc. v. McGillis/Eckman Invs.-Billings, LLC (In re Sportsman's Warehouse, Inc.),
457 B.R. 372 (Bankr. D. Del. 2011).....8

Sterling Vision, Inc. v. Sterling Optical Corp. (In re Sterling Optical Corp.),
371 B.R. 680 (Bankr. S.D.N.Y. 2007).....7

In re Teligent, Inc.,
268 B.R. 723 (Bankr. S.D.N.Y. 2001).....8

In re Great Atl. & Pac. Tea Co., Inc.,
544 B.R. 43 (Bankr. S.D.N.Y. 2016).....5

Weisfelner v. Blavatnik (In re Lyondell Chem. Co.),
544 B.R. 75 (Bankr. S.D.N.Y. 2016).....24

Whinnery v. Bank of Onalaska (In re Taggatz),
106 B.R. 983 (Bankr. W.D. Wis. 1989).....7

Statutes

11 U.S.C. § 365.....3, 7, 8, 9

11 U.S.C. § 365(c)(2).....7

11 U.S.C. § 552.....3

Other Authorities

Federal Rule of Bankruptcy Procedure 7012(b).....16

Federal Rule of Civil Procedure 12(b)(6).....16, 17

PRELIMINARY STATEMENT

USAV[1] advances only two arguments in its motion to dismiss the Debtors' complaint (the "Motion"). Each argument is fatally undermined by the facts and the law.

First, USAV argues that the Court's decision on the Debtors' *Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts* [Bankr. Do. No. 306] (the "Rejection Motion") forecloses the Debtors from pursuing recharacterization of the USAV Transaction as a financing. This argument distorts the Court's holding in that matter. But whether certain contracts comprising part of the USAV Transaction were executory, and could therefore be rejected, is an entirely separate question from whether the USAV Transaction is a disguised financing. As the Court recognized at the hearing on the Rejection Motion (and as counsel to the USAV Secured Lenders agreed), whether the USAV Agreements are executory does not "hinge on whether this was a true sale or secured financing."[2] The Debtors did not put the question of whether the USAV Transaction was a true sale or a disguised financing before the Court in the rejection litigation,[3] and indeed the Court explicitly declined to address the issue.[4]

Second, USAV argues that the Complaint should be dismissed for failure to state a claim because the legal opinion prepared by the Debtors' outside counsel and shared with USAV at the closing of the USAV Transaction "is binding on the Debtors and USAV and makes clear

---

1 Capitalized terms used but not defined herein have the meanings ascribed to them in the Debtors' complaint [Do. No. 1] (the "Complaint").

2 August 26, 2020 Rejection Hearing Transcript (the "Rejection Hr'g Tr.") at 92:12-14, 16-20.

3 *See* Debtors' Reply Brief in Support of the Rejection Motion [Bankr. Do. No. 683] (the "Debtors' Reply Brief") ¶ 47 n.11 ("While the Debtors do not agree that the RSPA was a sale of the Receivables and Contract Rights (it was a disguised financing—*see* Do. No. 307), the issue of whether the RSPA was a 'true sale' is not at issue in this Motion, nor necessary to its resolution.").

4 *See Memorandum Opinion Granting in Part and Denying in Part Debtors' Motion to Reject the USAV Agreements* [Bankr. Do. No. 850] (the "Rejection Opinion") at 4 n.3 (recognizing the Debtors' separate filing of the Complaint seeking recharacterization and agreeing with the Debtors' position that it was "not . . . necessary to reach the issues raised in the Complaint").

that the parties intended and understood the USAV Transaction to be a sale, not financing, transaction, thus requiring dismissal of the Complaint." Motion at 18. But it is simply untrue that a legal opinion as to the nature of a transaction given at the time the transaction was entered into is conclusive as to the true nature of that transaction. Such a rule of law would virtually foreclose the ability to recharacterize transactions, as nearly all sophisticated parties require such opinions to be issued as a condition to closing.

USAV has failed to articulate any basis on which the Complaint should be dismissed. The Debtors respectfully submit that the Motion must be denied.

FACTUAL BACKGROUND

In December 2017, the Debtors entered into a series of related agreements with USAV (the "USAV Agreements") pursuant to which the Debtors purported to "sell" certain of their Contract Rights and Receivables under credit card processing agreements with AMEX and Credomatic (the "Card Processing Agreements"), in exchange for an initial "purchase price" of $150 million plus continuing monthly installments of an additional "purchase price" (the "USAV Transaction"). As part of the same transaction, USAV entered into a loan agreement (the "Loan Agreement") with certain lenders (the "Lender Group") and Citibank, as Administrative and Collateral Agent, pursuant to which USAV borrowed $150 million. USAV's obligations under the Loan Agreement are secured by, among other things, the receivables from the Card Processing Agreements. Each of Avianca Holdings S.A., Taca International Airlines S.A., Avianca Costa Rica S.A., and Trans American Airlines S.A. guaranteed USAV's obligations under the Loan Agreement.

On June 23, 2020, the Debtors filed (i) the Rejection Motion, seeking authority to reject certain of the USAV Agreements; and (ii) the Complaint, seeking to recharacterize the USAV Transaction as a financing and for relief pursuant to section 552 of the Bankruptcy Code.

In the Rejection Motion and throughout litigation thereon (the "Rejection Litigation"), the Debtors asked this Court to make findings on two narrow issues: (1) whether the USAV Agreements were executory; and (2) if so, whether rejecting such agreements would be a reasonable exercise of the Debtors' business judgment. *See* Rejection Motion ¶¶ 3, 4; Debtors' Reply Brief ¶¶ 2, 8; Debtors' Supplemental Brief in Support of the Rejection Motion [Bankr. Do. No. 715] (the "Debtors' Supplemental Brief") ¶ 2; Rejection Hr'g Tr. at 11:5-10. Notably, the Debtors ***expressly disclaimed*** litigating any issues relevant to the Complaint in the Rejection Litigation. *See* Debtors' Reply Brief ¶ 47 n.11; Rejection Hr'g Tr. at 36:15-37:9; 133:15-19.[5]

On September 4, 2020, the Court entered the Rejection Opinion, holding that "the RSPA and the Undertaking Agreement are executory contracts that the Debtors may reject pursuant to section 365 of the Bankruptcy Code" and that the "remaining USAV Agreements are not executory contracts that can be rejected by the Debtors." Rejection Opinion at 3-4. The Court found that the Debtors could regain cash flow from the Receivables through entry into new card processing agreements. *See* Rejection Opinion at 36-37 ("[T]he result of rejection is to relieve the Debtors of their future performance obligations to USAV, including the unperformed obligation under section 2.01(a)(ii) of the RSPA to sell to USAV the contract rights arising under new credit

[5] While the Debtors initially indicated that, upon the successful resolution of the Rejection Motion, the Debtors intended to withdraw the Complaint (Complaint ¶ 2 n.2; Rejection Motion ¶ 1 n.2), that intention was premised on a ruling that would have enabled the Receivables to return to the Debtors without necessarily replacing the Card Processing Agreements. At the evidentiary hearing on the Rejection Motion on August 26, 2020 (the "Rejection Hearing"), the Debtors clarified that if the Court were to conclude that the only path by which the Debtors could regain access to cash flow from the Receivables was to engage new credit card servicers, "we would likely pursue our recharacterization petition in full force." Rejection Hr'g Tr. at 36:15-23.

Pending resolution of the Rejection Motion, the parties agreed to delay the response deadline for the Complaint to August 28, 2020. *See Order Enlarging the Time Under Which Defendant Must Respond to the Complaint* [Do. No. 6]. The parties later agreed to extend the response deadline through September 25, 2020. *See Amended Order Enlarging the Time Under Which Defendant Must Respond to the Complaint* [Do. No. 8].

card processing agreements that the Debtors may seek to enter with new credit card processors."). Accordingly, the Debtors seek to pursue the Complaint.

On September 17, 2020, USAV and the Lender Group (collectively, the "USAV Parties") each filed notices of appeal from certain findings in the Rejection Opinion. *See* USAV Notice of Appeal [Bankr. Do. No. 960]; Lender Group Notice of Appeal [Bankr. Do. No. 959]. The notices of appeal state that the USAV Parties are appealing from the Rejection Opinion only "insofar as the Order granted in part" the Rejection Motion; the USAV Parties are not appealing from the Court's findings (i) that the USAV Agreements cannot be treated as a single contract; (ii) that the USAV Agreements other than the RSPA and Undertaking Agreement are not executory; and (iii) related to the effect of rejection. *See id*.

On September 25, 2020, USAV filed the Motion, and the Lender Group filed a joinder thereto [Do. No. 14].

ARGUMENT

I. ISSUE PRECLUSION, ESTOPPEL, AND LAW OF THE CASE DO NOT WARRANT DISMISSAL OF THE DEBTORS' COMPLAINT

None of issue preclusion, estoppel, or law of the case warrants dismissal of the Complaint for the simple reason that the Court's findings in connection with the Rejection Opinion are wholly distinct from the findings necessary to making a recharacterization determination. Rejection requires two essential findings: that the agreements in issue are executory, and that rejection would be a sound exercise of the debtor's business judgment. *See, e.g., Control Data Corp. v. Zelman (In re Minges)*, 602 F.2d 38, 43 (2d Cir. 1979); *In re O.P.M. Leasing Servs., Inc.*, 79 B.R. 161 (S.D.N.Y. 1987). Neither of these findings speaks to whether the transaction effectuated through those agreements is a true sale or a disguised financing.

To obscure this simple fact, USAV claims that finding a particular contract to be executory is tantamount to a finding that it cannot be a financing. *See* Motion at 1, 8, 9, 11, 12, 13. This is wrong. A finding that a contract is executory is ***not*** the same as an affirmative finding that the contract is not a financing—as the Court expressly acknowledged at the Rejection Hearing[6] and as case law confirms.[7] Yet this is the only ground on which USAV bases its arguments for issue preclusion, judicial estoppel, and law of the case. Accordingly, the Motion must be denied.

A. The Rejection Litigation Did Not Trigger Issue Preclusion

A prior judgment may preclude litigation of the same issue in a subsequent proceeding if all of the following are present: "(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." *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006) (emphases added) (citation and internal quotation marks omitted). None of these factors is met here.

i. The True Nature of the USAV Transaction Was Not Raised in the Rejection Litigation

In an attempt to establish that identical issues have been previously raised, USAV incorrectly asserts that "[t]he Rejection Motion raised the issue of whether the agreements were a

---

[6] *See* Rejection Hr'g Tr. at 92:16-18 ("Either a contract, whether it was a true sale or a secured financing if there were future obligations, material obligations on both parties' part, could be rejected.").

[7] As the Second Circuit has held, a decision to allow a debtor to assume or reject a contract is "[i]n no way . . . a formal ruling on the underlying disputed issues, and thus will receive no collateral estoppel effect." *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993); *see also In re Great Atl. & Pac. Tea Co., Inc.*, 544 B.R. 43, 45 (Bankr. S.D.N.Y. 2016) (stating that courts should not "determine the parties' substantive rights" on a debtor's motion to reject a lease and sublease); *L.J. Hooker Int'l Fla., Inc. v. Gelina (In re Hooker Invs., Inc.)*, 131 B.R. 922, 931 (Bankr. S.D.N.Y. 1991) ("Requiring the Debtor to raise and litigate the more complex allegations . . . raised in the adversary proceeding would thwart Congress' intent in directing that a rejection motion be resolved as a 'fast track,' contested matter. To hold otherwise would essentially force a debtor to carry a potentially burdensome contract pending the resolution of an adversary proceeding. . . .").

sale, so as to permit rejection." USAV Motion at 10. But USAV can point to no such statement in the Debtors' extensive briefing or hearing transcripts in the Rejection Litigation—***it is simply not true*** that the character of the USAV Transaction was ever in issue in the Rejection Litigation. To the contrary, the Debtors repeatedly noted that "whether the [USAV Transaction] was a 'true sale' is ***not*** at issue in this [Rejection] Motion, ***nor necessary*** to its resolution." Debtors' Reply Brief ¶ 47 n.11 (emphases added); *see also* Rejection Hr'g Tr. at 35:22-36:1; 92:12-14, 16-18.

USAV's only supporting reference to the record claims that the Debtors placed the ownership of the Receivables in issue by stating that the result of rejection of the USAV Agreements would allow "the receivables generated by the Debtors [to] flow into the estates." USAV Motion at 11 (citing Rejection Motion ¶ 35). Not so. This lone quotation from the Rejection Motion speaks only to the Debtors' arguments regarding the ***effect*** of rejection of the RSPA. The Debtors argued that rejection would return future Receivables to the estate because the RSPA and certain related USAV Agreements dictated as much: once USAV became entitled to a claim for liquidated damages (the Debtors argued), the USAV Agreements required the Receivables to flow back to the Debtors. At no time did the Debtors seek a finding regarding the "true" ownership of the Receivables. And the Debtors echoed this position at argument: "We believe that the right outcome here is that, upon rejection, the receivables flow to [the Debtors] through the USAVflow structure." Rejection Hr'g Tr. at 36:5-7.

As a second step in its misguided argument, USAV contends that there is a *per se*, inviolable rule that financings cannot be rejected under section 365 of the Bankruptcy Code.[8] In so arguing, however, USAV ignores an extensive body of case law finding that financing

[8] *See, e.g.*, Motion at 2 ("[I]f the Court also finds that the USAV Transaction consummated under the RSPA and the Undertaking Agreement actually constitutes a disguised financing arrangement, then the RSPA and Undertaking Agreement could not be rejected under section 365."); *id.* at 7 ("If the transaction was a financing, as alleged in the Complaint, then the Debtors could not reject the RSPA or the Undertaking Agreement.").

arrangements in which both parties owe ongoing obligations ***may*** be rejected. *See Huntington Nat'l Bank Co. v. Alix (In re Cardinal Indus., Inc.)*, 146 B.R. 720, 729 (Bankr. S.D. Ohio 1992) (finding a credit agreement to be an executory contract where material obligations were due on both sides); *Whinnery v. Bank of Onalaska (In re Taggatz)*, 106 B.R. 983, 991 (Bankr. W.D. Wis. 1989) (finding that a promissory note with performance due on both sides was an executory contract). Indeed, this Court in *Sterling Vision, Inc. v. Sterling Optical Corp. (In re Sterling Optical Corp.)*, 371 B.R. 680, 685-86 (Bankr. S.D.N.Y. 2007), considered whether an executory contract that had already been rejected was a true sale or disguised financing. And while the Court there declined to determine whether the transaction was a true sale or a financing, it refrained from doing so not because the prior rejection precluded such a finding, but because the same result would obtain regardless of the "true" nature of that transaction. Thus, determining whether the transaction was a sale or a financing was unnecessary. *See id.* at 687.

USAV contends that when the Debtors succeeded in establishing that the RSPA could be rejected, the Debtors necessarily established that the USAV Transaction was a sale. USAV appears to be conflating the statutory schemes governing assumptions/assignments and rejections of executory contracts. While section 365(c)(2) of the Bankruptcy Code expressly prohibits a debtor from ***assuming or assigning*** any agreement "to make a loan, or extend other debt financing or financial accommodations" (11 U.S.C. § 365(c)(2)), no statutory provision prohibits a debtor from ***rejecting*** such an agreement. There are clear policy reasons behind this distinction: the fundamental unfairness of forcing third parties to ***continue*** extending credit to a bankrupt,[9] while plainly in issue when a debtor attempts to assume a contract, is not implicated

[9] *See In re Teligent, Inc.*, 268 B.R. 723, 737 (Bankr. S.D.N.Y. 2001) ("Section 365(c)(2) was intended to deal with a specific fear: forcing a lender to extend *new* cash or *new* credit to a trustee or his assignee through the assumption of a pre-petition financial agreement."); *Sportsman's Warehouse, Inc. v. McGillis/Eckman Invs.-Billings, LLC (In re Sportsman's Warehouse, Inc.)*, 457 B.R. 372, 392 (Bankr. D. Del. 2011)

when a debtor ***rejects*** a contract. So while it may not be possible to ***assume*** a contract and then later seek to recharacterize it, rejection and recharacterization are not mutually exclusive.

Case law accords: courts have engaged in recharacterization analyses following a debtor's rejection of the same agreements. *See In re Montgomery Ward, L.L.C.*, 469 B.R. 522, 527 (Bankr. D. Del. 2012) (during post-confirmation claims resolution process, court considered whether a previously rejected lease was in fact a financing: "[D]eciding the appropriate treatment of the claims requires the Court to first determine the character of the agreements. Accordingly, the Court has jurisdiction to determine the true nature of the Sublease Agreement."); *In re Pittsburgh Sports Assocs. Holding Co.*, 239 B.R. 75, 80 (Bankr. W.D. Pa. 1999) (refusing to apply the doctrine of judicial estoppel and holding that the debtor had "not made a judicial admission" in rejection litigation that the agreement was a true lease and could therefore seek to recharacterize it as a disguised financing). This Court also recognized exactly this at the hearing on the Rejection Motion. *See* Rejection Hr'g Tr. at 92:16-20 (Court: "Either a contract, whether it was a true sale or a secured financing if there were future obligations, material obligations on both parties' part, could be rejected." Mr. Kurtz: "Right, Your Honor. I don't disagree with you.").

The cases USAV cites as support for its argument are inapposite. In *Penn Traffic*, for example, the Second Circuit considered whether the post-petition actions of a non-debtor might render a contract—executory as of the petition date—*non*-executory for purposes of section 365. Contrary to USAV's characterization of the case, the Second Circuit did ***not*** address whether a financing may be executory. *See COR Route 5 Co. v. Penn Traffic Co. (In re Penn Traffic Co.)*,

("The purpose behind § 365(c)(2) is to avoid forcing a pre-petition creditor to continue to provide financing to a debtor.") (citations and internal quotation marks omitted); *In re Cole Bros., Inc*, 137 B.R. 647, 652 (Bankr. W.D. Mich. 1992) ("If the purpose of the executory contract is to provide financing, then the debtor should not be allowed to assume it and force the creditor to continue its obligation to provide financial benefit at its own risk."), *rev'd*, 154 B.R. 689 (W.D. Mich. 1992).

466 F.3d 75, 77 (2d Cir. 2006) (dismissing appeal from *In re Penn Traffic Co.*, 2005 WL 2276879 (S.D.N.Y. Sept. 16, 2005)).[10] *Columbia County Industrial Development Agency v. Hudson Valley Care Centers, Inc. (In re Hudson Valley Care Centers, Inc.)*, 2007 WL 2261585 (N.D.N.Y. Aug. 2, 2007), too, lends no support to USAV's position. While *Hudson Valley* states, parenthetically, that a disguised financing generally is ineligible for treatment as an executory contract, it does so while citing to *Penn Traffic*—a case which, as just discussed, does not reach any such holding. The *Hudson Valley* court then engaged in a traditional rejection analysis, ultimately concluding that the agreements in issue were not executory because there were no material obligations outstanding on both sides of the transaction. *See id*. at *9. The *Hudson Valley* court did not hold that disguised financings can never be executory.

Similarly, while USAV cites *Hotel Syracuse, Inc. v. City of Syracuse Industrial Development Agency (In re Hotel Syracuse, Inc.)*, 155 B.R. 824 (Bankr. N.D.N.Y. 1993) for the broad proposition that a financing can never be an executory contract, the court's analysis in that case does not go so far. *Hotel Syracuse* held only that, "[w]here one party has already completed or substantially completed performance, *e.g.*, by delivering possession of goods or property and holds legal title in trust solely to secure payment of the amount financed, ***and the only substantial obligation for the receiving party is to complete payment***, the contract is not executory for purposes of Code § 365." *Id.* at 843 (emphasis added). Because the whole of the financing in *Hotel Syracuse* had been provided, ***and*** because the only remaining performance due by the debtor was the repayment of money, the court held that the agreement was not executory. *See id*. at 843.

[10] Indeed, the Second Circuit's only mention of a disguised financing in the entire decision simply noted, in a footnote, that the contractual counterparty "presses on this appeal an argument, advanced below and explicitly rejected by the District Court, that the Project Agreement was in reality a disguised financing arrangement and thus ineligible for treatment as an executory contract at any stage of Penn Traffic's bankruptcy proceedings." *In re Penn Traffic Co.*, 466 F.3d at 77 n. 2.

Here, by contrast, outstanding material performance obligations beyond the mere payment of money remained on both sides of the USAV Transaction on the petition date, as the Court held in the Rejection Opinion. That the *Hotel Syracuse* court found the specific transaction it considered not to be executory does not support the proposition that the USAV Transaction, having been found executory, cannot now be found to be a financing arrangement (let alone a hard-and-fast rule that no financing arrangement may ever be executory).

ii. The True Nature of the USAV Transaction Was Never "Actually Litigated and Decided" in the Rejection Litigation

USAV advances much the same argument to satisfy the second prong of the collateral estoppel analysis, again stating that "the issues of ownership and rejectability were actually and necessarily decided in the Rejection Motion hearing." USAV Motion at 11. But while "rejectability" was decided—an issue which does not bear on recharacterization, as discussed *supra*—the issue of "ownership" was not litigated at all, much less "actually" or "necessarily" decided. The Complaint claims that the true economic nature of the USAV Transaction is that of a disguised financing. Complaint ¶ 2. The Rejection Litigation, by contrast, dealt only with whether material obligations remained outstanding for both parties, and whether rejecting the agreements was a reasonable exercise of the Debtors' business judgment. Neither of these issues involves the key inquiry of the true economic nature of the USAV Transaction.

USAV's own cited cases again cut against it. The cases cited in the Motion are clear that, for issue preclusion to apply, the prior proceeding must feature "specific factual findings" resolving issues substantially identical to those in the present proceeding. *See, e.g.*, *Ball*, 451 F.3d at 69-70 (affirming the lower court's application of issue preclusion to bar re-litigation of an issue, relying on the original court's "specific factual findings" of an "equivalent" nature to the findings required in the present litigation); *Purdy v. Zeldes*, 337 F.3d 253, 258, 260 (2d Cir.

2003) (engaging in a detailed comparison of the elements of the claim in the prior proceeding with those in the present one, holding that those elements "mirror[ed]" one another so that allowing the plaintiff's claim to move forward would "require a second determination" of the same issue).

The underlying elements of the Debtors' recharacterization claim do not "mirror" those the Court analyzed in the Rejection Opinion. The Court made no specific findings as to whether, for example, the seller retained the hallmark risks of ownership, or the purchaser retained recourse to the seller for any losses, or the parties' purpose in negotiating and executing the USAV Transaction was to effect a financing. *See infra*, at II.B. These factors, necessary to a recharacterization analysis under Colombian or New York law, are irrelevant to the determination of whether there remain sufficiently material obligations on both sides of a transaction to render a contract executory or whether rejection is an appropriate exercise of a debtor's business judgment. And as was appropriate, those issues were not raised in the Rejection Litigation, but were expressly reserved for this adversary proceeding. *See* Debtors' Reply Brief in Support of the Rejection Motion ¶ 47 n.11 ("[T]he issue of whether the RSPA was a 'true sale' is not at issue in this Motion, nor necessary to its resolution.").

Hotel Syracuse, cited in the Motion, is instructive. There, creditors argued that the debtor should be collaterally estopped from denying that the lease at issue was a true lease because the debtor previously admitted the lease's validity in state court proceedings: the debtor sought an injunction in state court and there represented that it held a commercial lease. 155 B.R. at 831 n.6. Despite that prior representation, the court found the debtor was ***not precluded*** from seeking to recharacterize the lease because the judge in the prior proceeding had no reason to determine whether the lease might be a true lease or a financing transaction. Because the state court did not make any "express finding as to the nature of the Lease and it does not appear that the issue was

necessarily determined there," the court held that the debtor was not collaterally estopped from subsequently seeking to recharacterize the lease as a financing. *Id*. at 835. The same is true here.

iii. The Debtors Did Not Have a Full and Fair Opportunity to Litigate the True Nature of the USAV Transaction

The true nature of the USAV Transaction was not "fully and fairly litigated" in the Rejection Litigation. It is disingenuous to argue otherwise, particularly as Debtors' counsel and the Court expressly noted that those issues would be reserved. *See* Debtors' Reply Brief ¶ 47 n.11 ("whether the [USAV Transaction] was a 'true sale' is not at issue in this [Rejection] Motion, nor necessary to its resolution"); Rejection Opinion at 4 n.3 (reflecting Debtors' position that it was "not . . . necessary to reach the issues raised in the Complaint").

USAV cites *In re Rea*[11] for the proposition that the Debtors had a full and fair opportunity to litigate the economic nature of the USAV Transaction, given the high degree of their participation in the Rejection Litigation. *See* USAV Motion at 12.[12] But full participation in a prior proceeding will not trigger issue preclusion if the prior proceeding ***did not consider the same issues*** as the new proceeding. USAV, by ignoring that the Rejection Litigation did not consider the issues raised in the Complaint, fails to engage at all with the second prong of the test applied in *In re Rea*: the nature of the record. *In re Rea*, 606 B.R. at 539. Here, the record reveals that the prior litigation did not address—much less "full[ly] and fair[ly]" address—the true nature of the USAV Transaction.

---

[11] *Fuller v. Rea (In re Rea),* 606 B.R. 531 (Bankr. S.D.N.Y. 2019).

[12] The court in *In re Rea* applied New York law of collateral estoppel, which is not applicable to the matter at bar. Unlike in *Rea*, where plaintiff was trying to estop litigation in a federal court of an issue from a prior state court proceeding, USAV is attempting to use prior federal litigation to preclude a subsequent federal action. In such cases, the federal law of issue preclusion is applicable, not state law. *See Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002).

iv. Resolution of the True Nature of the USAV Transaction Was Not Necessary to Support a Valid and Final Judgment on the Merits of the Rejection Motion

In the final prong of issue preclusion analysis, USAV yet again relies on the mistaken premise that the economic nature of the USAV Transaction was determined in the Rejection Opinion "because the Debtors could not reject a financing." USAV Motion at 12. As has been stated repeatedly herein, the Court did not determine the character of the USAV Transaction in resolving the Rejection Motion. As the Court made no finding on the character of the USAV Transaction, that issue certainly was not "necessary to support" the holding reached in the Rejection Opinion. "'If an issue was not actually decided in an earlier proceeding or if its decision was not necessary to the judgment, its litigation in a subsequent proceeding is not barred by collateral estoppel.'" *In re Hooker Invs., Inc.*, 131 B.R. at 931 (quoting *Jim Beam Brands Co., v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991)).

As none of the four requisite factors are met, issue preclusion does not estop the Debtors from seeking the relief sought in the Complaint.

B. The Debtors Are Not Judicially Estopped from Seeking Recharacterization

USAV's argument for judicial estoppel is as flawed as its argument for issue preclusion, and for much the same reason. For a party to be judicially estopped from asserting a claim, the following must all be true: (1) "a party's later position is clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept its earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Cayuga Indian Nation of N.Y. v. Pataki*, 188 F. Supp. 2d 223, 233 (N.D.N.Y. 2002) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). The Second Circuit has taken a fairly narrow view of the doctrine, stating that judicial estoppel is limited "'to situations where the risk of inconsistent results with its impact on

judicial integrity is certain.'" *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005) (quoting *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2d Cir. 1997)). USAV fails to establish any of the necessary factors, and the argument for applying judicial estoppel falls well outside the narrow category of cases in which its application might be appropriate.

First, the Debtors made no statements at any stage of the Rejection Litigation that are inconsistent with a recharacterization claim. *See* section I.A, *supra*. To the contrary, the Debtors stated that the Court need not reach the true nature of the USAV Transaction in determining whether the relevant agreements could be rejected, and the Court noted the same in its Rejection Opinion. *See* Debtors' Reply Brief ¶ 47 n.11; Rejection Opinion at 4 n.3.

Second, as the Debtors never took a position inconsistent with the relief sought here, the Court cannot have "adopted" that purportedly-inconsistent position. And the Court did not—in fact, it never announced any view on the true nature of the USAV Transaction. Quite the opposite: the Court clearly indicated that it ***did not need*** to decide whether the USAV Transaction constituted a true sale in reaching a decision on rejection. *See* Rejection Hr'g Tr. at 92:12-14 ("it really didn't seem to me on this point [whether a contract is executory] to really hinge on whether this was a true sale or a secured financing"), 16-18 ("Either a contract, whether it was a true sale or a secured financing if there were future obligations, material obligations on both parties' part, could be rejected.").

Third, the Debtors will not be "unfairly advantaged" in prosecuting the Complaint. There is no "unfair" advantage where there are no inconsistent positions. As this Court held in a similar case: "Because the relief sought in the Rejection Motion is not inconsistent with that sought in the adversary proceeding or otherwise at odds with representations made to the court, the Debtor is not judicially estopped from pursuing its claims." *In re Hooker Invs., Inc.*, 131 B.R. at 932.

In support of its argument for application of judicial estoppel, USAV invokes *In re Snelson*,[13] but erroneously claims that the debtor there was barred from recharacterizing a lease ***because*** it previously treated the lease as executory. *See* USAV Motion at 14. True, the debtor in *Snelson* was estopped from arguing that a previously-assumed lease was a secured financing in a post-assumption breach of contract action—but that result flowed from the policy considerations unique to ***assumed*** contracts, discussed *supra* at I.A.i., that do not apply with rejected contracts.

C. <u>There Is No Law of the Case that Prevents Recharacterization</u>

In its third iteration of the same argument, USAV posits that "the Court's determination in the [Rejection] Opinion that the Contract Rights were sold in 2017 is the law of these cases." USAV Motion at 14. Again: this Court never made a "determination" that the Contract Rights and Receivables were sold to USAV in a "true sale." As USAV's own cited precedent counsels, a court must first actually "decide[] upon a rule of law" before it can become law of the case. *Geltzer v. Soshkin (In re Brizinova)*, 588 B.R. 311, 323 (Bankr. E.D.N.Y. 2018) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (citation and internal quotation marks omitted); *see also Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Mgmt.*, 628 F. Supp. 2d 312, 322 (E.D.N.Y. 2009) (law of the case did not apply even where the prior court "appear[ed] to have accepted" the argument at the hearing, but was "silent with respect" to the issue in its ultimate opinion). As the Court has not "decided" that the USAV Transaction is a "true sale," there is no law of the case to apply.

[13] 305 B.R. 255 (Bankr. N.D. Tex. 2003).

II. THE COMPLAINT STATES A CLAIM TO RECHARACTERIZE THE USAV TRANSACTION AS A FINANCING

USAV next argues that the Complaint should be dismissed because the Debtors provided, at the closing of the USAV Transaction, a "true sale" opinion (the "Closing Opinion"). USAV contends that the mere existence of the Closing Opinion requires the Complaint's dismissal for failure to state a claim. *See* USAV Motion at 16. This argument falls far short of the showing required on a motion to dismiss premised on Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)," made applicable here by Federal Rule of Bankruptcy Procedure 7012(b)).

Rule 12(b)(6) instructs that "[t]o 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)). Following *Iqbal*, courts use a two-pronged approach in evaluating motions to dismiss. First, the court must accept all factual allegations in the complaint as true, discounting mere legal conclusions. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2d Cir. 2010). Second, the court must determine if these well-pleaded factual allegations state a "plausible claim for relief." *Iqbal*, 556 U.S. at 678. In order for a claim to have "facial plausibility," the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

USAV contends that the fact that the Closing Opinion exists—standing alone—warrants dismissal for failure to state a claim. For that to be the case, the Court would have to determine that, as a matter of law, the Closing Opinion is ***conclusive*** as to the true legal nature of the USAV Transaction. But USAV cites no authority for such a proposition—and surely enough, under any law that arguably applies here (Colombia or New York), the result is the opposite.

The Closing Opinion, standing alone, is therefore ***not*** determinative of the true nature of the USAV Transaction. Indeed, if the parties' written intent controlled, recharacterization could rarely occur, as sophisticated financial transactions nearly always are accompanied by contemporaneous legal opinions guaranteeing their validity. At most, the Closing Opinion is indicative of one factor in a larger recharacterization analysis, and whether that analysis is performed under Colombian or New York law, the Closing Opinion alone does not foreclose the recharacterization claim stated in the Complaint. The USAV Parties' failure to articulate any additional basis for dismissal under Rule 12(b)(6) means the Motion must be denied.

A. Either Colombian Law or New York Law Will Apply to the Debtors' Recharacterization Claim

Although the Complaint noted that either New York law or Colombian law might apply to the Debtors' recharacterization claim, USAV's Motion assumes, without analysis, that only Colombian law applies to the Debtors' recharacterization claim. *See* Motion at 17. Second Circuit precedent, however, counsels that this Court would be justified in applying either Colombian law or New York law to the recharacterization claim.

Where "no significant federal policy, calling for the imposition of a federal conflicts rule exists," a bankruptcy court must apply the choice of law rules of the forum state. *Bianco v. Erkins (In re Gaston & Snow),* 243 F.3d 599, 607 (2d Cir. 2001); *see also Statek Corp. v. Dev. Specialists, Inc. (In re Coudert Bros. LLP),* 673 F.3d 180, 186 (2d Cir. 2012). The Court should therefore apply New York choice of law rules here. Under those rules, the law of either Colombia or New York may apply.

New York choice of law rules instruct that "New York courts will normally apply the law of the jurisdiction having the greatest interest in the litigation, as measured by that jurisdiction's contacts with the litigation." *In re Gaston & Snow*, 243 F.3d at 607-08 (quoting

Matter of Allstate Ins. Co., 81 N.Y.2d 219, 225–28, 597 N.Y.S.2d 904, 613 N.E. 2d 936 (1993)). In this case, the USAV Transaction has significant contacts with two jurisdictions—Colombia and New York.

There are two points of contact with Colombia which could justify application of Colombian law: the fact that the majority of the Debtors are domiciled in Colombia, and the RSPA's choice-of-law clause specifying Colombian law. *See* RSPA § 9.09 [Bankr. Do. No. 306-2, Ex. 1]. New York courts enforce choice-of-law clauses if the chosen law has a reasonable relationship to the agreement and does not violate a fundamental public policy of the state of New York. *See Hugh O'Kane Elec. Co. v. MasTec N. Am., Inc*., 19 A.D. 3d 126, 127 (1st Dep't 2005). Thus, if the Court determines that these two contacts with Colombia create a reasonable relationship to the USAV Transaction, the Court could apply Colombian law.

The USAV Transaction also has significant contacts with the state of New York that could justify application of New York law:

- The property at issue has a close nexus to New York. The Receivables are generated from "Specified Sales," defined as sales made by travel agents in the United States of airline tickets or related services. *See* RSPA § 1.01 (defining "Specified Sales"). The American Express ("AmEx") Card Processing Agreement ("AmEx Agreement"), which creates certain of these Contract Rights, is governed by New York law and was executed with a New York counterparty (AmEx). Because those Contract Rights are created under New York law, determinations regarding such rights necessarily implicate New York law.[14]

- The Loan Agreement between USAV and the USAV Lender Group, guaranteed by the Debtors, is also governed by New York law and grants exclusive jurisdiction over all disputes to federal courts located in Manhattan. *See* Loan Agreement § 8.9 [Bankr. Do. No. 306-2, Ex. 9]. The Loan Agreement is inextricably linked with the

[14] In the case of the Credomatic Card Processing Agreement, those Receivables are processed under a local agreement between the Debtors and Credomatic of Florida, a Florida based corporation, and under a regional master agreement governed by Costa Rican law.

USAV Transaction,[15] and therefore creates a significant contact between the USAV Transaction and New York.

- The Cash Management Agreement, which governs the flow of Receivables through the USAV Transaction, is again governed by New York law and provides for the exclusive jurisdiction of any court of the State of New York or a federal court sitting in Manhattan. *See* Cash Management Agreement § 3.08 [Bankr. Do. No. 306-2, Ex. 4].

- The Receivables flow through three New York-based bank accounts: (a) the "New York Pass Through Account," into which AmEx and Credomatic deposit the Receivables; (b) the "Administrative Agent's Account," from which USAV's administrative agent, Citibank, disperses funds to the accounts of the Lender Group; and (c) the "Seller's Account" with JP Morgan Chase, into which the Debtors receive the "Additional Purchase Price" payments. *See* Cash Management Agreement §§ 1.01, 2.01-2.04, 2.11.

As a significant portion of the USAV Transaction structure makes use of New York law, New York bank accounts, and New York courts, it would be appropriate for this Court to apply New York law in performing a recharacterization analysis.

B. Under Either Colombian or New York Law, the USAV Transaction Likely Would Be Recharacterized As a Financing

Dismissal of the Complaint is not warranted because under either Colombian of New York law, the USAV Transaction is not likely to be found to be a true sale.

Colombian law. In determining the "true nature of a contract," Colombian courts are not tied to the name or titles used by the parties; "the true content of the contract" controls. *See Declaration of Jaime Alberto Arrubla-Paucar in Support of the Debtors' Complaint for Recharacterization* (the "Arrubla Decl.," filed contemporaneously herewith) ¶ 12. Colombian

[15] The Loan Agreement refers repeatedly to the Debtors' conduct and activity, and is structured so that a failure of the Debtors to perform various obligations created by the USAV Transaction will trigger defaults under the Loan Agreement. *See, e.g.*, Loan Agreement §§ 6.1.4 (Debtors commit Trigger Event under RSPA), 6.1.12 (Debtors' bankruptcy filing), 6.1.15 (Debtors' inability to fly domestically or internationally); 6.1.2 (Debtors' failure to generate sales sufficient to maintain a Collections Coverage Ratio above 1.75:1.00). Further, the monthly payments due under the Loan Agreement set the cap on the amount of Receivables USAV is allowed to keep under the RSPA and Cash Management Agreement (absent a properly-noticed Retention Event or Trigger Event). *See* RSPA § 3.01(a)(ii)).

courts look to several factors to determine the "true content of the contract": (a) the purpose of the parties in negotiating and entering into the contract; (b) the true economic nature of the transaction as a whole; (c) the practical result of the contract by the parties; and (d) the context of the contract negotiation and execution. Arrubla Decl. ¶ 13.

Colombian law specifically recognizes guarantees on personal or movable property (*garantías mobilarias*), which have the purpose to "expand access to credit through the increase of assets, rights or actions that can be the object of a security guarantee." Arrubla Decl. ¶ 16. This concept is wholly distinct from a true sale. Regardless of its "form or nomenclature," the concept of a security guarantee refers to every transaction whose purpose is to guarantee an obligation with the guarantor's personal property, and includes, among other things, guarantees and transfers of present and future receivables, or future rights derived from contracts. *Id*. If the purpose of the contract or contracts "was to guarantee a principal obligation, then it must be recognized that the contract is a personal property security contract and not a 'true sale.'" Arrubla Decl. ¶ 18.

Applying these rules of law to the USAV Transaction, a Colombian court likely would conclude that the true nature of the USAV Transaction is that of a guarantee contract, not a true sale. *See* Arrubla Decl. ¶ 23. The "practical application of the USAV Transaction" affirms this economic reality: (i) the Debtors transferred the Contract Rights and Receivables as a guarantee and source of payment for an existing obligation with the USAV Lender Group; (ii) USAV was created to serve only as a payment source for the USAV Lender Group, who are, in reality, Avianca's lenders; (iii) the RSPA contemplates the return of the Contract Rights and Receivables to the Debtors, upon full payment of the USAV loan; and (iv) the USAV Transaction

is duly registered in the Securities Guarantees Registry (*Registro de Garantías Mobilarias*). *See* Arrubla Decl. ¶¶ 21, 24.

The existence of the Closing Opinion does not change this result. *See* Arrubla Decl. at ¶ 25 (explaining that such legal opinions are not binding under Colombian law, and do not create any independent rights or obligations). The titles the parties gave the contracts and the opinions of legal counsel at the time of execution cannot override the economic reality of the USAV Transaction. As is emphasized by article 1618 of the Colombian Civil Code—which is cited in the RSPA itself—regardless of the contract's language, the real intention of the parties must control. *See* Arrubla Decl. ¶¶ 12, 22, 25 ("To seek to have the legal opinion of an attorney prevail over the true intention of the contracting parties would be to ignore the content of article 1618 of the Civil Code."). Accordingly, a Colombian court is likely to find that USAV holds the Contract Rights and Receivables as a "holder in guarantee" and not strictly as their final owner. Arrubla Decl. ¶ 24.

New York law. New York law similarly favors the conclusion that the USAV Transaction is a disguised financing and not a true sale. Courts considering recharacterization under New York law look to: (i) the seller's retention of the hallmark risks of ownership, such as the provision of recourse to the purchaser; (ii) the seller's retention of servicing and/or maintenance duties for sold accounts; (iii) whether proceeds of sold assets are comingled with other assets, such as general operating funds; (iv) the seller's entitlement to excess collections above a predetermined amount on the sold accounts; (v) the seller's retention of an option to repurchase the accounts; (vi) the seller's retention of discretion to alter terms of the transferred assets; and (vii) other factors and circumstances surrounding the transaction and the parties' course of dealing. *See, e.g., Endico Potatoes v. CIT Grp./Factoring,* 67 F.3d 1063, 1069 (2d Cir.

1995) (assignment of accounts receivable was a disguised financing because, *inter alia*, the seller provided recourse and was entitled to reversion of the accounts upon satisfaction of the underlying debt); *Levin v. City Tr. Co. (In re Joseph Kanner Hat Co.)*, 482 F.2d 937, 940 (2d Cir. 1973) (an assignment created only a security interest because, *inter alia*, payments received in excess of debt service payments were remitted back to the assignor); *Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 546 (3d Cir. 1979) (as none of the risks of uncollectability generally present in a true sale of accounts was transferred, the true nature of the transaction was a financing).

Applied here, these factors will establish that the USAV Transaction was a disguised financing, not a true sale of the Contract Rights and Receivables. For example, the Debtors retain servicing duties for the Contract Rights and Receivables (Undertaking Agreement §§ 2.02, 3.02 [Bankr. Do. No. 306-2, Ex. 2]); hold the right to repurchase (for nominal consideration) the Contract Rights and Receivables once USAV's loan has been paid in full (Option Agreement § 2 [Bankr. Do. No. 721-1]); remain entitled to excess collections on the Receivables above the amount needed to cover debt service payments (as Additional Purchase Price) (RSPA §§ 1.01, 3.01; Cash Management Agreement § 2.11); and are obligated to provide recourse to USAV for non-collection on the Receivables (Undertaking Agreement § 4.14(a); RSPA § 1.01 (defining "Contract Rights" as *excluding* any obligation under the card processing agreements to bear the financial burden of countercharges and claims generated by processed purchases).

Nor is the existence of the Closing Opinion conclusive of ownership under New York law. Far from finding that closing opinions bind parties in perpetuity, case law on recharacterization repeatedly emphasizes the "economic realities" of transactions over the form

they take—and does so to prevent creditors from gaining an unfair advantage by designing transactions in a way to receive preferential treatment in chapter 11 or to gain tax advantages. *See Duke Energy Royal, LLC v. Pillowtex Corp. (In re Pillowtex, Inc.),* 349 F.3d 711, 722 (3d Cir. 2003) (recharacterizing a purported lease where the parties chose a lease structure for tax purposes and to avoid capex restrictions, noting courts should not "defer to the intent of contracting parties . . . as otherwise the costs of the agreement would be externalized to third-party creditors"); *In re Homeplace Stores, Inc.*, 228 B.R. 88, 94-95 (Bankr. D. Del. 1998) (denying a lessor's summary judgment motion despite the purported lease having been classified as a lease for tax and accounting purposes for multiple years); *Liona Corp. v. PCH Assocs., (In re PCH Assocs.),* 949 F.2d 585, 598 (2d Cir. 1991) (recharacterizing a purported lease based on the "predominant policy objective of a bankruptcy proceeding—equal treatment of similarly situated creditors").

C. Recharacterization Claims Are Rarely Resolved on Motions to Dismiss

Finally, it is notable that courts often find that "the factual issues [surrounding recharacterization] cannot be resolved on [a] Motion to Dismiss." *See, e.g., LaMonica v. Tilton (In re TransCare Corp.),* 602 B.R. 234, 244-45 (Bankr. S.D.N.Y. 2019) (a debt-to-equity recharacterization claim could not be decided on a motion to dismiss because factors weighed in both directions and "the recharacterization question is intensely factual"); *Friedman's Liquidating Tr. v. Goldman Sachs Credit Partners, L.P. (In re Friedman's Inc.),* 452 B.R. 512, 525 (Bankr. D. Del. 2011) (same); *Autobacs Strauss, Inc. v. Autobacs Seven Co. (In re Autobacs Strauss, Inc.),* 473 B.R. 525, 582 (Bankr. D. Del. 2012) (same). So long as a recharacterization complaint "plead[s] facts to trigger the applicability" of the factors that courts typically weigh in determining whether to recharacterize a transaction, "or a meaningful subset of [those factors]," the motion to

dismiss must be denied. *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 544 B.R. 75, 94 (Bankr. S.D.N.Y. 2016) (citation and internal quotation marks omitted).

The Complaint is facially plausible, and USAV raises no grounds that warrant dismissal assuming the allegations in the Complaint to be true. As outlined above, the factors Colombian or New York courts typically consider in analyzing recharacterization claims will weigh in favor of recharacterizing the USAV Transaction as a disguised financing. "[A]ccepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor," the Complaint cannot be disposed of at the pleadings stage. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

III. THERE IS NO CAUSE TO STAY THIS ADVERSARY PROCEEDING PENDING THE REJECTION APPEAL

Finally, USAV requests—in the alternative to dismissing the Complaint—that the Court stay this adversary proceeding pending the appeal of the Rejection Opinion. This request is premised entirely on USAV's argument that appeal of the Rejection Opinion "will address the same issues that are the subject of this action and will likely be dispositive of those issues." Motion at 3. As discussed at length above, the appeal of the Rejection Opinion will not address the issue that is central to this proceeding because the Rejection Opinion did not address that issue—namely, whether the USAV Transaction is a true sale or a financing. The appeal will deal solely with whether there was material performance outstanding on either side of the USAV Transaction, not the true nature of the transaction.

Moreover, the standards required to grant a stay are not met here. Courts in the Second Circuit generally consider: "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil 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." *Morgan Art Found. Ltd. v. McKenzie*, 2019 U.S. Dist. LEXIS 109997, at *6 (S.D.N.Y. July 1, 2019) (citing *Kappel v. Comfort*, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996)).

None of these factors warrants a stay. First, the Debtors and their estates face great prejudice if the resolution of this proceeding is delayed. The Colombian government has reopened its airspace and the Debtors have resumed flights; the Receivables now represent a critical source of liquidity for the Debtors. Conversely, USAV faces no added burden as a result of litigating the recharacterization claim. The interests of the estates in resolving this adversary proceeding, which is central to the resolution of the bankruptcy cases, likewise weighs in favor of denying a stay.

USAV contends that *Readick v. Avis Budget Group, Inc.*[16] instructs that a stay is warranted. In that case, the District Court for the Southern District of New York stayed a putative class action pending resolution of an earlier-filed, nearly identical class action filed in the District of New Jersey. *Id*. at *18. The primary concern motivating the court's grant of the stay in that case was that resolution of the earlier case would "likely bind the putative class in *Readick*." *Id*. at *6 (internal quotation marks omitted). Furthermore, "the factual and legal issue in both cases [were] substantially similar." *Id*. at *10. Neither of those factors is present here. Any decision in the appeal of the Rejection Opinion will be irrelevant to these proceedings, as the issues that will be raised in that appeal are distinct from those to be analyzed here. Accordingly, allowing the appeal to proceed in parallel with this recharacterization litigation will not create the risk of two conflicting, binding decisions.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

[16] *Readick v. Avis Budget Group, Inc.*, 2014 U.S. Dist. LEXIS 58784 (S.D.N.Y. Apr. 25, 2014).

Dated: October 14, 2020

MILBANK LLP

/s/ Evan R. Fleck .
Dennis F. Dunne
Evan R. Fleck
55 Hudson Yards
New York, NY 10001-2163
Telephone: (212) 530-5000
Facsimile: (212) 530-5219

-and-

Gregory A. Bray
2029 Century Park East, 33rd Floor
Los Angeles, CA 90067
Telephone: (424) 386-4000
Facsimile: (213) 629-5063

-and-

Andrew M. Leblanc
Aaron L. Renenger
1850 K Street NW, Suite 1100
Washington, D.C. 20006
Telephone: (202) 835-7500
Facsimile: (202) 263-7586

Counsel for Debtors and
Debtors-In-Possession