

WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
Glenn M. Kurtz
Scott Greissman
Joshua D. Weedman
Mark Franke
Brandon D. Batzel

Attorneys for the USAV Secured Lender Group

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

In re:)	Chapter 11
AVIANCA HOLDINGS S.A., <i>et al.</i> , ¹)	Case No. 20-11133 (MG)
Debtors.)	(Jointly Administered)

**DESIGNATION OF RECORD AND STATEMENT OF ISSUES ON APPEAL
PURSUANT TO FED. R. BANKR. 8009(a)**

¹ The Debtors in the chapter 11 cases pending before the Bankruptcy Court are as follows: Aero Transporte de Carga Unión, S.A. de C.V.; Aeroinversiones de Honduras, S.A.; Aerovias del Continente Americano S.A. Avianca; Airlease Holdings One Ltd.; Avianca Costa Rica S.A.; Avianca Holdings S.A.; Avianca, Inc. (13-1868575); Avianca Leasing, LLC (46-2586415); Avianca Perú S.A.; Avianca-Ecuador S.A.; Aviateca, S.A.; Avifreight Holding Mexico, S.A.P.I. de C.V.; Grupo Taca Holdings Limited; International Trade Marks Agency Inc.; Inversiones del Caribe, S.A.; Isleña de Inversiones, S.A. de C.V.; Latin Airways Corp.; Latin Logistics, LLC (00-0107425); Regional Express Américas S.A.S.; Ronair N.V.; Taca de Honduras, S.A. de C.V.; Taca International Airlines S.A.; Taca S.A.; Tampa Cargo S.A.S.; AV International Holdco S.A.; AV International Holdings S.A.; AV International Investments S.A.; AV International Ventures S.A.; AV Investments One Colombia S.A.S.; AV Investments Two Colombia S.A.S.; AV Taca International Holdco S.A.; Servicios Aeroportuarios Integrados SAI S.A.S. The address of the Debtors’ principal offices is Avenida Calle 26 # 59 – 15 Bogotá, Colombia.



Pursuant to Fed. R. Bankr. P. 8009(a) and LBR 8009-1, the group of secured lenders (the “USAV Secured Lender Group”)² under the Loan Agreement, dated as of December 12, 2017 (as amended, amended and restated, supplemented, or otherwise modified from time to time, the “Loan Agreement”), by and among USAVflow Limited (“USAV”), as borrower, certain chapter 11 debtors, as guarantors, the financial institutions comprising the USAV Secured Lender Group, as lenders, and Citibank, N.A., as administrative agent and collateral agent, by and through its undersigned counsel, hereby submits its designation of items to be included in the record on appeal and statement of the issues to be presented on appeal in connection with its appeal from each and every portion of the *Memorandum Opinion Granting in Part and Denying in Part Debtors’ Motion to Reject the USAV Agreements* entered by the United States Bankruptcy Court for the Southern District of New York in these chapter 11 proceedings on September 4, 2020 [ECF 850] (the “Order”), insofar as the Order granted in part the *Debtors’ Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts* [ECF 306], before the United States District Court for the Southern District of New York at Case No. 1:20-cv-08008-LTS.

STATEMENT OF ISSUES ON APPEAL

In the proceedings below, chapter 11 debtor Aerovías del Continente Americano S.A. Avianca (“Aerovías”) and certain of its chapter 11 debtor affiliates (together, “Avianca”) requested authorization to “reject” under section 365 of the U.S. Bankruptcy Code certain distinct contracts relating to the 2017 sale to USAV of certain contract rights to payment associated with the sale of airline tickets processed with credit cards (the “Contract Rights and Future Proceeds”) for \$150

² The USAV Secured Lender Group is composed of the following members: Deutsche Bank AG, London Branch; Bank United N.A.; Banco de Credito del Peru; First Citizens Bank Limited; Metrobank S.A.; Prival Bank S.A.; Moneda Latinoamerica Deuda Local Fondo de Inversion; and Moneda Deuda Latinoamericana Fondo de Inversion.

million plus the potential for additional amounts subject to the occurrence or non-occurrence of certain conditions. The USAV Secured Lender Group financed the \$150 million purchase price in exchange for primary and guarantee claims against USAV and certain Debtors.

The USAV Secured Lender Group hereby states the following as included issues on appeal pursuant to Fed. R. Bankr. P. 8009(a)(1)(A):

- (1) Whether the bankruptcy court erred in allowing Avianca to unwind through rejection its prepetition sale of Contract Rights and Future Proceeds, where the United States Supreme Court's decision in *Mission Product Holdings v. Tempnology, LLC*, 139 S. Ct. 1652 (2019) recently held that sales could not be unwound through rejection?
- (2) Whether the bankruptcy court erred in finding that a back-up protection in the RSPA (as defined below) requiring Avianca to assign the Contract Rights and Future Proceeds to USAV if the card processors had to be replaced, allowed Avianca to instead take back the Contract Rights and Future Proceeds by terminating the card processing agreements in breach of the Undertaking Agreement (as defined below) and then breaching the RSPA by not assigning the diverted Contract Rights and Future Proceeds back to USAV?
- (3) Whether the bankruptcy court erred in allowing Avianca to unwind only one side of the sale transaction with USAV by allowing Avianca to take back the assets it sold but to keep the \$150 million plus other consideration USAV paid for those assets, financed by the USAV Secured Lender Group?
- (4) Whether the bankruptcy court erred in finding the Receivables Maintenance Agreement dated December 12, 2017 (the "Undertaking Agreement"), between Aerovías, as seller and servicer, and USAV, as purchaser, was an executory contract subject to rejection under Section 365(a), where USAV has no material unperformed obligation, as required for a contract to be executory? And specifically, whether the bankruptcy court erred in finding that:
 - a) USAV had an obligation under the Undertaking Agreement to furnish "account records" to Avianca, where the Undertaking Agreement is unambiguous that all accounts records with respect to the relevant Contract Rights and Future Proceeds are held and maintained by Avianca, not USAV; and
 - b) USAV's obligation to provide other documentation requested by Avianca in connection with its servicing and related duties is

sufficiently material to render the Undertaking Agreement executory, where Avianca did not even argue that such obligation was material, but rather admitted that it was not material, and where Avianca is only a servicer at this point because USAV and the USAV Secured Lender Group were prevented from replacing Avianca because of the automatic stay?

- (5) Whether the bankruptcy court erred in finding the Contract Rights and Receivables Sale, Purchase and Servicing Agreement dated December 12, 2017 (the “RSPA”), between Aerovías, as seller and servicer, and USAV, as purchaser, was an executory contract subject to rejection under Section 365(a)? And specifically, whether the bankruptcy court erred in finding that:
- a) USAV had an unperformed obligation to pay “Additional Purchase Price” (as defined in the RSPA) as of the chapter 11 petition date on May 10, 2020, where that obligation was extinguished prepetition;
 - b) “Trigger Events” (as defined in the RSPA) are obligations, even though they are conditions and conditions cannot render a contract executory; and
 - c) certain terms requiring Avianca to “sell” the diverted rights to payment under replacement card processing agreements to USAV rendered the RSPA executory, so as to allow Avianca to use its own breach to take back the assets it sold, while keeping the purchase price for those assets?
- (6) Whether the bankruptcy court erred in finding that Avianca exercised sound business judgment in “rejecting” the RSPA and Undertaking Agreement, where the Contract Rights and Future Proceeds are actually not “vital” to Avianca’s reorganization and rejection cannot “restore” the Contract Rights and Future Proceeds to Avianca under *Mission Product*?

DESIGNATION OF THE RECORD ON APPEAL

The USAV Secured Lender Group hereby designates the following items for inclusion in the record on appeal pursuant to Fed. R. Bankr. P. 8009(a) and LBR 8009-1. Each designated item shall also include any and all exhibits and documents annexed to and referenced within such items and, as to hearing transcripts, any and all documents admitted into evidence.

Bankr. ECF No.³	Document
20	Declaration of Adrian Neuhauser in Support of Chapter 11 Petitions and First Day Pleadings
61	Transcript of Hearing Held on May 11, 2020
17	Debtors' Motion for Interim and Final Orders Pursuant to Sections 105(a) and 363 of the Bankruptcy Code (I) Authorizing Debtors to Pay or Honor Prepetition Obligations to Customers, Travel Agents, Charter Tour Operators, and Certain Other Business Entities; (III) Modifying Automatic Stay to the Extent Necessary to Effectuate Ordinary Course Setoffs with Such Counterparties; and (III) Granting Related Relief
252	Final Order Pursuant to Sections 105(a) and 363 of the Bankruptcy Code (I) Authorizing Debtors to Pay or Honor Prepetition Obligations to Customers, Travel Agents, Charter Tour Operators, and Certain Other Business Entities; (III) Modifying Automatic Stay to the Extent Necessary to Effectuate Ordinary Course Setoffs with Such Counterparties; and (III) Granting Related Relief
285	Transcript of Hearing Held on June 11, 2020
306	Notice of Hearing on Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
306-1	Declaration of Adrian Neuhauser in Support of Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
306-2	Declaration of Aaron L. Renenger in Support of Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and Exhibits thereto
307	Complaint by the Debtors' Against USAVflow Limited and Exhibits thereto
350	Notice of Hearing on Debtors' Emergency Motion for Entry of an Order Authorizing Alternative Service of Process and Exhibits thereto
387	Monthly Operating Report for the Period Ending May 31, 2020

³ Documents cited herein were filed in the chapter 11 proceeding captioned In re Avianca Holdings S.A., Case No. 20-11133 (MG) (Bankr. S.D.N.Y.).

Bankr. ECF No.³	Document
389	Amended Monthly Operating Report for the Period Ending May 31, 2020
615	Verified Statement of White & Case LLP and the USAV Secured Lender Group Pursuant to Bankruptcy Rule 2019 and Exhibits thereto
616	USAVflow Limited's Objection and Reservation of Rights to Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and Exhibits thereto
616-1	December 12, 2017 Opinion of Gómez-Pinzón Abogados S.A.S.
617	Objection of the USAV Secured Lender Group to Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
618; 618-1	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 and Attached Sources
619; 619-1 to 619-18	Declaration of Joshua D. Weedman in Support of Objection of the USAV Secured Lender Group to Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and Exhibits thereto
628; 628-1	Order Scheduling Status Conference with Counsel Concerning Debtors' Motion to Reject USAV Agreements and Exhibits thereto
647	Transcript of July 27, 2020 Telephonic Status Conference ⁴
662; 662-1	Urgent Motion of the Debtors for Leave to Exceed Page Limit with Respect to Their Reply in Support of the Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and Exhibits thereto
663	Monthly Operating Report for the Period June 1, 2020 Through June 30, 2020
665	Response of the USAV Secured Lender Group to the Urgent Motion of the Debtors for Leave to Exceed Page Limit

⁴ The July 27, 2020 status conference transcript was filed on the bankruptcy court's docket but remote electronic access is restricted. In accordance with LBR 8009-1, a copy of the status conference transcript is attached hereto as Exhibit A.

Bankr. ECF No.³	Document
666	USAVflow Limited's Joinder to Response of the USAV Secured Lender Group to the Urgent Motion of the Debtors for Leave to Exceed Page Limit
674	Order Granting Debtors' Leave to Exceed the Page Limit with Respect to Their Reply in Support of the Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and Granting the USAV Secured Lender Group Leave to Exceed the Page Limit with Respect to its Sur-Reply
681	Official Committee of Unsecured Creditors' Reply in Support of Debtors' Motion for an Entry of an Order Authorizing Rejection of Certain Executory Contracts
683	Debtors' Reply to the Objections of USAV and the USAV Secured Lender Group to the Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
683-1	Second Declaration of Adrian Neuhauser in Support of Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
683-2 to 683-5	Declaration of Aaron L. Renenger in Support of Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and Exhibits thereto
684 to 684-2	Declaration of Jaime Alberto Arrubla-Paucar, certified English translation, of Declaration, and Attached Sources
694	Debtors' (I) Request for Expedited Determination; and (II) Emergency Motion for Authorization to Enter Into Letter Agreements with Financing Arrangers and Notice of Hearing and Exhibits thereto
714	Supplemental Response of the Official Committee of Unsecured Creditors to the Court's Questions Posed at the July 27, 2020 Status Conference
715	Debtors' Response to the Court's Questions Posed at the July 27, 2020 Status Conference
715-1	Declaration of Aaron L. Renenger in Support of the Debtors' Response to the Court's Questions Posed at the July 27, 2020 Status Conference and Exhibits thereto

Bankr. ECF No.³	Document
716	USAV Secured Lender Group's Supplemental Brief in Support of Objection of the USAV Secured Lender Group to Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
717 to 717-2	USAVflow Limited's Combined Response to (A) Debtors' Reply in Support of Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and (B) Questions Posed by the Court at the July 27, 2020 Status Conference, and Exhibits thereto
718	Sur-Reply of the USAV Secured Lender Group to Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
719	Declaration of Vicente Lines in Support of the USAV Secured Lender Group's Supplemental Brief and Sur-Reply in Support of Objection to Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts
720; 720-1	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 and Attached Sources
721 to 721-33	Second Declaration of Joshua D. Weedman in Support of Objection of the USAV Secured Lender Group to Debtors' Motion for Entry of an Order Authorizing Rejection of Certain Executory Contracts and Exhibits thereto ⁵
726; 726-1	Notice of Filing of English Translation of Exhibit A to the Declaration of Jorge Suescún Melo
740	Letter dated August 20, 2020 to the Court by Aaron L. Renenger

⁵ Exhibit K to the Second Declaration of Joshua D. Weedman was inadvertently not processed on the ECF system and thus was not included on the bankruptcy court's docket. As reflected in the August 26, 2020 hearing transcript, the bankruptcy court admitted Exhibit K into the record. *See* Hr'g Tr. Aug. 26, 2020 at 7:15-16. Accordingly, pursuant to LBR 8009-1, a copy of Exhibit K to the Second Declaration of Joshua D. Weedman is attached hereto as Exhibit B.

Bankr. ECF No. ³	Document
742	Transcript of Hearing Held on August 18, 2020 ⁶
743	Transcript of Hearing Held on August 19, 2020 ⁷
751	Order Admitting Exhibits in Evidence for August 26, 2020 Contract Rejection Hearing
757	Order with Questions that Counsel for the Parties Should Address During the Hearing of the Rejection Motion
788	Transcript of Hearing Held on August 26, 2020 ⁸
	Avianca's August 26, 2020 Hearing Demonstrative ⁹
	USAV Secured Lender Group's August 26, 2020 Hearing Demonstrative ¹⁰
850	Memorandum Opinion Granting in Part and Denying in Part Debtors' Motion to Reject the USAV Agreements
959	USAV Secured Lender Group's Notice of Appeal
960	USAVflow Limited's Notice of Appeal

⁶ The August 18 2020 hearing transcript was filed on the bankruptcy court's docket but remote electronic access is restricted. In accordance with LBR 8009-1, a copy of the hearing transcript is attached hereto as Exhibit C.

⁷ The August 19, 2020 hearing transcript was filed on the bankruptcy court's docket but remote electronic access is restricted. In accordance with LBR 8009-1, a copy of the hearing transcript is attached hereto as Exhibit D.

⁸ The August 26, 2020 hearing transcript was filed on the bankruptcy court's docket but remote electronic access is restricted. In accordance with LBR 8009-1, a copy of the hearing transcript is attached hereto as Exhibit E.

⁹ Avianca's August 26, 2020 Hearing Demonstrative was not filed on the bankruptcy court's docket. Accordingly, pursuant to LBR 8009-1, a copy of Avianca's August 26, 2020 Hearing Demonstrative is attached hereto as Exhibit F.

¹⁰ The USAV Secured Lender Group's August 26, 2020 Hearing Demonstrative was not filed on the bankruptcy court's docket. Accordingly, pursuant to LBR 8009-1, a copy of USAV Secured Lender Group's August 26, 2020 Hearing Demonstrative is attached hereto as Exhibit G.

Adversary Proceeding ECF No. ¹¹	Document
1	Complaint against USAVflow Limited and Exhibits thereto
10	Stipulation and Agreed Order Authorizing Intervention
11	USAVflow's Motion to Dismiss Adversary Proceeding or in the Alternative to Stay Proceeding
12	Declaration of Sheron Korpus in Support of Motion to Dismiss Adversary Proceeding or in the Alternative to Stay Proceeding and Exhibits thereto
14	USAV Secured Lender Group's Joinder to Motion to Dismiss Adversary Proceeding or in the Alternative to Stay Proceeding

¹¹ Documents cited herein were filed in the adversary proceeding captioned Avianca Holdings S.A., et al. v. USAVflow Limited, Case No. 20-01189 (MG) (Bankr. S.D.N.Y.).

October 2, 2020
New York, New York

Respectfully submitted,

WHITE & CASE LLP

By: /s/ Glenn M. Kurtz

Glenn M. Kurtz
Scott Greissman
Joshua D. Weedman
Mark Franke
Brandon D. Batzel
White & Case LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
Facsimile: (212) 354-8113
gkurtz@whitecase.com
sgreissman@whitecase.com
jweedman@whitecase.com
mark.franke@whitecase.com
brandon.batzel@whitecase.com

*Attorneys for the USAV Secured Lender
Group*