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

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In re:	:	
	:	Chapter 11
AVIANCA HOLDINGS S.A., <i>et al.</i> ,	:	
	:	Case No. 20-11133 (MG)
Debtors. ¹	:	
-----	:	(Jointly Administered)
	:	
AVIANCA HOLDINGS S.A., <i>et al.</i> ,	:	
	:	
Plaintiffs.	:	
	:	Adv. Proc. 20-1189
v.	:	
	:	
USAVFLOW LIMITED,	:	
	:	
Defendant.	:	
-----X	:	

**JOINDER OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
THE DEBTORS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

¹ Due to the large number of Debtors in these chapter 11 cases, a complete list of the Debtors and the last four digits of their federal tax identification numbers (to the extent applicable) is not provided herein. Such information may be obtained on the website of the Debtors' claims and noticing agent at <https://www.kccellc.net/avianca>. The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.



**TO THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE:**

The Official Committee of Unsecured Creditors (the “Committee”) of Avianca Holdings S.A., *et al.*, as intervenor in the above-captioned adversary proceeding (the “Adversary Proceeding”) pursuant to the stipulation entered by this court on September 23, 2020 [Adv. Pro. Docket No. 10], hereby submits this joinder (the “Joinder”) to the Debtors’ opposition [Adv. Pro. Docket No. 26] (the “Opposition”)² to the Motion. In further support of the Opposition and the Joinder, the Committee respectfully represents as follows:

JOINDER

The question at issue in the Adversary Proceeding is whether the USAV Agreements constitute a disguised financing transaction. As set forth in the Opposition, a financing contract can be executory so long as both parties to the contract have material unperformed obligations thereunder. The Court’s finding that certain of the USAV Agreements—the RSPA and the Undertaking Agreement—are executory contracts, therefore, does not foreclose the possibility that those agreements could also be recharacterized as financings. *See, e.g., In re Sterling Optical Corp.*, 371 B.R. 680 (Bankr. S.D.N.Y. 2007) (Glenn, J.) (suggesting that a rejected executory sale contract could later be recharacterized as a disguised secured financing).

With respect to the issue of estoppel, it is USAV and the USAV Secured Lenders—not the Debtors—that have taken contrary litigation positions and that should be estopped. When the Court expressed its view at the Rejection Hearing that a secured financing contract could be executory and subject to rejection, counsel to the USAV Secured Lenders expressed his clear agreement with the Court. *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

² Capitalized terms used but not defined herein have the meanings ascribed to them in the Opposition.

both parties' part, could be rejected." Mr. Kurtz: "Right, Your Honor. I don't disagree with you.")).
This Court should not now entertain a motion that takes the opposite position.

For these and all the other reasons raised in the Opposition, the Committee respectfully
requests that the Court deny the Motion.

Dated: October 14, 2020

Respectfully submitted,

MORRISON & FOERSTER LLP

By: /s/ Todd M. Goren

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